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Alessandro Chechi and Marc-André Renold (eds)

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**Cultural Heritage Law and Ethics:
Mapping Recent Developments**

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Studies in art law
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Introduction

The “Second All Art and Cultural Heritage Law Conference”, which was held at the University of Geneva on 24 and 25 June 2016, provided a space for a thorough discussion over two topical issues, namely the deliberate attacks on cultural heritage in the context of armed conflict or civil strife, and the relationship between law and ethics in the international art and culture heritage field. The relevance of these themes is demonstrated by the fact that the “Second All Art and Cultural Heritage Law Conference” welcomed participants from around the globe. The conference offered an ideal platform to foster awareness and engagement in these fields.

Scholars and practitioners gathered to offer the results of their researches with a view to (i) developing a process of cross-fertilization between academia and practice, and (ii) advancing the state of knowledge with respect to the selected themes. In effect, at present States and international organizations are striving to improve the existing legal framework in order to address the problems posed by the commission of crimes against cultural heritage and the unethical conduct in the art world, on the one hand, and to enhance the effectiveness of cultural heritage law, on the other.

Cultural heritage constitutes a unique and important testimony of the history and identity of different peoples and should be preserved in all circumstances. Regrettably, cultural heritage items are targeted with an alarming frequency in both peacetime and wartime. It is not by coincidence that today hardly a week goes by without a new case reported in the press involving stolen or illegally exported works of art, illicit excavation of archaeological objects, or the prosecution of thieves, tomb-raiders, forgers, or vandals. Several reports reveal that crimes relating to cultural heritage are often linked with organized crime. It has been proven that the proceeds generated by the sale of objects looted in conflict-affected countries are used to finance the activities of terrorist groups. This is possible because the – poorly regulated – international art market facilitates the laundering of illicitly trafficked cultural objects. This means that the collusion – be it premeditated or unintentional – between thieves and looters, on the one hand, and unethical art market professionals, on the other, has the effect of undermining the efficacy of the legal instruments deployed to thwart the illicit trade in cultural objects, corruption and terrorism.

This volume focuses on these and other changing law enforcement challenges. In particular, the authors look at the overall question of how the existing legal framework for the

protection of cultural heritage can be enhanced in order to address, prevent and criminalize the destruction and the illicit removal of cultural objects by criminals, on the one hand, and the unethical conduct of art trade professionals, on the other.

The First Part of the volume focuses on a number of legal concepts and case studies in order to suggest new directions for legal development. The chapter by Lucas Lixinski and Vassilis Tzevelekos engages with the connections between State responsibility and international cultural heritage law. It concludes that the combination of State responsibility rules and the principle of due diligence allows to address specific issues – particularly the conduct of non-State actors – and to develop the concept of concurrent responsibility – a tool that can be used to engage a plurality of States in the protection of cultural heritage. Chapter 2 by Wenke Brückner contributes critically to the concept of “cultural genocide” and examines whether the destruction of a group’s cultural heritage can amount to an international crime in the light of existing international law, particularly pursuant to the Statute of the International Criminal Court. Chapter 3 by Sabine von Schorlemer examines the concept of “Responsibility to Protect” and discusses whether it can legitimize actions of the international community aimed at the protection of endangered cultural heritage in the event of limited State commitment due to either incapability or reluctance. This analysis is based on the Recommendations that were issued at the end of an expert meeting that was organized by UNESCO in 2015. Chapter 4 by Ece Velioglu Yildizci and Chapter 5 by Michael Wosinski analyse indepth the situation of two countries – Turkey and Bahrain, respectively – where legislation concerning cultural resources is undergoing profound changes.

The Second Part considers the relationship between law and ethics. Chapter 6 by Susan Douglas and Melanie Hayes focuses on the subject of digital images and databases and argues that greater dissemination of information relating to cases of looting, robbery, and of missing objects around the world may act as deterrents to crime. Chapter 7 by Gareth Fletcher considers the efficacy of legal and ethical guidelines established to regulate the international art market, and seeks to identify the advantages and limitations of attempts to impose external value systems on the international trade in art objects. Chapter 8 by Anthony Connerty examines the dispute involving the “Hugh Lane Bequest” and questions whether it can be resolved through the use of non-adversarial dispute settlement methods. Chapter 9 by Sophie Vigneron looks at the British art market with a view to assessing museums and art dealers’ codes of conduct through the concept of “legalization” developed by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal. The final chapter, Chapter 10, by Andrea Raschèr, focuses on Holocaust-related art and on Switzerland, one of the most important hubs for art dealings during the Nazi Era. The author emphasises that soft law rules and ethical principles should be espoused by State authorities in order to redress past wrongs in the face of existing legislation.

The editors would like to take this opportunity to thank those who contributed to the success of the conference and – it is hoped – of the present publication: Justine Ferland, Mathilde Heaton, Valérie Leuba, Ece Velioglu Yildizci, Vanessa Vuille and Meng Yu.

So, once again and for two spectacular days in 2016 it can be said with pride that Geneva was, with regards to art and cultural heritage law, the “Capital of the World” (“La capitale du monde”) as stated on the memorial plate reproduced on the cover of the present publication.

Alessandro Chechi

Marc-André Renold

Stephen Urice

October 2017, Geneva

PART I

CULTURAL HERITAGE LAW IN DEVELOPMENT: THE EVOLVING LANDSCAPE OF PROTECTION EFFORTS

1. The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility

Abstract

The Chapter engages with the connections between State responsibility and international heritage law. In the absence – in principle – of special rules on State responsibility within the cultural heritage regime, general law is the law to use. The example of heritage tells an important story about the international law on State responsibility, namely, a story of how fragmented normative regimes in the same specialised field (i.e. heritage law) can articulate different responses and different levels of State responsibility, ultimately harming the regime's overall effectiveness. The Chapter identifies two strands of reasons explaining why State responsibility is not as effective as one would wish: those pertaining to general international law (especially the deficiencies of collective enforcement), and reasons that are inherent to international heritage law. However, despite these pessimistic remarks, the argument is made that the combination of State responsibility rules and the principle of due diligence allows cultural heritage to expand in various directions, including State responsibility associated with the conduct of non-State actors (whose conduct is not attributable to the State) and concurrent State responsibility. Outside heritage impacted by non-State actors, the Chapter examines different levels of State involvement in heritage safeguarding multinational heritage nominations and heritage listed by one State, but that is also of interest to other States.

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Introduction

In the aftermath of World War II, norms created for the return of Nazi-looted antiquities and other cultural artefacts were deemed so progressive in their approach to State responsibility that they would constitute a new “principle” of international law.¹ Since, the United Nations Educational, Scientific and Cultural Organization (UNESCO) was created in 1945, and the body of international cultural heritage law has evolved greatly, occupying its own, thematically distinctive place in international law. Tools and concepts that are mostly associated with the regime of human rights protection have been then employed to equip cultural heritage and endow it with certain systemic features that are absent from

¹ VRDOLJAK, p. 145.

other areas and rules of international law. Thus, many speak of *erga omnes* obligations on cultural heritage,² or at least of a shift from negative obligations (not to destroy) to positive obligations (to protect).³ A plethora of both hard and soft law rules have been developed under the aegis of UNESCO and other international organizations.⁴ These outline a series of obligations that States undertake to respect⁵ (in the negative realm) and protect⁶ (in the positive realm) heritage. Within this regime one can find varied rules, but often these are either entirely disconnected or loosely connected through rather unclear relationship clauses to one another. Be it distinctive, the specialized field of cultural heritage law remains fragmented.⁷ Ultimately, fragmentation and the lack of a unified approach to primary norms harm the overall effectiveness of heritage protection.

Thus, in spite of its expansion and distinctiveness as a particular field of international law, the reach and effectiveness of cultural heritage law remain in a sense quite limited. This shortcoming points to a disconnect between positive law and the everyday reality of international heritage law, that is, a disengage between the *law as it is* and the *need* for effective protection from a variety of menaces, including those that are not linked to the conduct of States, such as natural phenomena and activities by non-State actors. Therefore, while there is nowadays a fair amount of primary law on heritage, its effectiveness is undermined. This owes to a variety of reasons, such as the ones associated with the usual “suspects” pertaining to the systemic features international law (i.e. problems with enforcement in a decentralized, State-centric, sovereignist legal order, and lack, more generally, of effective mechanisms of accountability), but also lack of unity within heritage law and the absence (in principle) of controlling mechanisms (both legal and political), as well as

² FRANCIONI, *Droit coutumier*, pp. 19-41; GRAHAM, p. 756. *Erga omnes* obligations are discussed in more detail below. See also n. 10, 11 and Part II.A. of the study.

³ FRANCIONI, *Beyond State Sovereignty*, pp. 1209-1228; GRAHAM, p. 756. Positive obligations are associated with the concept of protection, with the principle of due diligence and obligations of means that we discuss in more detail below. States are expected to be proactive, to the best of their ability, with a view to offer protection. See also n. 80-86 and 102.

⁴ These organizations include the International Institute for the Unification of Private Law (UNIDROIT), the International Council of Museums (ICOM), and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), to name but the main ones.

⁵ Respect is associated with negative obligations corresponding to obligations of results. States are expected to abstain from producing a wrongful result, i.e. a result prohibited by the law. The concept of negative obligations is well-established in human rights law which distinguishes between respect (negative obligations), protection (positive obligations) and fulfillment. See EIDE, p. 9. See also DE SCHUTTER, pp. 242 et seq.; and UN Human Rights Committee, Fact Sheet No 15 (Rev. 1), p. 5.

⁶ See n. 3 and 5.

⁷ LIXINSKI, *Sustainable Development*, pp. 65-86 (on sustainability norms LIXINSKI, *International Cultural Heritage Regimes*) and pp. 407-429 (on expert rule norms); LIXINSKI, *Heritage for Whom?*, pp. 193-213 (on community participation norms).

of special, custom-made rules on responsibility that would specifically address the particularities of the cultural heritage regime. In the absence of such special rules and mechanisms of enforcement, cultural heritage cannot but rely on the “all-encompassing” tools that are available in general international law, including the secondary norms on State responsibility, namely the International Law Commission’s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁸

In this piece we explore the “tense” relationship between cultural heritage law and State responsibility. In Part I of the study we argue that, despite its distinctiveness and importance, international cultural heritage law is not a special, self-contained regime since, when it comes to State responsibility, it resorts to the rules of general international law. However, State responsibility is not as effective as one would wish. Part II explores the reasons for this mismatch between positive law on State responsibility and its implementation. Two strands of reasons are identified: those pertaining to general international law (especially the deficiencies of collective enforcement), but also reasons that stem from and, in a sense, are inherent to international heritage law. Nonetheless, in the absence of special rules, general law is – inevitably – the law to use. Part III argues that, in spite of its deficiencies regarding effectiveness, the law on State responsibility and especially the principle of due diligence⁹ (or, more accurately, the combination of the two) allows cultural heritage to expand in various directions, including State responsibility associated with the conduct of non-State actors (whose conduct is not attributable to the State) and concurrent State responsibility. The final Part concludes.

I. How Special Is International Heritage Law?

To answer this question, we need first to distinguish between three uses of the term “special”. First, this refers to the idea that something (in our case an area of law) differs from what is usual. Specialty in that sense is associated with the idea of *distinctiveness*. Seen from that perspective, international heritage law is indeed a special area of international law in that it aims at protecting values and interests that are not exclusive to an individual State that is linked (usually through territoriality) with heritage worthy of protection. As it is known, that type of specialty is recognized in international law, which, for that purpose, contains a special class of obligations that are owed *erga omnes* (*partes* – if the obligation

⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chap. IV.E.1.

⁹ See n. 80-86.

stems from a treaty and not from custom).¹⁰ As the ILC has recognized, *erga omnes* obligations are associated with the importance these rules have for the society and its legal system.¹¹ Thus, specialty as *importance* is the second meaning to which we refer. Because of its distinctiveness and importance, the special metal of heritage law translates into a set of rules of *general* international law especially designed to facilitate collective enforcement.¹² These are rules (that we discuss in more detail below) found in ARSIWA and applicable to all areas of international law that present the normative quality of obligations *erga omnes* – as arguably many cultural heritage rules do.¹³

This is where the third meaning of the term “special” comes into play. As it is known, the rules of general international law apply in all areas and regimes of that legal order, to the extent that these do not contain *special law*, that is to say, law governing a specific subject matter.¹⁴ That being explained, the question asked is whether, beyond these general international law rules that find an application – outside heritage law – in all areas of international law (including those with similar characteristics, i.e. protecting collective interests), cultural heritage contains special rules on State responsibility that are exclusive to its regime. In the affirmative, the conclusion to be reached will be that international heritage law may be considered to be closer to a self-contained regime,¹⁵ in the sense of having its own, *lex specialis* on State responsibility¹⁶ that shall override *lex generalis*.

The answer to these questions is that cultural heritage law remains quite embryonic when it comes to the existence of special rules on liability, which means that general State responsibility rules apply. Besides, as already explained, these have been designed in a way that reflects the normative specialty (in the sense of distinctiveness and importance) of areas of law like cultural heritage or – to give the example *par excellence* – human rights.

¹⁰ On obligations *erga omnes* see TAMS; ILC, A/CN.4/L.682, para. 380-409; and Institut de Droit International. See also TZEVELEKOS, *Revisiting the Humanisation of International Law*, pp. 66-72.

¹¹ ILC, A/CN.4/L.682, para. 380-409, under the general heading “Relations of Importance: Article 103 of the Charter of the United Nations, Jus Cogens and Obligations Erga Omnes a Conflict Rules,” para. 324. See also TZEVELEKOS, *Revisiting the Humanisation of International Law*, p. 70-72.

¹² See below analysis and relevant references in Part II.A. of the study.

¹³ See n. 2.

¹⁴ On the concept of *lex specialis* in the context of the law of responsibility, see SIMMA/PULKOWSKI, p. 485. More generally, see ILC, A/CN.4/L.682, paras. 46 et seqq.

¹⁵ On the origins of the term, see SIMMA, pp. 111-136.

¹⁶ ARSIWA, Art. 55. Examples of special rules on responsibility can be found within various regimes of international law: Art. 41 of the European Convention on Human Rights provides for just satisfaction as a form of reparation; Art. 91 of the First Additional Protocol to the Geneva Convention establishes a special rule of attribution of the conduct of persons forming part of a State’s armed forces. See SIMMA/PULKOWSKI, pp. 490 et seqq. On special or self-contained regimes of international law see ILC, A/CN.4/L.682, pp. 65 et seqq., para. 123-190.

Yet, although heritage law does not contain, in principle, notable *lex specialis* on the responsibility of States engaging in illicit activities, in a few instances, one can identify within cultural heritage law elements that are special (i.e. exclusive – just to add a fourth use of the term) to its regime and have consequences in terms of State responsibility. Although they do not constitute *lex specialis* with regard to ARSIWA – i.e. the latter continues to apply –, they condition its applicability.

A noteworthy example can be found in what initially was merely a soft law instrument. As a means to expand the character of legal obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (WHC),¹⁷ and arguably expand their *erga omnes* character beyond *erga omnes partes*,¹⁸ the UNESCO General Conference adopted in 2003 the Declaration concerning the Intentional Destruction of Cultural Heritage in the aftermath of the destruction of the Buddhas of Bamiyan.¹⁹ Even if not binding *per se*, the Declaration is seen as enunciating customary obligations.²⁰ It is also seen as part of a greater moment in enabling the interaction among multiple legal regimes around the protection of cultural heritage.²¹ The Declaration's text subscribes to universality and affirms that "States should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, *wherever such heritage is located*".²² The language in this Declaration is the strongest erosion of sovereignty and territoriality (which is a topic that we are discussing below) when it comes to international responsibility of States,²³ and offers the most incisive language of all UNESCO instruments in this area, articulating clear obligations the breach of which by States activates ARSIWA. But what is of importance for the argument that we are building here is that this instrument contains a specific provision on the international responsibility of States in Article VI (titled "State responsibility"), which reads: "A State that *intentionally* destroys or *intentionally* fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law".²⁴

¹⁷ Adopted 23 November 1972.

¹⁸ FRANCIONI/LENZERINI, pp. 633-635. For a contrary view, suggesting that the Declaration is meant to only restate the law, and not necessarily expand it, see O'KEEFE, *The Protection in Armed Conflict*.

¹⁹ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003.

²⁰ But opinions on this matter diverge. O'KEEFE, *World Cultural Heritage*, pp. 189-209; and FRANCIONI/LENZERINI.

²¹ FRANCIONI, *Plurality and Interaction*, p. 13.

²² Art. III.1 (emphasis added).

²³ CHECHI, p. 255.

²⁴ Art. VI (emphasis added).

The requirement of intention is present for both the positive (i.e. duty of States to take measures, that is, be proactive) and negative (i.e. prohibition for States to destroy) duties fleshed out in the Declaration.²⁵ With respect to the negative obligations, the requirement of intention introduces a subjective requirement for the prohibitive rule and the obligation of result this establishes (i.e. that heritage be not destroyed through conduct directly²⁶ attributable to a State) to be breached. Apparently, under the Declaration it would not be a problem if the heritage was accidentally destroyed by State organs. Intention sets a threshold for the breach; thus, it conditions State responsibility for wrongfulness. With respect to the positive obligations of protection, which are in essence obligations of means under the principle of due diligence,²⁷ the notion of intentional negligence seems to be oxymoronic, as rather than intention, what is of significance in the case of negligence is knowledge.²⁸

In reality, this Declaration, although clearly referring to State responsibility, in a sense undermines it. Under the law on State responsibility, subjective elements such as intention and knowledge are only pertinent if the primary rule requires them;²⁹ they are a prerequisite for the existence of a breach only if and to the extent they are part of the primary rule. By adding intention, Article VI narrowly circumscribes the duty of States. Thereby, it creates one extra requirement for a breach to exist. Overall, rather than enhancing the safeguarding of cultural heritage, it enfeebles it.

Interestingly, this provision is strongly-worded. This helps clarify the obligations with respect to world cultural heritage.³⁰ Yet its language is somewhat weakened by the final caveat, “to the extent provided for by international law”. The text of the provision refers to general international law and its rules on State responsibility. However, as we will argue in more detail below, State responsibility, and especially its rules on collective enforcement, often lacks effectiveness. But, beyond this caveat, even if the Declaration can be seen as an attempt to directly refer to State responsibility the way this is regulated by general international law and make sure that this area of law (i.e. State responsibility) is fully engaged, in reality, the Declaration undermines State responsibility.

Consequently, the Declaration creates obligations the breach of which results in State responsibility in accordance with general international law. Seen from that perspective, it

²⁵ On the distinction between positive and negative obligations see n. 3, 5 and 6.

²⁶ See n. 97.

²⁷ On due diligence and obligations of means see n. 80-86.

²⁸ See for instance *Corfu Channel Case, United Kingdom v. Albania*, Judgment, ICJ Reports 1949, para. 18; and *Case Concerning United States Diplomatic and Consular Staff in Tehran, United States of America v. Iran*, Judgment, ICJ Reports 1980, para. 68.

²⁹ ARSIWA, Commentary of Art. 2, p. 34. See also TZEVELEKOS, *Reconstructing the Effective Control Criterion*, pp. 154-155.

³⁰ CARDUCCI, p. 129.

contains no *lex specialis*. Hence, it does not justify departing from ARSIWA. Yet, by introducing the subjective element of intention in the primary rule, it raises a higher (and rather unnecessary, especially in the case of positive obligations) threshold for the breach of the primary rule, which is a precondition for entering the field of State responsibility.

II. The Limited Effectiveness of Responsibility within the Regime of Cultural Heritage

Irrespective of the threshold that may apply for entering the field of secondary obligations (i.e. the law of State responsibility), there are limits in the effectiveness of State responsibility. These limits can be classified in two categories. Limits that are inherent to international law (thus, they apply to the cultural heritage regime too) and limits that concern in particular the regime of cultural heritage protection.

A. The Limits of Collective Enforcement and the Role of Specially Affected States

Starting with the former category, we have already explained that the purpose of cultural heritage law is to protect values that are common to the entire international community. Even when heritage is located in the territory of a State, its protection is a common concern for everyone in the international society of States. This is the reason why cultural heritage law is associated with the concept of *erga omnes* obligations, which is a special class of obligations that are owed towards all other States, as all other States have a legitimate interest in their implementation.³¹ This status is reflected in the law of State responsibility, in particular in the way that area of law regulates invocation of responsibility.

In terms of who can invoke State responsibility as a matter of general international law, Articles 42 and 48 ARSIWA and the distinction they establish between injured and non-injured (or not directly injured)³² States is the key. If an obligation of general international law is owed *erga omnes*, all States in the world may invoke the responsibility of the wrongdoer, though they are not (directly) injured by the wrong.³³ *Mutatis mutandis*, if an obligation owed *erga omnes* has been established through a treaty (i.e. the obligation is *erga omnes partes*), all signatories to the treaty may invoke the responsibility of the wrongdoer,

³¹ See n. 2, 10, 11.

³² On the origins of the term, see SICILIANOS, *The Classification*, p. 1138.

³³ ARSIWA, Art. 48(1)(b).

while they are not (directly) injured by the wrong.³⁴ Under both scenarios, the State invoking the responsibility may request the wrongdoer to cease its wrongful conduct and (offer guarantees of) non-repetition,³⁵ but also to repair the wrong in the interest of the injured subjects.³⁶ The same applies with regard to *jus cogens* rules, as these are all owed *erga omnes (partes)*.³⁷

Turning now to the right of the injured State to invoke the responsibility of the wrongdoer, Article 42 recognizes that right when the obligation breached is bilateral(isable)³⁸ in nature (hence, reciprocal),³⁹ but also when, in case of *erga omnes* obligations, the breach specially affects a particular State.⁴⁰ As the ILC explains in its Commentary to ARSIWA, the term “specially affected” is taken from Article 60(2)(b) of the Vienna Convention on the Law of Treaties and is used to distinguish between the implications of wrongfulness for general interest (affecting the entire international community or the entire group of signatories to a treaty), as opposed to the particular adverse effects wrongfulness has on a specific State.⁴¹ The latter is the individually injured State, which is “affected by the breach in a way that distinguishes it from the generality of other States to which the obligation is owed”.⁴² In the case of cultural heritage law, a wrong affecting heritage of special interest to non-nominating and non-territorial States⁴³ could be seen as a basis justifying their involvement in the enforcement of the rule that has been breached in their capacity as a specially affected State.⁴⁴ This practically means that, beyond the claims that any non-injured State can make in case of breach of an obligation owed *erga omnes (partes)*, the specially affected State may request reparation, and may also – provided that the requirements established by ARSIWA are met⁴⁵ – resort to countermeasures. Nevertheless, our position is

³⁴ Ibid., Art. 48(1)(a).

³⁵ Ibid., Art. 48(2)(a).

³⁶ Ibid., Art. 48(2)(b).

³⁷ On the interrelationship between the two concepts, see BYERS, pp. 211-239, especially p. 236.

³⁸ SICILIANOS, *The Classification*, pp. 1133-1134.

³⁹ ARSIWA, Art. 42(a).

⁴⁰ Ibid., Art. 42(b)(1).

⁴¹ ARSIWA Commentary, p. 119.

⁴² Ibid.

⁴³ Lists exist under most heritage treaties, and properties are added to the lists if they go through a nomination process. A State in whose territory the heritage is located nominates the heritage for inclusion on the international heritage list.

⁴⁴ On specially affected States, see GAJA, pp. 373-382; and SICILIANOS, *Countermeasures*, p. 1139. The ILC definition of the concept of “specially affected states” is purposely general. In its codification it “does not define the nature or extent of the special impact that a State must have sustained in order to be considered ‘injured’”. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case”. ILC Commentary, n. 29, p. 119.

⁴⁵ ARSIWA, Art. 22, 26, 27 and 49-53.

that non-injured States too are allowed to resort to countermeasures for the protection of general interest when the obligation breached is *erga omnes (partes)*.⁴⁶

However, invocation of responsibility is a right and not a duty of States. Especially non-injured States will often refrain from reacting to wrongfulness that does not affect them directly.⁴⁷ This reflects the reality of international relations in a decentralized legal system. Within such a system, in principle, enforcement operates in an equally decentralized way (i.e. State versus State). Yet, political considerations might (and most of the times do) drive a State to abstain from reacting to wrongfulness. Thus, in most times, collective enforcement at the decentralized level lacks effectiveness. It relies on and presupposes the active engagement of the States that are entitled to invoke responsibility. Most States will often refrain from paying the (political or economic) costs of the invocation of responsibility for something that only indirectly concerns them, in the sense that it is a matter of all States together and of none of them in particular. From a purely technical, positivist perspective, the international legal system enables any State that wishes to contribute to a common cause to partake through enforcement action safeguarding general interest. The very purpose of the idea of obligations owed *erga omnes* is their collective enforcement. The bigger the number of States that react, the more effective enforcement will be. Yet, the naked truth is that States that are not (directly) injured often lack incentives to react to wrongfulness.⁴⁸ But this is something that does not apply to States that may feel specially affected by certain wrongful conduct.

One battleground to test this doctrinal idea in the context of international cultural protection law is heritage of interest to non-nominating and non-territorial States. For instance, in 2002, the Saudi Arabian government demolished a 200-year-old Ottoman castle in its territory to make way for more accommodation options around the site of Mecca.⁴⁹ Turkey repeatedly protested the destruction of the castle, which went ahead anyway. Does Turkey have any rights over said castle (as the successor to the Ottoman Empire) because of its cultural and historical ties to it? Because the castle was on the territory of Saudi Arabia, that State exercises its territorial sovereignty, which is a barrier for other States (no matter how interested they are in the monument at issue) to directly interfere with the monument

⁴⁶ TZEVELEKOS, *Revisiting the Humanisation of International Law*, p. 68. See also SICILIANOS, *The Classification*, pp. 1141-1144; SICILIANOS, *Countermeasures*, pp. 1137-1148; KATSELLI-PROUKAKI; BIRD, pp. 896-899; and DAWIDOWICZ. The ILC remained rather obscure as to the right of non-directly injured States to resort to countermeasures, see e.g. Art. 54 ARSIWA. The ILC states that, although “[a]t present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest”, “the resolution of the matter [is left] to the further development of international law” (ARSIWA Commentary, n. 29, p. 139).

⁴⁷ But see POSNER, pp. 5-23.

⁴⁸ For a broader analysis see THOMPSON, p. 319. The author argues that “the international community as a whole has an interest in punishing violators but no one state has an incentive to do so.”

⁴⁹ This situation is discussed in detail in WANGKEO, pp. 185-187.

outside their territory. Yet, the question that remains open is whether, in spite of Turkey not being able to make an “ownership” claim over the site, it is owed any obligations by Saudi Arabia that would allow Turkey to prevent the destruction of the site, or invoke the responsibility of Saudi Arabia and react to its wrongfulness through the means that are available under the law of State responsibility. Although it is not in a position to directly prevent the destruction of the site without breaching Saudi Arabia’s sovereignty, Turkey (apart from exercising other forms of jurisdiction, as we argue below) can invoke Saudi Arabia’s responsibility for its conduct vis-à-vis the heritage. In scenarios like the one we are examining here, the best that can be hoped for are guarantees of non-repetition and reparation in the form of an apology (satisfaction), possibly also compensation, but no restitution. Yet, these forms of reparation are of minor importance when unique and irreplaceable cultural heritage is at stake.

What complicates the situation further is the absence of uniform practice across the body of international heritage law with respect to the rights and duties of non-nominating and non-territorial States. The answers need to be very specific depending on the type of heritage. This may be explained by the different reality of different heritage domains.

B. State Responsibility and the Particularities of Cultural Heritage

Enforcing the law within a decentralized, State-centric system comes with certain difficulties. States need to be both interested in enforcing the law and powerful enough to effectively do it. Especially when the duty is owed to all States and to none of them in particular, States are less willing to pay the “cost” of enforcement. These are some of the reasons why, in general, State responsibility as a legal “tool” is often proven to be of limited effectiveness. But, in the case of cultural heritage law, one needs to add next to these general observations a number of factors impacting on State responsibility that are special to cultural law and its nature.

1. The Challenge of Reparations

The *first* and most obvious point to make is that reparations for loss of cultural heritage are oftentimes impossible. The concepts of authenticity and integrity needed for inscription of immovable World Heritage Sites,⁵⁰ for instance, only come to reinforce this idea of irreplaceability. Recently, in its recent *The Prosecutor v. Al Faqi Al Mahdi* judgment, the

⁵⁰ Operational Guidelines for the Implementation of the World Heritage Convention (2015 version), paras. 79-95.

International Criminal Court confirmed the irreplaceability of heritage and considered it as a factor in determining individual criminal responsibility.⁵¹ But the nature of cultural heritage is such that, even if (State) responsibility is triggered, there is a lingering question as to whether its legal regime is helpful. A factual scenario of *ex post facto* State responsibility in the context of heritage would in most cases imply destruction or damage, which is often conceived of as an “irreparable loss”.⁵² Irreplaceability creates a practical obstacle for State responsibility with respect to heritage to function, as the harm is more difficult to fully restitute,⁵³ whereas compensation,⁵⁴ supposing that the damage is financially assessable, does not truly remedy the problem. In a sense, the primary norms of cultural heritage law help articulate this status of irreplaceability as a means to attribute value to cultural heritage, but they also reveal the limits of responsibility. This is why, deterrence and, more generally, prevention (in light of the principle of due diligence)⁵⁵ are of extreme importance in cultural heritage law.

2. Territoriality

The *second* point concerns cultural heritage and territoriality. This is a question that we discuss in more detail in the next part of the study, where we move beyond territoriality to capture the transboundary and transnational nature of heritage protection. For the purposes of the argument built here, suffice it to explain that, by and large, heritage protection rules focus on obligations that States have regarding heritage on their own territory that has been added to international inventories, or towards the maintenance of an international system of safeguarding. There is relatively little in cultural heritage instruments on State obligations regarding heritage that is not within their territory.⁵⁶ A notable exception is the 1954 Hague Convention on the protection of cultural heritage in wartime, which determines that States have the obligation to protect heritage in their own territories *and* in the territories of other States Parties during wartime.⁵⁷ But this convention only applies during times of conflict, and particularly inter-State conflicts.⁵⁸ With respect to non-international armed

⁵¹ *The Prosecutor v. Al Faqi Al Mahdi*, Judgment, 27 September 2016, ICC-01/12-01/15, para. 46.

⁵² CARDUCCI, pp. 144-145.

⁵³ ARSIWA, Art. 35.

⁵⁴ ARSIWA, Art. 36.

⁵⁵ See n. 80-86 and related text.

⁵⁶ For instance, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (17 October 2003) only creates obligations for a State with respect to heritage “present in its territory”, Art. 11-13.

⁵⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, Art. 4.1.

⁵⁸ *Ibid.*, Art. 18.

conflicts, the Hague Convention declares that all Parties to a conflict are bound, as a minimum, to the obligations of respect contained in Article 4.⁵⁹ The enforcement of this provision through the rules of State responsibility is difficult – among other reasons because it concerns the conduct of non-State actors. State responsibility thus, seems unable to fully grasp the scope of the Hague Convention.

The WHC, the most widely ratified cultural heritage treaty, recognizes explicitly that the primary responsibility (in the sense of a duty) regarding heritage under its aegis lies with the State on whose territory the heritage is found.⁶⁰ The international community of States as a whole has a duty to cooperate in the protection of world heritage in other States as well, but only as long as it fully respects the sovereignty of the State on the territory of which the property is found.⁶¹ The duty of cooperation is seen as eroding State sovereignty, but critics highlight that, in fact, there is too much sovereign control over those allegedly sovereign-eroding dimensions of WHC processes. For instance, this duty of cooperation is defined as assisting the territorial State in their efforts to conserve and identify their heritage.⁶² As to extraterritoriality, the key provision in the WHC is Article 6.3, which determines that States Parties will not take *deliberate* measures against WHC-listed properties situated in the territory of *other* Parties.⁶³ As it has been rightly pointed out, Article 6.3 creates obligations among States Parties that may clearly engender State responsibility.⁶⁴ However, as we have argued above, the introduction of a subjective element for the enforcement of customary international law (i.e. the criterion of intention) circumscribes the obligation and raises a threshold for the existence of a breach that is a precondition for the establishment of responsibility. This might be an extra factor explaining why the main avenue left to States Parties, at least before the aforementioned 2003 Declaration, was diplomacy outside traditional legal enforcement channels.⁶⁵

3. Obligations Owed to Whom?

Moving now to a *third* point regarding the particularities of cultural heritage law that affect State responsibility and its performance, we need to return to obligations *erga omnes* to examine them not in general,⁶⁶ but specifically within the framework of cultural heritage law.

⁵⁹ Ibid., Art.19.1.

⁶⁰ WHC, Art. 4.

⁶¹ Ibid., Art. 6.1.

⁶² Ibid., Art. 7.

⁶³ Ibid., Art. 6.3.

⁶⁴ CARDUCCI, p. 127.

⁶⁵ O'KEEFE, World Cultural Heritage, p. 208.

⁶⁶ As part II.A. of the article did, above.

The ARSIWA commentary explains that breach of an international legal obligation can be equated with violating the rights of others.⁶⁷ After all, State responsibility for the breach of an international legal obligation is not enforceable within a decentralized system unless the breach results (at least indirectly) in an injury to other States. This seems to be a hurdle in the area of cultural heritage law as a consequence of the mismatch between the doctrinal mechanics of the law with heritage practice. Moreover, here the “procedural consequences”⁶⁸ of the concept of obligations *erga omnes* in terms of State responsibility (i.e. collective enforcement) prove even more difficult to occur. Cultural heritage law is more often than not the domain of obligations that States undertake as a means to create awareness and visibility to their own cultures, for the benefit of “humankind”,⁶⁹ and not necessarily other States directly. This means that in many instances no particular State may claim to be exclusively or directly injured. Often, poor heritage management practices in one State do not affect another State in a meaningful way. Arguably, the very purpose of the concept of obligations owed *erga omnes* is to remedy that problem. But this requires recognition of the norms in question as bearing that character. Many scholars have adopted that position,⁷⁰ but it is questionable whether States share the perception that cultural heritage rules are *erga omnes*. And, even if they are, as we have already explained, the enforcement of obligations *erga omnes* is rather problematic.

The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICHC)⁷¹ does not seem to contain provisions that create obligations that would be specific enough in what they require States to do and the breach of which could amount to a direct injury for one particular State. To the extent that the obligations it establishes are owed *erga omnes*, the text of the instrument is that general,⁷² that makes it difficult to establish wrongfulness that could be invoked by non-injured States for the breach of concrete standards of conduct. The instrument mainly creates obligations upon a State to inventory and list intangible cultural heritage within their own territory, and to cooperate with the international safeguarding system. In this respect, one can observe a gradual decrease of well-defined

⁶⁷ ARSIWA Commentary, p. 35.

⁶⁸ ILC, A/CN.4/L.682, para. 380.

⁶⁹ Hague Convention, Preamble: “Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind”. See also for example the Recommendation concerning the International Exchange of Cultural Property, 26 November 1976, at para. 2: “All cultural property forms part of the common cultural heritage of mankind and that every State has a responsibility in this respect, not only towards its own nationals but also towards the international community as a whole”.

⁷⁰ See n. 2.

⁷¹ Adopted 17 October 2003.

⁷² See for instance, Art. 11(a) ICHC that reads: “Each State Party shall: (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory”.

international legal obligations from previous instruments, such as the aforementioned 1954 Hague Convention, to the ICHC. This can arguably be explained if one conceptualizes intangible heritage as too politically volatile (a position expressed numerous times by negotiating States during the drafting of the convention).⁷³ As a result, compromises that strengthen sovereignty were made,⁷⁴ and safeguards added to the ICHC, in effect excluding (intentionally or not) the possibility of one State clearly owing clear obligations vis-à-vis other States. To collectively enforce the law, this (i.e. the law) needs to be certain (both regarding its existence as valid law and its content) and concrete enough as to the conduct it prescribes.

4. Language Softness

The example of the ICHC applies in the case of the argument we are making regarding *erga omnes* obligations and enforcement, but sits also comfortably in our *fourth* point regarding the particular features of international cultural heritage law that impact on the effectiveness of State responsibility. This point concerns the “softness” of the law both regarding the medium chosen to promote cultural heritage (i.e. soft law rather than hard law instruments), but also in the loose and unclear way these soft and hard instruments prescribe the desirable conduct and the impact its breach may have on third States that would be entitled to invoke State responsibility.

Cultural heritage is an area of law that owes a lot to soft law documents, such as the 2003 Declaration that we already discussed, the Recommendation on the Historic Urban Landscape,⁷⁵ or the Recommendation on Cultural Objects.⁷⁶ But there is also another form of softness.⁷⁷ Because of not being “concrete”, existing primary norms may not always set out obligations that can lead to an allegation of breach. One could even argue that, to a certain degree, there is a disconnect between the language of the treaties and the “mechanics” of the positive law, on the one hand, and the actuality of international heritage management practice, on the other. Although some types of heritage lend themselves to clearer international obligations because of the very nature of the heritage (such as underwater heritage),⁷⁸ this is not always the case.

⁷³ For this history, see generally LIXINSKI, *Intangible Cultural Heritage*.

⁷⁴ For a critique of the sovereignty safeguards, see LIXINSKI, *Selecting Heritage*.

⁷⁵ Recommendation on the Historic Urban Landscape, including a glossary of definitions, 10 November 2011.

⁷⁶ Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, 19 November 1964.

⁷⁷ See the idea of *soft negotium* suggested by D’ASPREMONT, pp. 1084-1087.

⁷⁸ Since underwater heritage is often outside States’ territories, and thus claims to it need to be resolved in other means, some of which are difficult to define, like cultural links.

The type of softness we are referring to here, namely lack of concreteness as to the prescribed conduct/duties, concerns both hard and soft law rules. To give a couple of examples stemming from soft law rules, Paragraph 2 of the Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas reads: “The governments and the citizens of the States in whose territory they are situated should deem it their duty to safeguard this heritage and integrate it into the social life of our times. The national, regional or local authorities should be answerable for their performance of this duty in the interests of all citizens and of the international community, in accordance with the conditions of each Member State as regards the allocation of powers”.

What are the concrete legal obligations established here? And when could an (indirectly) injured State invoke State responsibility? The Recommendation on the Historic Urban Landscape, reads in Paragraph 23: “All levels of government – local, regional, national/federal, – aware of their responsibility – should contribute to the definition, elaboration, implementation and assessment of urban heritage conservation policies”. In similar terms (to give also examples from hard law instruments), Article 14 of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention)⁷⁹ states that: “In order to prevent illicit export and to meet the obligations arising from the implementation of this Convention, each State Party to the Convention should, as far as it is able, provide the national services responsible for the protection of its cultural heritage with an adequate budget and, if necessary, should set up a fund for this purpose”.

While that would not matter if one were to focus simply on the language of international heritage instruments, the effects of the use of ill-defined standards of conduct and this lack of clear obligations corresponding to interests that would affect concrete right-holders has consequences in terms of State responsibility.

5. Due Diligence

A contiguous argument (corresponding to the *fifth* and last point) can be made regarding obligations of due diligence and the standards of conduct these require.⁸⁰ In a sense, ambiguity regarding the specific standards of diligence that a State is expected to demonstrate is inherent to all areas of law that establish duties of conduct, or obligations of means (the two terms meaning the same).⁸¹ Obligations under due diligence are of means and not of

⁷⁹ Adopted 14 November 1970.

⁸⁰ The literature on due diligence is vast. Among others see, PISILLO MAZZESCHI; KOIVUROVA; BARNIDGE; TZEVELEKOS, *Reconstructing the Effective Control Criterion*, pp. 152-157; and ILA First Report.

⁸¹ TUNK; and DUPUY, *The Difficulties of Codification*.

result. Certain subjective elements⁸² – such as knowledge on behalf of the State that a threat or risk for cultural heritage exist,⁸³ but also State capacity to act in a protective way,⁸⁴ which depends on the means that are available in each nation – need to be assessed for establishing the breach of the duty, which will consist in that case of negligence on behalf of the State. Therefore, under due diligence, the State is only required to perform to the best of its ability.⁸⁵ Instead of owing to achieve a given result, State authorities need to strive to achieve that result. As long as a State can prove that, given the circumstances of the case, it did everything it could have done, the effort suffices. Standards of conduct and proactive engagement with a problem are assessed on a case-by-case basis and depend on the particular circumstances, on the means that were available to the State and on other subjective criteria, such as knowledge on behalf of the State that a problem existed that required action from its side. This amounts to the so-called test of State fault.⁸⁶

Obligations for States to adopt measures to protect cultural heritage are not rare in cultural heritage law. The 1970 Convention offers a number of examples in that respect. That instrument was drafted with State responsibility in mind – or, more specifically, with reparations for internationally wrongful acts as one of its drivers. The harm of colonization and conquest, and the consequent taking of cultural artefacts from colonized areas, was seen as an internationally wrongful act that should be remedied by the return of these objects. This logic, opposed by former colonial powers, was ultimately excluded from the language of the treaty, but arguably it still permeates the treaty's spirit.⁸⁷ In terms of what remained in the treaty from its original spirit, the 1970 Convention requires States to take a number of measures (i.e. obligations of means),⁸⁸ such as to create domestic law prohibiting the export of cultural property.⁸⁹ There is also an obligation to criminalize or impose administrative sanctions against the illegal import, export, and transfer of ownership of these artefacts,⁹⁰ which, at least in the context of import, creates obligations that are correspond-

⁸² DUPUY, *Responsabilité internationale des Etats*, pp. 102-103; PISILLO MAZZESCHI, pp. 18-21, 49-50; TZEVELEKOS, *Reconstructing the Effective Control Criterion*, pp. 155-157.

⁸³ See for instance n. 28.

⁸⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, n. 28. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, ICJ Reports 2007, para. 430.

⁸⁵ This means that standards of conduct vary from one State to another. See PISILLO MAZZESCHI, pp. 41-45, arguing that, be they flexible, due diligence standards are objective.

⁸⁶ See n. 80 and 82, but also GATTINI, *La notion de faute*; and GATTINI, *Smoking/No Smoking*.

⁸⁷ VRDOLJAK, p. 206.

⁸⁸ See this more clearly stated in Art. 4 WHC: "[... the State] will do all it can to this end, to the utmost of its own resources [...]."

⁸⁹ 1970 Convention, Art. 6.

⁹⁰ *Ibid.*, Art. 8.

ingly owed to a State from where heritage is exported. There could arguably be responsibility here for omission, stemming from the obligation of diligence of the State where the artefact has been imported to proactively fight wrongfulness by developing appropriate policies. Further, were one State Party to keep cultural artefacts illicitly taken by non-State actors from another State Party, that would in all likelihood entail a breach of the treaty and clear obligations to return the object, even allowing for *restitutio in integrum* (via returning the artefact in question). Relatedly, in the context of one State refusing to return cultural artefacts taken from another State, the primary obligation the former State owes is to engage in diplomatic negotiations for the return of objects illicitly imported into its territory, and to prevent the import of cultural objects coming from churches and museums of other States (after the entry into force of the convention).⁹¹ Finally, Article 9 of the treaty creates an obligation for affected States to cooperate in measures to remedy the pillage of cultural artefacts from one State, as long as said State determines who the affected States are, and calls them to collaborate.⁹² Presumably, other States could be affected by the failure to impose import controls (legislative or administrative), since objects from their territory would find havens in States with lax import controls particularly neighbouring countries and large market nations. That is the type of obligation that would be a prime candidate for enforcement in the context of State responsibility. But, again, it is an obligation of means that is subject to the due diligence regime.

Overall, obligations of means remain elusive, as they depend on a number of criteria that are absent from negative obligations (of result) and, most importantly differ from one State to another⁹³ (because not all States have the same capacities and means at their disposal) and from one case to another. The standard of conduct to be expected from a State is not always well-defined. This might be a reason why there are complications in invoking State responsibility in the context of the 1970 Convention. A mismatch arises, for instance, from the fact that the 1970 Convention is rarely if ever invoked in settling cultural heritage disputes, with States preferring to choose (or at least declare to be choosing) alternative routes (through co-operation at the diplomatic level).⁹⁴ Avenues of co-operation contribute very little to the formation of clear and consistent State practice pertaining to cultural heritage standards of protection, and State responsibility with respect to cultural objects. One could even go as far as arguing that, in fact, they undermine it. The resort to diplomacy may even be seen as suggesting (especially in case of positive obligations under due diligence, where the standards of conduct might be subjective)⁹⁵ that there has been no breach of international law rules or, more generally, that the stakes of State responsibility are too

⁹¹ Ibid., Art. 7.b.

⁹² Ibid., Art. 9.

⁹³ See for instance n. 28.

⁹⁴ See generally CHECHI.

⁹⁵ See for instance n. 28.

high for States to engage with, and they thus need to avoid the legal mechanism in favor of more pragmatic and practical solutions.

6. Preliminary Conclusions

To conclude with this section of the study, what this survey has attempted to show is that different domains of heritage call for different “tiers” and sorts of international legal obligations from States. Connecting all these instruments is the fact that, in many instances, there is no directly injured State that would have an interest in invoking State responsibility. A large number of the obligations undertaken under the relevant treaties are obligations a State owes to the humankind. One would provocatively say that, in a sense, the State owes the obligation primarily to itself, as it is directly connected with the heritage at issue, and then to the “international community” as a whole, that is, to all States of the world and to none of them in particular. Furthermore, often, language in heritage law is soft in the ways it regulates State behavior, whereas the positive duties of protection and the means they establish for that purpose remain subjective and unclear as to the standards of conduct expected from the State. But, even when clear rules exist, these are often circumvented in the practice of international heritage law by widespread resort to diplomatic mechanisms of State co-operation instead of solid State responsibility. This is why we are calling here into question the extent to which various rules within cultural heritage treaties (can) trigger State responsibility. The reasons supporting that conclusion are both endogenous (i.e. pertaining to the particular features of cultural heritage law) and exogenous (i.e. pertaining to the systemic features of international law). But they also owe to the absence of rigorous controlling mechanisms that could render cultural heritage law (more) effective, as has been the case with other areas of international law that present similar qualities, such as human rights law – especially in the case of regional sub-systems that have been endowed with adjudicatory institutions with a power to scrutinize State conduct.

III. Who Is Responsible for Harm to Heritage?

The answer to this question is rather straightforward in the law of State responsibility. Responsible is the State to which a breach of a primary heritage rule is attributable.⁹⁶ However, heritage law is an area that requires from States not only to refrain from directly

⁹⁶ ARSIWA, Art. 1 and 2.

causing⁹⁷ results prohibited by the law (i.e. to directly harm heritage), but also to act in a preventive and protective fashion. This feature of cultural heritage law, namely that it develops effects in the light of due diligence,⁹⁸ was among the factors that we identified in the previous section as impacting on State responsibility and how effective results the latter (State responsibility) can produce. Yet, in spite of the aforementioned difficulties (i.e. lack of clarity as to the standards of conduct a State needs to demonstrate), one cannot ignore the far-reaching consequences that due diligence has in terms of State responsibility⁹⁹ and the advantages it offers for an area like cultural heritage law that is often called to produce effects in complex transnational situations, which frequently involve non-State actors. Thus, the argument we are building in this part of the study is that due diligence is one of the “ingredients” that allow cultural heritage law to expand beyond the confines of territoriality and cover the conduct of non-State actors.

A. The Conduct of Non-State Actors and State Responsibility

To begin with the latter aspect, in international law we tend to turn towards States for the conduct of non-State actors. This is a “natural” consequence of State-centrism and of the fact that international law establishes duties and prohibitions for non-State actors or sanctions their conduct only to a limited extent. To give a couple of examples, States have a duty to monitor and regulate the conduct of corporations, whereas they may be found to be responsible for the conduct of terrorists, even when that conduct is not directly attributable to them (i.e. States), but their authorities are proven to be negligent in their duty to effectively fight terrorism. Within this socio-normative environment, lack of diligence on behalf of a State engages its liability while possibly “connecting” its conduct with that of

⁹⁷ In this Chapter, by the term “causing” we mean wrongfulness that is directly attributable to a State. Direct attribution is juxtaposed to the concept of indirect attribution, which refers to indirect responsibility for lack of due diligence. See SALMON, p. 996, defining indirect responsibility as “incurred by a subject of law because of the conduct of another subject of law” (our translation). See also HESS-BRUEGGE, pp. 268-269. For a more general and very thoughtful discussion on causality and State responsibility, treating both direct attribution and indirect (omissions, fault, negligence etc.), PLAKOKEFALOS. See also SKOGLY who discusses causality (again with regard to both direct and indirect responsibility) and State responsibility in an area contiguous to the topic of this Chapter, namely extraterritorial violations of human rights. GATTINI refers to the protective purpose causal theory, linking positive obligations (of due diligence) with causation (GATTINI, *Breach of International Obligations*, pp. 30-31).

⁹⁸ Apparently, this is not something that is dissociated from the *erga omnes* nature of the rules at issue. TZEVELEKOS, *Revisiting the Humanisation of International Law*, p. 74.

⁹⁹ See n. 86 on State fault. See PISILLO MAZZESCHI, pp. 41-45, arguing that, be they flexible, due diligence standards are objective.

non-State actors under its jurisdiction.¹⁰⁰ In most situations, the conduct of non-State actors is not attributable to States;¹⁰¹ hence, the State is not liable for the conduct *per se* of the non-State actor, but it can be liable for its own negligence regarding the conduct of non-State actors. Due diligence gives a new scope to the substantive rules with which it is associated (i.e. which are read in the light of due diligence) establishing for States a positive duty to protect¹⁰² – in our case, heritage. The concept of protection is wide enough to cover the conduct of non-State actors, in the same way that human rights develop a positive (including the horizontal dimension of positive obligations) effect. Therefore, States may be responsible for a breach of their own heritage protection duties under international law (read in the light of due diligence) if they are proven to be negligent in regulating, monitoring, controlling, sanctioning, etc. the conduct of non-State actors over which they exercise jurisdiction. Diligence takes a variety of forms spanning from regulation to sanctioning and encapsulates a wide spectrum of goals around the axes of prevention and *ex post facto* punishment (for deterrence purposes).

That cultural heritage can be negatively affected by non-State actors is a fairly commonplace idea.¹⁰³ Modern warfare, deep seabed exploitation, the activities of international investors and other types of social behaviour by varied non-State actors increasingly affect cultural heritage deemed of international importance. The acts of the self-proclaimed “Islamic State” in the current conflict in Syria and Iraq are one such notorious instance. A series of recent resolutions adopted by the United Nations General Assembly and Security Council as well as UNESCO with respect to the conflict in Libya, Syria and Iraq¹⁰⁴ condemn the destruction of heritage on iconoclastic grounds.¹⁰⁵ These documents do not articulate, however, the issue of State responsibility, restricting themselves to exhortatory language asking the international community to safeguard heritage in these countries and the parties to refrain from attacks.

To move to an entirely different instrument and the example this allows regarding due diligence and non-State actors, the 2001 UNESCO Convention on the Protection of the

¹⁰⁰ TZEVELEKOS, *Revisiting the Humanisation of International Law*, p. 74.

¹⁰¹ The most common scenario for such attribution would be that of Art. 8 ARSIWA (i.e. the non-State actor acting as a *de facto* organ of the State to which the non-State actor’s conduct is attributable). On Art. 8, see MAČÁK. Beyond Art. 8, other scenarios may apply too, on the basis of the various other legal bases contained in Part I, Chapter II of ARSIWA.

¹⁰² Among others, in the context of human rights, see SHELTON; and MOWBRAY. See also n. 3 and 5.

¹⁰³ See for instance FRANCONI, *The International Protection of Public Goods*.

¹⁰⁴ UN Security Council Resolution 2199 (2015); UN General Assembly Resolution 69/2 (2014); UNESCO World Heritage Committee, Bonn Declaration of 29 June 2015.

¹⁰⁵ The destruction of religious structures based on the beliefs of a different religion, which sees the first one as heretic. See ZARANDONA.

Underwater Cultural Heritage (UCHC)¹⁰⁶ determines its obligations around the interests of “humanity”, stating that States shall protect underwater heritage “for the benefit of humanity”,¹⁰⁷ as well as take measures “individually or jointly” to protect underwater heritage.¹⁰⁸ The UCHC articulates specific obligations for States not to allow the entry into their territory of underwater heritage items,¹⁰⁹ or the use of a State’s territory or facilities for activities incompatible with the UCHC by States and non-State actors alike.¹¹⁰ In fact, the UCHC clearly directs States to regulating the conduct of private actors under their jurisdiction, or flying their flag.¹¹¹ In this treaty, it is the deterritorialized nature of the heritage that makes easier the establishment of this type of obligation.

But, as there is a variety of non-State actors, one needs to consider other ways as well in which private actors can impinge upon cultural heritage. For instance, possible scenarios include private economic activity, such as the development of hydroelectric dams that lead to the submergence of archaeological sites, or mining operations that can impact on tangible sites and the intangible heritage of communities where mining takes place.¹¹² In similar terms, multinational corporations or foreign direct investors may engage in conduct or make claims that undermine or threaten cultural heritage.¹¹³ Not to say anything of the activities of looters, private collectors and museums, which can be seen as forming transnational crime networks.¹¹⁴ But can these acts be seen as triggering State responsibility for breach of due diligence?

When it comes to looters, collectors and museums, the answer seems to be fairly clear, under the terms of the 1970 Convention.¹¹⁵ In similar terms, any time an international heritage instrument or customary international law establish a positive obligation, the State is expected to be vigilant and proactive in accordance with the requirements of the positive obligation. The argument we are making here is that this might allow holding States re-

¹⁰⁶ Adopted 2 November 2001.

¹⁰⁷ UCHC, Art. 2.3.

¹⁰⁸ Ibid., Art. 2.4.

¹⁰⁹ Ibid., Art. 14.

¹¹⁰ Ibid., Art. 15.

¹¹¹ Ibid., Art. 16.

¹¹² For a case study, see BAINTON/BALLARD/GILLESPIE/HALL.

¹¹³ See for instance, *Southern Pacific Properties (Middle East) Ltd v. Egypt*, ICSID Case No ARB/84/3, Award, 20 May 1992, especially para. 150 et seqq. concerning the clash between the WHC and investment protection obligations. More generally, for an analysis of the intersections between international investment law and international cultural heritage law, see VADI.

¹¹⁴ For an exposé, see *Chasing Aphrodite*. For an overview of actions of private actors with respect to cultural heritage, see PATERSON/TELESETSKY.

¹¹⁵ See n. 89-92 and accompanying text.

sponsible for their failure to sufficiently (although, as argued above, ambiguity often surrounds standards of conduct) address threats and actual damage generated by the conduct of non-State actors under their jurisdiction.

But, at that point, it is necessary to open a parenthesis in our analysis to explain that obligations under due diligence often need to be balanced against other rules of international law (such as the rights of investors) or general interest. Heritage law (including its positive dimension of protection) may clash and compete with other norms, interests or values, and the priorities these establish. For instance, the primary norm against the destruction of cultural heritage needs to be balanced with development (seen as a right to development or general interest, possibly associated with other rights). Or the wrong can be justified on grounds of economic necessity, as was the case with the construction of the Aswan Dam in Egypt.¹¹⁶ In fact, it has been argued that there is an emerging international norm that would see economic development as a permissible justification for destroying cultural heritage, even if said norm puts increasing demands on host States to make good faith efforts to preserve artefacts and to mitigate the harm caused by development projects to sites.¹¹⁷

It seems that, in cases of economic development activities impacting on cultural heritage, one of the mitigating factors is the involvement of local communities in the management of the resources (cultural and economic), and in the choices about the fate of the cultural sites to be affected by the development project.¹¹⁸ This mitigation through involvement of local communities does not necessarily eliminate responsibility, but it speaks to due diligence by shifting the main focus of international heritage law away from States and towards the stakeholders who actually live in or around heritage covered by the treaties. Formally, the subject to be held ultimately accountable for lack of diligence is the central State, which is a sovereign subject of international law. But, the view from the ground is different. It is not only upon States to do the work, but also the people living in or around heritage. Involving local stakeholders may amount to a means for States to exercise due diligence. Thus, participation at the local level may be seen as diluting the responsibility of the territorial State, and, while it does not affect the positivist mechanics of international law on State responsibility, it does help bridge the gap between heritage law and practice that we pointed out above is one of the main obstacles to international law of State responsibility's interactions with international heritage law.

Other situations involving economic uses of heritage seem to find less support. For instance, salvage of underwater cultural heritage is prohibited under the terms of the

¹¹⁶ WANGKEO, p. 209.

¹¹⁷ *Ibid.*, p. 187.

¹¹⁸ BANTON/BALLARD/GILLESPIE/HALL, pp. 90-91; WANGKEO, p. 269.

UCHC,¹¹⁹ and therefore the actions of a private company registered in a State Party to the UCHC in salvaging underwater heritage in the waters of another Party could trigger the first State Party's responsibility, if it can be proven that said State breached their due diligence obligations to regulate, monitor or sanction salvage companies. That argument is, of course, premised on the assumption (discussed in the next section) that the State is responsible for regulating and monitoring salvage companies within it. As already argued, the particular standards of due diligence are rather unclear and remain to be decided on a case-by-case basis. The exercise of jurisdiction by the State of nationality of the corporation will be justified on the grounds of the links established by nationality, but will inevitably concern facts taking place extraterritorially. This exercise of jurisdiction seems to be in line with the treaty's text,¹²⁰ and it raises a broader question about extraterritorial exercise of jurisdiction.

B. Shared Responsibility by More Than One State: Beyond Territoriality

Because jurisdiction is in principle territorial,¹²¹ the obligation to protect will primarily apply for the State on the territory of which heritage is found.¹²² Yet, nothing precludes that other States be equally expected to demonstrate diligence, when other bases of jurisdiction¹²³ link them to a situation that calls for protection – especially on the basis of the active personality principle.¹²⁴ If, for instance, the non-State actor who damages heritage is a corporation operating overseas, it is not only the State on the territory of which the

¹¹⁹ For this discussion, see generally DROMGOOLE. The idea behind that prohibition is that salvage disrupts the site, and, because the UCHC privileges conservation *in situ*, any salvage or economic exploitation is fundamentally incompatible with the treaty.

¹²⁰ “Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage” (Art. 5).

¹²¹ See for instance, European Court of Human Rights (CG), *Banković and others v. Belgium and others*, 12 December 2001, para. 59. See also the references that the European Court of Human Rights makes to scholars supporting this point of view.

¹²² WHC, Art. 4 as an example.

¹²³ On the bases of jurisdiction see, for instance, STALKER; HIGGINS; RYNGAERT.

¹²⁴ Although the narrower version of the active personality principle requires for the exercise of jurisdiction that the conduct also be illegal within the legal order of the *locus delicti*, the place where the offense is committed. See for instance the separate opinion of the former President of the ICJ, Judge Guillaume in the *Arrest Warrant of 11 April 2000, Democratic Republic of Congo v. Belgium*, Judgment, 14 February 2002, Separate Opinion of President Guillaume, para. 5.

harmful activity is taking place that owes diligence, but also the home State, whose nationals engage in these activities.¹²⁵ In the case of the former State, jurisdiction will be territorial. The latter's jurisdiction will inevitably extend extraterritorially, yet, as long as the means that the State has chosen in order to comply with its due diligence obligations are not unlawful (for instance, enforcement cannot take place on the territory of another State without its consent),¹²⁶ the reach beyond territorial borders is fine. This leads to a scenario of multiple duty bearers¹²⁷ and of parallel and possibly overlapping jurisdiction¹²⁸ exercised by more than one State connected through different bases to the same situation. All involved States have a due diligence duty that demands them to deploy the pertinent means that are available in each one of them and allowed by international law. Ideally, States should coordinate their action and cooperate to achieve the best possible result. Often, the relevant legal framework will establish a duty of cooperation, such as, in the case of international heritage law, the duty to provide technical assistance in the safeguarding of heritage,¹²⁹ and to cooperate in listing efforts.¹³⁰ But, even if this is not possible, the fact remains that transnational legal phenomena involve more than one jurisdiction connected to the same harmful situation simultaneously. The result is overlapping jurisdiction and,

¹²⁵ For a similar argument in the area of investment law and the harmful conduct of corporations operating overseas, see MCCORQUODALE; DEVA, p. 49; and TZEVEKOLOS, *Investors's Human Rights Abuses*. See also the Ruggie report, holding that States are allowed to exercise jurisdiction for their nationals engaging in economic activities abroad, "where a recognized basis of jurisdiction exists and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States", A/HRC/8/5 (2008), para. 19; and ETOS for Human Rights Beyond Borders, *The Maastricht Principles*, in particular Art. 25.

¹²⁶ See for instance the dissenting opinion of Judge Van den Wyngaert in the *Arrest Warrant* case, distinguishing between prescriptive jurisdiction and enforcement jurisdiction and arguing that when the exercise of jurisdiction is permitted for States it cannot lead to acts of extraterritorial enforcement. *Arrest Warrant of 11 April 2000*, n. 124, Dissenting Opinion of Judge Van den Wyngaert, para. 49, p. 168.

¹²⁷ On multiple duty bearers see the collection of studies edited by VANDERHOLE.

¹²⁸ See RYNGAERT'S idea about *reasonable jurisdiction* and the distinction he makes between primary and subsidiary jurisdictional bases (RYNGAERT, 185 et seq.).

¹²⁹ For instance, ICHC, Art. 19: "1. For the purposes of this Convention, international cooperation includes, inter alia, the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States Parties in their efforts to safeguard the intangible cultural heritage. 2. Without prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels."

¹³⁰ WHC, Art. 20: "International assistance provided for by this Convention may be granted only to property forming part of the cultural and natural heritage which the World Heritage Committee has decided, or may decide, to enter in one of the lists mentioned in paragraphs 2 and 4 of Article 11 [the World Heritage List, and the List of World Heritage in Danger, respectively]".

possibly, concurrent State responsibility too.¹³¹ Whether a State is liable depends on whether it has breached its international obligations, including the duty to act in a protective manner under due diligence.

A variety of concurrent responsibility scenarios can be identified. The limits of this Chapter do not allow us to examine them in a systematic way. Therefore, we limit ourselves in giving certain examples. In the case, for instance, of intangible heritage of more than one country, one State might be directly damaging the heritage, i.e. be directly causing¹³² a result that is prohibited by international heritage law. Next to that State, other States may be found to be negligent in their obligation to demonstrate diligence and act in a protective way, to the degree they can and through means that are both lawful and available to them. In the case of multinational heritage listing, at least two States are connected territorially with heritage to the extent that this is on their territory. Unless other arrangements have been made between them (such as the creation of a bi-national organization to regulate shared water issues, like the International Joint Committee of Niagara Falls by Canadian and US authorities),¹³³ each State contributes to the situation through its own conduct – consisting in acts or omissions. All involved States need to exercise diligence for the protection of the heritage at issue. They are equally expected to make use of all means available to them (including diplomatic and political means) to invite the other involved States to demonstrate the highest possible standards of diligence and to cooperate. Another scenario might be when no author of wrongfulness exists. The risk or danger for heritage might be owed to a natural phenomenon, like an earthquake, or a phenomenon caused by human activity that cannot be personified, such as air pollution.¹³⁴ More generally, what may in all those scenarios lead to concurrent responsibility is that more than one State, each one of them being linked to the situation at issue, thus having a duty of care (i.e. diligence), be expected to act. Although the subject that directly¹³⁵ breaks the law (if any) and the other(s) that failed to demonstrate diligence are breaking separate (that is, each one its own) obligations, they all share liability over the same in essence (one single and

¹³¹ TZEVELEKOS, *Reconstructing the Effective Control Criterion*, pp. 129–178, especially p. 164 et seqq.

¹³² See n. 97.

¹³³ See generally HALL, pp. 23–43; and HEALY. Save for specific regimes being created by the States involved, it would seem the administering institution could be the World Heritage Committee when World Heritage sites are involved. Having a separate legal personality, the World Heritage Committee and its conduct would be subject to the specific rules on the responsibility of international organizations, and the work of the ILC in this matter is particularly important. As in all similar cases, the thorny question is when can States be responsible for conduct linked with their participation in an international organisation. At any rate, these situations need to be assessed on a case-by-case basis. See also n. 150.

¹³⁴ In these cases, and particularly disasters, principles of international cooperation seem to be paramount. The ongoing work of the ILC in this area is particularly relevant in this context.

¹³⁵ See n. 28.

common to all) harmful situation. It goes finally without saying that concurrent responsibility may exist even in the absence of a breach of the principle of due diligence. In the case, for instance, of heritage that crosses the borders of two or more States, all States shall refrain from damaging the heritage through conduct directly attributable to them. Each State has a duty not to directly damage heritage (on its territory), and any State that directly causes/contributes to a (common, single) harm, is concurrently responsible together with the other States that directly cause harm – each one being responsible for its own wrongful conduct.¹³⁶

In a nutshell, in cultural heritage too multiple duty bearers may exist. Sometimes, these can be found exercising parallel jurisdiction that may lead to their concurrent responsibility. The responsibility is concurrent¹³⁷ and not joint (and several)¹³⁸ because there is a plurality of wrongful acts by plural States, with each State being individually responsible for its own wrongful conduct, consisting either in State fault (i.e. breach of due diligence) or in wrongfulness directly¹³⁹ attributable to it.

Concurrent responsibility will often present transnational or transboundary elements. In the context of heritage law these elements clearly appear in the case of multinational nominations on the World Heritage List.¹⁴⁰

¹³⁶ For the use of the term directly here see n. 28.

¹³⁷ TZEVELEKOS, *Reconstructing the Effective Control Criterion*, pp. 164 et seqq. See the interesting analysis by KHALFAN in the context of the International Covenant on Economic Social and Cultural Rights, who characterises responsibility as joint. KHALFAN, pp. 299-331.

¹³⁸ The two terms, namely joint responsibility and joint and several responsibility need to be distinguished. The latter also concerns the question of reparation; each responsible subject owes reparation in full, irrespective of its individual share of responsibility. SALMON, pp. 1039-1040. See also ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 26-06-1992, p. 240, para. 48. On joint and several responsibility, cf. NOYES/SMITH. As to the concept of joint responsibility, NOLLKAEMPER associates it with Art. 47 ARSIWA (NOLLKAEMPER, p. 10). Yet, it is important to stress that Art. 47 only deals with the scenario of a plurality of responsible States regarding the *same wrongful act*, which is clearly distinguished from that of a plurality of States contributing through *separate* internationally wrongful conduct to the same damage. ARSIWA Commentary, note 29, p. 125. According to the ILC, “[i]n international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2.” ARSIWA Commentary, note 29, p. 124. “Paragraph 1 [of Article 47 ARSIWA] neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned” (emphasis added) ARSIWA Commentary, n. 29, p. 125.

¹³⁹ See n. 97.

¹⁴⁰ The competences of the World Heritage Committee are laid out in Art. 8-14 of the WHC, particularly Art. 13. Most notable among these powers is the control over the World Heritage List. Addition to the

At the moment, there are relatively few such nominations (34 transboundary world heritage sites, out of 1,052 sites at the time of writing).¹⁴¹ A few examples are: the Jesuitic missions (in Argentina and Brazil);¹⁴² the ancient Andean Road System (in Argentina, Bolivia, Chile, Colombia, Ecuador and Peru);¹⁴³ the Waterton Glacier International Peace Park (on the border of Canada and the United States);¹⁴⁴ the Silk Roads (China, Kazakhstan and Kyrgyzstan);¹⁴⁵ the Struve Geodetic Arc which allowed for the first measurement of the size of the planet (Belarus, Estonia, Finland, Latvia, Lithuania, Norway, Moldova, Russia, Sweden and Ukraine);¹⁴⁶ and the Historic Center of Rome and the Vatican (Italy and the Holy See).¹⁴⁷

Some of these sites are serial sites (meaning parts of it are in multiple countries, and taken together they reach the “outstanding universal value” threshold needed for inscription), and a few are on the border of two States (with the Vatican corresponding to the entirety of one country plus its borders with Italy).¹⁴⁸

In these examples, because of the multinational nature of heritage, there clearly are the conditions for the presence of concurrent responsibility (in the sense of duty) to act in a protective manner, which may lead to the concurrent responsibility (in the sense of liability) of the involved States. The relevant obligations include the duty to establish joint management plans, which allocate duties between the signatories and set out the obligations of each party in the conservation of the sites under their territorial jurisdiction, as well as conditions for assistance among the multiple States for conservation of the different parts.

World Heritage List engenders a number of consequences, most notably that States give the World Heritage Committee, with the assistance of specific NGOs (Art. 13.7), the power to oversee the status of properties added to the World Heritage List, and to make recommendations to States on the management of these sites, as well as coordinate international assistance to the protection of world heritage. The issue of whether the World Heritage Committee could be internationally responsible is, to the best of our knowledge, untested. But it would seem that its responsibility might arise, for instance, in delaying decisions on international assistance that resulted in destruction or serious harm to a property on the World Heritage List; or it could be responsible for its failure to provide such assistance and directives to one State that is causing harm to a transboundary heritage site, to the detriment of the other State(s) involved in the listing.

¹⁴¹ The World Heritage List is created by Art. 11(1) of the WHC, n. 60, and is an international list of sites with “outstanding universal value”, as defined by the WHC’s Operational Guidelines. Multinational heritage consists of sites on the List that are jointly nominated by two or more States.

¹⁴² Available at <http://whc.unesco.org/en/list/275>.

¹⁴³ Available at <http://whc.unesco.org/en/list/1459>.

¹⁴⁴ Available at <http://whc.unesco.org/en/list/354>.

¹⁴⁵ Available at <http://whc.unesco.org/en/list/1442>.

¹⁴⁶ Available at <http://whc.unesco.org/en/list/1187>.

¹⁴⁷ Available at <http://whc.unesco.org/en/list/91>.

¹⁴⁸ On the relationships between Italy and the Holy See, see MORSS.

To be sure, each case is different, but the point we are making here is that the conditions might be present for concurrent responsibility – in spite of the term “joint” being used to describe these management plans.¹⁴⁹ Such plans also often involve the creation of multinational commissions for the protection of these sites.¹⁵⁰ The obligation of respect under Articles 4-7 of the WHC (discussed above) is clearly owed in the event of WHC sites on the border between two countries. When it comes to serial sites, though, the situation is less clear-cut, as one cannot effectively measure how many parts, if any, of a serial site can be affected before the combination loses its outstanding universal value (a requirement for inscription). But the presumption is that an impact on one part of the serial site necessarily affects its totality, and this assumption is reinforced by the relevant language of the Operational Guidelines, which suggests that “[e]ach component part should contribute to the Outstanding Universal Value of the property as a whole in a substantial, scientific, readily defined and discernible way”.¹⁵¹

One can also learn from failed attempts at multinational listing on the World Heritage List. Perhaps the most remarkable example, because it has been tied to an important case before the International Court of Justice now spanning six decades, is the Temple of Preah Vihear, on the border between Thailand and Cambodia. Both countries seem to exploit the cultural value of the site, which, even though in Cambodian territory, is only easily accessible from the Thai side of the border. When Cambodia wished to inscribe the site on the World Heritage List, both countries recognized its outstanding universal value, and the World Heritage Committee recommended the countries work together on a joint nomination.¹⁵² The two States initially decided Cambodia would propose the nomination individually, with Thai support. But there was a breakdown in the negotiations, and Thailand withdrew its support before the site had been inscribed on the List. Nevertheless, the site was still inscribed in 2008, with the World Heritage Committee admonishing Thailand to collaborate in the maintenance of the outstanding universal value of the temple. But the listing of

¹⁴⁹ If there is harm caused by a plurality of States contributing through separate internationally wrongful conduct, responsibility is concurrent; if the harm has been caused by a plurality of States that are responsible for the same wrongful conduct, responsibility will be joint.

¹⁵⁰ The first question to be asked for the purposes of allocation of responsibility is whether such commissions are autonomous international legal persons, i.e. international organizations. Each case needs to be assessed in the light of its particular characteristics, including the competences and powers that have been transferred to the commission. States will be responsible for any breach of international law they commit, including breaches of their duties in the context of these commissions. Furthermore, it might also be necessary to consider the responsibility of the commission itself as an independent legal body, but also the scenario of State responsibility associated with the conduct of the commission (in particular Art. 61 and 17 of the 2011 ILC Articles on the Responsibility of International Organizations, A/66/10, para. 87). See also n. 133.

¹⁵¹ Operational Guidelines (2015), para. 137.b.

¹⁵² For an in-depth discussion, see JAKUBOWSKI.

the temple only added fuel to the tensions between the two countries, to the point where military skirmishes escalated, and the temple suffered shelling. In its interpretation of the 1952 Judgment in the Temple of Preah Vihear Dispute, the International Court of Justice recalled the Temple's status under the WHC, and indicated that "each State is under an obligation not to take any deliberate measures which might damage directly or indirectly such heritage",¹⁵³ regardless of the territorial dispute.¹⁵⁴ If both States breached their obligations they would be held concurrently responsible.

On an optimistic reading, this dispute highlights that, even when an attempt at a multinational nomination fails, there is still sufficient proven interest in the preservation of specific heritage shown by both sides to warrant the imposition of obligations. Or, a more conservative reading can entirely dismiss this example, seen as Thailand was attempting to attack a site in Cambodian territory, and therefore the status of the temple as World Heritage would possibly be only secondary in triggering Thai responsibility as the breach of territorial integrity would likely come first. But there is still something to be said about heritage that is tied, through the UNESCO World Heritage List process, to more than one country, at least to the extent it highlights that States tied together by a World Heritage Site owe (beyond humankind) each other obligations, even with respect to the parts of the site on their own territory.

When, finally, it comes to the ICHC, the nature of intangible heritage, which is not necessarily attached to territory, would seem to lend itself more easily to multinational nominations. And, in fact, despite some failures at multinational nominations,¹⁵⁵ there are a number of successful examples. These inscriptions are encouraged by the ICHC system under its Operational Directives.¹⁵⁶ Out of 429 manifestations of heritage on the ICHC lists, 30 are multinational nominations at the time of writing. These include: Arabic coffee (United Arab Emirates, Saudi Arabia, Oman and Qatar);¹⁵⁷ Marimba music (Colombia and Ecuador);¹⁵⁸ Men's group Colindat, Christmas time ritual (Moldova and Romania);¹⁵⁹ and Kankurang, Manding initiation rite (Gambia and Senegal).¹⁶⁰

¹⁵³ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear, Cambodia v. Thailand*, Judgment, 11 November 2013, para. 106.

¹⁵⁴ JAKUBOWSKI.

¹⁵⁵ For an example, see LIXINSKI, *A Tale of Two Heritages*.

¹⁵⁶ Operational Directives for the Implementation of the Convention of the Safeguarding of the Intangible Cultural Heritage (2012), para. 13-16.

¹⁵⁷ Available at <http://www.unesco.org/culture/ich/en/RL/arabic-coffee-a-symbol-of-generosity-01074>.

¹⁵⁸ Available at <http://www.unesco.org/culture/ich/en/RL/marimba-music-traditional-chants-and-dances-from-the-colombia-south-pacific-region-and-esmeraldas-province-of-ecuador-01099>.

¹⁵⁹ Available at <http://www.unesco.org/culture/ich/en/RL/mens-group-colindat-christmas-time-ritual-00865>.

¹⁶⁰ Available at <http://www.unesco.org/culture/ich/en/RL/kankurang-manding-initiatory-rite-00143>.

The obligations States in a multinational nomination would owe each other under the ICHC are less clear-cut, because, as discussed above, obligations under the ICHC in general are less clear. But joint safeguarding plans would be required here, much like under the WHC, and thus it would seem that the mechanism of multinational nominations is one through which sufficiently clear obligations could be created under the ICHC for the purposes of (concurrent) State responsibility.

The situations described above seem to be clearer ways to articulate obligations one State would owe to the international community as a whole, but especially one another, as all States involved in a multinational nomination have a clear legal stake and set of commitments towards the heritage that they share. Their share in the heritage justifies shared responsibility (in the sense of duty) not to harm and to protect, but also, possibly, shared liability.

Conclusion

It is somewhat of a cliché to say that cultural heritage is special, unique, and irreplaceable. When it comes to the law, specialty plays a number of different roles, a particularly relevant role being that heritage law is special because it aims at protecting community interests or values. That said, international heritage law is not, in principle, a self-contained regime in the sense of having special rules on State responsibility. Therefore, general international law and, in particular, the ILC rules on State responsibility apply.

The overall goal of this Chapter has been to examine the law of State responsibility concerning the heritage regime(s) in international law. In the domain of international cultural heritage law, the norms on State responsibility have the distinct effect of highlighting the disconnect between the legal mechanics of the field and its operation in practice. The lack of clarity as to the exact content and effect of the obligations owed to other States, the choice of cooperation and diplomacy over law, the fact that obligations are often owed to the entire international community of States and to no one in particular are among the reasons compromising the effectiveness of the field, and its implementation and enforcement. This limited effectiveness has to do with deficiencies of international law more generally, particularly with respect to enforcement of collective interests. But specific features of cultural heritage, such as the sense that harm to heritage can never be fully repaired, the softness of many international heritage rules and their lack of clarity, also prove to be obstacles. Added to that is the spread of heritage regimes, and the growing visibility of the influence of non-State actors. These factors also highlight the dependence of the field on State sovereignty, despite its lofty aspirations to safeguard heritage for the benefit of present and future generations of all of humanity.

Special attention ought to be given to the principle of due diligence. This is a blessing in disguise. On the one hand, it does not always contribute to the establishment of clear, objective (i.e. common to all States as to the expected standard of conduct) obligations, contributing this way to the softness and vagueness of cultural heritage law. Yet, on the other hand, it could be an answer to the challenges faced by heritage law in many respects. It presents many advantages to the specific needs of international heritage law, particularly with respect to the conduct of non-State actors, whereas it is a precious “ingredient” of concurrent responsibility – even if not always a necessary condition. Concurrent responsibility allows involving multiple States in the protection of cultural heritage, which is an area of international law that very frequently presents transboundary and transnational characteristics. Concurrent responsibility (both in the sense of a duty and of liability) enables engaging a plurality of States (that are involved through different jurisdictional bases) in the protection of cultural heritage, in the hope that this increases protection in an area of law that is in need of more effectiveness for the benefit of our generation and the ones that follow in the course of evolution of humankind.

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2. “Cultural Genocide” and the International Criminal Court. The Possibilities and Limits of the Protection of Cultural Heritage

Abstract

“Cultural genocide” is neither an independent crime nor a legal term. However, it is understood to consist of the destruction of a group’s specific culture, thus encompassing, inter alia, the destruction of cultural property as well as the prohibition of the use of the group’s specific language. This Chapter examines whether such acts can amount to international crimes. As cultural genocide is not a crime per se and does not independently give rise to criminal liability, criminalization of the described actions is only possible if they can be characterized as a crime of genocide, crimes against humanity or war crimes. Surprisingly, the crime of genocide, which is under the jurisdiction of the International Criminal Court (ICC), gives only little room to actually incorporate cultural genocide in the realm of International Criminal Law. Thus, the question of how cultural genocide can be addressed under the Statute of the ICC is mostly left to the offences of crimes against humanity, specifically the crime of persecution, and war crimes. This Chapter shall therefore explain the critical issue of implementing cultural heritage law comprehensively as a protected issue under International Criminal Law.

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Introduction

Raphael Lemkin coined the term genocide, combining the Greek words “genos” and the Latin word “cide”, meaning “killing” a “tribe”, to describe the crimes committed by Nazi Germany.¹ Originally, Lemkin suggested different types of genocide, among them political, social, cultural, economic and physical genocide, and all of them encompassing the destruction of fundamental elements of the life of a group.²

When talking about cultural genocide it is important to bear in mind that until today cultural genocide has not developed into a legal term or an independent crime. The notion cultural genocide describes a particular situation rather than containing a legal classification relevant for criminal liability (which is why it will be put in inverted commas throughout the text). Following Lemkin’s original understanding, cultural genocide occurs when a particular group and its identity are being destroyed through the destruction of its specific

¹ “This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as *tyrannicide*, *homocide*, *infanticide*, etc”. LEMKIN, p. 79; METTRAUX, pp. 193 et seqq.

² LEMKIN’S definition of genocide consisted of a “co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religions, and the economic existence of national groups and the destruction of the personal security, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group”. LEMKIN, pp. 79, 82 et seqq.

culture.³ Actions, possibly named cultural genocide, could therefore be physical destruction or damage of cultural property linked to a specific group, like churches and historic monuments, the prevention of the use of social and educational institutions, or other infringements of intangible symbols of culture like prohibiting the use of the language or specific traditions and religious practices, when committed with a corresponding intent to destroy the group’s culture.

Considering this understanding of cultural genocide it is not surprising that the concept of cultural heritage is typically discussed whenever such acts occur.⁴ Applying a broad interpretation of the term cultural heritage that encompasses movable and immovable, tangible and intangible goods related to culture,⁵ cultural genocide can be interpreted as a direct attack against identities and diversity. History reminds us that conflicts have been fought between distinct ethnic, religious and cultural groups with the aim to affirm their supremacy over a territory. The adversaries are targeted because they are perceived as “different”, and thus alleged visible differences become the object of attack, explaining the vulnerability of culture and cultural heritage in conflict situations.⁶

The subsequent question is whether such acts – that are often named cultural genocide – can amount to international crimes. As cultural genocide is not a crime per se and does not independently give rise to criminal liability, criminalization of the described actions is only possible if they can be characterized as a crime of genocide, crimes against humanity or war crimes. Of particular importance is the codification of these crimes in the Statute of the International Criminal Court (ICC Statute). Criminal liability before the ICC as a permanent international criminal court could serve as effective protection for cultural heritage by providing a deterrence possibility of criminal punishment and an enforcement mechanism, at least in some cases.

However, genocide, crimes against humanity and war crimes – in their best – only cover certain aspects of the intended destruction of a group by destroying its culture. The crime of genocide (Article 6 ICC Statute), as will be explained, does not include cultural genocide. War crimes (Article 8 ICC Statute) only cover acts against some facets of cultural property without requiring the specific intent to target the group. And although crimes

³ Ibid., pp. 84 et seqq.

⁴ See e.g. VRDOLJAK, *Genocide and Restitution*, pp. 36 et seqq.

⁵ PABST, p. 39; NAFZIGER/PATERSON, p. 1: “Broadly speaking, the term ‘cultural heritage’ refers to the myriad manifestations of culture that human beings have inherited from their forebears. These manifestations include, for example: art, architecture, rural and urban landscapes, crafts, music, language, literature, film, documentary and digital records, folklore and oral history, culinary traditions, indigenous medicine, ceremonies and rituals, religion, sports and games, dance and other performing arts, and recreational practices such as those involving hunting and fishing”.

⁶ FRULLI, *Protection of Cultural Property*, p. 215; LENZERINI, p. 44; WALLER, p. 26.

against humanity and its alternative of persecution (Articles 7(1)(h) and 7(2)(g) ICC Statute) include acts committed with discriminatory intent against cultural groups, a lot of actions named above as possibly amounting to cultural genocide do not constitute persecution. Therefore, the concept of cultural genocide does not explicitly exist in the ICC Statute, which reflects the understanding that culture itself is not a top priority in the Statute. The term culture only appears in relation to persecution as “cultural grounds” and not even the war crimes addressing the destruction of cultural property actually use this term.

Hence, this study argues that cultural genocide can only be criminalized implicitly and in certain aspects under the ICC Statute. In order to identify these limited possibilities for penalizing cultural genocide under the ICC Statute, this Chapter will deal with crimes against culture in a broad understanding and not only focus on the narrow understanding of cultural genocide as the intended destruction of a group by destroying its culture. The following examination deals with the crime of genocide, war crimes and crimes against humanity, the respective protected values and hence the amount of effective protection against cultural genocide.

I. Genocide

Genocide came into existence as an independent crime in the aftermath of the Second World War. The Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention)⁷ contains in its Article II the following definition: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group”.

Although this definition of the crime has been criticized for its limited scope of application, it was reproduced unchanged or only slightly changed in most of the relevant subsequent international instruments, including the ICC Statute.⁸ According to this definition, the crime of genocide focuses on the destruction of a *group* rather than an individual, leading

⁷ Adopted 9 December 1948.

⁸ Art. 6 of the ICC Statute; for the reproduction of the definition see also Art. 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Art. 2 of the International Criminal Tribunal for Rwanda (ICTR); KIRSCH therefore qualifies “genocide” as the most standardized crime of the world, KIRSCH, p. 10.

to the conclusion that the *rationale* of the crime is the protection of the existence of these groups.⁹ Furthermore, it is broadly accepted that the groups are protected in their existence precisely because of their contribution to international cultural diversity.¹⁰ Consequently, the existence of the crime of genocide can be understood as a tribute to cultural diversity and should give hope for the inclusion of cultural genocide.

However, an effective protection of the diversity of cultures suffers from serious restrictions. Firstly, the exhaustive listing of protected groups is restricted to national, ethnical, religious and racial groups,¹¹ leading to situations where groups with an equally specific identity, that cannot be defined as one of the listed groups, but are also contributing to cultural diversity might not fall under the protection of the ICC Statute, e.g. linguistic groups without characteristics of an ethnic or national groups or specific social groups (remember for example the mass crimes committed in Cambodia against the so called "new people", living in the city).¹² Secondly, one of the biggest debates concerning the scope of the crime of genocide is the type of intended destruction that the groups are protected against. Scholarly writings¹³ and international jurisprudence¹⁴ interpret the "intent to destroy" as encompassing only an intended physical-biological destruction: the perpetrator must intend to destroy the group through the multiple "commission of one or more of those acts that form the crime's *actus reus*".¹⁵ Following this approach, "cultural geno-

⁹ ICTR, *Akayesu*, TC Judgment, ICTR-96-4-T, 2 September 1998, para. 469; ICTY, *Krstić*, TC Judgment, IT-98-33-T, 2 August 2001, para. 552 et seqq.; VEST, p. 476; LERNER, p. 149; ROBINSON, Genocide Convention, p. 58; FRONZA, pp. 118 et seqq.; LÜDERS, pp. 44, 261; WERLE/JESSBERGER, para. 784.

¹⁰ UN General Assembly Resolution 96(I) (1946); LEMKIN, p. 91; KREB, *Völkermord*, § 6, para. 3; LÜDERS, p. 37 et seqq.; WERLE/JESSBERGER, para. 785.

¹¹ SCHABAS, Genocide in International Law, 11 et seqq., 151; WERLE/JESSBERGER, para. 789; KREB, *Völkermord*, § 6, para. 32; KREB, Genocide under International Law, p. 473; BERSTER, Article II, Genocide Commentary, para. 60; critically: LÜDERS, pp. 65 et seqq.; LIPPMAN, p. 412.

¹² See SCHABAS, Problems of International Codification, pp. 289 et seqq.

¹³ Among others: KREB, *Völkermord*, § 6, para. 72f.; KREB, ICJ and Genocide, pp. 625 et seqq.; SCHABAS, Genocide in International Law, p. 271; METTRAUX, p. 216; BOOT, pp. 439 et seqq.; CASSESE ET AL., p. 113; BEHRENS, pp. 82 et seqq.

¹⁴ ILC Draft Code 1996, Art. 17, pp. 45 et seqq.; UN Security Council Darfur-Report S/2005/60 (2005), para. 515 et seqq.; ICJ, *Application of the Genocide Convention, Bosnia v. Serbia*, ICJ Reports (2007) Judgment, p. 43, para. 190, 328; confirmed most recently in: ICJ, *Application of the Genocide Convention, Croatia v. Serbia*, 2015, para. 136 et seqq.; similarly: ICC, *Al Bashir*, PTC, Decision on Warrant of Arrest, ICC-02/05-01/09-3, 4 March 2009, para. 143 et seqq.; ICTY, *Krstić*, TC Judgment, IT-98-33-T, 2 August 2001, para. 580; ICTY, *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 553; ICTR, *Kajelijeli*, TC Judgment, ICTR-98.44A-T, 1 December 2003, para. 808; ICTR, *Seromba*, TC Judgment, ICTR-2001-66-I, 13 December 2006, para. 319.

¹⁵ KREB, ICJ and Genocide, p. 627; KREB, *Völkermord*, § 6, para. 71f.

cide” would mostly be excluded from the crime’s scope of application. The opposing approach, however, particularly supported by German jurisprudence and literature,¹⁶ requires the intent to destroy the group socially.¹⁷ This means that while single acts of the physical-biological *actus reus* must still be committed, the intended destruction of the group need not be physical. Consequently, as the destruction may also be achieved through other means, the social destruction approach leaves room for cultural genocide. In both approaches, the specific identity of the protected group actually appears to be the targeted object of destruction and it is above all the intended method of destruction that is different: either the group’s identity shall cease to exist because a great number of group members are killed or physically or biologically harmed – the most horrifying way of eliminating a group identity¹⁸ – or the group identity shall be destroyed through the destruction of the specific characteristics of the group.¹⁹ The following example, brought forward by Kreß, highlights the drastic differences between the two interpretations:

If a State conducted an intended campaign to destroy all cultural property of one of the protected groups and committed a listed act of murder during the course of the campaign, this could constitute genocide according to the latter approach.²⁰ However, according to the first, physical-biological approach, this act could not be qualified as genocide, as the main part of the campaign was not composed of the listed physical and biological acts. The greater protection with regard to identity and culture would thus *prima facie* derive from the latter perspective, requiring “only” the intention to destroy the group socially, because forms of cultural genocide could be qualified as the crime of genocide under Article 6 of the ICC Statute.

Although there are strong arguments for each position,²¹ the physical-biological approach to destruction is until now clearly dominating.²² One foundation of this approach is the

¹⁶ German Constitutional Court, 2 BvR 1290/99, 2000, para. 32; German Federal Court 3 StR 215/98, 1999, para. 38; German Federal Court, 3 StR 575/14, 2015, para. 13; for an overview see RISSING-VAN SAAN.

¹⁷ Dissent SHAHABUDDEEN, in: ICTY, *Krstić*, AC Judgment, IT-98-33-A, 19 April 2004, para. 45 et seqq.; ICTY, *Blagojević/Jokić*, TC Judgment, IT-02-60-T, 17 January 2005, para. 659 et seqq., 666; ICTY, *Krajišnik*, TC Judgment, IT-00-39-T, 27 September 2006, para. 854; BERSTER, Article II, Genocide Commentary, para. 2; BERSTER, Cultural Genocide, pp. 683 et seqq.; RISSING-VAN SAAN, p. 398; WERLE/JESSBERGER, para. 785; ZAHAR/SLUITER, p. 179.

¹⁸ Similarly BERSTER, Article II, Genocide Commentary, para. 79, 87.

¹⁹ In any case, the group’s physical existence cannot have an independent meaning other than the accumulation of lives of the group members – hence a concentration on the group identity is favourable.

²⁰ KREß, Genocide under International Law, p. 487.

²¹ For an overview of the discussion see among others: KREß, Genocide under International Law, pp. 486 et seqq.; BERSTER, Cultural Genocide, p. 677; SCHABAS, Genocide in International Law, pp. 270 et seqq.

²² See n. 13, 14.

drafting history of the Genocide Convention – an early draft of the 1948 Genocide Convention actually contained an article entitled cultural genocide, criminalizing the following acts: "(1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; (2) destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group".²³

If the goal is the criminalization of acts of cultural genocide, this Article contained everything that one could hope for. However, this part of the draft convention did not make it into the final version.²⁴ The wording and the evident decision of the drafters of the Genocide Convention against the inclusion of cultural genocide, a rather vague concept open to abuse, and the focus on physical destruction implies the overall exclusion of such acts, and can be interpreted as securing the characterization of the crime of genocide as one of the most serious crimes.²⁵ Instead, acts of cultural genocide were supposed to be addressed by the regime of human rights.²⁶ The crime of genocide, as it also appears in Article 6 of the ICC Statute, is thus limited by the listed single acts and requires the intent to destroy the group in a physical-biological way. The jurisprudence of the ICC supports this interpretation as well in the one case before the ICC dealing with genocide: the case of Sudanese President Al-Bashir who is still at large. In the decision of the Pre-Trial Chamber on the Prosecution's Application for a Warrant of Arrest, the Court confirmed the ICJ's interpretation of a physical-biological approach.²⁷ Since then, the ICC has been reluctant to address

²³ Art. III, Ad Hoc Committee Draft, 24 May 1948, UN Doc. E/794, p. 17; similarly the Secretariat Draft contained the alternative of "destroying the specific characteristics of the group by," inter alia: "(b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship". Art. I(3), Secretariat Draft, 26 June 1947, UN Doc. E/447, pp. 6 et seqq.

²⁴ See e.g. UN General Assembly Committee (30 September to 4 October 1948), Summary records A/C.6/SR.63 and A/C.6/SR.66; FRULLI, Protection of Cultural Property, p. 211; MORSINK, Cultural Genocide, 1021 et seqq., 1028 et seqq.

²⁵ See e.g. UN General Assembly Committee (30 September to 4 October 1948), Summary records A/C.6/SR.63; UN General Assembly Committee (11 to 29 October 1948), A/C.6/SR.83, pp. 197, 200, 203; UN Commission on Human Rights, WHITAKER, Report on Genocide, E/CN.4/Sub.2/1985/6 (1985), para. 32.

²⁶ SCHABAS, Preventing Genocide, p. 5; UN Commission on Human Rights, n. 25; MORSINK, p. 1010 et seqq.

²⁷ ICC, *Al Bashir*, PTC, Decision on Warrant of Arrest, ICC-02/05-01/09-3, 4 March 2009, paras. 143-145.

genocide; a policy that does not imply the court's tendency to a broader interpretation concerning the intent to destroy.

The only remaining aspect of cultural genocide is the alternative of forceful transfer of children, which was introduced 1948 in the final definition of the crime of genocide by Greece.²⁸ Regarding this alternative, all States could agree that the destruction of a group through the deprivation of its next generation was severe enough to constitute genocide. It is likely that the majority of States also did not fear being indicted for genocide through the forceful transfer of children, a risk that might have existed for some States regarding other forms of cultural genocide.²⁹ However, the ICJ and the *ad hoc* Tribunals, supporting a strict physical-biological approach, take actions of cultural genocide into consideration, namely as relevant evidence for the necessary physical-biological "intent to destroy".³⁰ According to this jurisprudence attacks on the cultural and religious property and symbols of the targeted group often occur simultaneously with physical and biological destruction and therefore serve as indications for the required intent to destroy. This way, acts of "cultural genocide" do not need to remain completely irrelevant when assessing whether an act amounts to a crime of genocide.

Ultimately, the effective protection achieved by the punishment of genocide with regard to "cultural genocide" is rather weak, as most forms of "cultural genocide" are not contained in Article 6 of the ICC Statute. The crime of genocide therefore does not entirely

²⁸ Greek Amendment Proposal (1948), A/C.6/242, proposed in UN General Assembly, 22 October 1948, A/C.6/SR.81.

²⁹ Sweden was concerned about such a responsibility in light of the practiced forceful conversion of the Lapps, UN General Assembly, 25 October 1948, A/C.6/SR.83, p. 197; similarly New Zealand with regard to the actions of the UN Trusteeship Council in the case of Tanganyika, *ibid.*, p. 201; also the US representative warned that genocide "might be extended to embrace forced transfers of minority groups such as have already been carried out by members of the United Nations" (UN ECOSOC, US Comment on the Draft Convention, 1948, E/623). Accordingly JESCHECK also described some actions of the Allied Forces as a possible crime of genocide, JESCHECK, *Genocide*, p. 541.

³⁰ ICJ, *Application of the Genocide Convention, Bosnia v. Serbia*, ICJ Reports (2007) Judgment, p. 43, para. 344: "However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. [...] At the same time, it also endorses the observation made in the Krstić case that 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group'"; ICTY, *Krstić*, TC Judgment, IT-98-33-T, 2 August 2001, para. 580; *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 553; ICC, *Al Bashir*, PTC, Decision on Warrant of Arrest, ICC-02/05-01/09-3, 4 March 2009, para. 194(vi); VRDOLJAK, p. 37.

live up to its goal of preserving the contribution of the protected groups to cultural diversity, but punishes only the worst ways of destroying a group’s identity.

II. War Crimes

Having the limits of Article 6 of the ICC Statute, the concept of war crimes must be examined in order to determine whether it can partly ensure the criminalization of “cultural genocide” committed against culturally distinct groups.

The basic requirements for criminal liability under Article 8 of the ICC Statute already limiting its scope are the existence of an armed conflict and the destruction of protected objects in connection to the conflict. Some of the war crimes listed in Article 8 of the ICC Statute actually address, in the most explicit terms, the destruction of cultural property. The identical Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the ICC Statute prohibit the following acts: “attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”.

A protection against cultural genocide only follows implicitly from these articles, as a discriminatory targeting of a specific group is not required. However, the destruction of cultural property mostly occurs when the goal consists of harming symbols of the adversary’s identity.³¹ Thus the attacks will *in fact* be discriminatory in most cases.³² The *actus reus* consists of an “attack”,³³ while an actually destructive result is not necessary – although the directing of the attack might be hard to prove in such a case.³⁴ It is a positive step that the destruction of cultural property is punishable in both international and non-international armed conflict. This comprehensive sanctioning underlines the difference with the more general war crime of attacking civilian objects (Article 8(2)(b)(ii) of the ICC Statute), which is only punishable in times of international armed conflict. Because of the recognized special value of the listed buildings and historic monuments, they enjoy

³¹ FRULLI, Protection of Cultural Property, p. 215; LENZERINI, p. 44. For an overview of the systematic destruction in Yugoslavia see UN Security Council Final Report of the Commission of Experts (1994), S/1994/674, pp. 66 et seqq.

³² For an example see the current judgment of the ICC in the case of *Al Faqi Al Mahdi*, where the discriminatory targeting of a certain belief was viewed as an aggravating factor in sentencing, ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 81.

³³ The term “attack” is defined in Art. 49(I) of Additional Protocol I to the 1949 Geneva Conventions as: “acts of violence against the adversary, whether in offence or in defence.”

³⁴ EHLERT, p. 132; ICTY, *Strugar*, TC Judgment, IT-01-42-T, 31 January 2005, para. 310.

a higher protection than other civilian property.³⁵ At the same time, a specific degree of universal value is not necessary. This problem was treated inconsistently by the *ad hoc* Tribunals multiple times: while the ICTY Trial Chamber in the *Kordić/Čerkez* case declared educational institutions to always be of great importance to the cultural heritage of peoples and consequently came to the conclusion that the destruction of these buildings was a breach of the prohibition to destroy cultural property in humanitarian law,³⁶ the Appeals Chamber overruled this finding and qualified educational institutions as general civilian property, therefore only convicting on the basis of the more general prohibition to destroy civilian property.³⁷ In a subsequent judgment, the ICTY found that the destroyed object did not need to form part of a spiritual or cultural heritage of a people,³⁸ only to require this element again in a later judgment.³⁹ In the first case before the ICC concerning a charge for the war crimes in Article 8(2)(b)(ix) against Malian Ansar Eddine-member Al Faqi al Mahdi the Court shows a strong focus on the special value of the destroyed objects for cultural heritage: “The Buildings/Structures were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali. The community in Timbuktu was involved in their maintenance and used them for their religious practices. At the time of the destruction, all cemeteries in Timbuktu, including the Buildings/Structures within those cemeteries, were classified as world heritage and thus under the protection of UNESCO, and as many as 16 mausoleums situated in Timbuktu were also themselves protected sites pursuant to the 1972 Convention concerning the protection of the world cultural and natural heritage”.⁴⁰

Similarly, the Trial Chamber in its judgment of 27 September 2016 referred to the status of the destroyed buildings as UNESCO World Heritage⁴¹ sites in order to prove their required characterization as religious buildings and historic monuments.⁴² But although the objects’ characterization as UNESCO World Heritage is stressed and might be important on an evidentiary basis, there is no direct legal implication attached. The wording of Articles 8(2)(b)(ix) and 8(2)(e)(iv) does not require the attacked object to form part of the cultural or spiritual heritage of a nation or to have a unique character transcending geographical boundaries, in contrast to what is partly required under Article 53 of Additional

³⁵ LENZERINI, p. 51 et seqq.

³⁶ ICTY, *Kordić/Čerkez*, TC Judgment, IT-95-14/2-T, 26 February 2001, para. 360.

³⁷ ICTY, *Kordić/Čerkez*, AC Judgment, IT-95-14/2-A, 17 December 2004, para. 91 et seqq.

³⁸ ICTY, *Hadžihasanović/Kubura*, TC Judgment, IT-01-47-T, 15 March 2006, para. 60.

³⁹ ICTY, *Martić*, TC Judgment, IT-95-11-T, 12 June 2007, para. 97.

⁴⁰ ICC, *Al Faqi Al Mahdi*, PTC, Confirmation of Charges, ICC-01/12-01/15, 24 March 2016, para. 36.

⁴¹ See for the Classification as UNESCO World Heritage i.e. Art. 1, 11 of the Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972.

⁴² ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 46.

Protocol I to the Geneva Conventions (AP I).⁴³ Hence, this provision of the ICC Statute easily includes religious sites or educational institutions important to every local community under the specific protection of Articles 8(2)(b)(ix) and 8(2)(e)(iv), in effect broadening the scope of protection offered by these provisions. The discussion of the ICTY concerning the requirement of such a "unique character" of the destroyed objects is therefore irrelevant for the commitment of the war crime of Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the ICC Statute. The status as UNESCO World Heritage, implying the said "unique character" required in AP I, might however – apart from evidentiary considerations – play a role in the sentencing of the ICC. As a matter of fact, the Trial Chamber in the *Al Faqi Al Mahdi* Judgment explicitly considered this aspect as an aggravating factor: "Furthermore, all sites but one [...] were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community".⁴⁴

A special cultural status of the attacked object can therefore become important. Similarly, the ICC took into consideration a discriminatory targeting of objects in its decision on sentencing, thus approaching the discriminatory concept of "cultural genocide".⁴⁵ Still, in order to arrive at sentencing considerations, the *actus reus* has to be met first. Hence the attacked objects have to constitute "buildings" or "historic monuments" under the ICC Statute. This requirement limits the scope of protection significantly: movable cultural property can only be protected through general norms protecting civilian property, which completely leave cultural aspects aside and are sometimes only applicable in international armed conflicts (e.g. Articles 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(xiii), 8(2)(b)(xvi) applicable in international armed conflicts and Articles 8(2)(e)(v) and 8(2)(e)(xii) applicable in armed conflicts not of an international character). Additionally, intangible cultural heritage cannot be addressed at all through the criminalization of war crimes.

The waiver of criminal liability in cases where the protected object is used for military purposes ("provided they are not military objectives") constitutes an additional limitation of the scope of protection provided through Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the ICC Statute. An object's status as UNESCO World Heritage normally implies a non-military

⁴³ ICRC Commentary on the Additional Protocols, p. 646: "It was stated that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people."

⁴⁴ ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 80.

⁴⁵ For an example see the current judgment of the ICC in the case of *Al Faqi Al Mahdi*, where the discriminatory targeting of a certain belief was viewed as an aggravating factor in sentencing, ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 81.

character;⁴⁶ however, even despite that status there can always be changes regarding a characterization as a military objective if the object is actually used to a certain amount for military purposes and thus becomes a military objective. In that case Articles 8(2)(b)(ix) and 8(2)(e)(iv) technically do not apply anymore. Unfortunately, this limitation of protection is especially serious, because such use of cultural property is not punishable under the ICC Statute, although international humanitarian law forbids it.⁴⁷ Thus, the scope of protection suffers remarkably from having to take into account the “necessities” of military operations in armed conflict.

Furthermore the construction of Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the ICC Statute reveals the rather unspecific approach of the offence: the term “cultural property” does not appear anywhere in the Statute, and “hospitals and places where the sick and wounded are collected” are listed among the specifically protected objects, although they do not entertain a relationship to culture and “only” serve civilian use.⁴⁸ Judging from the wording it seems that the particular value of the listed objects for the identity of specific groups, their culture, and thus, at least in the long term, the cultural heritage of humankind is not the primary interest of Article 8 of the ICC Statute. It is telling that the first jurisprudence of the ICC in this regard seems to follow a different approach, addressing particularly the “particular importance of international cultural heritage”.⁴⁹

Apart from the more specific Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the ICC Statute, civilian property is protected more generally against destruction, seizure, appropriation, and intentional attacks on non-military objectives.⁵⁰ A cultural element is not taken into account in these war crimes, but the protected objects in some cases also include movable property. Hence, in some cases these provisions might implicitly offer a more effective protection of moveable cultural property than e.g. the criminalization of genocide.⁵¹

All in all, war crimes provisions can provide a possible protection for a limited part of tangible cultural property. However, the specific value of the targeted objects for culture and the identity of a group is not explicitly considered in the Statute and large gaps of protection exist, especially regarding intangible symbols of identity, movable cultural

⁴⁶ See ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 39.

⁴⁷ GOTTLIEB, p. 867.

⁴⁸ FRULLI, *Offences Against Cultural Heritage*, p. 207; ARNOLD/ WEHRENBURG, para. 420; GOTTLIEB, p. 865; EHLERT, p. 122.

⁴⁹ ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 17.

⁵⁰ A general protection of civil property can be found in Art. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xiii) – all prohibiting the destruction or seizure of property; Art. 8(2)(b)(xvi) and 8(2)(e)(v) – prohibiting plunder; Art. 8(2)(b)(ii)-(v), (xxiv) and 8(2)(e)(ii), (iii) – prohibiting the attack of civil objectives.

⁵¹ O’KEEFE, p. 511.

property like books and other works of art, and evidently in peace time and in situations without a connection to armed conflict.

III. Crimes against Humanity

The imperfect protection granted by the ICC Statute's norms on war crimes might be resolved by resorting to another category of crimes, the crimes against humanity codified in Article 7 of the ICC Statute. It is important to note, that crimes against humanity are no less serious than the crime of genocide; both crimes are mass crimes and can have an equal gravity. The stigma attached solely to the crime of genocide is fatal in cases in which the conclusion that the "only" crimes committed do not constitute the crime of genocide but "only genocide" amount to crimes against humanity is understood as a total acquittal.⁵²

According to Article 7 of the ICC Statute, all crimes against humanity require the existence of a widespread or systematic attack against any civilian population, while the listed single acts (*inter alia* murder, torture, enslavement etc.) must be perpetrated as part of the attack.⁵³ Acts of cultural genocide are not explicitly mentioned in Article 7 but some of the listed acts (such as the forcible deportation or transfer of a population) have a strong relationship with cultural genocide.

Particularly relevant when assessing criminal liability for cultural genocide is the criminalization of persecution as a crime against humanity because, first, persecution is a discriminatory crime directed against a group (just as is the crime of genocide), and second, the wording does not limit the *actus reus* of the crime of persecution to the same extent as the definition of the crime of genocide. Article 7(1)(h) of the ICC Statute specifies perse-

⁵² See for example the case of Sudan: when the UN Commission explained that the crime of genocide had not been committed, these findings were presented by the media as if no serious crimes had been committed at all. See LUBAN, p. 303; KREB, Völkermord, §6, para. 20.

⁵³ Art. 7 of the ICC Statute: "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

cution as a crime against humanity: “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.

And the following Article 7(2)(g) seeks to define persecution as: “The intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

Put simply, the crime of persecution consists of an unequal treatment of a particular group because of specific features. While the genocidal intent to destroy is result-based, the discriminatory intent of persecution does not require the perpetrators pursue of a specific destructive result other than the discrimination. The wording offers a potentially broad scope of application, but one of the greatest difficulties is a reasonable limitation of the *actus reus*, especially in cases where it is difficult to differentiate between a “mere” human rights violation and an act that is criminally relevant.⁵⁴

Robinson recounts the established consensus during the drafting of the ICC Statute that while “discrimination may not be criminal, extreme forms amounting to deliberate persecution clearly are criminal”.⁵⁵ But the wording “deprivation of fundamental rights” only gives vague indications as to what is relevant conduct and consequently Article 7(1)(h) of the ICC Statute is often criticized as violating the principle of legality.⁵⁶ Abstract definitions of these terms do not exist and international jurisprudence as well as academia mostly content themselves with simply determining specific conduct as persecution without further explanation. In the end these uncertainties lead to a cautious application of Article 7(1)(h) by the international courts. While it seems accepted that other listed alternatives of crimes against humanity like murder, committed with additional discriminatory intent, can constitute persecution,⁵⁷ problems remain with regard to conduct not listed as an independent act of crimes against humanity or war crimes or the crime of genocide.

⁵⁴ These difficulties regarding the differentiation were one of the reasons for the rejection of the inclusion of cultural genocide during the drafting of the Genocide Convention, UN General Assembly Committee (11-29 October 1948) A/C.6/SR.83, p. 201; THORNBERRY, p. 73.

⁵⁵ ROBINSON, Defining “Crimes against Humanity”, p. 53.

⁵⁶ SUNGA, p. 389; ERNE, pp. 371 et seqq.

⁵⁷ ICC, *Libya*, Art. 58 Decision, PTC, ICC-01/11, 27 June 2011, para. 42 et seqq.; ICC, *Ruto et al.*, PTC, Art. 61 Decision, ICC-01/09-01/11, 23 January 2012, para. 269 et seqq.; ICC, *Kirimi Muthaura et al.*, PTC, Confirmation of Charges, ICC-01/09-02/11, 23 January 2012, para. 283: “The Chamber reiterates at this point its above findings in relation to killings, displacements, rape, serious physical injuries and acts causing serious mental suffering, and considers that they constitute severe deprivations of fundamental rights.”; ICC, *Raheem Muhammad Hussein*, PTC, Art. 58 decision, ICC-02/05-01/12, 1 March

In the general practice of international jurisprudence, the ICC as well as the *ad hoc* Tribunals mostly consider persecution when the conduct in question is also listed independently as another crime against humanity or at least a war crime. This practice limits the potential of the crime of persecution to address acts of cultural genocide without any physical dimension.

The only situations where the ICC considered other acts than those listed as separate crimes against humanity in Article 7 of the ICC Statute to be persecution and thus giving hope to include a broader interpretation of persecution, are specific cases of destruction of property.⁵⁸ However, the destruction of cultural property has to date never been qualified as an act of persecution by the ICC. In the already mentioned case before the ICC concerning cultural property in Mali, the prosecution focused only on the destruction of cultural property as a war crime.⁵⁹ The ICC could have also considered the qualification of the destruction of cultural property as persecution in addition to the charged war crimes.

The focus of persecution as a crime against humanity lies more on the individual and the group than the object, and the criminalization of its destruction is rooted in the importance of such an object for the identity of the group and the affected individuals. This kind of wrong is not illustrated through the sole employment of war crimes, although the ICC explicitly highlighted the impact of the destruction of cultural property on the population of Timbuktu as follows: "The mausoleums reflected part of Timbuktu's history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them. [...] The mausoleums were among the most cherished buildings of the city and they were visited by the inhabitants of the city, who used them as a place for prayer while some used them as pilgrimage locations. Thus, the

2012, para. 11, 13; ICC, *Goudé*, PTC, Confirmation of Charges, ICC-02/11-02/11, 11 December 2014, para. 122 et seqq.; ICC, *Gbagbo*, PTC, Confirmation of Charges, ICC-02/11-01/11, 12 June 2014, para. 204 et seqq.; *Ongwen*, PTC, Confirmation of Charges, ICC-02/04-01/15-422-Red, 23 March 2016, para. 25, 39, 52, 65; ICTY, *Kupreškić et al.*, TC Judgment, IT-95-16-T, 14 January 2000, para. 571, 593 et seqq., 621, 627; last confirmed in: ICTY, *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 498; ICTR, *Semanza*, TC Judgment, ICTR-97-20-T, 15 May 2003, para. 349; HALL/VAN DEN HERIK, para. 142; MESEKE, pp. 241 et seqq.; ROBERTS, p. 290; WERLE/JESSBERGER, para. 991; EHLERT, p. 164.

⁵⁸ ICC, *Kirimi Muthaura et al.*, PTC, Confirmation of Charges, ICC-01/09-02/11, 23 January 2012, para. 286, although the destruction of property as persecution was not included independently in the charges the Pre-Trial Chamber stressed that this would have been possible; for an independent charge of destruction of property as persecution see ICC, *Ntaganda*, PTC, Art. 61(7) Decision, ICC-01/04-02/06, 9 June 2014, para. 58.

⁵⁹ ICC, *Al Faqi Al Mahdi*, PTC, Confirmation of Charges, ICC-01/12-01/15, 24 March 2016; ICC, *Al Faqi Al Mahdi*, PTC, Chef d'accusation, ICC-01/12-01/15, 17 December 2015, para. 1.

Chamber considers that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed”.⁶⁰

The ICTY, in contrast to the ICC, has a long history of qualifying the destruction of cultural property as persecution;⁶¹ additionally the ICTY also declared various other discriminatory measures to amount to persecution, which do not imply criminal liability according to any other crime, as for example, the general dismissal of employment and denial of equal access to public services.⁶²

As the ICC has never addressed such discriminatory measures as persecution and did not even raise the issue of persecution in the case of Mali concerning the relatively “strong case” of destruction of cultural property, it does not seem likely that the Court will support a broad interpretation of the crime of persecution in the future. However, such an interpretation is still possible, as, it has been acknowledged very early by international jurisprudence that the crime of persecution can also, and should in particular, include conduct not listed independently as an international crime.⁶³ Therefore, acts of cultural genocide such as the prohibition of the use of language or the prevention of use of certain institutions could theoretically amount to persecution if they qualify as a deprivation of a fundamental right committed with the necessary discriminatory intent.

Admittedly, such qualifications will be problematic for the ICC, as will be evidenced by the following three problems. The first is how to identify a fundamental right. A funda-

⁶⁰ ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 78 et seqq. (footnotes omitted).

⁶¹ ICTY, *Kordić/Čerkez*, TC Judgment, IT-95-14/2-T, 26 February 2001, para. 206; ICTY, *Stakić*, TC Judgment, IT-97-24-T, 31 July 2003, para. 766; ICTY, *Blaškić*, AC Judgment, IT-95-14-A, 29 July 2004, para. 145; ICTY, *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 530 et seqq.

⁶² ICTY, *Brđanin*, TC Judgment, IT-99-36-T, 1 September 2004, para. 1036 et seqq.; ICTY, *Krajišnik*, TC Judgment, IT-00-39-T, 27 September 2006, para. 736; ICTY, *Brđanin*, AC Judgment, IT-99-36-A, 3 April 2007, para. 295, 297; ICTY, *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 535.

⁶³ ICTY, *Tadić*, TC Judgment, IT-94-1-T, 7 Mai 1997, para. 703 et seqq.; ICTY, *Kupreškić et al.*, TC Judgment, IT-95-16-T, 14 January 2000, para. 568, 614; ICTY, *Kordić/Čerkez*, TC Judgment, IT-95-14/2-T, 26 February 2001, para. 192 et seqq.; confirmed consistently, last in: ICTY, *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 498; ILC Draft Code 1996, Art. 18, pp. 48 et seqq.; MESEKE, p. 243; CURRAT, p. 448; ROBERTS, pp. 290 et seqq.; HALL/POWDERLY, para. 142; NERSESIAN, p. 241.

mental right is mostly interpreted as an individual right that appears in human rights treaties and is accepted in customary international law.⁶⁴ This element of the crime already leaves the judges with a very difficult assessment.

Some components of cultural rights that are violated in situations of cultural genocide might be qualified as fundamental rights, as they are codified in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and specifically for minorities in Article 27 of the International Covenant on Civil and Political Rights (ICCPR),⁶⁵ as well as religious rights, as provided e.g. by Article 18 ICCPR.⁶⁶ Although the exact content of these rights might be disputed, they have sometimes been qualified as customary international law, at least regarding the negative understanding of obligating the State to respect these rights;⁶⁷ consequently their qualification as fundamental rights seems possible.

The destruction of cultural property of a group is a promising example of culture-related persecution; in this case the assessment of a fundamental right might be successful as components of fundamental rights to religion and culture are violated. The right to take part in cultural life is violated if cultural institutions are destroyed and a right to religion is also violated when religious sites are damaged and destroyed. Additionally, the protection of cultural property has a long tradition in humanitarian law and its relationship with the international crime of persecution can be based on various precedents.

⁶⁴ ILC Draft Code 1996, Art. 18, pp. 48 et seqq.; ICTY, *Tadić*, TC Judgment, IT-94-I-T, 7 Mai 1997, para. 697; ICTY, *Kupreškić et al.*, TC Judgment, IT-95-16-T, 14 January 2000, para. 621; HALL/POWDERLY, para. 142; WERLE/JESSBERGER, para. 989.

⁶⁵ Art. 15(1) of the International Covenant on Economic, Social and Cultural Rights, 19 December 1966: "1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life [...]."; Art. 27 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

⁶⁶ Art. 18 ICCPR: "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. [...]."

⁶⁷ UN Human Rights Committee, General Comment No. 24 CCPR/C/21/Rev.1/Add.6 (1994) para. 8; DINSTEIN, p. 118. For a comprehensive consideration of State practice and presentation of different point of views see: LEPARD, p. 346, especially pp. 361 et seqq. For cultural rights see also the development from UN General Assembly Res. 55/91 (2000) until Res. 70/156 (2015) – every one of the resolutions containing the paragraph: "Also recognizes the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications."

The 1991 ILC Draft Code already named the “systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group” as a possible conduct of persecution.⁶⁸ Accordingly, the ICTY qualified the massive and systematic destruction occurring in the Yugoslavia conflict as persecution, relying also on the precedents of the Nuremberg Trials.⁶⁹ There is a clear consensus, also reflected in the existence of the corresponding war crime, that cultural property is not to be harmed in times of conflict. In contrast to the protection of cultural property and the recognition of cultural heritage in instruments of international humanitarian law, however, the crime of persecution – which is independent of an existing armed conflict – requires the deprivation of an individual right. Although cultural property often has a universal value for humanity as a whole, this “international” value is not primarily relevant for the crime of persecution.

Instead, the object must only be meaningful for the cultural life and religion of the group as well as the said individual in order to be connected to a fundamental right. To give an example, the inhabitants of Timbuktu can claim that the massive destruction by the rebel group Ansar-Eddine of their historic monuments and religious buildings, which have the status of UNESCO World Heritage, constitutes the violation of an individual cultural and religious right, while individuals on the other side of the world who are not affected in their concrete cultural and religious life cannot do so. That is why, in the case of the destruction of the Buddhas of Bamiyan, it might prove difficult to qualify the acts as persecution, since the statues no longer played a role in the cultural or religious life of the inhabitants.⁷⁰

The focus of the crime of persecution is placed on the importance of the object to the specific group rather than to humanity as a whole. This is because the relevant wrongdoing of the crime of persecution lies within the negation of the right to equality, materialized by an attack on cultural property as the symbol of a specific identity.⁷¹ Accordingly, the protected object is not limited to specific objects with importance to the cultural heritage of mankind.

The crime of persecution’s focus on the meaning of the cultural object for the individual and the group as a whole is the reason that the qualification of the destruction of cultural property as persecution is sometimes criticized: allegedly, the focus on the individual does

⁶⁸ ILC Draft Code 1991, Art. 21, p. 105.

⁶⁹ ICTY, *Kordić/Čerkez*, TC Judgment, IT-95-14/2-T, 26 February 2001, para. 206; ICTY, *Stakić*, TC Judgment, IT-97-24-T, 31 July 2003, para. 766; ICTY, *Blaškić*, AC Judgment, IT-95-14-A, 29 July 2004, para. 145; ICTY, *Karadžić*, TC Judgment, IT-95-5/18-T, 24 March 2016, para. 530 et seqq.

⁷⁰ See FRANCONI/LENZERINI, p. 638, although the destruction is in the end nevertheless qualified as an act of persecution (*ibid.*, p. 637).

⁷¹ See VRDOLJAK, p. 36: “Cultural property is protected not for its own sake, but because it represents a particular group”.

not give due consideration to the inherent value of cultural property as cultural heritage of humankind, which is independent of specific allegiance.⁷² But on the other hand, qualifying the destruction of cultural property as an act of persecution relates crimes against property as closely as possible with crimes against persons, the latter being normally perceived as entailing greater gravity.⁷³

However, even if a fundamental right could be identified, a second problem arises: the deprivation of the fundamental right would need to be sufficiently severe. According to the *ejusdem generis* principle, every act that is qualified as a crime of persecution and hence as a crime against humanity should be comparable to the other acts listed as crimes against humanity regarding its severity. If a group was targeted through the prohibition of the use of its language in private and public life, it might be possible to argue for a deprivation of a fundamental right. But the members of the group remain physically unharmed, and although the group's culture might suffer dramatically, it is questionable whether such a prohibition of the use of language could be severe enough to constitute a crime of persecution.

While the ICTY draws on the existence of a cumulative context, which can intensify acts that could not in themselves constitute persecution,⁷⁴ one avenue the ICC seems to pursue the consideration of mental suffering caused: "As discussed above, in the present case the Prosecutor decided to charge as persecution only the alleged destruction of property causing mental suffering of a degree which would qualify it as other inhumane acts within the meaning of Art. 7(1)(k) of the Statute".⁷⁵

As mental suffering is again very difficult to identify, another way for the future might be to rely on physical or psychological coercion that could be connected with the act of persecution. Taking again the example of the prohibition of the use of language, if failing to comply with this prohibition leads to punishment by unlawful detention or other physical

⁷² See PETROVIC, p. 286.

⁷³ See ICC, *Al Faqi Al Mahdi*, TC Judgment, ICC-01/12-01/15, 27 September 2016, para. 77; ICTR, *Katanga*, TC, Decision on Sentence, ICC-01/04-01/07, 23 May 2014, para. 43.

⁷⁴ ICTY, *Kupreškić et al.*, TC Judgment, IT-95-16-T, 14 January 2000, para. 615(e), para. 622; ICTY, *Kordić/Čerkez*, TC Judgment, IT-95-14/2-T, 26 February 2001, para. 199; ICTY, *Krstić*, TC Judgment, IT-98-33-T, 2 August 2001, para. 535; ICTY, *Kvočka et al.*, TC Judgment, IT-98-30/1-T, 2 November 2001, para. 185; ICTY, *Vasiljević*, TC Judgment, IT-98-32-T, 29 November 2002, para. 247; ICTY, *Krnojelac*, TC Judgment, IT-97-25-T, 15 March 2002, para. 434; ICTY, *Stakić*, TC Judgment, IT-97-24-T, 31 July 2003, para. 736; ICTR, *Nahimana et al.*, TC Judgment, ICTR-99-52-T, 3, December 2003, para. 987.

⁷⁵ ICC, *Kirimi Muthaura et al.*, PTC, Confirmation of Charges, ICC-01/09-02/11, 23 January 2012, para. 286.

abuses and other acts similar to those listed in Article 7 of the ICC Statute, sufficient severity of the acts could maybe be demonstrated more easily, while the actual violation of physical integrity etc. need not occur.

Such considerations would also relate to the requirement of the crime of persecution that the deprivation of the fundamental right be in connection to another act of crimes against humanity or to any act within the jurisdiction of the Court.⁷⁶ This requirement is the third element that limits the scope of application of the crime of persecution, unlike the other alternatives of crimes against humanity. Although crimes against humanity originally emancipated from the formerly required connection to a state of armed conflict, the crime of persecution still contains a similar restriction, thus reacting to the State's fear of broadening the crime too much.⁷⁷ As a consequence, the crime of persecution can only occur if other acts listed in the ICC Statute are also committed.

Conclusion

As has been shown, the crime of genocide only covers the most severe form of the destruction of groups – physical-biological destruction – and, accordingly, acts of cultural genocide are mostly not included in Article 6 of the ICC Statute. The decision of the drafters of the ICC Statute to retain the crime of genocide in its strict sense should be respected, especially as the crime of genocide is often understood to be a particularly severe crime. However, it is in theory possible for the ICC to prosecute the destruction of cultural property as a war crime as well as a crime against humanity.

Article 8 of the ICC Statute contains a special offence relating to cultural objects as well as general norms protecting civilian property. While war crimes can only address a limited part of cultural property in times of armed conflict, other acts of cultural genocide such as targeting movable cultural property or intangible symbols of identity could possibly constitute persecution if the necessary requirements are met. Especially against the background of the jurisprudence of the ICTY, there is a strong case for qualifying destruction of cultural property as the required deprivation of a fundamental right.

The wording of Article 7, paragraphs (1)(h) and (2)(g), of the ICC Statute might also cover other acts of cultural genocide, but such qualifications remain problematic because of the crime's vagueness and the reluctance of the ICC to address such acts so far. Surely, nothing

⁷⁶ See Art. 7(1)(h) of the ICC-Statute.

⁷⁷ ROBINSON, *Defining Crimes against Humanity*, p. 54; WERLE/JESSBERGER, para. 996; CURRAT, p. 452; MESEKE, pp. 245 et seqq.; BOOT, p. 523.

can be gained by diluting international crimes, which are intended to address only the most heinous crimes.⁷⁸ If all conducts could amount to a crime against humanity, its criminalization would lose its meaning and ultimately, its deterrent effects. However, at least some forms of cultural genocide may amount to the same severity as explicitly listed acts of crimes against humanity and thus deserve criminal punishment. If the ICC would manage to concretely define fundamental rights and would develop clear criteria regarding a sufficient severity, the crime of persecution – despite the differences between the discriminatory intent of persecution and the genocidal intent striving for destruction – could best address cultural genocide in Lemkin's narrow definition, that is to say in situations where a group is intentionally destroyed through targeting its culture. Another option – although more difficult to accomplish considering the challenging process of changing the ICC Statute – could be to create an independent crime addressing acts of cultural genocide, although the term "genocide" should best be avoided because of the attached stigma and the expected resistance of the international community of States.

The existence of an independent crime with a new and concrete definition could provide a certain consensus on what conduct should be punishable as an international crime and in this way also secure a sufficient severity.

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⁷⁸ LUBAN, p. 102: "No good purpose is served by labelling all the world's oppression crimes against humanity."

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3. The Usefulness of the “Responsibility to Protect” as Applied to the Protection of Cultural Heritage in Armed Conflict

Abstract

Intentional attacks on cultural heritage reflect an assault against peoples’ collective memory and their cultural values. “Responsibility to Protect” (R2P) can be a viable tool to legitimize actions undertaken by the international community in order to protect endangered cultural heritage, particularly in the event of limited State commitment due to either incapability or reluctance. This Chapter aims at exploring the latest trends in applying R2P to cultural heritage in the realm of armed conflict, in particular on the basis of the “Expert Meeting on the ‘Responsibility to Protect’ and the Protection of Cultural Heritage”, which was organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and which was attended by the author.

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Introduction

Each State has the duty to protect its cultural heritage and to respect cultural property of all other States, be it in peacetime or armed conflict. This is an increasingly complex task, also because of the existence of numerous non-State (terrorist) actors with little knowledge of and/or little willingness to respect international law, for example in Afghanistan, Iraq, Syria, Mali and Libya.¹ Cultural Heritage sites are “symbols of unity, bearing witness to the dialogue of cultures [...] violent extremists know this, and that is why they seek to destroy it”, the Director-General of UNESCO emphasized vis-à-vis the Security Council in March 2017.² The UN General Assembly recently warned that the destruction of cultural heritage “erases the collective memories of a nation, destabilizes communities and threatens their cultural identity”.³ Doubtlessly, intentional attacks on cultural heritage are an assault against history and values of mankind.

Cultural heritage located on a State’s territory is shared in its international importance with other States and the international community. Based on its paramount relevance for the identity of individuals and people it is a common heritage of humankind. Consequently, cultural heritage protection action may be seen as part of the responsibility of all mankind.

The obligation to protect cultural heritage extends to all States, it is not restricted to States Parties to relevant human rights treaties, humanitarian law or cultural heritage instruments.⁴ Evolving normative trends indicate the growing importance of obligations *erga omnes* when it comes to wilful destruction. The “duty not to destroy cultural heritage” is

¹ BAUER, p. 1; for cultural heritage destruction by non-State actors see VON SCHORLEMER, Kulturgut-zerstörung, pp. 141, 502 et seqq.; see also SCHMALENBACH, p. 1 et seqq.; BRODIE, pp. 212-217.

² UN, Meetings coverage, p. 1.

³ UN General Assembly Resolution 69/281 (2015), preamble, para. 9.

⁴ VRDOLJAK, p. 68.

even seen as a manifestation of an *erga omnes* obligation, as Francioni/Lenzerini stressed,⁵ rooted in treaty law and in customary international law. All States bear responsibility in respect of “intentional destruction of cultural heritage of great importance for humanity [...] to the extent provided for by international law”⁶ it was emphasized in the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the UNESCO General Conference on 17 October 2003.

When the survival of irreplaceable cultural treasures is at stake, R2P could be an adequate instrument in protecting cultural heritage and, related to it, group identity of people.⁷

I. Cultural Heritage Protection and International Organisations

Today numerous international intergovernmental and non-governmental bodies play a role in the protection of cultural heritage. Their activities constitute a substantial element of the universal responsibility to protect cultural heritage on a worldwide scale.

With a membership of 195 States UNESCO’s purpose as a universal organisation is to “contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further respect for justice, for the rule of law and for human rights and fundamental freedoms [...]”.⁸ To realize this purpose the Organisation will assure the “conservation and protection of the world’s inheritance of books, works of art and monuments of history and science [...]”.⁹

Among others, UNESCO supports the implementation of the 1954 Hague Convention, in particular through the Committee of Cultural Property in the Event of Armed Conflict, which was established by the Second Protocol to the Hague Convention of 1954 for the Protection of Armed Conflict of 1999.¹⁰ UNESCO also plays an important role in the field of finest world cultural and natural heritage (through the implementation of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage) and intangible heritage (through the implementation of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage). UNESCO helps disseminate knowledge about the international legal framework und increasingly mobilizes support by civil society partners.

⁵ FRANCIONI/LENZERINI, p. 638; ANNACKER, p. 131.

⁶ UNESCO Records of the General Conference, pp. 62-64.

⁷ PETROVIC, p. 386.

⁸ Art. I UNESCO Constitution.

⁹ Art. I.2(c) UNESCO Constitution.

¹⁰ Adopted 26 March 1999. For details, see TOMAN, pp. 492 et seqq.

The “Unite4Heritage” campaign was launched in response to unprecedented attacks on cultural treasures (Iraq, Syria) and intends to celebrate and safeguard cultural heritage and diversity around the globe. Furthermore, UNESCO assists governments in training their forces with regard to cultural heritage protection in times of crises.

A pro-active and more robust approach in order to prevent destruction of cultural heritage, including a broader use of enforcement measures is reflected in the new UNESCO Strategy on the “Reinforcement of UNESCO’s Action for the Protection of Cultural Heritage and the Promotion of Cultural Pluralism in the Event of Armed Conflict”.¹¹ When the UNESCO-General Conference adopted the Strategy in 2015 it called on Member States to support the elaboration of an action plan, including the definition of mechanisms for the rapid mobilization of national experts and invited the Director-General to explore – in collaboration with UNESCO Member States – practical ways for effectively implementing such a mechanism.

Subsequently, the Italian Government informed UNESCO that it was willing to establish, under the coordination of the Italian Ministry of Culture and Tourism, an “Italian Task Force”. According to the Memorandum of Understanding, concluded between UNESCO and Italy on 16 February 2016, the Task Force “may be able to operate preventively as well as in the context and in the aftermath of a crisis” upon request by a Member State and in accordance with “paragraph 4 of 38C/Resolution 48 and with UNESCO’s mandate foreseen therein”.¹² Its functions are, *inter alia*, to assist “in transferring movable cultural heritage property at risk to safe havens” and to fight “the looting and the illicit trafficking of cultural properties through the mobilization of the relevant department of the Italian Carabinieri”. Besides, the Task Force shall provide technical supervision and training, assess damage and risk to cultural heritage and devise operational plans for urgent safeguarding measures.

As a result, international capacity-building to protect cultural heritage in situations of armed conflict and crisis is about to improve. This is a most welcome element in the system of international cultural heritage protection. It is reflected also by a new, more culture-related role of the UN Security Council, a role that is welcomed by UNESCO: the Bonn Declaration on World Heritage, which was adopted under German chairmanship on 29 June 2015 on the occasion of the 39th session of the UNESCO World Heritage Committee, recommended that the Security Council shall analyse not only the possibility of introducing heritage protection in the mandates of peacekeeping missions, but also the possibility

¹¹ UNESCO Resolution Doc. 38 C/49; see also UNESCO Report of the Culture Commission, Doc. 38 C/94.

¹² Memorandum of Understanding between the Government of the Italian Republic and the UNESCO, p. 3.

of delivering “complementary training modules for peacekeeping missions focussing on the protection of cultural property both tangible and intangible, during and in the aftermath of armed conflicts”.¹³

Progressively, cultural heritage protection in times of crisis evolves into a crosscutting issue within the United Nations system. Thus, in its Resolution 2347 (2017), the Security Council underlined the importance that “all relevant United Nations entities coordinate their efforts” in order to combat the unlawful destruction and smuggling of cultural property during armed conflict.¹⁴

II. R2P as an Obligation under International Law

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) presented a report where it expressed the fundamental idea that sovereign States have a “responsibility” to protect their own citizens “from avoidable catastrophe”, but when they “are unwilling or unable to do so, that responsibility must be borne by the broader community of states”.¹⁵

One of the main achievements of the ICISS Report was that it broke with the State-centric concept of humanitarian intervention, which relies solely on military action.¹⁶ Instead, the Commission made clear that within a three-dimensional concept of R2P (“responsibility to prevent”; “responsibility to react” and “responsibility to rebuild”) prevention is the most important pillar.

When the Heads of State and Government gathered at United Nations Headquarters in New York from 14 to 16 September 2005, they adopted the World Summit Outcome Document approving the responsibility to protect from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁷ Thus, a second, slightly different and narrower version of R2P came into existence, creating at first “differences to confuse publics and delegates alike”.¹⁸

¹³ UNESCO World Heritage Committee, The Bonn Declaration on World Heritage, 29 June 2015, para. 23.

¹⁴ Security Council, Res. 2347 (2017), preamble, para. 18.

¹⁵ International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, Report, December 2001, p. VIII.

¹⁶ For detail see VON SCHORLEMER, The Responsibility to Protect as an Element of Peace, pp. 1 et seqq.

¹⁷ UN General Assembly Resolution 60/1 (2005), paras. 138-139; see also BELLAMY, pp. 111-128.

¹⁸ LUCK, p. 1.

The main features of R2P as it stands today may be resumed: (i) each *UN Member State* has a responsibility to protect its population from crimes of atrocity (i.e. genocide, war crimes, ethnic cleansing, and crimes against humanity); (ii) the *international community* assists in doing so, including capacity-building by peaceful means; (iii) *UN Member States* have a responsibility to respond collectively where an individual State is not willing or able to do so.

There is some controversy about the legal nature of R2P, however. Several authors voice scepticism regarding the binding force of the R2P¹⁹ and see it rather as a moral duty and/or a political concept than a binding norm. Besides, the NATO intervention in Libya in 2011 temporarily brought R2P into discredit. Regime change was brought about without a corresponding authorisation by the Security Council Resolution 1973 (2011).

Still, despite the arguments over the use of force in Libya in 2011, there are positive signs of a further consolidation of R2P within the United Nations. As the Global Centre for the Responsibility to Protect, a New York non-profit organisation founded in 2008 showed, there are more than two dozens references to R2P to be found in Security Council resolutions since the adoption of the controversial Libya Resolution 1973 (2011).²⁰

It is important that R2P as a normative concept addresses crimes that are already prohibited by existing international law. As the 2009 Report of the UN Secretary-General “Implementing the Responsibility to Protect” stated in that context, the responsibility of States to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity “derives both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the responsibility to protect”.²¹ That means, the responsibility of States to protect innocent people from atrocity crimes is largely independent from the recognition of the R2P concept.

The controversy on the legal nature of R2P is not to be seen as a serious obstacle for its application on cultural heritage either. As a participant of the 2015 UNESCO Expert Meeting rightly emphasized: “[...] the contested status of R2P does not as such prevent us from reflecting on whether the ‘R2P framework’ may be considered applicable in the context of war crimes against cultural property”.²²

¹⁹ PAYANDEH, p. 471: “The responsibility to protect lacks specific normative content.”; see also ZIMMERMANN, p. 645: “not yet crystallized into a norm of international law”; see also BRUNNÉE/TOOPE, p. 79.

²⁰ With further references see LUCK 2015, p. 8.

²¹ UN General Assembly Report of the Secretary General 63/677 (2009), para. 11 a).

²² ROSÉN, p. 4.

III. Relevance of R2P for Cultural Heritage Protection?

There are several arguments why R2P might apply to cultural heritage. Quite often the deliberate destruction of monuments, places of worship and works of art is only the “prelude” to subsequent humanitarian disasters and mass killings of people or even genocide. Destruction of cultural heritage may be an “indicator of impending genocide” as Adama Dieng from the Office of the Special Adviser to the Secretary-General on the Prevention of Genocide set forth.²³ Cultural heritage protection at an early stage, i.e. before a conflict escalates, might therefore give an early warning signal and reflect the international community’s determination to prevent atrocity crimes committed against people. When the international community steps in to protect cultural heritage, this will be an important factor to reduce insecurity of local populations and even prevent them from fleeing in some cases. In some way to protect people in their living (built) environment is at the heart of R2P.

Second, deliberate destruction of cultural property is quite often inseparably linked to severe suffering of human beings. The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage left no doubt that intentional destruction of cultural heritage may have “adverse consequences on human dignity and human rights”.²⁴ Thus, the rationale of R2P – preventing human suffering – is valid in cases when it comes to the deliberate extinction of cultural heritage concurring with massive human rights violations. To include cultural heritage in R2P seems to be a natural step in the further development of cultural heritage law as the latter is increasingly intertwined with human rights.²⁵

Third, attacks against cultural property may amount to war crimes and in particular to persecution under the framework of appalling crimes against humanity.²⁶ Both categories of crimes are constitutive elements of R2P as defined by the United Nations General Assembly in the World Summit Outcome Document.²⁷ The International Criminal Tribunal for the Former Yugoslavia (ICTY) held that targeting of (cultural) property is an element of serious crimes against humanity. In the case of *The Prosecutor v. Blaškić*, the ICTY stated that the act of persecution “[...] encompasses not only bodily and mental harm and infringements upon individual freedom but also acts [...] such as those targeting property,

²³ UNESCO Final Report, para. 10; see also UN Office on Genocide Prevention and the Responsibility to Protect, Framework of Analysis for Atrocity Crimes: A Tool for Prevention, 2014, paras. 7.11; 9.5; 10.8; 11.1; 12.9; 13.5; 13.16.

²⁴ UNESCO Records of the General Conference 2003, preamble, para. 5.

²⁵ CHECHI, pp. 11 et seq.; BENNOUNE; VON SCHORLEMER, Kulturgutzerstörung, pp. 153-202.

²⁶ See Rome Statute of the International Criminal Court, 17 July 1998, Art. 8 (2) lit. e) (xii); Art. 8 (2) lit. e) (v); Art. 8 (2) lit b) (v); Art. 7 (1) h).

²⁷ UN General Assembly Resolution 60/1 (2005).

so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community”.²⁸ Recent conflicts show that intentional destruction of cultural property often aim at people belonging to a religious or ethnic minority, e.g. in Northern Iraq where extremist forces destroyed Yazidis’, Turkmen’s and others’ religious places and holy sites.

Generally, the application of R2P to the protection of cultural property might become more pressing with recent forms of intentional destruction by terrorist non-State actors such as ISIS/ISIL/Dae’sh and associated groups in Syria and Iraq, or in Northern Mali where in 2012 jihadist groups destroyed sacred mosques and manuscripts in Gao, Kidal and Timbuktu, amounting to cultural cleansing. “Such acts of destruction cannot be decoupled from the killing of people, as violent extremists attack anything that can sustain diversity, critical thinking and freedom of opinion – schools, teachers, journalists, cultural minorities, and monuments”,²⁹ as UNESCO Director-General Irina Bokova emphasized. Cultural cleansing may be seen as a sort of new atrocity crime, often committed by non-State actors in asymmetric conflicts. Consequently, the “Responsibility to Protect Cultural Heritage” is an innovative way to deal with these new threats.³⁰

Against this background, UNESCO started examining ways and means for the application of R2P to the protection of cultural heritage in armed conflict.

IV. The 2015 UNESCO Expert Meeting on R2P

A. Background of the Meeting

In response to UNESCO Director-General Irina Bokova, who had referred to the new phenomenon of intentional destruction of cultural heritage in the ongoing armed conflicts in Iraq and Syria as cultural cleansing, the UNESCO-Secretariat organized an expert meeting in order to exchange ideas on the application of the doctrine of the “Responsibility to Protect” to the protection of cultural heritage in armed conflict and to draft recommendations

²⁸ Case *The Prosecutor v. Blaškić* (Judgement), ICTY Trial Chamber I, Case No. IT-95-14-T (3 March 2000), para. 223.

²⁹ BOKOVA, pp. 40 et seqq.

³⁰ See VON SCHORLEMER, *The Application of the Responsibility to Protect*, p. 2.

for the Director-General. The UNESCO “Expert Meeting on the ‘Responsibility to Protect’ and the Protection of Cultural Heritage” took place at the Paris Headquarters from 26 to 27 November 2015.³¹

In order to prepare the Expert Meeting, the UNESCO Secretariat drafted an informal Concept Paper for the participants.³² The UNESCO “Proposal for an Expert Group Meeting to Discuss the Application of Responsibility to Protect to the Protection of Cultural Property” resumed the basic facts of R2P, emphasizing that UN Member States have a “responsibility to respond collectively where an individual State fails to do so” and that the international community must step in when the State is “unwilling or unable to act adequately”.³³ Thus, the UNESCO Concept Paper referred largely to the concept of R2P as expressed in paragraph 139 of the United Nations’ World Summit Outcome Document (2005),³⁴ the latter having been confirmed by the Secretary-General’s Report (2009)³⁵ and the General Assembly Resolution on “The Responsibility to Protect” (2009).³⁶

Hopes were expressed as well. The UNESCO Secretariat was confident that “[t]he application of the doctrine of R2P to include the protection of cultural property” will be a way to “strengthen safeguarding measures of such cultural heritage under threat”.³⁷

B. The Recommendations of the Meeting

The UNESCO Expert Meeting in Paris was attended by 22 experts and representatives of governmental and non-governmental organisations, including the Office of the High Commissioner for Human Rights, the Office of the Special Adviser to the Secretary-General on the Prevention of Genocide, the International Committee of the Red Cross and the International Coalition for the Responsibility to Protect.

It is interesting to note that according to the UNESCO experts, R2P clearly applies to cultural heritage: the experts emphasized that “it was not a question of expanding the parameters of the ‘responsibility to protect’ to include the protection of cultural heritage in

³¹ For details see VON SCHORLEMER, *Kulturgutzerstörung*, pp. 857 et seqq.

³² On file with the author.

³³ UNESCO Concept Paper, p. 1.

³⁴ UN General Assembly Resolution 60/1 (2005).

³⁵ UN General Assembly Report of the Secretary General 63/677 (2009).

³⁶ UN General Assembly Resolution A/RES/63/308 (2009), para. 1.

³⁷ UNESCO Concept Paper, p. 1.

armed conflict”.³⁸ Instead, they saw it as “a question merely of articulating and highlighting such protection as an aspect of the ‘responsibility to protect’”.³⁹ As a result, cultural heritage protection was viewed as being intertwined with R2P.

In their final Recommendations the experts stated that deliberate heritage destruction is a major obstacle to peace and reconciliation. They were convinced therefore that “the intentional destruction and misappropriation of cultural heritage and the violation of cultural rights are aggravating factors in armed conflict”.⁴⁰ Against this background the experts agreed “that intentional destruction and misappropriation of cultural heritage during armed conflict could fall within the existing scope of the ‘responsibility to protect’”.⁴¹

According to the structure of the R2P as reflected in paragraphs 138 and 139 of the 2005 World Summit Outcome Document, there are two main actors:

- First of all, the *territorial State*, where the cultural heritage (temples, synagogues, mosques, churches, libraries, museums, world heritage sites, archaeological sites etc.) is located, has to be considered. The territorial State is obliged to fulfill its responsibility to protect. In this respect, protecting cultural heritage was seen as an integral part of the overall responsibility of the territorial State to protect its populations from atrocity crimes. The experts urged that “UNESCO Member States take all appropriate measures [...] to exercise their responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity through protecting cultural heritage situated in their territory from intentional destruction and misappropriation”.⁴²
- Second, *external actors* come into play. They are obliged to assist the territorial State concerned with its fulfilment of its obligation under R2P. In that respect the UNESCO Expert Meeting recommended that “UNESCO Member States and the UNESCO Secretariat take all appropriate measures, including through bilateral and multilateral co-operation, and with the support of relevant intergovernmental and nongovernmental organizations, to encourage and help States to exercise their responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity through protecting cultural heritage situated in their territory from intentional destruction and misappropriation”.⁴³

³⁸ UNESCO Final Report, para. 7.

³⁹ Ibid.

⁴⁰ Ibid.; UNESCO Recommendations, preamble, para. 3.

⁴¹ UNESCO Final Report, para. 7.

⁴² UNESCO Recommendations, para. 1.

⁴³ Ibid., para. 2.

The wording reflects a new way of thinking: cultural heritage protection becomes an inherent element of R2P implementation. A comprehensive approach of R2P was advocated.

V. Options for the Operationalization of R2P Applied on Cultural Heritage

The UNESCO Expert Meeting envisaged several options to operationalize R2P on cultural heritage.

A. Cultural Safe Havens

As a potential means of operationalizing the Responsibility to Protect, the experts emphasized the relevance of “safe havens”.⁴⁴

Two modalities exist in this regard: property may be either removed from the source State to the territory of another State (external safe haven)⁴⁵ or to a place of safety in the source State itself (internal safe haven).

Most of the UNESCO experts were familiar with the “Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material” which have been adopted in 2008 by the International Law Association’s (ILA) Cultural Heritage Committee. According to the 2008 ILA Guidelines, safe havens are established “in order to care for cultural material that has been endangered by armed conflict, natural disasters, illegal excavation, or other insecurity and has therefore been removed for safekeeping and preservation from the territory of the source state to the territory of another state or to a place of safety in the source state”.⁴⁶

As the specific safe haven location is concerned, the focus of the UNESCO Recommendations was rather restrictive: the experts recommended that “UNESCO Member States

⁴⁴ The concept of transitionally keeping cultural heritage goods in so-called safe havens had already come up during the Hague Convention in 1954: see para. 5 of the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (First Hague Protocol), 14 May 1954; see also Art. 18 of the Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

⁴⁵ This is the concept highlighted in First Hague Protocol, para. 5. It states that Contracting Parties may deposit cultural property in the territory of another party “for the purpose of protecting such property against the dangers of an armed conflict”.

⁴⁶ International Law Association, para. 2.

and the UNESCO Secretariat give due consideration to the idea of ‘safe havens’ for cultural property situated in States outside the conflict zone [...]”,⁴⁷ i.e. they focussed on external safe havens only.

The Swiss Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Disaster and Emergency Situations⁴⁸ was considered as a valuable example by the experts in that respect: it provides for the granting of safe havens to States willing to protect their cultural property from threats of war, terrorism and disasters. Under the condition of a bilateral treaty between the Swiss Federal Council and the requesting State, safekeeping of cultural property is offered on a 400 m² surface in a former “dépôt de munition” under the patronage of UNESCO.

All experts agreed that in the future, the protective function of safe havens should be emphasized. Most of them did not advocate access of the public to cultural property in safe havens (e.g. exhibitions or presentations of the cultural objects).⁴⁹ Public access for art expositions or for research purposes is not foreseen in the Swiss Federal Law either. In contrast, the ILA Guidelines (2008) had set forth that “a safe haven may exhibit cultural material in its care unless to do so would be inappropriate under the laws and traditions of the source state”.⁵⁰

At present, it is not quite clear how many States will make use of the new possibility to give shelter to cultural treasures under threat with the help of third States. There seems to be general reluctance on the side of affected States, despite a growing number of armed conflicts with serious threats for the heritage of mankind. For that reason, it was felt by the experts that governments of conflict-ridden States should be familiarized with existing legal and financial possibilities to temporarily transfer cultural treasures to safe havens abroad and safeguard them for the sake of humanity.

B. Cultural Protected Zones

Cultural protected zones, i.e. “demilitarized zones for the in situ protection of cultural heritage”⁵¹, were considered to be another instrument by the UNESCO Expert Meeting in

⁴⁷ UNESCO Recommendations, para. 3.

⁴⁸ Loi fédérale sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d’urgence (LPBC) du 20 juin 2014 (état le 1^{er} janvier 2016).

⁴⁹ UNESCO Final Report, para. 21.

⁵⁰ International Law Association, para. 4(e).

⁵¹ UNESCO Final Report, para. 24; see also Arts. 59, 60 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

November 2015 to operationalize R2P.⁵² Generally, cultural zones may be established “through agreements between parties to the conflict, including non-State actors”, as the UNESCO experts reminded.⁵³ For example, under international humanitarian law demilitarized zones may be established with the express agreement of the parties to a conflict, verbally or in writing, in peacetime or during armed conflict, meaning that the limits of the demilitarized zone and the instruments of supervision ought to be defined as early as possible.⁵⁴ Also, a party to the conflict may declare unilaterally as a “non-defended locality” a place where all combatants and mobile weapons have been removed and no acts of hostility or activities in support of military operations are undertaken.⁵⁵ Thus, demilitarized zones around cultural heritage sites or places can be established with the consent of the territorial State and agreement of the warring parties. Their purpose is “the immunity of cultural property situated in that area”, as the UNESCO Concept Paper had highlighted before the expert meeting.⁵⁶

In order to bring more of these zones into existence, the UNESCO experts recommended that the UNESCO Secretariat and UNESCO Member States “give due consideration to the idea of ‘cultural protected zones’”.⁵⁷ In that respect, the “right of initiative granted to UNESCO” was also emphasized. Under binding international humanitarian law, UNESCO may offer its services to the parties to the conflict at any time.⁵⁸ UNESCO is also entitled to make on its own initiative proposals for technical assistance in organizing the protection of cultural heritage.⁵⁹

Based on Chapter VII of the UN Charter, the Security Council may impose such zones on parties of an armed conflict.⁶⁰ Against this background Marc-André Renold and Alessandro Chechi urged: “UNESCO should call on the UN Security Council to adopt resolutions under Chapter VII of the UN Charter in order to establish demilitarized ‘protected cultural zones’”.⁶¹ The Security Council could decide in a legally binding way that parties of the conflict shall cease hostilities near cultural heritage sites or places (e.g. armistice).

⁵² Cf. UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict, CLT-15/10.COM/CONF.203/INF.3.

⁵³ UNESCO Concept Paper, p. 1.

⁵⁴ Art. 60 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵⁵ Art. 59 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵⁶ UNESCO Concept Paper, para. 1 et seqq.

⁵⁷ UNESCO Recommendations, para. 4.

⁵⁸ See Art. 19(3) of the Hague Convention, 14 May 1954; Art. 22(7) of the Second Protocol.

⁵⁹ Art. 23(2) of the Hague Convention, 14 May 1954; Art. 33(3) of the Second Protocol.

⁶⁰ UNESCO Final Report, para. 26.

⁶¹ RENOLD/CHECHI, p. 3.

This measure may be combined with the evacuation of cultural objects which will be brought to a declared safe haven /or depot under the patronage of UNESCO.

But how about the fact, that in Syria, for instance, after years of fighting, neither a protected zone for civilians nor a protection zone for cultural property has been established? How about the tragic losses we face, also in Yemen? We must be realistic: even if there was no veto of the five permanent members of the UN Security Council and a decision to create a cultural protected zone would be taken by the Security Council, the chances of full implementation are quite small – except when there would be UN forces on the ground to supervise the process.

Another problem concerns the potentially massive influx of civilians into demilitarized zones. Whenever the Security Council adopts an enforcement measure for cultural property under Chapter VII of the UN Charter, civilians are not to be forgotten. A solution is seen in establishing comprehensive zones that cover cultural property *and* serve to provide shelter for civilians at the same time, as Marc-André Renold and Alessandro Chechi suggested.⁶²

There are other practical challenges: one concerns urban cities. Demilitarized zones need some space and buffer zones in order to be functional. Thus, it is not quite clear whether such a comprehensive zone can be established, for example on the compound of a national museum in a city or around a library in a densely populated area.

C. Other Measures

Three dimensions for R2P cultural heritage action, i.e. capacity-building before armed conflict, measures during the conflict and post-conflict, were addressed by the UNESCO Expert Meeting on R2P. Consideration was given to the issue of strengthening the capacity of UNESCO Member States “to prevent the destruction and misappropriation of cultural heritage in armed conflict on their territory, as well as to mitigate damage and loss and to restore such heritage”.⁶³ Training of experts, dissemination of information, awareness-raising and education were seen as important elements of capacity-building with the support of UNESCO. In addition, “mobilization in emergency situations” was mentioned as paramount.⁶⁴

⁶² RENOLD/CHECHI, p. 3.

⁶³ UNESCO Final Report, para. 14(a).

⁶⁴ *Ibid.*, para. 14(b).

As regards the cultural heritage of Iraq, for example, an Emergency Response Action Plan was adopted by UNESCO in July 2014.⁶⁵ It provides for the training of professional curators, support for staff in the country and emergency measures for the transfer of cultural property under threat (e.g. from museums, libraries, archives and manuscript collections). In order to support emergency operations and fight against illicit trafficking a UNESCO Heritage Emergency Fund as well as an International Fund for the Protection of Endangered Cultural Heritage in Armed Conflict was established, the latter in Abu Dhabi on 3 December 2016.

The reduction of illegal trading with cultural objects from regions suffering from armed conflict is crucial in order to prevent irreplaceable losses for the heritage of mankind. In its resolution “Saving the cultural heritage of Iraq“, adopted on 9 June 2015, the General Assembly welcomed the adoption of Security Council Resolution 2199 (2015).⁶⁶ It called upon all Member States to take appropriate steps to prevent the trade of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance, which have been illegally removed from Iraq since 6 August 1990 – the time when Iraq invaded Kuwait.

In its Resolution 2347 (2017), which was seen as “historic”,⁶⁷ the UN Security Council alluded to R2P by stressing not only “that Members States have primary responsibility in protecting their cultural heritage” (para. 5), but also by inviting “the United Nations and all other relevant organisations to continue providing Member States [...] with all necessary assistance” (para. 6). International standards and certification of provenance were considered to be a useful tool for preventing illegal trafficking: Member States should adopt effective regulations, including certification of provenance (para. 17 b); besides, museums, relevant business associations and antiquities market participants should be engaged on standards of provenance documentation (para. 17 g).

When it comes to Security Council measures under R2P, a trade ban might be helpful as well. When the affected territorial State is no longer able to assume the responsibility for its cultural heritage (e.g. archaeological sites), an international trade ban concerning cultural objects illegally exported might be considered by the Security Council under Chapter VII (Article 39 and Article 41) of the UN Charter.

Given the dramatic damage that all too often occurs to cultural property by organised illicit trading on a worldwide scale⁶⁸, UNESCO could advocate a general embargo of the UN for cultural property traded illegally from regions of armed conflict as a further step to protect

⁶⁵ UNESCO, Emergency Response Action Plan.

⁶⁶ UN General Assembly Resolution 69/281 (2015), para. 11.

⁶⁷ See <http://en.unesco.org/news/security-council-adopts-historic-resolution-protection-heritage>.

⁶⁸ CAMPBELL, pp. 113-114.

cultural heritage. A trade embargo on “blood artifacts” – in reference to “blood diamonds” – i.e. a general trade ban for objects from war regions – would be a far-reaching, yet crucial step for the preservation of the heritage of humankind.⁶⁹

VI. Military Enforcement Measures: The Case of Mali

The most controversial element of R2P is the issue of dispatching international peace forces in order to intervene militarily when a State is unable or unwilling to assume its R2P. In an optimistic “best case” scenario the deployment of a peace mission on the ground with a cultural mandate may take place with the broad consent of the territorial State and civil society partners. If a mandate for enforcement measures according to Articles 39 and 42 of the UN Charter is needed for one or more UN Member States to intervene militarily and protect the civilian population and their cultural heritage, the related problems are well-known: interventions in conflict zones are often controversial among the UN Security Council members.⁷⁰

It is interesting to note, however, that the Security Council already has adopted a robust UN mandate that included international enforcement measures for the sake of safeguarding cultural property. The deployment of the UN Stabilization Mission (MINUSMA) in Mali 2013 with Resolution 2100 (2013) comes under the rationale of R2P. A military offensive that had been launched by terrorist, extremist and other armed groups towards the South of Mali in January 2013 endangered the country’s territorial integrity. Therefore, on 1 July 2013, MINUSMA took over from the African-led mission AFISMA, following the signature of the Ouagadougou Preliminary Peace Agreement of 18 June 2013 between rebel groups of Northern Mali and the interim government.⁷¹ The strength of MINUSMA as of 30 June 2015 was 9.149 military and 1.058 police personnel based in Mali.⁷²

Several references to R2P were incorporated in Resolution 2100 (2013). First of all, the Security Council emphasized that the transitional authorities of Mali “have primary responsibility for resolving the interlinked challenges facing their country”⁷³ Furthermore,

⁶⁹ For more details see VON SCHORLEMER, *Kulturgutzerstörung*, p. 405.

⁷⁰ BRUNNÉE/TOOPE, pp. 59-80; see also STRAUSS, pp. 83, 89.

⁷¹ The Ouagadougou Agreement provided for a ceasefire and established a framework for inclusive peace talks with all communities of the North of Mali.

⁷² See United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), *Facts and Figures*, available at <http://www.un.org/en/peacekeeping/missions/minusma/facts.shtml>.

⁷³ UN Security Council Resolution 2100 (2013), preamble, para. 21.

the international community was called upon to meet regularly “to assist” the transitional authorities of Mali to implement the transitional road map.⁷⁴

MINUSMA’s tasks were defined broadly. Among others, it was supposed to stabilize the main population centres, help to re-establish State authority, protect civilians and United Nations personnel, promote and protect human rights, support humanitarian assistance and national/international justice. Most importantly, MINUSMA had a clear mandate regarding “support for cultural preservation”. According to para. 16(f) of Resolution 2100 (2013), MINUSMA had the task to “assist the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO”.

This was a premiere in the UN system: Security Council Resolution 2100 (2013) was “the first to include the protection of cultural and historical sites in the mandate of a peacekeeping operation” as the UN Human Rights Council stressed in its 2014 Report on the Situation of Human Rights in Mali.⁷⁵ Here, cultural heritage protection was embedded in the mandate of a regular UN peacemission, thus linking peacemaking and heritage protection.⁷⁶ As a positive result, not only physical protection of the World Heritage sites but also reconstruction work of the magnificent mausoleums in Timbuktu⁷⁷ became possible with the support of MINUSMA.

The UN Stabilization Force in Mali may be viewed as an example of how to implement R2P in protection of cultural heritage, in particular when cultural property is threatened with purposeful extinction by non-State actors. The argument is strengthened that solidarity measures on a global scale are feasible for the defense of universal values and cultural diversity.

Conclusion

This Chapter tried to explore some trends in applying R2P on cultural heritage threatened by armed conflict. According to the author, R2P applies to save cultural property under exceptional circumstances, in particular when massive human rights violations concur

⁷⁴ Ibid., para. 5.

⁷⁵ UN Human Rights Council Report 25/72 (2014), para. 89.

⁷⁶ See VON SCHORLEMER, *Der Schutz von Kulturerbestätten als Aufgabe der UN-Sicherheitspolitik*, p. 3.

⁷⁷ 16 of these mausoleums are inscribed on the World Heritage List, 14 of them were destroyed in 2012. In May 2013, the Government of Mali requested assistance from external partners, including UNESCO. Besides preserving invaluable ancient manuscripts, the rehabilitation of the mausoleums began in March 2014 and was concluded largely in July 2015; see UNESCO 2016, 900-Year-Old Consecration Ceremony Held for the Timbuktu Mausoleums, available at <http://whc.unesco.org/en/news/1430/>.

with the extinction of cultural heritage. When people's lives and cultural identity is annihilated, cultural cleansing may surface as a new atrocity crime triggering R2P.

It is rather the combined effect of particular attacks on cultural heritage, constituting crimes against cultural property, *and* massive human rights violations, which leads to the gravity of the acts required under R2P. Therefore, the focus should not be solely on the safeguarding of cultural objects, as this approach will not correspond to the rationale of R2P.

What is crucial in the view of the author of this Chapter both from an ethical and a legal point of view is that under R2P, the protection of cultural property aligns with the protection of civilians in conflict areas. War crimes against cultural property *ipso facto* appear not to be sufficient for triggering R2P. A "stand-alone-R2P-category" for "simple" war crimes against cultural property, is at least "debatable".⁷⁸ Applying R2P to cultural property requires acts that are linked to massive human rights violations. As Marc-André Renold and Alessandro Chechi highlighted rightly in that context: "a R2P relating to cultural heritage should take place simultaneously to any measures of R2P relating to human lives".⁷⁹

The unlawful destruction of cultural heritage and the looting and smuggling of cultural property in armed conflicts undermine security, stability and development of affected States. There are no easy solutions. Still, as James Nafziger underlined, "the problems in protecting cultural heritage do not reflect an inadequacy of the law of war itself, but rather a lack of civic responsibility and inadequate commitment".⁸⁰ Here R2P comes into play. The R2P approach for cultural heritage may give a stronger basis to the international community to assist States or step in in order to save humanity's precious cultural treasures from extinction.

To conclude, dogmatic uncertainties regarding R2P continue to exist. Still, R2P is a useful tool as far as it legitimizes action by the international community and UN Member States in life-threatening situations, whenever a State is unable or unwilling to act. Given the extent of violence occurring against people and their rich cultural heritage, it is still a long way to go, but it is worth it.

⁷⁸ ROSÉN, Paper for UNESCO Expert Group Meeting on Cultural Heritage Destruction and R2P in Paris, The Danish Institute for International Studies, 26-27 November 2015, available at pure.diiis.dk/ws/files/402500/Frro_paper_paris.pdf, p. 1.

⁷⁹ RENOLD/CHECHI, p. 2.

⁸⁰ NAFZIGER, p. 235.

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4. Collecting Archaeological Objects in Turkey: Legal Framework and Practice

Abstract

This Chapter focuses on collecting archaeological objects in Turkey, a long-debated subject among scholars and practitioners. According to a well-established principle, Turkish law provides for State ownership of archaeological objects discovered in Turkey and their trade is prohibited. However, several amendments to Ministerial regulations made it possible for private parties to collect archaeological objects under special conditions. Many experts argue that this created a domestic market (alongside the international market) for archaeological objects illegally excavated in Turkey. This Chapter first explores the legal framework under which collectors of archaeological objects operate. It then argues that Ministerial regulations did not only create a domestic market, but also placed such collectors and their collections in a grey zone. This Chapter therefore proposes to either abandon the current practice as it is applied to archaeological objects, or to amend it. If the State seeks the help of private parties in preserving archaeological collections, sustainable solutions need to be found.

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Introduction

During parliamentary discussions on Antiquities Law in 1972,¹ the deputy member of Uşak, a region in Western Turkey, commented on the problem of looting and the illicit traffic of archaeological objects in Turkey: “Today, in almost every village in Turkey,

¹ Antiquities Law (Eski Eserler Kanunu) of 25 April 1973. Published in the Official Gazette on 5 May 1973 (no. 14527), abrogated by the 1983 Law. The 1983 Law replaced the term “antiquities” (eski eser) by “cultural property requiring protection” (korunmasi gerekli kultur varligi).

there are professional diggers who make a living out of it and support their families. [...] It is possible to see these diggers working from morning until evening, in the mountains, in the middle of the fields and on riverbanks. [...] [The digger] is usually unaware of the value of his find. He sells it for 30 Turkish liras to cover his expenses of 15 Turkish liras. The clever dealer who buys it (for 30 Turkish liras) re-sells it, in turn, for 3,000 Turkish liras. We need especially to go after these antiquities dealers. Their patrons transfer the same antique object to abroad for 30,000 Turkish lira. They are all smugglers of antiquities and enemies of historic values”.²

The region of Uşak has suffered considerably from looting.³ By the time the above statement was made, the famous collection called “Lydian Hoard” had already been plundered from several tumuli in the village of Güre in Uşak and reached the Metropolitan Museum of Art in New York.⁴ The deputy member of Uşak had a point when he suggested going after the dealers who buy the looted objects from locals. A fieldwork study conducted in 2001 and 2005 in Lydia, confirmed that local diggers were “kept on retainer by collectors/dealers” or “patrons” in Izmir, the city through which archaeological objects eventually entered foreign markets.⁵ The same pattern still exists in many parts of Turkey. The 2015 Anti-Smuggling and Organized Crime Report defines three main groups involved in the illicit traffic of cultural property: diggers (kazıcı) who discover the objects, gatherers (toplayıcı) who buy them on behalf of the patrons, and the patrons (örgüt liderleri) who transfer the objects to their agents abroad.⁶

² Original text in Turkish: “Bugün Türkiye’nin hemen her köyünde kazı yapan, bunu meslek edinen ve bu yüzden ailesinin nafakasını sağlayan kişiler vardır. [...] Bu tip kazıcıları dağ başlarında, tarla ortalarında, akarsu kenarlarında sabahtan akşama dek çalışır görürsünüz. [...] bulduğunun yüksek değerini bilemez. 30 liraya satar, yevmiyesi 15 liraya gelir. Elinden çarpan açığöz antika tüccarı 30 liraya aldığı 3 bin liraya satar. Esasen takip edilmesi gereken bu kapkaççı antika tüccarlarıdır. Bunları ağababaları da aynı tarihi eşyayı yurt dışına 30 bin liraya devreder. Bunlar da eski eser kaçakçısı ve tarihi değer düşmanlarıdır”. See Journal of the National Assembly Proceedings (Millet Meclisi Tutanak Dergisi), p. 194.

³ ROOSEVELT/LUKE, Looting Lydia, p. 179. Following an extensive survey conducted in 2001 in the region of ancient Lydia, the authors reported that “of the 397 tumuli personally inspected, 357 or 90 percent showed signs of looting.” It is difficult to find data on the current state of the looting in Turkey. An independent research team had prepared an online data pool on the archaeological settlements in Turkey and published reports on destruction covering a period between 2000 and 2008 (see project TAY – Archaeological Settlements of Turkey, Destruction report by region, available at <http://www.tayproject.org/raporeng.html>).

⁴ See CHECHI/BUNDLE/RENOLD.

⁵ ROOSEVELT/LUKE, The Culture of Looting, p. 196.

⁶ Anti-smuggling and Organized Crime Report 2015, pp. 38-39.

The Turkish Law on the protection of cultural and natural properties of 1983 (“the 1983 Law” or “the Law”)⁷ provides sanctions for each of these illicit activities, being the non-authorized digs (Article 71), the illicit trade of cultural property (Articles 67.2 and 67.3), and its illegal export (Article 68).

This Chapter focuses on collecting archaeological objects (arkeolojik eser koleksiyon-culuğu) in Turkey, an activity that has been wedged between the licit and the illicit sides of the market. The main reason for this is that as a principle, the Law provides for State ownership of archaeological objects discovered in Turkey (chapter II) and that their trade is prohibited (chapter III). However, several amendments in Ministerial regulations have made it possible to collect archaeological objects under special conditions (chapter IV). This practice has been criticized from the outset because it has created a domestic market (alongside the international market) for archaeological objects plundered in Turkey (see below section III.D).

This Chapter puts this continuous source of tension between archaeologists and collectors in Turkey, in its legal context, which is quite complex and barely explored by legal scholars. In addition, the Chapter argues that the Ministry of Culture and Tourism (“the Ministry”) has not only (unintentionally) created a domestic market, but also placed collectors of archaeological objects in a grey zone (chapter V). To conclude, this Chapter urges the Ministry to abandon this special practice once for all, or if an exception should be accorded, to adopt a more sustainable solution for the preservation of archaeological objects by private parties (chapter VI).

It is important to stress that this Chapter deals mainly with movable archaeological objects discovered in Turkey. Some loopholes in the collecting system may have a certain impact on foreign archaeological objects too. This is because collections of cultural property can be imported into Turkey when accompanied with valid exportation certificates. However, there is no sufficient empirical data available on foreign archaeological objects imported to Turkey, which makes it difficult for us to draw any conclusions in this respect.

⁷ Law (no. 2863) on the protection of cultural and natural properties (Kültür ve Tabiat Varlıklarını Koruma Kanunu) of 21 July 1983. Published in the Official Gazette on 23 July 1983 (no. 18113). An unofficial English translation is available in the UNESCO Database of National Cultural Heritage Laws, <http://www.unesco.org/culture/natlaws/>.

I. State Ownership of Archaeological Objects

In Turkey, as in many other countries, newly discovered archaeological objects belong to the State (Article 5 of the 1983 Law).⁸ It is irrelevant whether such objects are of movable or immovable nature, situated on public or private land and discovered by pure chance, or discovered during archaeological research. Public (administrative) law determines the legal regime applicable to archaeological objects discovered in Turkey.

A. Discovery and Acquisition of Ownership

The principle of State ownership was first introduced by the Ottoman Antiquities Decree (Asar-ı Atika Nizamnamesi) of 1884 and reinforced by the subsequent Decree of 1906.⁹ In addition, the first Turkish Civil Code of 1926 provided an article declaring the State's ownership on movable "objects of scientific value" (bilimsel değeri olan eşya) that belong to no one.¹⁰ The new Turkish Civil Code adopted in 2001 (TCC) replaced the content of this article with a reference to the applicable law, which is the 1983 Law.¹¹

Archaeological objects become the property of the State *ipso iure* (by operation of law). This means that in practice, the State does not need to perform an official act (i.e. act of appropriation) to confirm its interest in the objects. Archaeological objects become the State's property automatically.¹² This aspect is the basis of Turkey's claims for the restitution of the archaeological objects that have been illegally excavated and exported.¹³

⁸ According to Art. 5, all movable and immovable cultural and natural property requiring protection that is found on property belonging to the State, public institutions or private institutions and individuals have the quality of State property ("Devlete, kamu kurum ve kuruluşlarına ait taşınmazlar ile özel hukuk hükümlerine tabi gerçek ve tüzelkişilerin mülkiyetinde bulunan taşınmazlarda varlığı bilinen veya ileride meydana çıkacak olan korunması gerekli taşınır ve taşınmaz kültür ve tabiat varlıkları Devlet malı niteliğindedir"). See also BLAKE, p. 443; KANADOĞLU, pp. 84-85; ÖZEL, Basel Decisions, p. 332.

⁹ See ÖZEL, Basel Decisions, p. 325. The Decree of 1906 remained into force until the adoption of the Antiquities Law of 1973. See also the Constitutional Court's decision of 6 July 1965 no. 1965/41 recognizing the Decree's effect as a law.

¹⁰ See Art. 667 of the Turkish Civil Code (no. 743) of 17 February 1926, abrogated.

¹¹ See Art. 773 of the Turkish Civil Code (no. 4721) of 22 November 2001: in case cultural property is discovered, "special rules" (özel kanun hükümleri) shall apply.

¹² See ÖZEL, Basel Decisions, pp. 324-332.

¹³ The *ipso iure* nature of Turkey's ownership on newly discovered archeological objects has been challenged in two famous cases before Swiss and Unites States' courts. In the Swiss case, the Basel-City Civil Court interpreted Turkey's right as a mere right of appropriation and rejected the restitution of

In practical terms, the State as the owner has to obtain the possession of newly discovered archaeological objects. Different rules may apply depending on the circumstances of the discovery. The typical way is that archaeological objects will be discovered through scientific research, to which the 1983 Law dedicates an entire chapter. In particular, Article 41 stipulates that all movable cultural property unearthed during excavations shall be transferred to public museums appointed by the Ministry.¹⁴

On the other hand, Article 4 of the Law states that individuals who discover cultural property or who become aware of the existence of cultural property on the land under their possession or use are obliged to notify the nearest museum directorate (“the obligation of notification”). If they respect this obligation, they receive a reward, otherwise they are penalized.¹⁵ The objective of this rule is twofold: in the short term, its aims to protect the area of discovery and keep it intact so that archaeologists can carry out excavations; and in the long term, to preserve the objects in public museums once they have been properly excavated and studied.

the gravestones displayed in the Antikenmuseum in Basel. In appeal, the question remained open, since the Court of Appeal of Basel-City decided that in either way, Turkey had lost all its rights due to its “inactivity.” According to the Court of Appeal Turkey failed to take an action in reasonable time after a witness had informed the authorities about the existence of the gravestones and thus violated the legal security principle (for the Court of Appeal judgment of 18 August 1995, see *Türkische Republik/Kanton Basel-Stadt und Kons.*, in: *Basler Juristische Mitteilungen* 1997, p. 17). For a detailed analysis of the case in English, see ÖZEL, *Basel Decisions*. The second case is related to a coin collection called “Elmalı Hoard” which was in the possession of several collectors in the United States. As opposed to Swiss courts, the District Court of Massachusetts recognized Turkey’s “absolute right of immediate possession” and accepted to hear the case. See *The Republic of Turkey v. OKS Partners*, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994). The dispute was eventually resolved out of court and the collection returned to Turkey. See VELIOĞLU/CHECHI/RENOLD.

¹⁴ Dr. Gül PULHAN, the director of Gre-Amer excavations in south-eastern Turkey, explains that at the end of each excavation season, all the objects unearthed end up in the responsible public museum’s hands. Objects in a well-preserved state and worth to be displayed in a museum, as well as those that have been damaged but are rarely found, are assigned an inventory number. Other damaged or broken objects are kept in the museum’s storages. The pieces of potteries or other objects that have no use for scientific studies are reburied in the ground (personal discussion, September 1st, 2016).

¹⁵ See Art. 64 of the Law for rewards, and Art. 67.1 for the penalty for violating the obligation of notification.

B. Public Property Regime

Turkish administrative law categorizes public properties under two groups: the State's private property and public property *stricto sensu* (dar anlamda kamu malları), the latter covering also cultural property in State ownership.¹⁶ Public property *stricto sensu* is inalienable in principle (devir ve ferag edilemez) and cannot be acquired by third parties in good faith (iyi niyet) or through acquisitive prescription (kazandırıcı zamanaşımı).¹⁷ Their sale may only be possible if the State decides to withdraw their public property status (following certain procedures).¹⁸ For instance, a building may be allocated by the State, in the public interest, for the conservation and display of its historic boats collection. If the historic boats are moved somewhere else, the building will lose its utility, and may be subject to a sale.

The case of archaeological objects is a little different since they are State property due to their scientific value and by the act of law. In principle no further administrative act (i.e. dedication for a specific public duty) is needed in order to consider them as public property *stricto sensu*.¹⁹ Even if theoretically one argues that archaeological objects may lose their function as public property if they lose their scientific value, this appears hardly possible in practice. Archaeology views scientific value in each object (or its parts) that is extracted from the soil, regardless of its state of conservation or aesthetic value.

Archaeological objects are therefore considered as *res extra commercium*.²⁰ They are inalienable, which means that the State cannot dispose of these objects. In the event that they are stolen or lost (i.e. through illegal excavations), third parties cannot acquire ownership in good faith²¹ or through prescriptive acquisition.²² Since all the means of acquisition under civil law are disabled, archaeological objects remain excluded from the trade, as

¹⁶ Scholars have different opinions on the sub-category to which cultural properties belong (common goods, service goods or a distinct sub-category). For a general overview on this issue, see GIRITLI ET AL., pp. 1000-1006. In our opinion, it is difficult to place all archaeological objects in one sub-category. An antique vase displayed in a museum or preserved in a laboratory for study, a site in ruins accessible to the public or discovered on the land occupied by a private hotel, have all different implications in terms of public use and benefit.

¹⁷ GIRITLI ET AL., p. 981; GÖZÜBÜYÜK/TAN, p. 943.

¹⁸ GIRITLI ET AL., pp. 981-982.

¹⁹ Ibid., p. 999.

²⁰ The *res extra commercium* regime is one of the mechanisms to retain ownership of cultural property in the public domain, used by many countries. See WANTUCH-THOLE, pp. 98-103.

²¹ Art. 763.2 and Art. 988-991 of the TCC.

²² Art. 777 of the TCC.

opposed to other types of cultural property (i.e. paintings, manuscripts or ethnographical objects).

II. Trade in Cultural Property

This section aims to cross check our conclusion from the first chapter with the practice, by examining the application of the rules on trade in archaeological objects. The 1983 Law distinguishes between the trade of cultural property (kültür varlığı ticareti) and its collection (koleksiyonculuk).²³ So it is important to first define these notions. Then, this Chapter will consider whether in practice it is possible to trade in or to collect archaeological objects.

A. Definitions

The 1983 Law does not provide a definition for “collecting cultural property” (Article 26) or the “trade in cultural property” (Articles 27-29), but both activities require prior permission from the Ministry.

The Regulation on collectors²⁴ defines a collector as someone (or an entity) responsible for the “collecting, inventorying, conservation, promotion through scientific journals and the display of” cultural properties.²⁵ The Regulation on the trade of cultural property²⁶ refers to “people who trade in cultural property” (kültür varlığı ticareti yapanlar) without defining it, but indicates that they “acquire cultural property in order to be sold”.²⁷ It is important to note that the permits provided from the Ministry for the trade and collection of cultural property are not cumulative.²⁸ So, it seems that a person willing to engage in the trade of cultural property in Turkey should reflect first on the ultimate purpose of the

²³ This distinction is initially provided in the Antiquities Law of 1973. Its preamble or the parliamentary discussions did not help us to understand the rationale behind it.

²⁴ The full title is the “Regulation on collecting of movable cultural property requiring protection and its control” (Korunması Gerekli Taşınır Kültür ve Tabiat Varlıkları Koleksiyonculuğu ve Denetimi Hakkında Yönetmelik). Published in the Official Gazette on 23 March 2010 (no. 27530).

²⁵ See Art. 4(e) of the Regulation on collectors.

²⁶ The full title is the “Regulation on the trade of movable cultural property and the control of commercial premises and storage areas” (Taşınır Kültür Varlığı Ticareti ve Bu Ticarete Ait İşyerleri İle Depoların Denetimi Hakkında Yönetmelik), published in the Official Gazette on 11 January 1984 (no. 18278).

²⁷ See Art. 9 of the Regulation on the trade.

²⁸ The Regulation on collectors explicitly states that those who trade in cultural property cannot collect cultural property. See Art. 6.3 of the Regulation on collectors.

trade and then apply for the appropriate permit: do I want to build a collection and assume the above mentioned duties or am I only interested in buying and selling?

Another difference is the type of cultural property, which is explicitly stated in the 1983 Law this time. Article 26.6 states that “individuals and private entities may form collections of movable cultural properties requiring protection [...]”,²⁹ whilst Article 27.1 limits the trade to “movable cultural property that is not subject to classification or registration, and [cultural property] not assigned to public collections”.³⁰

The Regulation on the trade clarifies that Article 27.1 actually concerns two categories of cultural property: “cultural property which does not require any protection [falling out of the Law’s scope] and cultural property requiring protection and officially registered, but not assigned to public collections”.³¹ On this basis, Özel stresses that in Turkey, even the trade in cultural property that is not required to be protected under the Law is subject to the Ministry’s permission.³² Kanadoğlu, former judge of the Court of Cassation, argues, on the contrary, that such objects fall outside the Law’s scope and should therefore be freely traded.³³

For the purposes of this Chapter, there is no doubt that archaeological objects qualify as cultural property requiring protection,³⁴ and thus fall within the scope of 1983 Law and of its provisions on the trade and collecting.

B. Trade in Archaeological Objects: Not Possible

Although the 1983 Law does not explicitly prohibit the trade in archaeological objects, the sanctions provided in the Law and how they are applied in practice confirm that it is not possible to trade in archaeological objects whose origin is Turkey.

Article 67.2 of the 1983 Law punishes “anyone who offers for sale, sells, gives, acquires or accepts cultural property that has not [previously] been notified [to museum directorates]” with imprisonment of two to five years and a fine. Case law demonstrates that

²⁹ Emphasis added. Original text in Turkish: “Gerçek ve tüzelkişiler, Kültür ve Turizm Bakanlığınca verilecek izin belgesiyle korunması gerekli taşınır kültür varlıklarından oluşan koleksiyonlar meydana getirebilirler.”

³⁰ Emphasis added. Original text in Turkish: “[...] tasnif ve tescil dışı bırakılan ve Devlet müzelerine alınması gerekli görülmeyen taşınır kültür varlıklarının ticareti, Kültür ve Turizm Bakanlığının izni ile yapılır.”

³¹ See Art. 1 of the Regulation on collectors.

³² ÖZEL, *The Protection of Cultural Heritage in Turkey*, p. 31.

³³ KANADOĞLU, p. 189.

³⁴ See Art. 23 of the Law.

such objects “that have not been notified” (bildirimi yapılmamış) are mostly archaeological objects that have not been reported to the authorities according to Article 4 of the 1983 Law (discussed above). For instance, if I offer for sale a Roman marble statuette that I found in my yard³⁵ or a mosaic that I discovered in my family’s old warehouse,³⁶ or acquire with the intent of selling ancient coins that have not been previously notified to museum directorates,³⁷ I will be punished according to Article 67.2 of the Law. In practice, police officers often pretend to be potential buyers in order to catch offenders in the act.³⁸

While the 1983 Law does not provide a proper title for this specific crime,³⁹ Yağcı et al. name it “the trade in movable cultural property whose trade is prohibited” (ticareti yasak olan taşınır kültür ve tabiat varlıklarının ticaretini yapma suçu).⁴⁰ This title actually makes a fair point because the second crime that relates to the trade is provided in Article 67.3 of the Law as the “non-authorized trade of movable cultural property whose trade is [normally] permitted” (ticareti yasak olmayan taşınır kültür varlıklarının izinsiz olarak ticareti). This latter case particularly concerns ethnographical objects, which are subject to registration (thus requiring protection). After their registration, public museums may acquire such objects from the owners and assign them to public collections. If the owners do not give their consent or public museums simply do not make an offer, such objects can be traded with the Ministry’s authorization according to Article 27.1.⁴¹

Statistics show that even the trade in such ethnographical objects under Article 27.1 is hardly exercised in Turkey. The Ministry publishes statistics on the number of people who currently hold a trading permit as per Article 27.1 (the “registered trader”). According to the 2016 statistics, there exist only 47 registered traders in Turkey and 41 of them work in Istanbul.⁴²

It is even more interesting to compare this number to the number of people holding a collector permit as per Article 26.6 (the “registered collector”) (kayıtlı koleksiyoncu), also

³⁵ Court of Cassation, Criminal Chamber no. 12, judgment of 16 April 2013 (application no. 2012/21963; decision no. 2013/10073). See YAĞCI ET AL., p. 419.

³⁶ Court of Cassation, Criminal Chamber no. 12, judgment of 8 November 2012 (application no. 2012/27044; decision no. 2012/23510). See YAĞCI ET AL., p. 443.

³⁷ Court of Cassation, Criminal Chamber no. 12, judgment of 3 December 2012 (application no. 2012/19890; decision no. 2012/26006). See YAĞCI ET AL., p. 433.

³⁸ See YAĞCI ET AL., p. 415.

³⁹ The title of Art. 67 is “Persons violating the obligation to notify and the trade in cultural property” (Haber verme sorumluluğuna ve kültür varlığı ticaretine aykırı hareket edenler). While the first paragraph deals with the non-respect of the obligation to notify, the second and third paragraphs focus on the illicit trade.

⁴⁰ See YAĞCI ET AL., p. 414.

⁴¹ Ibid., pp. 454-455.

⁴² See the statistics at <http://www.kulturvarliklari.gov.tr/TR,44149/tasinir-kultur-varligi-ticareti.html>.

published by the Ministry. They are 1583 in number and spread throughout Anatolia.⁴³ Do all of them “collect, inventory, promote through scientific journals and display” cultural property, as suggested by the Regulation on collectors? As will be shown below, in practice, it is difficult to determine the real purpose behind the acts of some registered collectors.

C. Collecting Archaeological Objects: Possible Under Conditions

Examples will help us first to respond to the question on whether it is possible to collect archaeological objects (whose origin is Turkish) in Turkey. The Ministry differentiates between museums working under its administration and özel müzeler (“private/special museums”).⁴⁴ Private/special museums, which are 220 in total today, are “operated not only by private entities but also municipalities, universities and other public bodies”.⁴⁵ Among this list, at least six museums that have acquired or received a donation of archaeological collections from registered collectors, were identified:

- i. İzzet Koyunoğlu Museum in Konya: İzzet Koyunoğlu (1900-1974), chief inspector at the national railway company, gathered an immense collection of cultural objects (including archaeological ones) and books that he donated to the Konya Municipality in 1973. They are displayed today in the museum named after him.⁴⁶
- ii. Yapı ve Kredi Bank’s Vedat Nedim Tör Museum in Istanbul: Yapı ve Kredi Bank (one of Turkey’s first private banks) has an important coin collection of 55,000 pieces “testifying to 2600 years of political and economic history beginning in the 6th century BC and covering a vast area” including Istanbul and Pergamon. According to its website, all the pieces were acquired between 1950s and 1998 from Turkish collectors, including the collector Hüseyin Kocabaş.⁴⁷
- iii. Sadberk Hanım Museum in Istanbul: Kocabaş also had a collection of Anatolian objects, which was acquired by the Sadberk Hanım Museum, one of Turkey’s first private museums. This museum was founded by the Koç family (one of the

⁴³ See the statistics at <http://www.kulturvarliklari.gov.tr/TR,44048/koleksiyonculuk.html>.

⁴⁴ See the Ministry’s list of “özel müzeler,” available at <http://www.kulturvarliklari.gov.tr/TR,135633/ozel-muzeler.html>.

⁴⁵ BONINI BARALDI ET AL., p. 740.

⁴⁶ ÖZKAN, p. 11.

⁴⁷ See the museum’s website, English version, available at <http://art.ykykultur.com.tr/collections/coin-collection>.

major industrialist families supporting art) in 1980 to house the private collection of Sadberk Koç, Vehbi Koç's wife.⁴⁸

- iv. Rezan Has Museum in Istanbul: This museum, founded by the wife of the businessman Kadir Has, has around 2000 archaeological objects from Anatolian civilizations, in particular a unique Urartian jewelry collection.⁴⁹ According to collector/lawyer Haluk Perk's personal website, these objects were transferred from his personal collection to the museum (through donation and sale).⁵⁰
- v. Haluk Perk Museum in Istanbul: Collector Haluk Perk has also opened a private museum under his name. After collecting objects as a registered collector for years, he transferred his collection, including archaeological objects among others, to the Haluk Perk Museum in 1995.⁵¹
- vi. Erimtan Archaeology and Arts Museum in Ankara: Collector/civil engineer Yüksel Erimtan also transferred his private "collection of artifacts unearthed in Anatolia" (mainly from Roman period) to the museum bearing his name in 2015.⁵²

In addition, the Turkish newspaper *Hürriyet* reported in 2004 a public auction sale of an archaeological collection that was confiscated during a bankruptcy process. According to the article, the sale was the first of its kind and only open to registered collectors.⁵³

These examples show that in practice, it is possible to collect archaeological objects that originated in Turkey despite the principles mentioned above (see chapter I). How could this be possible? The 1983 Law sets down the principal obligations of a collector in Article 26, however it does not provide an answer to our specific issue.

If I want to collect archaeological objects, I know that I should first apply for a permit from the Ministry (Article 26.6). Then, I am obliged to register all the acquisitions I make in the official inventory book (envanter defteri) (Article 26.7), kept by the museum directorate responsible to supervise me. Finally, I have to give 15 days' notice to the Ministry before I sell to, or exchange with, another registered collector an object in my collection (Article 26.8). However, where will I buy archaeological objects in the first place, if they

⁴⁸ See the museum's website, English version, available at <http://www.sadberkhanimmuzesi.org.tr/default.asp?page=tarihce&hl=en>.

⁴⁹ Accessible online via Google Arts & Culture platform, available at <https://www.google.com/culturalinstitute/beta/partner/rezan-has-museum?hl=tr>.

⁵⁰ See the collector's website in Turkish, available at <http://www.halukperk.com/rezan-nas-muzesi/>.

⁵¹ See the collector's website in Turkish, available at <http://www.halukperk.com/hpm-aciklama/>.

⁵² See the museum's website, English version, available at <http://www.erimtanmuseum.org/index.php/en/collections.html>.

⁵³ See AKYOL.

belong to the State, are preserved in public collections and are excluded from the trade? (see chapter I)

The following chapter will demonstrate that the legal basis for the collection of archaeological objects in Turkey is hidden between the lines of the Ministry's regulations and it has been a controversial issue since the very beginning.

III. Private Collections of Archaeological Objects

The possibility for registered collectors to collect archaeological objects was first introduced, at normative level, in late 1990s. The Association of Archaeology and Archaeologists (Arkeoloji ve Arkeologlar Derneği) ("the Association of Archaeologists"), contested this new practice but failed before the Council of State (Danıştay), the highest administrative court. This practice is still in force today under the Regulation on the classification, registration and admission to museums of cultural property⁵⁴ ("Regulation on classification"), and is reinforced by some loopholes in the Regulation on collectors.

A. Background

The first regulation on collectors, adopted in 1984,⁵⁵ covered many issues including the application procedure for a permit (Article 5), authorizations to change the collection's official location (Article 6), authorizations to exhibit the collection elsewhere (Article 7), inventory making (Article 10), the procedure in case of inheritance (Article 11), the exchange of items (Article 12) and the control of the collections and their inventory (Article 13). While these requirements are applicable more or less in the same way today, Article 14 created some particular problems for a long time.

The original title of Article 14 was "cultural properties left to their owners" (sahiplerinde bırakılan kültür varlıkları). Article 14.1 stipulated that cultural property "not acquired by the Ministry [...] and left to their owners' disposal and use [were] subject to registration

⁵⁴ Full title is the "Regulation on the classification, registration and admission to museums of movable cultural and natural property requiring protection" (Korunması Gerekli Taşınır Kültür ve Tabiat Varlıklarının Tasnifi, Tescili ve Müzelere Alınmaları Hakkında Yönetmelik). Published in the Official Gazette on 20 April 2009 (no. 27206).

⁵⁵ Published in the Official Gazette on 15 March 1984 (no. 18342).

and control”. This article was not even dealing with collecting *per se*, but rather the registration of privately owned cultural properties.⁵⁶ Therefore its original version did not apply to archaeological objects, which are State property from the moment they are discovered.

Following the amendments in 1998 and 1999,⁵⁷ the text of Article 14 completely changed. For our purposes, it is important to mention a particular section that says “cultural property notified (bildirilen) to the Ministry by collectors [...] is to be registered in the inventory book”.⁵⁸ As mentioned earlier, the Association of Archaeologists contested these amendments. The Council of State then had to investigate the article’s meaning and its conformity with the principles laid down in the 1983 Law.

B. Procedure before the Council of State

According to the Law on the Council of State, the Court is competent to decide on the claims related to the cancellation of the Ministry’s administrative acts.⁵⁹ Therefore, the Association of Archaeologists directly addressed the Council of State and demanded the cancellation of the amendment made to Article 14. The Ministry, as the defendant, was joined by the Association of Collectors of Cultural Property (Kültür Varlıkları Koleksiyoncuları Derneği) (the “Association of Collectors”). In its decision of 19 December 2000 (the “2000 decision”), the Court rejected the claim that related to Article 14.⁶⁰ The Association of Archaeologists appealed against this decision, which was also overturned (the “2004 decision”).⁶¹

1. Plaintiff’s Claims

The Association of Archaeologists objected to this new concept of “notification by collectors” introduced by the amendment to Article 14. Normally, the Law provides for one type of notification, regarding individuals who accidentally discover archaeological objects (Article 4 of the Law).

⁵⁶ ÖZEL, Analysis of the Amendment, p. 664, n. 9.

⁵⁷ Published in the Official Gazette on 18.05.1998 (no. 23346) and on 29 April 1999 (no. 23680).

⁵⁸ See paras. 1, 3.

⁵⁹ See Art. 24.1(c) of the Law on the Council of State (no. 2575) of 6 January 1982.

⁶⁰ Council of State, Chamber no. 6, judgment of 19 December 2000 (application no. 1998/3696; decision no. 2000/6484). Not published. In the same judgment, the Council of State accepted the second claim of the Association of Archaeologists related to the re-introduction of an additional Art. 1(a) on the annulment of the collecting permit for the possession of non-registered objects.

⁶¹ Council of State, Plenary Session of the Administrative Law Chambers, Judgment of 6 May 2004 (application no. 2001/544; decision no. 2004/558) (Kazancı database).

The Association of Archaeologists argued that due to the amendment to Article 14, finders of archaeological objects now had two options: they could either notify the museum directorates of the objects (as the Law requires) or “sell” them to registered collectors, who in their place would then “notify” the museum directorates of the objects (according to the amendment to Article 14).⁶² Collectors could then register such objects in their inventories, which implied that the objects would be part of their collections. According to the Association of Archaeologists, this practice would inevitably increase the looting.⁶³

2. Defendants’ Response

The Ministry responded to this claim by defending very broadly the amendment’s conformity with the 1983 Law. The Association of Collectors brought more concrete arguments. First of all, collectors accepted that the objects referred to as “notified” according to the amendment to Article 14 were indeed newly discovered archaeological objects that “for some reason” were not brought to the museum directorates. According to the Association of Collectors, there was no unconformity with this practice since collectors were generally obliged to register their acquisitions, and in this case the registration they would function as the original finder’s notification. In addition, they argued that thanks to their intervention, such objects were not illegally exported abroad and could be recorded in official inventories.⁶⁴

3. Court’s Decision

The Court confirmed that the contested amendment brought an option for finders to “bring” (getirmek) the objects found directly to collectors instead of museum directorates.⁶⁵ So the critical question the Court had to answer was whether this alternative “notification by collectors” was in conformity with the 1983 Law or not.

The Court agreed with the defendants and held that the amendment was in conformity with the Law for two main reasons. According to the Court, collectors were still under the obligation to “notify” the objects found to the museum directorates (even if they were not the original finders). Following the “notification”, museum directorates could then decide

⁶² Throughout this paper, the words “sell”, “acquire” and “notify” are left between quotation marks when they apply to collectors of archaeological objects. Collectors cannot acquire the ownership of newly discovered archaeological objects that are State property (see section IV.2). On the other hand, the declaration made by collectors cannot qualify as a notification in terms of Art. 4 of the Law (see section III.2(c)).

⁶³ ÖZEL, *Analysis of the Amendment*, p. 666.

⁶⁴ *Ibid.*, p. 667.

⁶⁵ See the 2004 decision, summarizing the unpublished 2000 decision.

to assign the objects to public collections, since such objects were State property. Collectors could only keep the objects in their collections if the objects were not admitted to public collections. The Court also added that the amendment brought “some kind of discipline” to the registration process by forcing collectors to declare all cultural property in their possession.⁶⁶

Özel provides a detailed analysis of this decision and critics the Court’s reasoning for several reasons.⁶⁷ Here three important aspects will be stressed. First of all, the Court fails to rightfully determine the amendment’s purpose. In fact, Article 26.7 of the Law already puts collectors under the obligation to register their acquisitions. If there is a problem of discipline in practice, this is a different issue and requires different solutions (i.e. more regular and efficient control of inventories, increasing the fines, etc.).

More importantly, the Court fails to recognize the double purpose of Article 4 of the Law. With collector’s “notification”, it is true that objects are registered and can be added to public collections, if necessary. However the place of origin or the circumstances of the discovery remain unknown to the authorities. There is no way to verify if the objects are discovered by chance or looting. Plus, even if the objects are accidentally unearthed in agricultural or other non-looting activities, no protection measures can be taken *in situ* if the authorities are unaware of the discovery. Collector’s “notification” cannot therefore have the same function as the original finder’s notification under Article 4.

Finally, the Court completely ignores the phase between the discovery of the object and their “acquisition” by collectors. Who are the people bringing the objects to the collectors?⁶⁸ Are they the original finders or subsequent possessors? On what basis do they “acquire” and “sell” archaeological objects that are State property? By allowing original finders to renounce their obligation of notification, the Ministry unintentionally enables the misappropriation of archaeological objects and their illicit traffic, until the time they are provided to a registered collector. Controversially, the Court fails to discuss this aspect, given the extent of clandestine excavations in Turkey. In summary, the Court only deals with the collection of archaeological objects as if it were purely a procedural issue, without placing it in its larger context: the prevention of the illicit traffic and looting.

⁶⁶ Ibid.

⁶⁷ See ÖZEL, Analysis of the Amendment, pp. 666 et seqq.

⁶⁸ It is known that villagers regularly bring archaeological objects they find to registered collectors. See Court of Cassation, Criminal Chamber no. 12, judgment of 5 May 2016 (application no. 2015/463; decision no. 2016/8040).

C. Current Regime

The amended Article 14 no longer exists in the new Regulation on collectors, adopted in 2010. However, a similar text was included in 2013 in the Regulation on classification.⁶⁹ Article 10.5 of this Regulation reads as follows: “Among [...] cultural and natural property brought to museum [directorates] by collectors of cultural and natural property or private museums who carry out their activities according to Art. 26 of the Law, those not assigned to [public] museums according to the commission, shall be placed in [public] museums’ custody after their inventory information is recorded. If requested, collectors and private museums under the Ministry’s supervision can register such movable cultural and natural property in their inventories”.⁷⁰

Two differences can be noted compared to the amended Article 14. Firstly, the current text refers to cultural property “brought” by collectors, instead of “notified”. Regarding terminology, it is indeed more correct to use the term “bring” since collectors are usually not the original finders of the objects. As already underlined, only the original finders are under the obligation of notification according to Article 4. Collectors mostly “acquire” archaeological objects through sale, donation or inheritance, as will be discussed below. Secondly, the new text mentions that a commission is responsible for the evaluation of the objects, particularly their admission into public museums. In fact, the procedure applicable after collectors bring the objects to museum directorates was not very clear in the old text. Nevertheless, the Council of State had ruled that Article 4 should not be interpreted in a way that would allow collectors to automatically keep the objects, and that museums directorates could decide to assign the objects to public collections if needed (see above).

Article 10.5 of the Regulation on classification consequently does not bring any substantial change to the existing practice. Under the current regime, registered collectors can bring archaeological objects to museum directorates for registration and keep them in their collections, unless museum directorates assign them to public collections. This practice surely benefits collectors who normally cannot trade in archaeological objects discovered in Turkey.

⁶⁹ Published in the Official Gazette on 15 August 2013 (no. 28736).

⁷⁰ Emphasis added. Original text in Turkish: “[...] Kanunun 26 ncı maddesi kapsamında faaliyette bulunan taşınır kültür ve tabiat varlığı koleksiyoncuları veya özel müzeler tarafından ilgili müzelere getirilen taşınır kültür ve tabiat varlıklarından değerlendirme komisyonu tarafından müzeye alınmasına gerek duyulmayanlar, envanter bilgileri çıkartılarak müze emanetinde alınırlar. Talepte bulunulması halinde bu şekilde belgelendirilen taşınır kültür ve tabiat varlıklarının Bakanlık denetimindeki özel müze veya koleksiyoncuların envanterlerine kaydedilmelerine izin verilir.”

D. Registration Process for Collectors

As discussed above, registered collectors are obliged to register each object they acquire in the inventory book kept by museum directorates. According to Article 7.2 of the Regulation on collectors, during the registration, collectors should provide information on how the object was obtained (elde ediliş şekli), the time period it belongs to and a physical description accompanied by a photograph.⁷¹ Any information on the object's origin is not required.

But how does this work in practice? It is actually possible to take a glimpse at the real world through the announcements the Ministry publishes about the thefts from private collections. To inform the public about the thefts, the Ministry sometimes publishes entire pages of the inventory books, not just pictures of the objects.⁷² In these pages, it is possible to observe that inventory books are separated according to two categories: coin (sikke) and object (eser), a general term that appears to cover the rest. However, there is no significant difference in terms of information required. The examples examined date between 1982 and 2005.⁷³

Besides the physical and historical characteristics of the objects, collectors need to provide information on where and when they took possession. In addition, they need to specify through which means they took possession by ticking one of the three boxes: sale, donation or inheritance (plus sometimes a forth option, "other"). In regards to coins, they also need to indicate the place of origin. Having said this, none of this information is complete on the inventory pages. Even when the information is there, it is very broad. Ticking the box "sale" and indicating the place of discovery as "Tarsus" for example (a very ancient settlement and district of the city Mersin) seems to be sufficient for a collector to fulfill its legal requirements.⁷⁴

The digital inventory of the Koyunoğlu Museum is another online source that raises similar problems. Among 3115 objects listed as "archaeological", only 290 have information on the object's origin. These 290 entries usually provide the name of an entire village or

⁷¹ Original text in Turkish: "Kayıt anında taşınır kültür ve tabiat varlıklarının elde ediliş şekli, dönemi ve fiziki tanımlaması belirtilir. Taşınır kültür ve tabiat varlıklarının sahiplerince usulüne uygun şekilde çektiirdikleri fotoğraflarını da ihtiva eden bu envanter defterinin bir adedi müzede saklanır."

⁷² See the Ministry's website on stolen cultural property in Turkey, available at <http://www.kulturvarliklari.gov.tr/TR,44493/calinan-eserler.html>.

⁷³ Objects were stolen from the collections of five different collectors: Alparslan Göktaş (objects registered in 2005), Recep Tuncer and Nevzat Akın (objects registered in 2002), Ertuğrul Çakır (objects registered in 1998) and Özkan Nebi Çelikoğlu (objects registered in 1982).

⁷⁴ See <http://www.kulturvarliklari.gov.tr/TR,44672/koleksiyoner-alparslan-goktasin-koleksiyonundan-calinan-.html>.

district, mostly in the Konya region. Some provenience entries are as vague as “Anatolia”.⁷⁵

To summarize, registered collectors of archaeological objects in Turkey are not obliged to indicate the origin of the objects they register in the inventories. Yaylalı, an expert working at the Ministry, brings forward this problem in his proficiency thesis (*uzmanlık tezi*). Following his comparison between the rules applicable to collectors in Turkey and in Greece, he concludes that while Greek law explicitly requires collectors to provide the information related to an object’s place of discovery and origin, Turkish law does not provide for a clear requirement on this issue.⁷⁶ Examples discussed above confirm that in practice, provenience information is often missing in the inventory pages and that sadly, collectors in Turkey possess little information about the origin of the archaeological objects they “acquire”.

This situation is not at all a surprise for anyone who is familiar with the practice of archaeology in Turkey. It has been argued for decades that registered collectors have been collecting archaeological objects that have no provenience and were probably unearthed illegally by looters in Turkey. By allowing collectors to collect such objects, the Ministry unintentionally created domestic market for illicit trade, alongside the international market.⁷⁷ Experts explain that “first quality” (*birinci sınıf*) looted objects are usually exported outside Turkey through clandestine channels. For instance, imagine the gold winged sea horse brooch and other exquisite objects from the “Lydian Hoard” mentioned above in the introduction. “Second quality” (*ikinci sınıf*) looted objects, which are less valuable from a market perspective, are eventually offered to registered collectors.⁷⁸

IV. Collecting as a Legal Grey Zone

As Özdoğan often recalls, from a scientific perspective, it will not matter if an object illegally excavated in Turkey features in a private collection in London or in Istanbul.⁷⁹ Either way, it has been extracted from the soil through non-scientific methods, which causes damage to the archaeological context of the site. The demand in archaeological objects of Turkish origin remains the same regardless of who is at the end of the acquisition chain.

⁷⁵ See the digital inventory, available at http://88.255.225.19:8092/tr_TR/midas/about_collection.

⁷⁶ YAYLALI, pp. 68-70.

⁷⁷ KARADUMAN, p. 192; TIRPAN, p. 43.

⁷⁸ Ibid.

⁷⁹ ÖZDOĞAN, p. 189.

And as long as this demand exists, the looting activities aimed at extracting such objects will continue.⁸⁰

While this connection between the collecting system and the looting of archaeological sites has long been debated, no one seems to have convinced the opposite party. Archaeologists continue to stress the problem of looting and sometimes accuse collectors of being criminals, while collectors defend themselves by arguing that they actually save archaeological objects from being lost or smuggled abroad, and thus should be more encouraged.⁸¹

Instead of going over the same debate, this Chapter will put forward the flaws of the system in general. In fact, the system has created a grey zone where uncertainty reigns over the status of collectors (A) and the status of their collections (B).

A. Collectors: Criminals or Heroes?

What should the public think about registered collectors? Are they really criminals as archaeologists pretend or are they heroes as they claim? The answer is neither of them.

In practice, it has been observed that some dealers involved in the smuggling of archaeological objects abroad obtain official collecting permits.⁸² They collect archaeological objects that have been illegally excavated and keep them as if they were part of their collection until they find suitable buyers (in or outside Turkey). Of course these objects are never registered with the museum directorates. Karaduman, former director of the Ministry's anti-smuggling department, believes that it is not difficult to detect these dealers disguised as collectors. They eventually get caught and their permits are cancelled.⁸³

In this case it is important to note that the dishonest collectors lose their permits because they are caught with objects that were not registered with the museum directorates. The failure to comply with the registration obligation falls within the scope of the violation of rules on collectors and private museums, punishable with imprisonment (from three months to one year) and a fine, according to Article 73 of the Law.⁸⁴ However, in order to

⁸⁰ YAYLALI, p. 68.

⁸¹ The proceeding of a 2007 conference held at the Rezan Has Museum illustrates very well this dichotomy as well as the difficulty in finding a solution. In his closing statements, Özdoğan noted that while the collection of archaeological objects was the most heavily discussed topic in the conference, nothing new has been actually said or suggested. See ÖZDOĞAN, pp. 188, 191.

⁸² KARADUMAN, p. 58.

⁸³ Ibid.

⁸⁴ In practice, courts tend to suspend the sentence and its implementation (hükmüm açıklanmasının geri bırakılması) in case of a first time violation. See Court of Cassation, Criminal Chamber no. 12, judgment of 24 March 2015 (application no. 2013/26602, decision no: 2015/4967), p. 6.

prosecute the dishonest collectors for smuggling and subsequently dismantle their networks, more evidence is needed. In addition, if the police do not closely watch them after their permits are withdrawn (or suspended), they will probably continue to carry out their illicit activities. For instance, a 2015 case revealed that two registered collectors who were accused of having violated the registration obligation (Article 73), had their permits suspended years ago due to an earlier investigation.⁸⁵ The suspension of the collector's permits (or their cancellation) will therefore not be enough to prevent them from engaging in illicit trafficking.

So from a legal perspective, collecting archaeological objects is not a crime *per se* if one has a collecting permit. Collectors commit a crime if they fail to register the objects or if they are involved in the smuggling of archaeological objects (the latter needs to be confirmed by a court decision). Nevertheless, the collecting system appears to be used by the dealers as a cover. This should not be so surprising because it seems very easy to obtain a collecting permit. It is sufficient to have a clean criminal record⁸⁶ and a suitable place to store the objects.⁸⁷ Other requirements are purely administrative (i.e. ID number)⁸⁸ or very vague (i.e. a commission examines "whether the person is capable of collecting").⁸⁹ Even collector Haluk Perk, who is also the head of one of the collectors' association, suggests applying more stringent criteria because some collectors "abuse their power" and damage the reputation of the profession as a whole.⁹⁰

What about the collectors who collect for art's sake and who are not involved in the smuggling networks? Some of them believe that they contribute to the fight against illicit traffic by "acquiring" archaeological objects that would otherwise be illegally exported or lost.⁹¹ This statement alone shows that collectors, even those with no criminal intent, are aware of the illicit origin of some of the objects "brought" to them. In principle, there is little risk that objects that are scientifically excavated will be lost or illegally exported. Since they are all inventoried and transferred to public museums, the objects "brought" to collectors whose origins or previous possessors are unknown, have most probably been excavated by looters. This is pure common sense. In this case, it is difficult to consider collectors as heroes since they knowingly "acquire" archaeological objects that have either been discovered by chance, but not reported to authorities, or worse illegally excavated.

⁸⁵ Court of Cassation, Criminal Chamber no. 12, judgment of 24 March 2015 (application no. 2013/26602, decision no: 2015/4967), p. 9 and 11.

⁸⁶ See Art. 5.3 of the Regulation on collectors.

⁸⁷ See Art. 6.1(a) and (b) of the Regulation on collectors.

⁸⁸ See Art. 5.1 of the Regulation on collectors.

⁸⁹ See Art. 6.1(ç) of the Regulation on collectors.

⁹⁰ PERK, p. 34.

⁹¹ ÖZEL, Analysis of the Amendment, p. 667.

B. Status of the Archaeological Collections in Private Hands

Some collectors have challenged the public property status of the archaeological objects in their collections. Collector Haluk Perk claims that such objects do not belong to the State. However he does not explicitly express that they belong to registered collectors either.⁹² This is because there is no legal basis to support such a claim. According to Article 5 regarding State ownership and to administrative law principles discussed above (*res extra commercium*), all archaeological objects discovered in Turkey belong to the State and cannot be alienated. In principle, archaeological objects (of Turkish origin) found in the collections of registered collectors (or private museums) belong to the State as well. No exception is provided in the Law in favor of collectors in this respect.

Özel argues that the State transfers to registered collectors the objects' possession (zilyetlik) only and retains ownership (mülkiyet).⁹³ According to Turkish civil law, "the person who has the effective control over an object is its possessor"⁹⁴ even if he has no right over the object or no right to possess the object.⁹⁵ Certain rules made by the Regulation on collectors also support State's ownership on the archaeological objects in private collections. For instance, if the objects are damaged, collectors have to compensate the Ministry (Article 8.3). If collectors have been negligent, they lose their permit and may even be prosecuted (Article 8.2).

In addition, the modifications made to Article 10.5 of the Regulation on classification indicate that the transfer of archaeological objects to private collections does not imply a transfer of ownership. Article 10.5 has been modified twice by the Ministry before the current version was adopted. The 2012 version particularly caused a great reaction among archeologists. Notably, it said that "movable [cultural] properties which are to be studied, but not deemed to be admitted into [public] museum[s] according the commission [...] can be sold to collectors and private museums".⁹⁶ The former director of the Santa Sophia Museum gives the example of an Urartian flask found in pieces in an excavation. From the museum's perspective, it could be worth studying these pieces without necessarily putting them on display. If the museum is entitled to restore the flask and sell it, it leads to a "disagreeable situation" where public museums would commercialize archaeological

⁹² PERK, p. 30.

⁹³ ÖZEL, Analysis of the Amendment, p. 672.

⁹⁴ See Art. 973.1 of the TCC (equivalent of Art. 919 of the SCC).

⁹⁵ OĞUZMAN ET AL., p. 53.

⁹⁶ Original text in Turkish: "[...] komisyon tarafından etütlik eser olarak tasnif edilen ve müzeye alınmasına gerek görülmeyen taşınır varlıkların [...] özel müze veya koleksiyoncuların envanterlerine kaydedilmek üzere satışına izin verilir." Published on the Official Gazette on 19 January 2012 (no. 28178).

objects.⁹⁷ Rather, it is suggested that these objects are borrowed (and not sold) to universities or other institutions for exhibition or study. The 2012 version of the Article 10.5 was also criticized for violating the State ownership of archaeological objects and the principle of inalienability.⁹⁸

The current version of Article 10.5 avoids all reference to a transfer of ownership. However, many questions remain unanswered. For example, registered collectors can “sell” archaeological objects in their collections to other registered collectors and private museums as if they were the owners and they receive payment in return. This Chapter has cited above many examples of actual sales of archaeological collections from collectors to private museums. How then should one justify the payment collectors receive if such objects are ultimately State owned property? Is it a form of compensation for having preserved the objects well? In brief, the conditions and terms of this special regime are not sufficiently clear, where archaeological objects are left under the special guardianship of registered collectors and private museums.

Conclusion

This Chapter examined a specific area in the regime of movable archaeological objects in Turkey, the one of private archaeological collections. The existence of these collections is a very controversial issue since all archaeological objects discovered in Turkey are State property by law. The legislator may provide for an exception under which certain archaeological collections can be preserved by registered collectors and private museums, however this special practice should be regulated in a clear and precise manner. This Chapter demonstrates that the current system is far from being clear or well regulated and only appears to benefit looters and dealers involved in the illicit traffic.

The current system is problematic for many reasons. First, the origin of the objects, which end up in the collections of registered collectors, is unknown. The objects are most probably unearthed through clandestine excavations but not subsequently smuggled abroad. Second, registered collectors can exchange or “trade” such objects between each other or private museums in Turkey. This has created a licit domestic market for archaeological objects with no provenience information. Third, this special practice introduced by Ministerial regulations, contradicts the principle of State ownership of archaeological objects and the prohibition on its trade provided by the Law. Since the terms of this practice have

⁹⁷ See ERBİL.

⁹⁸ See “Taşınır Kültür Varlıklarının Satılması!” (“Sale of movable cultural property!”).

not been clearly set out since the very beginning, collecting archaeological objects in Turkey has become a real grey zone.

This Chapter proposes that the Ministry revises the practice of collecting archaeological objects under three aspects. First, the Ministry has no other choice but to remove from the Regulation on classification, the optional “notification by collectors” with regard to new discoveries. If the Ministry needs support from the private sector, it is always possible to build partnerships once archaeological objects are properly excavated and studied. For instance, Tirpan suggests that collectors (individually or collectively), or museums could sponsor scientific excavations and exhibit the objects that are discovered for a period of time.⁹⁹

Second, the Ministry should explicitly require that registered collectors provide information on the origin of the archaeological objects during the registration process detailed in the Regulation on collectors. This obligation concerns not only archaeological objects of Turkish origin, but also foreign objects, which may be illegally imported to Turkey.¹⁰⁰ Collectors should be able to provide information and supporting documents (including the export permit from the country of origin) on the excavation site and date of excavation/discovery of the objects, as well as the objects’ previous and current owners.¹⁰¹

With these two revisions, there could at least be a chance to downsize clandestine excavations since collectors will no longer be able to add archaeological objects with no provenience information in their collections. However, it also means that registered collectors of archaeological objects can no longer practice their profession and the already existing tension between archaeologists and collectors will increase.

This brings us to the third point. The Ministry is responsible for balancing the different interests in the field. Therefore, it should at least encourage collectors to collect different types of cultural objects with no risk of looting, i.e. contemporary art or traditional craftsmanship. Given the work load of public museums and the extent of archaeological resources in Turkey, it could also be possible for the Ministry to involve private parties in the preservation of archaeological objects, as mentioned earlier. Studying the best practices applied by foreign countries with rich archaeological heritage is a possible way to start to address this issue.

⁹⁹ TIRPAN, p. 45.

¹⁰⁰ The Ministry has recently translated in Turkish ICOM’s Emergency Red List of Syrian Cultural Objects at Risk and started its distribution to museums and collectors. See <http://www.kulturvarliklari.gov.tr/TR,160032/icom-suriye-acil-durum-kirmizi-listesi-artik-turkce.html>.

¹⁰¹ See Art. 2 of the 2003 Berlin Resolution adopted following the international conference “Illegal Archaeology?” held in Berlin in 23-25 May 2003, available at http://ipch.yale.edu/sites/default/files/files/Berlin_Resolution_2003.pdf.

What is important here, is to realize that the collection of archaeological objects has proved to be problematic in many aspects. Should the archaeological objects all be preserved by the State as the Law proposes or should the Ministry adopt special measures in order to have support of private parties? In the first case, the Ministry should focus its efforts to procure the necessary logistic, human and financial resources. In the second case, the Ministry should carefully regulate the terms and conditions of this special practice, taking into consideration the realities of looting and illicit trafficking. In either way, there will be room to reflect on more sustainable ways of preserving Turkey's archaeological heritage.

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5. Protection of Cultural Heritage in the Kingdom of Bahrain: Practice and Challenges

Abstract

This Chapter aims to comprehensively describe the system of heritage protection in Bahrain.¹ The reader may find a descriptive information about various legal sources and critical analysis of the *de facto* heritage protection. The Chapter begins with a short introduction to the cultural patrimony in the Kingdom. The following part describes the domestic and international legal sources that contain provisions regulating the protection of heritage. The second part informs about the practice and regular work in the field of heritage preservation in Bahrain. The third part highlights the main challenges to cultural heritage including the regulatory framework shortcomings and development pressure. In the concluding section, the author suggests certain measures that should be applied in order to improve the heritage protection system.

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¹ Only members of the scientific community familiar with the World Heritage files repository have had chance to reach to documents with chapters dedicated to the protection of cultural heritage in Bahrain. Documents like The Integrated Management Plan for Qal'at al-Bahrain (Kingdom of Bahrain 2012) or Nomination File of The Pearling: Testimony to an Island Economy (Kingdom of Bahrain 2008) contain significant amount of information. However, the material provided does not go much beyond being relevant to the typology of the monuments concerned. The former document refers to the built heritage and the latter to the archaeological heritage.

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Introduction

The Kingdom of Bahrain is a small island country in the Arabian Gulf, north of Saudi Arabia and west of Qatar. Al Bahrain in Arabic means “the two seas”, one of which is the Gulf and the other the abundant underground aquifer that has allowed people to live here and prosper since the Neolithic Era.² Thanks to its strategic position and resources, Bahrain was home to the Dilmun and Tylos civilizations and later an important port for the Persians, Omanis, Portuguese, Ottomans and the British.

The most iconic examples of Bahraini cultural heritage are two World Heritage Sites: “Qal’at al-Bahrain”, and the “Pearling: Testimony of an Island Economy”. Qal’at al-Bahrain, also known as the Portuguese Fort, is a late-Middle-Ages fortress built in the Omani style and extended by the Portuguese with characteristic bastions. It is situated on the northern coast at the mouth of a natural sea channel.³ The Pearling Testimony is the serial nomination⁴ incorporating natural oyster beds in the Bahraini territorial waters and historic buildings related to the pearling industry which are located on Muharraq Island. For millennia, Bahrain was famous for its pearls, and until the 1930s the economy of the island mainly relied on the income from their sale.

The aforementioned Dilmun Civilization prospered in the region between 3rd and 1st millennia BCE. Its political and economic centre is believed to have been located in Bahrain, with Qal’at al-Bahrain as its capital and main port. The Dilmunites were traders and seafarers, and they left behind an impressive legacy of almost a hundred thousand burial mounds, several settlements, temples and water springs.⁵

After the Dilmun ceased to exist, Greek Hellenistic culture became influential in Bahrain and gave rise to the Tylos civilization. The Tylos, dated approximately between the 4th century BCE and 7th century CE, also left behind thousands of burial mounds and funerary offerings to the deceased.

After Islam reached Bahrain in the 7th century, the community stopped burying its members in mounds and started using more ‘conventional’ cemeteries. The heritage of the Islamic Era is mostly embodied in the architectural remains of mosques, palaces or merchant houses, all of which are built with typical Arabic features.

² LOMBARD/ALSENDI.

³ MACLEAN/INSOLL.

⁴ “Serial nomination” is a term used in the jargon of 1972 UNESCO Convention. It refers to the World Heritage sites consisting of multiple elements in different locations. In case of Pearling Testimony there are 3 oyster beds and 17 historic buildings inscribed altogether as one World Heritage Site.

⁵ HØJLUND.

The abundant cultural patrimony of Bahrain is vulnerable to threats caused by uncontrolled development, shortage of vacant land, housing needs, neglect, underfunding and natural factors. Its protection relies on the joint effort of the government and local communities.

I. National Legislation

Since the entry into force of the constitution of 2002, the main sources of law in the Kingdom of Bahrain are: the constitution; the royal order; the decree-law; the law; the decision (“order” or “qarars”). Royal decree and decree-law are issued by the King, the latter one only between the sessions of the parliament. The law is initiated by the parliament and issued by the King. Decisions are issued by the prime minister, council of ministers, individual ministers and heads of the authorities. Before the constitution of 2002, the Amir of Bahrain used to issue decree-laws upon consultation with the Shura Council (now the upper chamber of the parliament).⁶

The national legal framework for heritage protection in Bahrain is based on various laws. The most important is the Decree Law No. 11 of 25 June 1995 Concerning the Protection of Antiquities (hereinafter “Antiquities Law”). This law defines what a protected monument is, describes procedures for their registration, and contains further stipulations regarding excavations, research licences, import and export, penalties for breach of the law, and so on. This Decree is supplemented by several acts concerning development planning and zoning. These laws set up procedures by which development projects are initiated, consulted upon, and implemented. They also regulate what is permitted for construction in different areas of the Kingdom, by creating special codes (“zoning codes”) that are applied in development plans.⁷ Finally, they guarantee the participation of the Bahrain Authority for Culture and Antiquities (“BACA” or “the Authority”) in rezoning land containing or adjacent to protected areas. The last group of laws relates to environmental protection. Especially important are provisions concerning large-scale projects, for which environmental impact assessments (“EIAs”) must be conducted.⁸

A. The Antiquities Law

Decree Law No. 11 was adopted in 1995 by Amir Isa bin Salman Al-Khalifa. It replaced the older Bahrain Antiquities Law of 1970, amended by Decree Law No. 17 of 1985. The

⁶ Constitution of the Kingdom of Bahrain, Arts. 32, 33, 35, 37 - 39, 47, 70, 81-87.

⁷ In example, the zoning code RA allows construction of detached houses of maximum 3 floors and height up to 15 metres.

⁸ For more on the subject of EIAs, see Part II.C.

Antiquities Law consists of 56 articles arranged into seven chapters: I. General Provisions, II. Exploration and Excavation of Archaeological Antiquities, III. Antiquities Exploration Licences, IV. Registration, Maintenance and Disposal of Antiquities, V. Trading in and Exporting of Antiquities, VI. Penalties, VII. Final Provisions.

1. Definition of a Monument

According to Article 2 of Decree Law No. 11: “Anything passed on from civilizations or left over by previous generations explored or discovered whether that be a building or a movable object relating to the arts, sciences or literature or ethics or beliefs or daily life or public events or anything that is at least fifty years of age that has an artistic or historical value is considered a monument. Historical documents and manuscripts and related covers are considered monuments. Remains of human and animal pedigrees and other contemporary creatures that date back to six hundred calendar years are considered monuments. It is possible, by a decision of the Prime Minister made in accordance with a proposal submitted by a President of Bahrain Authority for Culture and Antiquities, to consider for artistic and historic reasons an edifice or a movable object a monument if the State has a national interest in conserving and maintaining it without complying with the time limit stated in this article”.

Article 3 then states that there are two types of monuments, immovable and movable. Immovable monuments “[...] are antiquities attached to the ground, such as archaeological mounds; remains of settlements and burial grounds; fortresses and bastions, historic houses and buildings; pools and qanats, religious buildings such as temples, mosques and others whether on ground or beneath it or in the territorial sea”.⁹

Movable monuments are “[...] movable objects manufactured to be naturally separate from the ground or static monument, whose location is possible to change without damaging them. The concerned authority may consider movable monuments as immovable ones if they were part of a static monument or related to and complementing it, or part of decorations such as inscriptions, scripts, architectural elements and gravestones”.¹⁰

A legally protected monument in Bahrain, also referred by the legislation as an antiquity, can be a movable object or immovable building or site which is at least 50 years old and was declared to be a monument by the President of BACA. The notion of immovable monument includes settlements, burials, mounds, forts, buildings, temples, wells, and irrigation channels (or the remains thereof). Any tangible object can be a movable monu-

⁹ Qanat is a traditional irrigation system used in Bahrain and other countries in the region. The water is pumped out from the wells and distributed through the network of channels to the cultivated land.

¹⁰ Art. 3.

ment. Human or animal remains must be at least 600 years old to be inscribed. Additionally, any movable or immovable object may be exempted from the requirement of being at least 50 years old if declared as such by the Prime Minister upon the request of the President of BACA.

The definition of a monument, according to above cited Articles 2 and 3, does not cover all types of heritage found in Bahrain and should be amended. As such, the provisions do not allow inscription of other heritage categories for example historic gardens or groups of buildings.¹¹

2. Registration of a Monument

Upon discovery of an archaeological site or after a heritage asset reaches the age of 50 years, it can be declared as protected by law and inscribed in the National Heritage Register. The National Heritage Register (hereinafter “the Register”) is the name of the collection of all decisions (also called order or qarar) by virtue of which sites have been put under protection over the years. As of October 2016, there have been a total of seven such decisions inscribing over 170 immovable monuments.

Registration of antiquities is regulated by Articles 26 to 34. In accordance with them, the Authority issues a decision in which the immovable or movable monument is named and declared as under the protection of the Antiquities Law.

The inscription of a new monument becomes effective after the decision has been published in the Official Gazette of the Kingdom of Bahrain. Registered monuments are considered public property, and may not be appropriated, possessed or disposed of, except under special conditions provided by the Antiquities Law.¹² Destroying, altering, damaging, deforming, decorating and changing features of the monuments as well as placing signs or billboards on them is prohibited.¹³

There has not been any qarar for the inscription of movable monuments. In practice, such objects are subject to registration in the inventories of museums administered by the Directorate of Museums. The movable artefacts are exhibited or safely stored in repositories and are only accessible by employees with security clearances and scientists with individual and non-transferable research licences. In fact, there is no inventory of movable cultural heritage publicly accessible to other institutions or to the citizens.

¹¹ See Part III.A for more information.

¹² Art. 5.

¹³ Art. 6.

Where immovable monuments are concerned, if the registered monument is situated on privately owned land, BACA informs the owner about its inscription in the National Heritage Register. BACA also notifies the authority responsible for urban planning,¹⁴ so that the registered area can be adequately marked on the Kingdom's development maps and intra-governmental information systems. Another notice is sent to the authority responsible for land registration¹⁵ in order to update the relevant registers.

The private owner may not fully exercise his or her ownership rights over the listed building or land on which the monument lies. In addition to the previously mentioned limitations, Article 33 makes BACA's approval a requirement for any renovation or changing of the features of a historic building, and for disposal of such a structure or land to a third person. The owner may request compensation from BACA within two years from the publication of the inscription in the Official Gazette, or from the date of notification about the inscription by BACA, whichever is earlier.¹⁶ One way of compensating the owner is for BACA to purchase the private land or structure.¹⁷ In practice, due to the limited resources, it takes many years for BACA to pay for each of the inscribed sites. Because of this some owners have filed lawsuits against the Authority.

Delisting of a monument from the National Heritage Register is not provided for in the Antiquities Law, nor has this taken place yet. Even though some archaeological sites which were inscribed by the first qarar in 1989 no longer exist, they are still listed in the Register.¹⁸ This is a matter that should be dealt with by future legislation. In the author's view, the procedure for delisting of a site, whether no longer existing or otherwise, should follow the same steps as registration. The President of BACA should issue a qarar stating that a certain site, building, movable object, etc., shall no longer be protected by law. The delisting would take place from the date of publication of the qarar in the Official Gazette.

Alternatively, the President of BACA could issue a qarar cancelling the older one which had inscribed the site in question. The delisting would also take place on the date of publication in the Official Gazette.

¹⁴ Art. 7.

¹⁵ Art. 31.

¹⁶ Art. 32.

¹⁷ Art. 9, and in accordance with Decree Law No. 8 of 1970 Concerning Land Acquisition for Public Benefit, as amended by Decree Law No. 24 of 1975 Amending Certain Provisions of Decree Law No. 8 of 1970 Concerning Land Acquisition for Public Benefit and Decree Law No. 6 of 2005 Amending Certain Provisions of Decree Law No. 8 of 1970 Concerning Land Acquisition for Public Benefit and Decree Law No. 24 of 1975.

¹⁸ In 1989 qarar had 17 articles declaring a total number of 31 sites under protection. The articles were rather short providing only a rough boundary for the registered sites. Due to the large scale infrastructure and housing development that took place in the 1990s, not all the registered sites survived to this day and some of them became smaller.

3. Penalties

The Antiquities Law contains penalties for violations of its provisions. Smuggling of artefacts out of the country is punishable with imprisonment and a fine of between 5,000 and 20,000 Bahraini Dinars.¹⁹ Excavating without a valid licence, as well as demolishing, damaging, destroying, deforming, changing the features of, or amputating any part of a monument is punishable with imprisonment of up to seven years and a fine of between 3,000 and 10,000 Bahraini Dinars.²⁰ Illegal trade in antiquities, forgery, failing to inform BACA about the discovery of antiquities, presenting false information in order to obtain an excavation licence, and declining or failing to deliver to the Authority discovered artefacts is punishable with imprisonment or a fine of up to 1,000 Bahraini Dinars.²¹

In addition to the above, the court may decide to confiscate the antiquity for the benefit of BACA. The verdict may also order the violator to demolish or remove anything constructed, introduced or planted in violation of the Antiquities Law.²²

B. Development Law

Additional laws with provisions used for the protection of cultural heritage in Bahrain are the ones regulating issues of construction, physical planning and zoning.²³ The legislative framework organising these matters consists of Decree Law No. 13 of 1977 Concerning Building Regulation as amended by Decree Law No. 15 of 1993 Concerning Building Construction, and Prime Ministerial Decision No. 28 of 2009 Concerning Zoning Regulations for Construction; and Decree Law No. 3 of 1994 Concerning Division of Land Intended for Construction and Development, and Prime Ministerial Decision No. 56 of 2009 Concerning Subdivision of Land Prepared for Construction and Development.

In accordance with these laws and the Antiquities Law, BACA must be informed about any development projects affecting registered sites and areas in their proximity. BACA's

¹⁹ The Antiquities Law, Art. 47.

²⁰ Ibid., Art. 48.

²¹ Ibid., Art 49.

²² Ibid., Art. 50.

²³ More information about physical planning and land use in Bahrain can be found in AL-NABI.

approval is a legally required condition for the commencement of the projects.²⁴ The approval of the Authority is also required for town and village planning,²⁵ building or restoration requests,²⁶ or development projects in the proximity of registered archaeological sites and historic buildings.

Article 107c (3), (4) and (5) of the Prime Ministerial Decision Concerning Zoning Regulations for Construction set a requirement for coordination with BACA for the development of “special projects” planned in the vicinity of archaeological sites, historical landmarks, or burial mounds. Special projects are those intended specifically for public benefit, and include a variety of structures such as electricity substations and schools. Such structures are not subject to height or design limits. The requirement of consultation with BACA is therefore of utmost importance to ensure as low an impact on the registered sites as possible.

Construction, building extension, demolition and other development must be conducted in line with the zoning regulations for the area in question.²⁷ The regulations are issued by the Ministry of Works, Municipal Affairs and Urban Planning through decisions. The following zoning codes are used in relation with protected sites: AR – archaeological site; GY – graveyard; US – under study; UP – unplanned. All these zoning codes forbid any development; the latter two, however, can be revised and rezoned at any time. Therefore, they are not considered as a good long term solution for heritage preservation. There is also a special designation of the historic area of Muharraq, encompassing the World Heritage Site of Pearling Testimony and surrounding historic houses. This code allows BACA’s experts to coordinate, with the Municipality of Muharraq, development in the old town.

If needed, a new zoning code can be created by a qarar of the Prime Minister. This is one of the potential ways of introducing new heritage protection solutions without the need for amending the Antiquities Law.

C. Environmental Law

The main law for environmental protection in Bahrain is Decree Law No. 21 of 1996 Concerning Respect for the Environment (“the Respect for the Environment Law”). In Article

²⁴ See Part II for more information.

²⁵ The Antiquities Law, Art. 7.

²⁶ Ibid., Art. 8.

²⁷ Unless the development project belongs to one of the categories mentioned in the environmental law as explained in the following passages. In such cases the project can only be allowed after extensive studies and, if necessary, mitigation measures.

2 it defines the environmental impact assessment (EIA) as a measure to protect the environment, conducted before licensing a project to determine its possible environmental effects, to prevent negative effects and to increase the positive effects of the project.²⁸

From the point of view of cultural heritage preservation, however, Ministerial Decision No. 1 of 1998 Concerning Environmental Evaluation Projects (“the Environmental Evaluation Projects Ministerial Decision”) is of higher importance. This qatar sets up conditions under which EIAs are required and stipulates what should be considered when conducting an EIA.

An application to the Environment Authority for evaluation of the environmental impact of a development project must be made for all new projects, except residential and light commercial building proposals in approved planned areas.²⁹ The Environment Authority reviews each application and decides whether the investor of the project is required to provide an EIA study. If the type of project corresponds to one on a list of 30 explicitly mentioned categories,³⁰ the EIA is mandatory *ex lege*.³¹ The investor must then commission the preparation of the study from a specialized consulting company.

Article 8, §8, read with Article 9, §3, of the Environmental Evaluation Projects Ministerial Decision constitutes the legal basis of cultural heritage impact assessment in the Kingdom of Bahrain:

“Article 8. The environment evaluation impact report of the project shall include the following bases and elements which conform to the nature of the project: [...] §8. A comprehensive description of the environmental situation which may be affected by the project and details of the reactions in all its stages with this situation and analysis of the environment reactions resulting from it in these stages.

Article 9. The list of the environment reactions situation that may be affected by the project referred to in the proceeding Article shall include the following effects and factors: [...] §3. Any effect on an area, place or building having aesthetic, archaeological, architectural, cultural, historic, scientific, social or any other environmental characteristics of a special value for the present and future generations”.

The impact on cultural heritage can be assessed as a part of the broader social impact assessment or separately in a heritage impact assessment study.³²

²⁸ HUMOOD.

²⁹ Ministerial Decision No. 1 of 1998, Art. 2.

³⁰ E.g. land reclamation, highway construction, oil and gas pipelines, refinery extension, construction of factories, etc.

³¹ Art. 4.

³² See Part II.C for more on this subject.

D. Royal Decrees

In exceptional situations, the protection of heritage in Bahrain can be achieved through Royal Decrees issued by the King of Bahrain. One such case exists at the moment – Royal Decree No. 26 of 2006 was issued to declare the visual corridor of the Qal’at al-Bahrain World Heritage Site as a special protection zone. The decree forbids development in the strip of sea from the coast of the fortress to approximately seven kilometres away from the shore.³³

E. International Conventions

The Kingdom of Bahrain has ratified five of the most relevant and widely recognized standard-setting conventions in the field of cultural heritage. Bound by these treaties, Bahrain is part of a sophisticated information and report scheme. It also enables the Kingdom access to a pool of international expertise and participation in meetings of experts from all over the world. As a State Party to these conventions, Bahrain regularly submits reports on their implementation, takes part in the ordinary and extraordinary meetings of the international bodies established thereby, responds to the requests of other State Parties, and maintains professional and friendly relations with them.

The first treaty, the Convention Concerning the Protection of the World Cultural and Natural Heritage,³⁴ was ratified on 28 May 1991. This treaty is of particular interest because of the special protection scheme of the List of World Natural and Cultural Heritage. As mentioned in the introduction, the Kingdom of Bahrain has two places inscribed on the World Heritage List: Qal’at al-Bahrain and the Pearling Testimony. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the First Protocol, and the Second Protocol,³⁵ were acceded to by the Kingdom of Bahrain on 26 August 2008. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,³⁶ the Convention on the Protection

³³ Although the government of Bahrain and UNESCO have later agreed to allow a low profile bridge to pass through the visual corridor. For more information see http://whc.unesco.org/en/soc/?action=list&id_site=1192.

³⁴ Adopted on 16 November 1972.

³⁵ Adopted on 14 May 1954 (the Hague Convention and the First Protocol), and on 26 March 1999 (the Second Protocol).

³⁶ Adopted on 14 November 1970.

of the Underwater Cultural Heritage,³⁷ and Convention for the Safeguarding of the Intangible Cultural Heritage,³⁸ were ratified on 7 March 2014.³⁹

The implementation of the aforementioned conventions has so far been carried out through the work of BACA and, earlier, the Ministry of Culture. There are no executive bylaws issued in this regard; however, their absence has not prevented BACA from fulfilling duties stipulated in the provisions of the treaties. In the author's view, it is not clear whether this situation means that the Conventions have direct effect in the domestic law of Bahrain. There has not been any judicial examination of this matter, and the Constitution of the Kingdom is also silent on the issue.

II. Safeguarding Measures

BACA was established in 2015 in place of the Ministry of Culture.⁴⁰ Its mandate includes overseeing the culture and national heritage sector. BACA is responsible for developing all plans and programs related to culture, arts, and heritage in the Kingdom of Bahrain.⁴¹

The Directorate of Museums is in charge of displays, exhibitions and interpretation of movable cultural heritage in the visitor centres of historic sites, and in the National Museum. It is also the Directorate's duty to appropriately conserve and store artefacts, and carry out research on them. The Directorate of Archaeology and National Heritage is on the frontline of cultural heritage preservation, conservation and management. It is divided in a unit in charge of archaeological heritage, and a unit responsible for the built architectural heritage of the 19th and 20th centuries.

Other institutions partly concerned with cultural patrimony are the municipalities of Bahrain, Sunni and Shia waqf (endowments) and the Royal Court.⁴²

³⁷ Adopted 2 November 2001.

³⁸ Adopted 17 October 2003.

³⁹ More information is available at http://www.unesco.org/eri/la/conventions_by_country.asp?contr=BH&language=E&typeconv=1.

⁴⁰ Until 2008 cultural affairs were under the responsibility of the Ministry of Information. In 2008 the Ministry of Culture and Information was established, and in 2010 the name of the institution was changed to the Ministry of Culture.

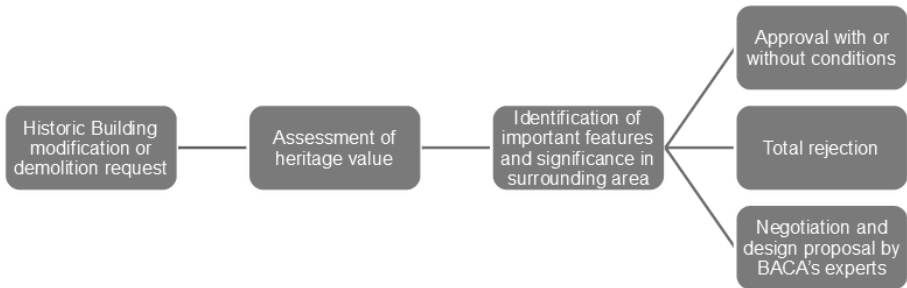
⁴¹ More information is available at Bahrain Authority for Culture and Antiquities, About the Authority, www.culture.gov.bh/en/authority/about_authority.

⁴² Sunni and Shia waqfs are endowments responsible of administering religious structures on a communal level, such as mosques, cemeteries etc. Cultural Authority provides expertise needed to conserve and restore the old mosques.

A. Building Permits

The bulk of the work of BACA in safeguarding built heritage is related to examining requests for construction, modification or demolition in the historic areas of Manama and Muharraq. These two cities are protected, in addition to the previously mentioned legislation, by municipal regulations which grant BACA the status of a recognized stakeholder in the so-called “permit process”. A permit for building works cannot be issued without BACA’s official consent in the way-leave system, which connects all interested parties.⁴³

After the request of the building owner to, for instance, modify or demolish a structure, BACA’s architects assess the character of the edifice, its original materials, later additions, decorative elements, and the function it played in its historic setting. The decision can be anything from the complete rejection of the proposal, to approval with or without conditions. In some cases only some elements of the building convey heritage value, for example, the original coral stone facade, the traditional bamboo ceiling or decorative window elements. If this is the case, BACA’s architects prepare a design proposal for the new or restored building which is in line with the most up-to-date conservation techniques. If resources allow it, BACA funds the restoration projects. If not, BACA seeks sponsorship from generous individual donors and private sector through the “Invest in Culture” initiative. Scheme 1 visualizes how building permits are reviewed by the Authority.



Scheme 1. Examination of building permits by BACA.

⁴³ Way-leave system is an IT application that can be accessed by designated personnel of the governmental authorities which take part in an assessment of the building application. Among these stakeholders are: Electricity and Water Authority, municipalities, General Directorate of Traffic, aviation authority, BACA and others.

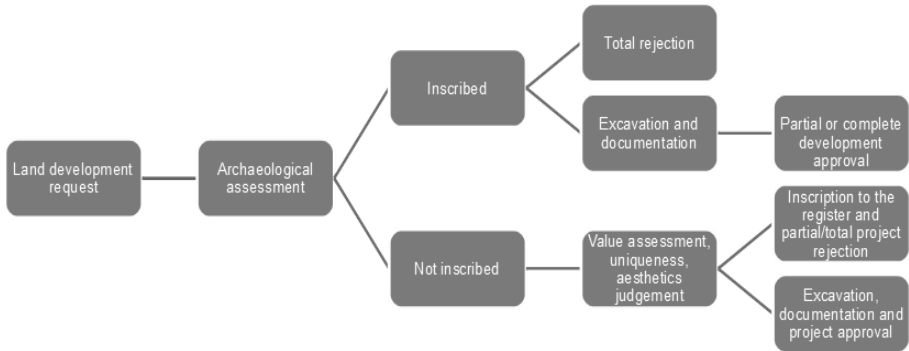
B. Land Requests

Archaeological heritage is protected in a similar way to the previously described process. However, in this case the development requests concern vacant land. The process is shown in the Scheme 2. After a request is submitted by a private owner who would like to construct a building such as a house or a mall on the land, BACA is asked to give feedback about the archaeological heritage in the area. If there is an inscribed archaeological site, the development is rejected. Rarely, the request may be approved as regards the part of the land which does not contain archaeological features. In really extraordinary cases, if the remains are neither unique nor exceptional (e.g., if their state of preservation is very poor), the request may be approved and the site delisted. The Directorate of Archaeology and National Heritage would then undertake a full excavation and document all heritage found.

If the land is not inscribed, but there is potential for the existence of archaeological features, BACA's experts conduct a survey and, based on the result, either approve the request or undertake an excavation. In extraordinary situations, when the archaeological features turn out to be unique and date, for example, to the Dilmun and Tylos periods, the place may be inscribed in the National Heritage Register. The project would be then rejected and the owner compensated.

Different processes take place when the development projects are undertaken directly by the government or major investors with governmental support. In these situations BACA has a status of a recognized stakeholder, but the final decision on the project remains with the government. In order to protect cultural heritage in such cases, BACA takes part in intra-governmental negotiations, requests impact assessment studies or, in special cases, may appeal to international bodies such as UNESCO.⁴⁴

⁴⁴ If the development project threatens to cause an irreversible change to one of the World Heritage Sites, the World Heritage Committee may issue a decision requesting the State Party to refrain from such actions. The Committee may further decide to inscribe the threatened site on List of World Heritage in Danger. The ultimate sanction to the State Party would be removal of the site from the World Heritage List. Additionally, the Director General of UNESCO may use her or his authority in hope to resolve the issue through the diplomatic channels.



Scheme 2. Examination of land requests by BACA.

C. Environmental Impact Assessment and Heritage Impact Assessment

As was mentioned before, it is stated in the Respect for the Environment Law that all large-scale industrial and development projects in the Kingdom of Bahrain require a prior environmental impact assessment which is conducted by well-known international companies. This is important for heritage protection because social and cultural impacts of a project are examined as part of the EIA.

In practice, the company chosen to conduct the study contacts BACA; explains what the relevant project is about, and asks for an official statement as to whether any known heritage sites are located in the project area. If there are none, BACA issues a no-objection letter. If there are heritage assets, BACA requests a heritage impact assessment (HIA).

The HIA can be anywhere between a few pages and several volumes long, depending on the type of the project and the heritage asset affected. For example, the HIA for a highway proposal close to Qal'at al-Bahrain and a dozen of smaller sites was over 600 pages long, contained over a hundred maps and resulted in the total abandonment of the project idea.⁴⁵

The HIA should ideally be conducted in line with ICOMOS guidelines and should take into consideration any sort of impact on the attributes of the heritage asset, such as visual impact, noise, vibration, pollution, traffic volume, siltation, and any impact on underground water, springs, wells, traditional fish traps (hadrah), etc.⁴⁶

⁴⁵ See Think Heritage!, Heritage Impact Assessment.

⁴⁶ ICOMOS Guidance on Heritage Impact Assessments for Cultural World Heritage Properties.

D. Customs

Another body actively taking part in the safeguarding of movable cultural heritage is the Customs Service. Its duties include preventing the illicit import, export and transfer of cultural property as defined in the 1970 UNESCO Convention. The Customs Service checks import and export certificates and searches for any undeclared antiques. In case the Customs finds any object attempted to be imported or exported without an appropriate certificate, it contacts BACA and requests a visit from an expert in order to assess the character of the item.

A good illustration of the work of Customs officers is a 2015 case in which a parcel from Lebanon entered Bahrain in order to be sent onwards to the US. Examination of the package revealed a hoard of glass objects wrapped in toilet paper. The BACA expert declared that most of the objects were genuine glass vessels and accessories from the time of the Roman Empire. The expert further declared that he believed the artefacts were originally removed from Syrian territory. The State of Lebanon was contacted through diplomatic channels to provide information about the exporter and to identify the rightful owner of the treasure.

III. Main Challenges

Protection of cultural heritage in Bahrain is a difficult task for several reasons. The country's abundance of archaeological resources, its small size and its very rapid pace of development create conditions of constant pressure. New projects come up every week and settling one case in favour of heritage preservation does not preclude similar case from reappearing. Even sites with the highest level of protection, like the two World Heritage Sites, face challenges from building projects of high importance.

Development pressure is just one of many difficulties. The others are very strong land ownership rights, an inadequate legal framework, a shortage of government staff and resources, and in some cases a lack of cooperation from the local community.

A. Shortcomings of the Legislation

Laws relating to heritage protection are not up to date with the international standard setting treaties, charters and recommendations. The Antiquities Law has not been amended a single time since its adoption more than two decades ago, even though Bahrain has ratified numerous international conventions in this period of time.

The Antiquities Law, at the time of adoption, was in line with the predominant perception of cultural heritage protection. It deals only with tangible heritage, which can be described with the wording of civil law used for ownership and property rights.⁴⁷

While research and heritage expertise have greatly improved since the 1990s, Bahraini legislation has remained where it was. Concepts of intangible cultural heritage; cultural landscapes combining works of nature and people; historic urban landscapes bringing together the multi-layered cultural, social and economic aspects of a place; and the broad idea of cultural significance going beyond a tangible monument to include its setting, meaning, associations and uses, are not recognized.

The main issues with the legislation are the limited number of heritage categories recognized by the law; the lack of provisions regulating the action to be taken when cultural property is illicitly imported, exported or transferred in Bahrain; and the lack of executive regulations for the implementation of ratified international treaties.

Although current legislation allows for proper protection of archaeological sites, the same cannot be said for other kinds of heritage assets. There is no legal basis to protect historic centres, districts or quarters, ensembles or groups of buildings, cultural landscapes, or natural components connected to the cultural sites. There was an amendment proposal in 2014 which aimed to solve this problem, however, due to restructuring of the government institutions, remained at the stage of parliamentary consultations. It is not clear how much longer can it take to finally pass the new or amended Antiquities Law, therefore, at the end of 2016 BACA prepared a proposal of a new zoning code of “Archaeological Garden”. If approved by the council of ministers, the zoning code would apply to the traditionally cultivated agricultural areas in the vicinity of Qal’at al-Bahrain, and potentially in other locations in the Kingdom. The proposal allows very limited development and specifies approved functions. It is hoped, that more heritage specific zoning codes will be proposed and implemented in the future.

Another legislative problem is that ratified international conventions have not been properly implemented through bylaws. For instance, there are no defined procedures to deal with intangible cultural heritage. Among measures to be taken is establishing a national inventory of intangible heritage that could serve as a base for future inscriptions to the Representative List of the Intangible Cultural Heritage of the Humanity.⁴⁸ The 1970 UNESCO Convention has only been partially implemented. For instance, the penalties from the Antiquities Law can only be applied in case of illicit exportation of heritage from Bahrain.⁴⁹ The Antiquities Law does not contain provisions against the unlawful transfer

⁴⁷ HASALTUN/WOSINSKI.

⁴⁸ 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, n. 38, Art. 16.

⁴⁹ The Antiquities Law, Art. 47.

of cultural property originating from other countries through Bahrain. All cases, like the one mentioned before, are dealt with through the diplomatic channels. Instead of foreign affairs, such cases could be done directly between BACA and relevant department of the cultural authority in concerned country. Most likely, it would make the work much faster and cheaper, as storing of some antiquities is expensive and occupies space in the repositories. Additional provisions could not only extend the application of strong penalties to all cases of illicit import, export and transfer of ownership of cultural property, but also have educational and preventive character.⁵⁰ It could be considered by BACA to apply some of the ideas from the 1954 Hague Convention with two protocols. For instance, registered historic buildings could have a symbol on a façade indicating their monument status. A widely recognized “blue shield” could be such a symbol.⁵¹ Additionally, both World Heritage Sites could be nominated to the Enhanced Protection scheme of the Second Protocol.⁵²

B. Development Pressure

A much more acute challenge than imperfect legislation is the constant pressure from the development both on an individual and a large scale. Part II.B. clarified the procedures for dealing with land requests. However, this is not the end of the matter. Land ownership rights in Bahrain are very strong, and even though there are legal clauses allowing for the appropriation of land by the government for public benefit, it is neither a quick nor inexpensive process.

The owner of the land may demand compensation for not being able to exercise his or her ownership rights. According to the Antiquities Law, the owner has two years from the date of inscription of the land in the Register of National Heritage to demand compensation.⁵³ It has long been a practice in Bahrain that the State acquires land or a building from the owner after inscription, thus fully compensating the owner with damages. However, for three reasons this practice no longer seems to be in place. First, the Register of National Heritage has been significantly enlarged in the past decade, meaning that more owners might seek compensation. Secondly, the value of land has skyrocketed, making it impossible to satisfy all claims with current budget constraints. In parallel, the rapid development of the last 20 years has created a shortage of vacant land and made previously inaccessible

⁵⁰ 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, n. 36, Arts. 7 and 10.

⁵¹ 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, n. 35, Arts. 6 and 16.

⁵² 1999 Second Protocol to the Hague Convention, n. 35, Art. 10-14.

⁵³ *Ibid.*, Art. 32.

and undesirable land parcels, on which many heritage sites are located, much more attractive and sought after. Together, these factors have resulted in more lawsuits against BACA for monetary compensation or the granting of alternative parcels of similar value.

C. Other Challenges

There are more challenges in safeguarding heritage. One problem, mostly visible in the historic cities of Manama and Muharraq, is the reluctance of the local community to abide by built heritage conservation rules. Bahrainis in general are very proud of the heritage of their country. Nevertheless, many people fail to see value in old houses, which are often in a bad state and require conservation. Private owners who would like to demolish the old houses and build new ones do not understand why BACA prevents them from doing so, and instead proposes to keep the original fabric.

This attitude of the community is additionally fuelled by the extremely low penalties imposed for breach of the law. The Antiquities Law states in Article 48 that unauthorized demolition or alteration of a listed monument shall be punishable with imprisonment of up to seven years and a fine of between 3,000 and 10,000 Bahraini Dinars. However, in practice, the typical fine for illegal action is virtually negligible. Instead of reporting the perpetrator to the police in order to put into use penalties from the Antiquities Law, municipalities typically apply administrative fine of 20 Bahraini Dinars.

Conclusion

There is no simple solution to all the challenges faced in heritage preservation in Bahrain. It is impossible to imagine that the development will cease to be a constant threat, or that all interested parties would start speaking the same language, favouring the protection of heritage. BACA should do everything in its mandate to influence future decision-making to be more sensitive towards cultural heritage and perceive it as an opportunity and not an obstacle.

First of all, the Authority should endeavour to amend its main law – the Antiquities Law – to include the new categories of heritage and incentives for preservation, as proposed in the ratified international conventions.⁵⁴ Ideally, this amendment should also introduce new heritage specific zoning code(s). It should be ensured that the amended law is easy to apply by all BACA personnel, understandable to other public bodies like the Ministry of Works,

⁵⁴ Incentives such as allowing sponsor's names and logos to be displayed on the funded project or next to the donated object.

Municipality Affairs and Urban Planning, the municipalities, the police, etc., and should clearly state the rights and the obligations of local community and private property owners.

The UNESCO Recommendation on Historic Urban Landscapes suggests seeking a balance between the needs of development and preservation of cultural heritage.⁵⁵ If development can be integrated into heritage areas without compromising their cultural value, then it can be permitted. On the other hand, new projects should embrace the cultural assets that are present in their area. Instead of levelling and losing them forever, these heritage sites can be integrated into the projects and augment their overall value.

It is particularly necessary to start effectively applying the tools which have existed in the law for more than 20 years. The full range of sanctions should be used to prevent unwanted behaviour towards monuments. At the same time, BACA should initiate a long-term communication strategy to inform the community about the value of their cultural heritage, the need for preserving it and ways to do so, and how people can collaborate with BACA. The communication campaign should become an integral part of BACA's agenda for implementation of the national heritage vision. All these measures should lead to better cooperation between the community and the Authority.

The Bahrain Authority for Culture and Antiquities has a vision to preserve authentic Bahraini heritage for future generations. Awareness-raising and the involvement of all stakeholders are measures which in the long run can bring the best results. They can create a bottom-up grassroots effect, spreading awareness and the will to preserve the cultural heritage of the Kingdom of Bahrain.

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PART II

ART AND CULTURAL HERITAGE: THE ROLE OF ETHICS?

6. Ethical Databases: Case Studies and Remaining Gaps in Cultural Heritage Information Sharing

Abstract

While digital cultural heritage is moving slowly from institutional and commercial contexts, into the public domain it is still under pressure, effectively being restricted by tenuous proprietary interests. This Chapter examines access to cultural heritage representations from a user perspective, focusing on image control and copyright in the broader framework of archival institutions and museum databases and reflects on whether collecting organizations such as museums and libraries are going far enough in meeting the aims of cultural heritage research.

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Introduction

In an earlier research project published under the title of “Access to Loss: Copyleft and the Protection of Visual Information”, we focused on the subject of digital images and databases for art and crime through the framework of law. This Chapter extends the discussion to representations in institutional databases wherein digitized materials (texts and images) are distributed that enhance a user’s research needs.¹ There is considerable potential for communities using networking technologies to solidify cultural heritage and identities across geographic boundaries. With the escalation in global art crime linked to the art market, law enforcement agencies (Interpol, FBI) and related agencies (Art Claim, The Art Loss Register, www.lostart.de) work towards a goal of greater dissemination of information in the public realm. But while these organizations compile vast amounts of information and create, manage and provide access to material, they are not structurally integrated.

Various types of institutions operate within the digital environment enhancing knowledge culture, yet digital assets are under pressure being effectively held up by tenuous proprietary interests. Digital copyright is not universally understood and it is not uncommon for copyright law to be used in a counterproductive manner. Content distribution, obfuscation of data and ownership of copies are equally valid concerns.²

This Chapter lays out how proprietary interests, used to unethically maintain a monopoly over information, would appear to limit the goal of digital image content distribution and information sharing within digital environments. Many organizations offer the public free access to digital content on the Internet including images of artworks by famous artists. The computational processing capabilities available today should make digital images accessible for provenance studies, tracking art sales and collecting metadata on stolen art wherever it may be located. We argue that high-quality digital representations of artworks must support the functionality of databases and reach a broad audience if cultural heritage is to be served.

This Chapter comprises five sections. First, it presents an overview of how museums, as representative cultural heritage institutions, link objects and information to visitors following a critical shift in paradigms associated with the idea of the “virtual museum”. Second, it provides arguments for making collections of digital surrogates accessible to serve the public at large. The third section looks at case studies illustrating fundamental differences in institutional databases and analyses some challenges users experience with online content. The fourth section discusses acceptable use of information and of art image copyright

¹ DOUGLAS/HAYES.

² For more, see LASTOWKA.

pertaining to digital reproductions of public domain works. Finally, this Chapter clarifies the areas that need to be developed if access to cultural heritage research is to be improved.

I. Context: Value Drivers in Virtual Museums

For over four decades, cultural heritage institutions – museums, galleries, libraries, archives – have been challenged, informed and shaped by computing and the concept of digital connectedness. These establishments, open to the public, have always upheld an ethical responsibility to maintain and manage special collections and computerized databases existing within them have sought to represent this information as a coherent system. Technology fundamentally changed museums in the 1990s. Real museum experiences and virtual museum experiences amalgamated, as leading institutions generated and stored information and datasets about artists and works and eventually made them available to the public. Information technology enabled museum institutions to present and interpret objects within their collections and also to metaphorically follow visitors out the door. As Hooper-Greenhill observed, museums moved from being “collections-driven” to “audience driven”, and in the process they evolved from temples of culture into accessible communal experiences. Today a wealth of knowledge about art can be accessed and downloaded with ease on mobile devices as well as social media from many museum platforms. We see “virtual” museums distributing digital resources and networked experiences to online communities in an era of digitization.

For example, Google’s Art Project allows one to tour acclaimed museum collections online and experience a simulated art gallery experience through zoomable images of select artworks from top cultural institutions. This rich display made available to us on screen calls to mind Malraux’s “imaginary museum” – a model closely resembling a virtual museum because he contemplated accumulating visual information that might be imaginatively adapted and adjusted to meet shifting needs. With the development of the Internet, interaction between multiple users has been facilitated. Fostered by shared experiences and driven by data, for users the net is a platform for multi-layered collaborative interactions and in museums it is used to support conservation, education, outreach and interpretation.

The World Wide Web and the Internet fundamentally transformed museums through design processes that enabled public access to collections from anywhere and at any time. One remarkable result of this phenomenon – identified with “convergence culture” according to MIT researcher Henry Jenkins – was that ordinary people could now discover, access and appropriate digital reproductions of original artworks for research and derivative

works.³ It is important to understand the background to these developments. During the 1990s, as museums moved from being collections-driven to audience-driven, they began to seek new ways to disseminate information with the help of integrated media.⁴ The aspect of marshaling entertainment along with information is significant because museums suddenly found themselves competing with theme parks and the mass media for survival.⁵ Information technology became, and remains, the testing ground of what the new museum might achieve. Designing relatable exhibits and other resources linked to cultural objects, museums explored creating new contexts for their collections in order to attract the public. When, shortly afterwards, they created platforms to give access to the public and researchers, they fully understood the implications. Making primary source data and information accessible not only helped people recognize cultural heritage and want to support it, it encouraged interactivity and allowed visitors to participate in electronically mediated culture.

As museums soon recognized, digital media has many characteristics – “intangibility, variability, interactivity and reproducibility”⁶ – which suggested they should start to describe themselves as “storehouses of knowledge as well as storehouses of objects”.⁷ The digitally mediated context of the Internet challenged museum professionals to rethink museological practice, and soon new media began to be integrated into curatorial practice (presentation and display). New media could provide broad access and detailed explanations to interested parties quickly and easily. Some museums adapted touch screens to replace or integrate text labels in galleries; through partnering with technological companies, they developed apps to distribute images and factual information; and technology in museums was also seen as the answer to other museum problems such as drawing in the crowds.⁸ Still another way technology began to alter museum institutions was through reference materials, electronic texts, hyperlinks and multimedia, content which engaged the attention of the viewer and brought about an encounter with original objects.⁹ In short, the new museum presents its information to the audience in many forms as a way of creating a con-

³ JENKINS.

⁴ SCHWEIBENZ citing HOOPER-GREENHILL, p. 134.

⁵ MACDONALD/ALSFORD, *Museum and Theme Parks*, pp. 129 et seq.; SCHWEIBENZ; MACDONALD/ALSFORD, *The Museum as Information Utility*, p. 76. See SYLAIYOU ET AL. for discussion on virtual and augmented reality in museums.

⁶ DZIEKAN, p. 52.

⁷ SCHWEIBENZ.

⁸ GRAHAM/COOK, p. 173. For more see RUBINO.

⁹ See LOHR.

nection and dialogue. The increased multimedia capacity of museums provided new opportunities for greater flexibility in the amount and kinds of information museums could present and share.

In administration, technology helped with concerns of operations and security of systems and processes. For communication, technology helped to analyze information from outside the organization. In marketing, people gained access to the Internet, and marketing techniques were developed to promote programs, enable online bookings, customer analysis and online ticketing.¹⁰

Cultural heritage networks enable users to collectively create meaningful encounters with the past and inspire more meaningful experiences of material culture. The digital environment had the effect of generating networked cultural heritage in the form of collaborative projects such as the Art Museums Image Consortium (AMICO, 1997 to 2005), the work of the Consortium for the Computer Interchange of Museum Information (CIMI, 1999), and the International Committee for Documentation of the International Council of Museums (ICOM-CIDOC), among others. Sources for art and historians and others, in the form of illustrated catalogues and digitized images could also be viewed online at the touch of a button. As the networked participatory institutional model took hold, national collections went online. For example, the Victoria and Albert Museum collection, with over a million catalogue records, represents one such initiative.¹¹ It is by no means exceptional. The Metropolitan Museum of Art partnered with Creative Commons to provide open access to over 375,000 images of public domain works in their collection,¹² and there is direct access to collections at Stanford University's Cantor Centre, the Guggenheim Museum, the Getty in Los Angeles, the Smithsonian, the Tate Gallery, the Whitney, the Norway National Museum, the Museum of New Zealand and perhaps most famously the Dutch national Rijksmuseum. This institution encourages visitors to download its high-resolution images of the masterworks in their collection urging them to generate personalized virtual collections and to treat the collection as a repository of images for creative remixing and making new works.¹³

The topic of technology and virtual museums was one that was circulating around the museum community and as more and more cultural institutions began to use the Internet to establish a presence, to educate, inform and entertain global audiences, international

¹⁰ RENTSCHLER/POTTER; GALANI/CHALMERS.

¹¹ V&A Images, available at <http://www.vandaimages.com/>.

¹² See The Metropolitan Museum of Art, New York, 7 February 2017, available at <http://www.metmuseum.org/about-the-met/policies-and-documents/image-resources>; and at <http://www.metmuseum.org/press/news/2017/open-access>.

¹³ See Remix the Rijksmuseum and Win!, 2014, available at <http://holykaw.alltop.com/remix-the-rijksmuseum-and-win>.

experts began gathering at annual conferences to debate digital cultural heritage, its documents, standards, preservation and best practices.¹⁴

Among the issues hotly debated was using open access software programs and tools to showcase a diversity of work being done. Some viewed it as important to make these projects widely available online where visitors and the institution could dialogue and consequently jointly develop new lines of research and investigation. Managers of digital collections were also encouraged to work collaboratively in a joint effort to overcome differences in organizational culture.¹⁵ This originated with the idea of convergence, a model that would challenge museums to reframe the role of the public in relation to larger policy goals as well as invite them to redefine virtual museum visitors as “members of the knowledge economy”.¹⁶

The digital side of convergence, “digital heritage” brings together a variety of data (historical, cultural, and scientific) and connects it with other distributed resources (tangible or intangible) in a digital environment.¹⁷ The first attempts to link open data have been traced back to the 1940s.¹⁸ In the 1990s, when those in support of convergence began to see the function of the museum as not only a source of knowledge but a service, the massive acceptance of open source software had already made the public sphere more democratic. One might argue that the intellectual commons came to be broadly perceived as benefitting intellectual culture as well as compelling public interest stimulating creation. Through the terms of Creative Commons licensing museums now had the ability to distribute images and texts opening up collections. The next step would be to enhance public access to institutional databases.¹⁹

Top museums and galleries began to make their resources available, some of them through creative commons licenses. For example, in October 2015, the Museum für Kunst und Gewerbe in Hamburg, Germany made its collection freely available online.²⁰ Amsterdam’s Rijksmuseum provided free online access to all of its paintings, including the ability to download and use the reproductions under the CC0 Public Domain Dedication license.²¹

¹⁴ The annual conference Museums and the Web, established in 1997, is an example.

¹⁵ MARTIN, p. 86.

¹⁶ MARTIN, p. 88; ERIKSON ET AL., p. 67.

¹⁷ OOMEN/BALTUSSEN. The term “digital heritage” describes historical, cultural and scientific data accessed through electronic media as well as collections of digital material museums might bring together in an online-accessible collection. Digital heritage is a subject and a practice cognate to but distinct from cultural or material heritage.

¹⁸ THOMA.

¹⁹ GOSS.

²⁰ Museum für Kunst und Gewerbe, available at <https://sammlungonline.mkg-hamburg.de/en/node/2>.

²¹ Overview of Creative Commons licenses available at <http://www.creativecommons.org>.

In Denmark, The National Gallery of Denmark (SMK: Statens Museum for Kunst) released more than 25,000 digital images with accompanying guidelines for use derived from the Europeana Usage Guidelines for public domain works.²² The British Library and the Japan Centre for Asian Historical Records (JACAR) jointly released more than 600 illustrated works into the public domain.²³

However, in the museum field the idea of making digital images easily accessible and databases explicitly open has not always been welcomed. Lohr reports museums were concerned opening up collections and having access to online content would hurt museum attendance figures and that curators worried about copyright and commercialization—for example that Google would try to profit from images being shared by museums.²⁴ Technological protection measure (TPM) regulations are often written into copyright laws with the intention to protect copyrighted material and prevent unlawful sharing of images and information. However, contracts were signed protecting copyright and pledges against using art images for commercial gain.²⁵

When creating digital reproductions, issues in production, resource allocation and compensation come into play. The digitization of a collection is a vast undertaking, one that requires time, effort and money. It poses threats to the business of administering a museum, and museums have had to make efforts to consider their business models in order to capitalize on the access to knowledge. The practical reality of digitally archiving collections information is that institutions may lack adequate financial and personnel resources to go through the process of archiving and making available even basic reproductions of their collections and associated information. Many institutions – under the Galleries Libraries Museums and Archives (GLAM) umbrella especially – note difficulties in securing funds for high resolution image scanning, building and/or training in digital database management, ensuring formatting for long-term digital information saving, ensuring the correct

²² Statens Museum for Kunst, available at <http://www.smk.dk/en/use-of-images-and-text/free-download-of-artworks/>.

²³ British Library Collection guides: Japanese collection, available at <https://www.bl.uk/collection-guides/japanese-collection>.

²⁴ LOHR.

²⁵ See PANTALONY, WIPO Guide, pp. 86-87; CREWS/BROWN; and BERTACCHINI, p. 71, which indicates that image permissions and sales should be a substantial revenue stream for museums; and REKRUT, p. 239, who notes that academic historians are concerned about the quality of digital representations of analogue records. HAMMA argues “placing art reproductions in the public domain and clearly removing all questions about their availability for use and reuse would likely cause no harm to the finances or reputation of museums, and would contribute to the public good”. On a separate note, the common mission of distributing online content via open access has not rendered all information producers equal. Small museums where funding is limited do not possess the ability to use technology on the same level as institutions like the British Library. See ANDERSON, *Museums of the Future*.

information is shared, and often lack the staff to lead and work on appropriately cataloguing collections materials.²⁶ To deal with these issues, current practices in archive and collection digitization have moved towards private/public partnerships in order to have the resources necessary for large projects²⁷ and initiatives such as the GLAM-Wiki project have sought to partner with institutions to catalogue and share collections in open source formats.²⁸ This does not mean relaxed control over the use and reproduction of images. There are numerous instances of pricings that have been adopted along with image-licensing models set by museums.²⁹

This process is complicated for museums, but digital rights management technologies that seek to prevent unauthorized copying track its use.³⁰ Numerous other concerns exist around digital image use: in addition to the various issues of rights management, there are reports staff in museums worry about losing control over how images are used or might be depicted.³¹ This raises questions about who owns, controls and maintains database content (primary information, digitized images, and associated metadata. Whether or not the making of digital surrogates of existing works gives rise to proprietary rights in the new creations, is a related fear. In a nutshell, the ideal of convergence and the deep impact of the Internet, engendered museum-related digitized information resources including online-accessible collections. The virtual museum promised interesting opportunities for presenting, organizing and distributing digital assets. The financial drivers and legal means of protecting images discussed illustrate the difficulty in pleasing all the players involved.

The digital images we are concerned with here are digitized two-dimensional surrogates of existing physical works of art. Securing rights to these images requires mechanisms beyond those that would be used to maintain ownership over physical goods, though still using the same framework of property rights and potential for criminalization of trespass or infringement. To date existing intellectual property rights have enabled larger players to maintain exclusive rights on information products, through exclusive licensing and contract, technological protection measures, extended copyright claims and legal action. For example, the US-based photo agency Getty Images filed a competition lawsuit against

²⁶ PANTALONY, WIPO Guide, p. 41, reports that intellectual property management is dispersed across departments and staff due to lack of resources. See also DRYDEN; and BERTACCHINI. CIFFOLILLI points out that part of the appeal in hijacking open access resources is that the production costs for digital reproductions are high and labour intensive, while making copies of existing resources is not.

²⁷ For discussion, see ROSENZWEIG. The Google Cultural Institute is another example of a private/public partnership.

²⁸ GLAM-Wiki project, Wikipedia, available at <https://en.wikipedia.org/wiki/Wikipedia:GLAM>.

²⁹ BERTACCHINI.

³⁰ PANTALONY, *Museums and Digital Rights*.

³¹ TANNER; KELLY.

Google with the European Commission.³² As of 2013, the Google search engine began displaying high-resolution images “scraped” from third party websites rather than thumbnails. According to a statement released by Getty Images: “Because image consumption is immediate, once an image is displayed in high-resolution, large format, there is little impetus to view the image on the original source site. These changes have allowed Google to reinforce its role as the Internet’s dominant search engine, maintaining monopoly over site traffic, engagement data, and advertising spend. This has also promoted piracy, resulting in widespread copyright infringement, turning users into accidental pirates”.³³ Until recently, Getty Images offered stock photos from a huge archive of over 80 million images paying photographers who make a living from licensing or selling their work. Copyright infringement is at issue when large agencies interfere with another’s right to control how to distribute images used on the Internet or for online or print publications. In March 2014, under pressure from online content creators and others, Getty Images discontinued its practice of watermarking its image collection thus allowing web publishers the right to use and share free unlicensed images in return for a credit line or attribution linked to their licensing page. This embedded, legal and free path to using images provides a powerful incentive for creators to use these large databases, with easy searches and scraped images as an image source in digital space. It is clear that when it comes to commercially available digital images, Getty’s decision to challenge Google relates to monopoly interests and not providing a resource for inexpensive images, education or the public good. Chances are that the high-resolution images distributed by Getty can be used to collect valuable user information just like Google or to plant advertising on web pages thus potentially providing them with a substantial revenue stream that is not being reflected elsewhere. Hence, as images in the private sector are increasingly being monetized and as various monopolies continue to fight with each other over who will control images, they raise issues of copyright, ownership, moral rights and remuneration for creators.

It appears that the question of whether or not reproductions of public domain works of art can or cannot be shared is in part an exercise in ethics.³⁴ It is also a question of copyright and of the driving forces behind copyright protection and exceptions. Working towards a common set of standards in the use and reuse of images involves copyright issues since digital images are easy to exchange, trade, and license as commodities. But opinion is divided as to whom has the right to assert control over digitally reproduced images by means of copyright.

³² France, Code de la propriété intellectuelle, Chapitre VI: dispositions applicables à la recherche et au référencement des oeuvres d’art plastiques, graphiques, ou photographiques at L-136-1 to L.136-4, in action as of 07/01/2017, outlines that automated search services, such as Google, will be required to pay licensing fees to creators under a collective management structure.

³³ MIYASHITA.

³⁴ For examples and discussion, see CAMPBELL WOJCIK; BELDER; RAHMATIAN; and MARGONI.

Over the years, we have seen many arguments to the effect that “access-control rights are harmful to the public good”. Multinational projects such as Europeana (Europe’s Digital Public Library) make specific note of the fact that the digitization of information should not result in new proprietary rights being applied to it. As stated on the front page of Europeana’s Public Domain Charter: “Digitization of Public Domain content does not create new rights over it: works that are in the Public Domain in analogue form continue to be in the public domain once digitized”.³⁵ Subjects also reported concerns about losing authority when image rights have not been secured.

These may indeed be legitimate concerns, but information property rights have largely allowed those who supply or facilitate access to information to maintain exclusive rights on their information as products via licensing and contract, leading to the use of venues outside of traditional protections in physical goods to maintain their control over their information products. This back and forth around cultural heritage information leaves users struggling with a “permissions purgatory”.³⁶

II. Accessible Databases of Digital Images

Since the 1990s, when the digital environment of the current World Wide Web was first created, key databases such as the FBI Stolen Art File and Interpol Stolen Works database have been online, many of them exchanging pictures as well as information about stolen artworks to other agencies but not necessarily to the public at large. Online resources provide details of cases of looting, heists, and of missing objects around the world which may act as deterrents to crime.³⁷

Resources, in the form of archival records, information about missing works of art, cases of restitution and the results of provenance searches are accessible both through non-commercial databases (Interpol, FBI, IFAR) and commercial websites (Art Claim, The Art Loss Register). Marinello and Hasler establish the usefulness of databases in due diligence research: “[...] what is more important than any single resource for due diligence in the art market is the awareness of how useful databases can be in the due diligence responsibilities of auction houses, galleries, and dealers alike”.³⁸ Indeed, there are many existing open

³⁵ Europeana Public Domain Charter, available at <http://www.europeana.eu/portal/en/rights/public-domain-charter.html>.

³⁶ CREWS.

³⁷ United States Attorneys’ Bulletin 2016, 4 at IV: “Because these cases get excellent press coverage, they are important examples to discourage criminals from committing cultural property crimes”. CZEGLEDI suggests best practices if your art is stolen include “[...] publicizing the theft in every way possible” as “secrecy only benefits the offender” (p. 74).

³⁸ MARINELLO/HASLER, pp. 318-319.

access initiatives with the potential to aid in combatting art crime and with due diligence in sales, donations and transfers. Some are connected specifically with provenance-related claims and restitution and extend to art recovery issues that have intersected with case law.

Research suggests that, when authoritative sources share files and images online thus allowing everyone to play a part in art crime investigation, the result is awareness of the global extent of criminal activities. The connectivity of the Internet has led to transformations in the field of law enforcement where specialized agencies routinely disseminate information about art crimes via social media.³⁹ People who formerly investigated crimes working patiently through records and documents stored in passive repositories such as libraries now use the Internet as an electronic reference service and make contact and develop long-term relationships with a wider public through message boards, online chats and blogs. More significantly for this Chapter, information technology has made it possible for large number of individuals to find reliable material on art by accessing digital collections. These database users, who formerly had very limited access to expert opinion or professionals inside or outside cultural heritage organizations, not only maintain a presence on the Internet but have been using the Internet to get involved in monitoring the traffic of stolen artefacts, many of which are being sold online.⁴⁰ With increased access and interactivity, the Internet offers a cheap, complementary form of policing activity for law enforcement. This is particularly important given the global nature of the art market and the reported increase in transnational crime which, as Kerr argues: “poses immense challenges to cross border policing”.⁴¹

To put this in context, according to the US Department of Justice, art crime ranks as the fourth highest grossing criminal trade, behind the arms trade, drug trafficking and terrorist activity, and the impact of the global art crime industry is estimated to be in excess of US\$6 billion a year.⁴² Reportedly, international crime syndicates fuel the trade in masterpieces⁴³ while antiquities from Egypt, Iraq and Syria appear for sale online with depressing regularity giving rise to concerns about the destruction of cultural heritage on a broad scale.⁴⁴ Art and other similarly valuable objects are increasingly exposed to appropriation,

³⁹ For some examples, see O'REILLY/SHAW; NG.

⁴⁰ See relatedly BRODIE, *The Internet Market in Antiquities*; and CAMPBELL, pp. 141-142. For a specific case of using the Internet to solve an art crime see “Blue Dog” painting recovered hours after being stolen in New Orleans, available at <http://in.reuters.com/article/us-usa-painting-new-orleans-id-INKBN0KG2BG20150107>.

⁴¹ KERR, *The Securization*, pp. 16 et seqq.

⁴² See DOUGLAS/HAYES, p. 102 for related discussion.

⁴³ For more, see DOBOVŠEK/SLAK, p. 397; and DOBOVŠEK.

⁴⁴ For more see DURNEY/PROULX. See also BORODKIN; PASTORE; BRODIE, *An Archeologist's View*; TUHUIS; BOWMAN; NAYLOR; PROULX; and HARDY.

vandalism, and other forms of criminal activity as the value of works of art escalates in the art market both symbolically and financially.

Ironically, while transnational crimes against culture are dramatically publicized in the media, and big thefts or thefts involving large sums of money garner attention in criminological research, day to day criminal acts are far more widespread.⁴⁵ Art is taken from smaller collections in private hands, public museums, art galleries and artist's studios with alarming frequency. Lower value property crime present a problem not only for those whose important role it is to govern, monitor and securitize the art world but for individual art collectors whose vulnerability is arguably greater. A general lack of reliable information may also adversely affect the insurance industry⁴⁶ and the knowledge gained from linked open access databases would afford opportunities for managed risk assessment in the context of art security.

Many suggest a lack of cross-referencing capability between databases imposes limits on practical advances and research in the fields of art crime, provenance, restitution, and ethical art sales and transfers. There have been calls for linked open, impartial databases from numerous quarters, both professional and academic. For instance, Interpol granted the public access to its records of theft/ missing artworks in 2009 in the belief that it is crucial to the fight against illicit art and antiquities trafficking.⁴⁷ It set an important precedent and Aplin, Belder, Root, and Benson have all put forward compelling arguments for making more images available in the public domain.⁴⁸

Of course, not everyone agrees. Some criticize free open databases claiming privacy concerns and essentially arguing for the monopolization of databases.⁴⁹ Yet many more in the public sector believe that free open databases are a simple and effective way to combat crimes against art. Websites and virtual world technologies appeal to modern audiences for whom technology opens doors through two-way and multiple-way exchanges of information. For those who recognize that digital reproductions play a vital part in securing cultural heritage, universal access means civic engagement and collective action.

⁴⁵ KISLUK; POLK; TIJHUIS; and KERR, *The Securitization*.

⁴⁶ KERR, *The Art of Risk Management*.

⁴⁷ See Interpol website, available at <https://www.interpol.int>; KIND; and KERR, *The Securitization*, pp. 100 et seqq.

⁴⁸ See APLIN; BELDER; ROODT/BENSON. For an example of a broader call for open access to images, see CUNO. The issue of proprietary interests surrounding the dissemination of reproductions of Old Masters and other works in the public domain and public access to all available information has also been raised in connection with problematic trafficking and auction houses in TSIROGIANNIS. See n. 20 for more.

⁴⁹ For example the Chairman of The Art Loss Register, see discussion in KERR, *The Securitization*, pp. 100 et seqq.

Arguing for universal standards-based information management and collection management to meet user needs, David Bearman offers the interesting perspective that cultural institutions have already implicitly recognized the power of visual surrogates of primary materials.⁵⁰ Over a decade ago William Thomas wrote, “The goal for historians working in the new digital medium needs to make computer technology transparent and to allow the reader to focus his or her whole attention on the ‘world’ that the historians have opened up for investigation, interpretation, inquiry and analysis”.⁵¹ More recently Robert Martin, former Director of the Institute of Museum and Library Services (IMLS), said: “One goal of successful collaboration is the assurance that the integrity of each institution is sustained by the partnership”.⁵² Thus, not only are databases a vital part of the strategic stewardship of cultural resources but, in the long run, institutions might serve their users better through a developed sense of ethics. In line with Martin’s expectation that individuals and institutions should foster the exchange of information and expertise, we argue that cultural heritage is strengthened by sharing and increased visibility leading to culturally responsive databases⁵³ that may be tailored for specific user needs.

III. Case Studies

This leads to the theme of copyright. The argument so far: Cultural heritage research, recovery, and due diligence in art transactions is greatly aided by access to visual information about missing or problematic property.⁵⁴ While many believe that strengthening the potential for use of pertinent information for the protection and recovery of cultural heritage is achieved by sharing and increasing visibility,⁵⁵ others feel pressure to limit access to images and hence restrict not only the exchange of pictures but of information concerning problematic stolen or missing works of art.⁵⁶ Thus the question appears to be one of how

⁵⁰ BEARMAN, p. 49.

⁵¹ THOMAS, p. 66.

⁵² MARTIN, p. 86.

⁵³ On the potential of information sharing with a variety of users and/or with no specific or directed uses in mind see CONWAY; VERWAYEN ET AL.

⁵⁴ DOUGLAS/HAYES.

⁵⁵ BIBAS suggests at p. 2439 that prompt reporting of theft to police and computerized databases should be incentivized since it is important for recovery.

⁵⁶ For more on the claim that sharing information about lost or stolen works of art leads to an increased likelihood of theft, see *Guggenheim v. Lubell*, 77 N.Y.2d 311 at para. 320. The museum claimed that, following advice from several parties, publication or reporting of the theft of a painting would drive the item further underground. Studies and figures to verify this claim were not discoverable at the time of writing.

specific conceptions of information as property can be adjusted to not only share information resources but also to catalyze innovation in art crime research to meet the specific goal of advancement of research into cultural heritage crime and loss, recovery of property, and ensuring due diligence and best practices are being met.

This section briefly surveys case studies of visual representations of analog material in selected websites at the forefront of opening access to their content. The digitized images in question represent items of cultural significance shared with offsite and on-site researchers. The institutions housing these collections variably provide free access to content and also reinforce the legitimacy of copyright law through both technological and non-technological means.⁵⁷ We examined select online databases focusing on functionality for various agents and on the terms outlined for permissible use.

The Getty Museum's Open Content Program, linked to the Getty Research Institute's (GRI) Online Scholarly Catalogue Initiative (OSCI), affords scholars, curators, and conservators a means to understand works of art through their digital catalogue. The Open Content Program was started in 2013 with the aim to be ever-expanding source of restriction-free digital copies of works believed to be in the public domain.⁵⁸ The project's "About Us" page makes specific note of the fact that the Getty Research Institute does not claim copyright on digital images of public domain works.⁵⁹ The Open Content Program section contains a relatively small number of pictures, around 10,000 images. Another GRI project, the Getty Provenance Index, offers charts, maps and documents. The Provenance Index has been undergoing a re modeling since 2016 in order to allow for the data on it to be open and able to be linked with other existing information via a Linked Open Data agreement and datasets available on GitHub.⁶⁰ The relative ease with which this information can be accessed or shared and linked may partly be a result of the lack of images associated with the database.

As a contrast in provenance research, Phase 1 of the Smithsonian Institution's Freer|Sackler (FS) archives, linked with the Smithsonian Provenance Research Index (SPRI), enables scholars to make use of emerging technologies to create their own digital archives. The FS

⁵⁷ For more on the technological vs. non-technological protection mechanisms, see DRYDEN.

⁵⁸ Getty Foundation, Getty Releases Second Batch of Open Content Images, More than Doubling Number Available to the Public, Getty Foundation Press Release, 15 October 2014, available at http://news.getty.edu/press_materials.cfm#2-3-5826.

⁵⁹ Getty Research Institute Open Content Program, Frequently Asked Questions, available at <http://www.getty.edu/about/whatwedo/opencontentfaq.html#about>. Other issues, however may be barriers to sharing, such as privacy and publicity, contractual obligations, or copyright held by another party.

⁶⁰ Getty Research Institute, Getty Provenance Index Remodel Project, available at http://www.getty.edu/research/tools/provenance/provenance_remodel/index.html.

archives contain more than 40,000 works, around 90% of which are available in high resolution for non-commercial use. This makes almost the complete digitized collections of the Freer|Sackler Galleries and the Freer Study Collection free to explore.⁶¹ The Freer|Sackler lacks the permissions necessary to release high-resolution images of some contemporary artworks but makes thumbnail images available. The governing Smithsonian Terms of Use, while not overly explicit, complicate uses of Smithsonian material by being vague, a fact seemingly affirmed by stating: “[...] copyright is often difficult to determine with certainty, so the phrase [‘no known copyright restriction’] is intended to say that the Smithsonian is unaware of any copyright restriction, but such restrictions may still exist”. The terms indicate that other considerations, such as rights of privacy, publicity or contractual obligations, may limit use. The Terms of Use page also places limits on educational use: users may include content in a research paper or class work if they identify the source and do not remove any proprietary notices of any kind in or near the text.⁶² The Smithsonian Digital Asset Access and Use Directive gives the impression that someday the open and free nature of these digital assets may change. “Until a public domain policy is developed and implemented by the Institution, holding units are encouraged to make public domain digital assets available without restrictions and without licensing fees”.⁶³

The Commission for Looted Art in Europe’s (ECLA) lootedart.com provides case news, details of claims, case law, details of looted property claims and other such provenance research-related resources. The site is searchable by country and provides resources for claimants in international disputes, some of whom may wish to remain anonymous. The Commission, set up in 1999, is a non-profit representative body. This means it exercises responsibility for managing particular kinds of information about individuals or active cases involving disputed property. It also means keeping an inventory of assets as an aspect of the records database. This site is not well supported by high-resolution digital images, arguably due to the sensitive nature of the material involved. The site’s Terms of Use are vague, the objects (texts and images) are potentially open for non-commercial use and site and content are noted to contain “proprietary and confidential information which is protected by applicable intellectual property and other laws”.⁶⁴

By far the most open and comprehensive resource is Europeana. Funded by the European Commission, it is a services platform containing images from a spectrum of European institutions, but they are not geared towards any specific use.⁶⁵ The Europeana Digital

⁶¹ Freer|Sackler, FAQ, available at <http://asia.si.edu/collections.faq>.

⁶² Smithsonian Institution, Terms of Use, available at <http://www.si.edu/termsfuse>.

⁶³ Smithsonian Directive 609, Digital Asset Access and Use, available at <http://www.si.edu/content/pdf/about/sd/SD609.pdf>.

⁶⁴ Commission for Looted Art, Terms and Conditions: Web User Agreement, <http://lootedart.com/terms-and-conditions>.

⁶⁵ VERWAYEN ET AL.

Library enables cultural institutions and users to access, provide, and build applications using Europeana functionalities through the Europeana Portal. Data contained within the database includes: Digital Surrogate Objects (DSO) of different kinds, “born digital” or Digital Primary Objects (DPO), representations of real physical objects (known as RPO), and digital objects obtained by digitizing RPOs and created by data providers. Each DSO is linked to a meta-record describing the object concerned and to licensing information. Despite the aims of the European Community Framework in opening access to all works in the public domain, not all of the images are free to use. The documents and image records are consolidated for viewing by various aggregators, only some of which use open access and therefore are committed to making culturally important works publicly available.⁶⁶ The sheer scale and scope of Europeana differentiates it from other similar initiatives we have discussed. So much information is available that ensuring alignment between source materials such that linking and preservation is facilitated is the salient concern. Alignment in rights management across participatory institutions has proved a challenge for developers, as has data normalization and creating relationships among DSOs. The difficulty for users is that, with so many layers of content, many find it impossible to know where to begin.

Created by research leaders and institutions ethically committed to mobilizing information for scholarship in the interest of public access, these four important public databases are representative of the kind researchers might use as tools in provenance as well as criminal investigations. The impression we create by looking at them is that these institutions champion open access, especially encouraging personal and educational use. Many produce high-quality images and associated projects that make use of their content to promote the museum and education surrounding the institution and its collections. Additionally, there is demonstrated care in accounting for potential risks associated with publicly discoverable information as well as in the management of sensitive material. Halting progress towards linked dedicated databases, such as those used for researching provenance, are low resolution digital surrogate objects (thumbnail images) and hurdles remain in the form of technological protection measures. Sharing low quality images is one technological means of limiting access. Thumbnail images are seen as unproblematic because they reproduce works at a size too small to make them useful for unlawful appropriation.⁶⁷ Cultural institutions appear to have a limited understanding of acceptable use of information and of art images. From the perspective of a user, permissions information is often vague, which

⁶⁶ CONCORDIA.

⁶⁷ *Authors Guild v. Google*, para. 103: “[...] thumbnail images, which transformatively provided an internet pathway to the original images, were of sufficiently low resolution that they were not useable as effective substitutes for the originals.”

reflects on the nature of copyright law more than it does on the intentions of institutions. We will briefly elaborate further on this complex subject in what follows.

IV. Public Domain Images Copyright

Copyright law is a means of controlling access to and use of intellectual property for both commercial and non-commercial purposes. Copyright protection is attached to original artistic, literary and other works of authorship. Legislated copyright provisions generally include rules regarding the length of protection, authors' rights, infringement actions, exceptions, remedies and highly specified rules for different types of works.⁶⁸ It does not apply to works in the public domain or works which are not original.⁶⁹ Copyright legislation is outlined and controlled at international, national, and sometimes sub-national levels, making its parameters difficult to determine and navigate.⁷⁰ The written laws of copyright are influenced and adapted in response to changes in culture that are first evident in standardized practices across various industries and in relevant jurisprudence. In legal theory, interpreting the purpose of intellectual property and copyright law calls for adaptation to changing needs including a reorientation of thinking about copies and proprietary rights. Craig states that copyright is "central to our evolving information system"⁷¹ and other legal scholars have proposed an operative conception of property law wherein the law is adapted to serve societal goals and values.⁷² Drassinower suggests a reorientation of copyright to consider it not just in terms of balance between author and user rights but in terms of authorship adding to an ongoing cultural conversation that can be adapted as needs

⁶⁸ For example, following the Berne Convention, copyrights and exception legislation generally includes specifics pertaining to artists and works of art. See, for example, the Visual Artists Rights Act in the United States U.S.C. §106A. The US is currently undergoing a review of moral rights concerns in copyright law, see USCO Library of Congress, Study on the Moral Rights of Attribution and Integrity, available at <https://www.gpo.gov/fdsys/pkg/FR-2017-01-23/pdf/2017-01294.pdf>.

⁶⁹ For example: The Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886; WIPO Copyright Treaty of 1996 set the minimum standards for protection of copyrightable works that can be expanded on a country by country basis. For discussion, see MARGONI; and CANAT ET AL., p. 10.

⁷⁰ For discussion see VAVER; GELLER; and TORREMAN.

⁷¹ CRAIG, p. 631.

⁷² UNDERKUFFLER, pp. 54, 38-51: an operative conception that governs legal matter wherein "individual rights are fluid in time and mutable as circumstances dictate".

change.⁷³ Lawful copying is part of copyright, as is the current model suggesting that balances should be struck between creativity incentives and public interest.⁷⁴

Though copyright protections may appear absolute, certain exceptions written into all copyright legislation allow for specified uses of copyrighted material to further purposes such as research, education and preservation of culture.⁷⁵ These copyright exceptions are intended as a safeguard to reduce the likelihood of overreaching and provide limited use rights for specifically designated purposes. The legislation across borders, as well as the language associated with these exceptions can be difficult to navigate.⁷⁶ Complicating the untangling of rights and exceptions further, all countries signatory to international treaties such as the Berne Convention recognize foreign copyrights and exceptions as well as their own.⁷⁷

It is important to note that exceptions are not rights. Whether or not use of copyright protected material is allowed is determined through bureaucratic and pseudo-legal mechanisms. Lack of understanding and exaggeration of the potential risk in opening up uses of material, even to outlined copyright law exceptions, has led to overextension of restrictions (“better safe than sorry”) in cultural heritage institutions.⁷⁸ For example, in a 2015 complaint, the Reiss Engelhorn Museum maintained that because of new copyrights resulting from the digitization of artworks, representations of Old Masters’ works in their collections cannot be freely shared with the world.⁷⁹

Interestingly, despite the existence of copyright exceptions, the field of visual arts is very much one of a “permissions culture” wherein it is generally accepted that new uses of copyright protected material must be directly authorized.⁸⁰ Concerns over the appropriation of shared information and images by Internet-mining companies have proved justified in several instances. The use of shared images plays a significant role in civil suit decisions

⁷³ DRASSINOWER, Note.

⁷⁴ *Ibid.*, p. 3.

⁷⁵ For an overview of exceptions in countries where the copyright law refers specifically to “museum(s)”, see CANAT ET AL., Appendix II, pp. 2-72.

⁷⁶ See CHAPDELAINE for discussion of exceptions in the Canadian context; and DRASSINOWER, Note, for a discussion on the framing of value in copyright law and that copyright limitations are user rights rather than exceptions.

⁷⁷ AUFDERHEIDE ET AL., pp. 24-30.

⁷⁸ *Ibid.*, pp. 40-48; DRYDEN; and TANNER, pp. 31-32. Overextension of protections is also cited as being necessary because many museums and public institutions lack the resources to follow up on potentially infringing actions.

⁷⁹ *Reiss-Engelhorn Museum (REM) of the City of Mannheim v. Wikimedia Foundation Landgericht*, available at [https://wikimediafoundation.org/wiki/File:Reiss-Engelhorn_Museum_\(REM\)_of_the_City_of_Mannheim_v._Wikimedia_Foundation_Landgericht.pdf](https://wikimediafoundation.org/wiki/File:Reiss-Engelhorn_Museum_(REM)_of_the_City_of_Mannheim_v._Wikimedia_Foundation_Landgericht.pdf).

⁸⁰ AUFDERHEIDE ET AL., pp. 24-39.

and policy conversations about open access where collective licensing groups and individuals advocating for creator rights are meeting with difficulties in asserting the view that mass information scraping is hurting individual creators as well as the creation of new works. In the United States, the *Authors Guild v. Google, Inc.* decision sets the foundation for what has been termed the “new realities of modern publishing”. It determined fair use exceptions may be applied to mass information mining as long as the information amassed serves a demonstrable public good and does not directly harm the market from which the material was scraped.⁸¹ The *Authors Guild* decision applied to the fair use of scraping and sharing portions of copyright protected texts. The implications of the case are that information made available online can be scraped by commercial entities (e.g. Google) for use in non-commercial ventures such as Google Books.

More recently, Getty Images and related affiliates were accused of scraping and licensing thousands of public domain images after photographer Carol Highsmith was asked to pay for photographs she had taken and uploaded under an open license.⁸² For proponents of author rights, the assumption was that, unlike *Authors Guild v. Google*, Getty Images’ actions were likely to be infringing on the photographer’s copyright. The photographs in question are original works attributable to a creator and therefore should easily qualify for copyright protection. However, Highsmith’s copyright claims in thousands of images were entirely dismissed by US District Court Judge Jed S. Rakoff in late 2016.⁸³ At the core of Getty Image’s argument was the idea that public domain material is often amassed and used for profit.⁸⁴ Without written clarification from the Judge, this indeed appears to be an acceptable practice. There is an enormous potential for financial rewards to be gained from the licensing of public domain images and licensing agencies such as Getty Images set the commercial industry standard.⁸⁵ As oligopolies such as these gain more control over information, they fight one another over these lucrative resources. Both companies have been involved in antitrust lawsuits in Europe over image rights and image sharing, and both

⁸¹ *Authors Guild v. Google Inc.*, No. 13-4829 (2d Cir. 2015) at para. 42. The US Supreme Court denied review on April 18, 2016.

⁸² Southern District of New York, *Highsmith v. Getty Images*. Historical and Topical Legal Documents, Complaint: 16 CIV. 5924 filed 17 August 2016 available at <http://digitalcommons.law.scu.edu/historical/1246/>. Amended complaint: 16 CIV. 5924 filed 25 July 2016, available at <http://digitalcommons.law.scu.edu/historical/1262>.

⁸³ WALKER.

⁸⁴ See Getty Company News, Statements regarding Highsmith claim, 28 July 2016, available at <http://press.gettyimages.com/statement-regarding-highsmith-claim>.

⁸⁵ A 2015 assessment of the value of public domain images, examining biographical pages on Wikipedia, put the value of images on the sites at USD \$208 million (GBP £138 million), using pricing set by commercial image groups Getty Images and Corbis. ERIKSON ET AL., pp. 4, 65.

have previously been the subjects of antitrust investigations over image sharing in Europe.⁸⁶ The Getty Images and Google cases illustrate some of the high stakes of commercial image scraping and licensing, but smaller players such as individuals are also implicated.

If commercial enterprises can share images on a mass scale, what about individuals sharing a limited number of images? The Supreme Court of Sweden ruled in 2015 that individuals were allowed to take photographs of public art, but sharing the images online in an open database was “an entirely different matter” because “[s]uch a database can be assumed to have a commercial value that is not insignificant” and “artists are entitled to that value”.⁸⁷

Similarly, in a 2009 civil suit submission by the National Portrait Gallery (NPG) of the United Kingdom against Wikimedia, the NPG and its legal team took issue with the fact that images appropriated from their shared database by an individual and uploaded to an open access site could then be used in a way they could not control.⁸⁸ Any time an image is shared online it is open to potential appropriation. This is why international and national policymakers have discussed and implemented measures designed to limit the appropriation of digital surrogates of creative works regardless of the intention behind putting them online.⁸⁹ Uploading images and making a financial gain in any way, even pennies from banner ad revenue, has been viewed in image-sharing civil suits as stealing from creators or alternately as opening up the potential for others to steal. According to EU Parliamentarian Julia Reda, the concern in allowing images to be shared freely lies in that the “realm of commercial usage is entered long before a person makes a profit”.⁹⁰ The debate over Freedom of Panorama exceptions in the European Union highlights some of the potential for nationally varied rules and difficulties in policy and legislation harmonization.

Regardless of commercial vs. non-commercial intent, various types of digital locks or TMPs are available, and often backed by copyright laws; they have been created with the

⁸⁶ MIYASHITA.

⁸⁷ *Bildupphovsrätt i Sverige ek. för (BUS) v. Wikimedia Sverige*, Case no. Ö 849-15, Stockholm, Sweden Supreme Court 2016.

⁸⁸ PETRI citing *National Portrait Gallery (UK) v. Wikimedia Commons*. Legal action stopped at the level of a cease and desist letter, and the case was settled out of court.

⁸⁹ For example: in some countries it is legal to photograph architectural and artistic works in public spaces without authorization regardless of commercial or non-commercial intent for the resulting images, in others it is not. In France it is legal to reproduce public architectural works and sculptures for non-commercial uses only. See *Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine*. In Canada, the *Canada Copyright Act*, R.S.C. 1985 c. C-42 S32.2(1) gives no such restriction.

⁹⁰ See REDA.

intention to protect copyrights and prevent sharing of images and information. These practices have also been referred to as “copyfraud” or a misrepresentation of what copyright actually protects.⁹¹ The response of locking down content can be seen as a reaction to the monopolization of public domain information, specifically images, by for-profit enterprises, whether their intention in amassing images is commercial or non-commercial in nature. Precautions in locking down content are also a response to the variation in legal consideration regarding commercialization of the public domain. Non-technological barriers, such as listing restrictive terms and conditions of use work together with TPMs and the legislated punishments for subverting them, in restricting access.⁹² Legal language and jurisprudence establishes the expectation that legal processes should be followed in order to gain access to information censored from databases, and that the legal system is the ultimate arbiter of which resources are essential to the public interest. This culture is detrimental not only to institutional museums, publishers, and artists,⁹³ but also slows or stalls progress in sharing the type of information that would be relevant to lost and stolen art databases.

Image sharing is determined on a case-by-case basis, with commercial groups gaining the most because they have the resources. This incentivizes further locking down of public domain information by managers of cultural heritage information. Misrepresentation of rights can skew conventions in museum image rights management. Deazley argues that the Victoria and Albert, the National Gallery, the National Portrait Gallery, and other museums in the United Kingdom have ignored the *Bridgeman v. Corel* decisions to claim copyright to photographs of works in their collections, whether or not the works themselves are in the public domain.⁹⁴ Margoni asserts that generally, under European Union originality standards, digital surrogates of two-dimensional works are rarely copyrightable since there is not much need for creativity when reproducing existing works.⁹⁵ As Kenneth Crews indicates, when it comes to copyright, museums will overreach “the bounds of justifiable legal rights”.⁹⁶ To avoid these issues, suggested best practices and common usage in the field of cultural heritage should set the parameters and conventions of image sharing until there is a specifically applicable legal dispute or disputes.⁹⁷

⁹¹ MAZZONE.

⁹² DRYDEN, p. 541.

⁹³ AUFDERHEIDE ET AL. As with intellectual property law more broadly, experts such as David Vaver view the web of rights permissions as being unnavigable and therefore unusable. See VAVER.

⁹⁴ DEAZLEY.

⁹⁵ MARGONI, p. 51.

⁹⁶ CREWS, p. 796.

⁹⁷ For examples see AUFDERHEIDE/JASZI regarding the American fair use exception; and PANTALONY, WIPO Guide.

Conclusion

The digitizing of collections has opened museums to people all over the world. Many leading public cultural heritage institutions enable users to view, distribute, and manage open visual content. Large-scale initiatives such as the Getty Research Institute and Europeana set an example for open access. However, both legally and in terms of best practices, it remains an open-ended question as to whether or not reproductions of artworks in the public domain are copyrightable. Overall, a combination of concerns over permissions and monopolization of information is limiting the potential of shared visual information about art. This continues the maintenance of a status quo in restitution and retrieval of lost works and limits further research into cultural heritage management.

Access to digital surrogates of works in the public domain is restricted by proprietary information ownership, concern over misuse and hijacking and the opaque legal status not only of digital images but also the boundaries of the public domain. An operative conception of copyright law expands the dialogue around whether or not current patterns of relationships at play in achieving imaginable uses of existing image databases work to the benefit of research. It is already a part of the decision making process in examples such as *Authors Guild v. Google*, and *Highsmith v. Getty*, though these examples end in the service of commercial or semi commercial interests. Accordingly, developments in image management are misaligned with the fundamental goals of many public institutions that seek to share information and engage with the public, setting up barriers to entry which rely on mixed interpretations of copyright legislation and jurisprudence. Areas that need to be developed if access to cultural heritage research is to be improved include the fostering of partnerships between existing educational and research databases and the continuation of project building to set standards in image use and sharing with clear and transparent rules and guidelines.

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7. “Scores on the Doors”: Establishing a Certificate of Virtue Framework for Future Art Market Regulation

Abstract

This Chapter will consider the history and efficacy of legal and ethical guidelines established to regulate the international art market, and will seek to identify the advantages and limitations of attempts to impose external value systems on the international trade in cultural objects. By learning from the development and decline of historical “art passport” regulatory initiatives,¹ this Chapter considers the potential for re-establishing a critical dialogue towards the implementation of a proposed certificate of virtue framework for the international art market. Three case studies will be used to gauge the market response to provenance information provided for objects sold at auction, and the Chapter will conclude by considering the future and viability of the proposed regulatory framework.

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¹ SOMERS COCKS.

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Introduction

The ongoing concerns regarding the looting of cultural heritage in conflict zones and the risk of transfer of illicit objects onto the international art market has made it imperative for art market participants to obtain clear and verifiable provenance information for objects in their possession.² This provenance, or ownership history, provides a meaningful contribution to the historiography of cultural objects, inflecting them with nuance and additional context that may have otherwise been overlooked or obscured. Dealers, collectors and institutions risk becoming complicit in illicit transactions if they fail to acknowledge this ethical and legal imperative, and proactively obtain this information to counteract cultural misappropriation.³ The knowledge asymmetry that often exists between buyer and seller within the art market often means that collectors are unaware of all the historical characteristics of an object or regulatory frameworks that may be applicable to current or future acquisitions. Collectors are also often unaware of the origins or transaction histories of cultural objects if the information is not explicitly presented, and without standardised procedures or best-practice guidelines these ownership records are often omitted, misinterpreted or wilfully obscured.⁴ Passports are an international proof of citizenship that indicate the origins, national identity or patrimony of their possessor, and through the inclusion of stamps and visas (physical or otherwise), they also identify the geo-temporal narratives of location, transition and destination. The possession of a passport for citizens is neither obligatory nor hereditary, however, if the passport-as-record-keeping-mechanism

² DRENNAN.

³ GIROUD/BOUDRY.

⁴ HAUSER-SCHÄUBLIN/SOPHORN. See also BATOR, pp. 327-330. The author considers the inherent complexities associated with adequately enforcing international importation and exportation controls, and the potential emergence of a market for forged documentation and provenance information.

is applied to cultural objects, the relationship between object and location becomes almost impossible to decouple. In this regard, the passport represents the unique provenance of the cultural object, and art market participants may be considered the locations through which it has previously travelled. The definition of location is not contingent on distance or international movement, rather, each moment of transition contributes additional information within the passport. Just as in any geo-political analysis, the integrity and identity of these locations vary according to personal value systems, politics and prejudices; however, certain objective qualities such as size, governance, and unique cultural identity are much more clearly observed. As an ecosystem established on personal relationships, reputation and trust, the international art market remains sensitive to these objective indicators.⁵

In the United Kingdom (UK), “Scores on the Doors” is a food hygiene and inspections compliance initiative governed by the Food Standards Agency (FSA) that acts as a grading system to evaluate the performance of businesses selling food to consumers.⁶ It regulates the production, processing, distribution, retail, packaging and labelling of foodstuffs within the UK through the application of a formal grading system, where unannounced inspections of businesses culminate in an evaluation of the compliance standards upheld by individual food retailers. This public evaluation is presented on the door of the retailer as a number from one to five, with five indicating the highest level of compliance, and one indicating the lowest.⁷ Applied to the art market, the “Scores on the Doors” framework has the potential to function as a similar compliance summary by identifying and evaluating participating organisations and objects in their possession. This analogous framework would seek to be established as a positive certificate of virtue, through which the presentation and elaboration of provenance information for objects transacted through an organisation could be evaluated and displayed for consumer review. As a plausible response to an evaluation and in order to maintain demand, the competition amongst market participants to achieve the maximum score of five has the potential to function as a consumer-driven market regulatory mechanism. Objects bearing specific or nuanced provenance information will contribute towards a positive score on the door, sending a signal of best practice to the buyer market and to competing businesses. In a crowded marketplace, quality, integrity and reliability contribute to customer satisfaction and repeat sales, and it can be difficult for underperforming businesses to respond to consumer demand. Participation within the proposed framework will also provide an opportunity to measure shifting

⁵ See Deloitte Luxembourg and ArtTactic, Section 5.

⁶ Food Hygiene Rating Scheme, Food Standards Agency UK.

⁷ Ibid.

tastes and market demand for risk mitigation and increased transparency.⁸ Before examining the market appetite for provenance information, however, it is important to briefly identify the efficacy of existing regulatory frameworks in order to understand the benefits and limitations of imposing external value systems on the international trade in cultural objects.

In 2015, the British Art Market Federation identified 167 extant regulations applicable to the British art market, which incorporated examples from international, European Union and English law, professional Codes of Conduct and best practice guidelines.⁹ Challenges facing regulatory initiatives include difficulties in ensuring international enforcement of national guidelines and the establishment of a sophisticated, proactive and agile monitoring process that responds to the market fluctuations and idiosyncrasies unique to the cultural sector.¹⁰ An important example in the UK is the Dealing in Cultural Objects (Offences) Act 2003, which prohibits the transaction of “tainted” objects; defined as those of “historical, architectural or archaeological interest”.¹¹ The Act does not specifically require dealers to proactively obtain provenance information for objects within their possession, and they are liable for prosecution only for objects that they know or believe to conform to the “tainted” definition.¹² As such, the obligation resides with the prosecution to prove that a dealer acted dishonestly in handling one of these objects, impeding its potency in regulating the cultural heritage trade within the UK.

Another important regulation governing the international trade is the United Nations Educational Scientific and Cultural Organisation (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, which prohibits the importation and exportation of cultural objects without

⁸ As evidenced by the establishment of the Responsible Art Market initiative in 2016, see <http://www.responsibleartmarket.org>.

⁹ British Art Market Federation, Art Market Regulations.

¹⁰ The international art market is idiosyncratic in its dependence on the symbiotic currencies of trust and reputation as regulatory mechanisms, and the majority of transactions typically avoid public scrutiny by occurring within the private sphere. As the auction market adheres to a structured calendar of sales, it is a relatively illiquid market, which makes it difficult to conduct the spontaneous or frequent transactions that occur in other industries. Within the art market, supply and demand has the potential for inversion under specific conditions, as evidenced in the market for editioned photographs, in which the initial example is often more expensive than the subsequent reproductions. Furthermore, an alternative dynamic, named after economist and sociologist Thorstein Veblen (the Veblen effect), often applies to high value items offered at auction, where demand for objects increases in proportion to the asking price. Finally, in most other markets a price agreement enables a buyer to obtain a good for sale, however, it is common for art dealers participating in the primary market to determine their willingness to sell based on the identity and reputation of the potential buyer.

¹¹ Art. 2(1).

¹² Art. 1(1).

legal importation and ownership history extending to 1970.¹³ This framework identifies the importance of verifiable provenance in determining the current and future legitimacy of acquiring cultural objects that have the potential to enter the art market, and penalises or prohibits non-compliant actors and transactions. In this way, the legitimating effect of provenance from a legal, ethical and economic perspective is enshrined within these guidelines, and the impact of provenance on future consumer preference is central to the “Scores on the Doors” regulatory proposition. It is therefore important to now consider a range of ways in which consumer preference within the art market may have previously been articulated.

The following three case studies will explore the market perception and response to the provenance histories of cultural objects; however, it is important also to note that these analyses are intended to examine the marketing of provenance and its impact upon buyer preference from the available data. As approximately fifty three per cent of art market transactions in 2015 were conducted privately for which there is no reliable information, the following analysis is based on auction results available within the public domain.¹⁴

I. Case Study No. 1: Portrait of Gertrud Loew

On 24 June 2015, *Portrait of Gertrud Loew – Gertha Felsovanyi* (1902) by Gustav Klimt was offered for sale at Sotheby’s Impressionist and Modern Art evening sale with a pre-sale estimate of £12 million to £18 million.¹⁵ The work was a commissioned portrait of his daughter, Gertrud Loew, by Dr Anton Loew in 1902 and to whom it passed by descent upon his death. The work, but not legal title, was acquired in 1941 by the cinematographer and film director Gustav Ucicky, whom the Klimt Foundation believes to be the artist’s first illegitimate son.¹⁶ His daughter, Ursula Ucicky, inherited the painting in 1961 and bequeathed it to the Klimt Foundation in 2013, where it attracted an ownership claim from the heirs of the original subject, Gertrud Felsöványi (born Loew).¹⁷ Title disputes often distort the market for cultural objects as the risk of uncertainty regarding ownership can disincentivise potential collectors. In this instance, however, the final piece of provenance information in the auction catalogue confirmed that the painting was a joint consignment

¹³ Adopted 14 November 1970.

¹⁴ TEFAF Art Market Report 2015.

¹⁵ See Catalogue Note for Lot No. 26, Sotheby’s Impressionist and Modern Art Evening Sale, London, 24 June 2015, available at <http://www.sothebys.com/en/auctions/ecatalogue/2015/impressionist-modern-art-evening-sale-115006/lot.26.html>, accessed 23 June 2015.

¹⁶ Refer to <https://www.klimt-foundation.com/en/collection/the-collector>.

¹⁷ KENNEDY.

from both the heirs and the Klimt Foundation, and quoted that an “ownership settlement (had been) agreed between the two parties in 2014”.¹⁸ Although room exists to interpret the legal applicability of this information, it provided an assurance, but not a guarantee, to the market that legal title would pass to the purchaser through the auction process, and reinforced the idiosyncratic ownership narrative associated with the object. In addition, a future provenance was also indicated in the catalogue prior to sale, where it was revealed that the work had been requested for a forthcoming exhibition at a private museum in New York from September 2016.¹⁹ To critically examine the impact of this provenance information on the market performance of the work is to identify its contribution to the perception of validation and trust associated with the transaction. This may have contributed to its subsequent performance at auction where it exceeded its high estimate by £4 million and achieved a hammer price of £22 million.²⁰ From a qualitative perspective, it is possible that the provenance information included in the catalogue note provided an element of reassurance to potential collectors, however, as the next case study observes, the retrospective identity of a previous owner does not always work to the advantage of the consignor.

II. Case Study No. 2: Torso of a Man

In 2011, after 165 years in business, the eminent Knoedler Gallery in New York ceased trading as a result of ongoing legal proceedings.²¹ As an important proponent of the Abstract-Expressionist movement, the Knoedler Gallery was accused of acting as a conduit for forgeries purporting to be original works from artists such as Mark Rothko, Robert Motherwell and Willem de Kooning between 1994 and 2008.²² As one of the oldest and most established galleries in New York, the integrity and reputation of the Knoedler Gallery prior to 1994 was integral to its sustainability and identity. This exposure to allegations of wilful duplicity and misrepresentation of works acquired through the gallery has had a negative impact on the reputation of the art market, and has also increased the number of claims alleging the handling of inauthentic works.²³ There are many legitimate reasons for market participants to insist on discretion throughout the transaction process, however, this discretion can also result in the asymmetry of meaningful information between buyer, intermediary and seller. An analysis of the provenance record for *Torso of a Man* (1965) by

¹⁸ See Catalogue Note for Lot No. 26, n. 15.

¹⁹ Ibid.

²⁰ This equates to £24,789,000 including buyer’s premium. Ibid.

²¹ AMINEDDOLEH.

²² MILLER

²³ Ibid.

Willem de Kooning, offered for sale at Sotheby's in early 2016, provides an opportunity to consider the potential impact of this informational asymmetry on a work's market performance.²⁴

The work was consigned for sale from a private collection in New York, prior to which it was owned or transferred through Lang and O'Hara Gallery in New York from M. Knoedler & Co., who had originally acquired it from a private collection.²⁵ As no dates were associated with this provenance information and Lang and O'Hara Gallery is no longer trading, a prospective purchaser would benefit from knowing whether the painting had been acquired from Knoedler & Co. prior to 1994. As the authenticity of Abstract-Expressionist works previously transacted through the gallery remains under scrutiny, a potential buyer would be particularly reliant on the due diligence conducted by the auction house throughout the consignment process. In this particular circumstance, the auction house indicated that it also had an ownership interest in the lot, which eventually achieved a hammer price of \$130,000; \$20,000 below the pre-sale low estimate of \$150,000.²⁶ The imprecise provenance information supplied to the market prior to auction may have had a material effect on its performance at auction, as the symbolic resonance of the Knoedler brand continues to the present day to receive scrutiny from art market participants.

III. Case Study No. 3: A Sardinian Marble Female Idol Ozieri Culture

As reported by Catherine Schofield Sezgin in the Association for Research into Crimes Against Art (ARCA) blog, twenty days prior to their Antiquities auction in New York on 11 December 2014, Christie's had consigned a lot for sale with a pre-sale estimate from \$800,000 to \$1,200,000.²⁷ Catalogued as a Sardinian Marble Female Idol, Ozieri Culture, circa 2500-2000 BCE, its provenance indicated that it was "property from the Michael and Judy Steinhardt Collection" acquired in 1997, prior to which, according to the website, it had been "with Harmon Fine Arts, New York, with The Merrin Gallery, New York, 1990".²⁸ Following the circulation of the physical auction catalogues, the blog post also indicated that Dr Christos Tsirogiannis, a Research Assistant with the Trafficking Culture

²⁴ See catalogue note for Lot No. 93, Sotheby's Contemporary Curated Sale, New York, 3 March 2016, available at <http://www.sothebys.com/en/auctions/ecatalogue/2016/contemporary-curved-n09473/lot.93.html>, accessed 1 March 2016.

²⁵ Ibid.

²⁶ Ibid.

²⁷ SCHOFIELD SEZGIN.

²⁸ Ibid.

Project at the University of Glasgow, had visually matched the consignment with a photograph from an archive of objects associated with a dealer previously convicted of handling illicit antiquities, Giacomo Medici.²⁹ Although it is unclear whether this information was supplied to the auction house prior to the distribution of the catalogue, the comparable image was circulated in the public domain and the information had been presented for potential buyers to digest. It is possible that this elucidation of provenance information may have had an impact upon the perceived desirability of this object for collectors, and a potential influence on the bidding process. In the end the object failed to sell at auction and the consignment record that accompanied the catalogue is no longer accessible online.

IV. Future Trajectories

If the presentation of the ownership histories for these three case studies may have potentially contributed to their individual market performance, it is important to briefly consider future trajectories of provenance information and the businesses operating within this environment.

Verisart, Tagsmart, Ascribe and i2M Standards are organisations that have emerged to provide ownership verification for cultural objects.³⁰ They are valuable resources for recording the ownership and authenticity of works created by living artists, but establishing current and future standards for provenance and ownership information has the potential to provide a number of challenges. The majority of these platforms also utilise blockchain technology to record provenance information within a digital ledger, which records previous and future transaction information in a distributed and verifiable format.³¹ Although these business models articulate the provenance history of objects at the moment of registration, the distinct nature or integrity of this information remains sensitive to qualitative interpretation. Future research would benefit by evaluating the content and semiotics of these data; to identify the meaningfulness and relevance of the ownership records identified and retained within these platforms. The qualitative analyses proposed through the “Scores on the Doors” framework benefits the collector of cultural objects by contextualising these ownership histories; contributing to the positive regulation of the art market through the vehicle of consumer preference.

²⁹ Ibid. See also WATSON/TODESCHINI, p. 283.

³⁰ See <https://www.verisart.com>, <http://www.tagsmart.com>, <https://www.ascribe.io>, and <https://www.i2mstandards.org>.

³¹ For more information on blockchain technology refer to NORTON.

As the evaluation of the integrity of provenance information becomes available to collectors, and commercial organisations consider adapting to this alternative framework, objects bearing blank passports have the potential to become less attractive to the trade. Legitimately-sourced objects without verifiable provenance that are currently circulating within the trade are unlikely to experience market discrimination, however, as demand increases for the provision of quality information, those in possession of unprovenanced antiquities may choose to revisit their circumstances of acquisition. In effect, social marketing would facilitate the dissemination of the proposed regulatory framework, contributing to the potential re-evaluation of consumer expectations. The grading criteria for this proposition would reflect the qualitative principles introduced through a selected methodology, an example of which is introduced later in the article. The contextual historiography and specificity of the information provided within a provenance record would provide qualitative criteria to be used to establish the numeric score for the door. For example, objects bearing a legitimate exportation permit or verifiable proof of ownership prior to 1970 are more likely to attract a score near the top of the numeric threshold. Verifiable dates and find spots would contribute to this positive evaluation, and sales receipts or photographs would further substantiate the ultimate score. A more punitive assessment might apply to provenance records that incorporate names historically associated with the handling or transaction of illicit objects, and this proactive evaluation of market participants and their professional conduct would be an ongoing administrative function of the proposed framework.

Conclusion

Through the analysis of extant art market regulations and the provision of provenance information for three indicative case studies, this Chapter considered the potential for applying the UK Food Standards Agency compliance framework within the international art market. As a market-driven model through which provenance information would be evaluated and presented in a public context, the proposed regulatory framework is an ambitious initiative through which consumer preference has the potential to reconfigure the international trade in cultural objects. The future challenge remains in establishing a robust methodology to apply to the art trade, in order to evaluate and contextualise the identity and reputation of participants and provide a justifiable score for the door.

One approach to a proposed methodology would evaluate objects from the perspective of semiotics, in which the distribution of information, or stamps within the passport, is the signifier, and the accumulated reputational value, the signified. In this regard, the integrity of the provenance information, for instance, an original certificate or legitimate record indicating legal exportation from its origin prior to 1970, has the potential to satisfy the

evidential burden imposed by this methodology. In adopting this approach, the specific complexity, clarity and sophistication of information is privileged over quantity or opacity, as it provides a meaningful historiographical context and forms the basis for evaluation and external scrutiny. Through this evaluation of the signified or, more specifically, the meaning of provenance text, the contingent associations and patterns that emerge would define the evaluative criteria of this proposed regulatory framework.

The implementation of this framework would achieve the greatest potential for success if administered through an independent transnational third-party, with a sophisticated appreciation of the networks and structures that contribute to the international art market. To proactively avoid the perception and execution of potential conflicts of interest, the organisation must evidence a clear detachment from external commercial entities. To achieve this and to maintain an observable measure of objectivity, revenue could be derived from a standardised sales tax applied to participating businesses. In a similar way to the *droit de suite* or Artist's Resale Right initiatives that currently operate in various international art markets, a small percentage of the sales price for objects transacted by participating businesses would contribute to the administration and marketing of the regulatory organisation.³² In addition, governments and trade bodies would have the opportunity to subsidise participation for art market participants as a way of promoting and encouraging best practice behaviour.

If cultural artefacts are considered by some collectors as a store of financial value for potential resale in the future, the art market privileges those objects whose passports are replete with intelligible stamps from legitimate destinations. And, just like popular restaurants, there are particular cities and countries that the art market will return to time and time again.

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³² For more information, see <https://www.gov.uk/guidance/artists-resale-right>, and <http://www.assemblee-nationale.fr/12/amendements/1206/120600232.asp>.

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8. Ownership, Ethics, and Non-Adversarial
Dispute Settlement Methods: The Hugh Lane
Bequest

Abstract

Can art law disputes be resolved other than by the application of strict legal principles? If ethical considerations suggest an answer to a dispute different from a strict legal answer, would the use of non-adversarial dispute settlement methods such as arbitration, conciliation or mediation assist? Would such an approach assist in a dispute between two galleries, one in London and one in Dublin? The dispute involves the Hugh Lane Bequest. The strict legal position is that ownership is vested in the National Gallery in London, but an ethical challenge to the London Gallery’s ownership is advanced by the Dublin City Gallery.

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Introduction

Would non-adversarial ADR means such as arbitration, conciliation or mediation assist in resolving the Hugh Lane dispute? Many of the world’s dispute resolution institutions use conciliation or mediation. For example, the International Council of Museums (ICOM) and the World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center) have developed a special process for the resolution of art and cultural heritage disputes.¹ This Chapter will outline the Hugh Lane controversy and evaluate the suitability of arbitration, conciliation and mediation as possible mechanisms to resolve it.²

I. The Bequest of Thirty-Nine Paintings to the National Gallery in London

The dispute relating to the thirty-nine paintings left to the National Gallery in London by Sir Hugh Lane has raged for many years. The reason is that, whereas Sir Hugh’s 1913 will

¹ ICOM-WIPO Art and Cultural Heritage Mediation, available at <http://www.wipo.int/amc/en/center/specific-sectors/art/icom/>.

² BODKIN, pp. xiv-xv.

stipulated that he bequeathed the pictures to the National Gallery, his 1915 codicil directed that paintings “now at the London National Gallery” should instead be bequeathed to the City of Dublin. The codicil was not witnessed. Where should ownership lie?

At the time of Hugh Lane’s death, Ireland was part of the United Kingdom. English law applied. The requirement was that a codicil to a will required to be witnessed.³ The same requirement as to witnesses applies today under the laws of the Republic of Ireland.⁴ In law, the codicil had no effect on the earlier will bequeathing the paintings to the London Gallery. Lane died in 1915, a passenger on the *Lusitania* returning to England from New York: the ship was torpedoed by a German submarine. The will therefore remained unchanged, and the bequest to London remained unaltered.

The French Impressionist paintings in the bequest were considered to be of limited interest in both Dublin and London in the early 1900s. However, they are now thought to have a value in the region of one billion GBP.

In 2016, Dublin City Council passed a motion calling for the return of the paintings. Sir Nicholas Penny, former Director of the National Gallery, is reported to have said that Dublin “has a moral right” to the paintings.⁵ A number of articles published in London have argued that the paintings should be returned to Dublin.⁶

II. Hugh Lane – The Life of a Collector

Hugh Lane was born in 1875 at Ballybrack House, County Cork, Ireland. He seems to have been the only child of the family actually born in Ireland. However, he was brought up in England.

Robert O’Byrne tells the circumstances of Hugh Lane’s birth. His parents, James and Adelaide Lane, were married in Ireland. They moved to England following their marriage. They lived in Yorkshire for three years before moving to Bath. At one stage they lived temporarily in Ireland: James’s aunt had left him a property in a village near Cork. Hugh Lane was born on 9 November 1875. Soon afterwards the family returned to Bath and Hugh Lane never again spent any time in Cork. The family later moved from Bath to

³ The English Wills Act 1837.

⁴ The Irish Succession Act 1965.

⁵ O’BYRNE.

⁶ See FOSTER; BOLTON.

Plymouth where, in his mid-teens, his mother arranged for him to take lessons from a woman who cleaned and restored pictures. The family subsequently moved to Cornwall.⁷

By the time of his eighteenth birthday, Lane needed to earn a living. Through introductions from his aunt, Lady Augusta Gregory, Lane obtained employment in 1893 in the London gallery of Martin Colnaghi.⁸ Robert O'Byrne says that Lane stayed with Colnaghi no more than a year before he started to buy and sell paintings in his own name.⁹ After some time at Colnaghi's gallery in Bond Street, Lane was employed by a Mr Turner as manager of the Marlborough Galleries in nearby Pall Mall. He left those galleries and with a little of his own capital began to trade as an art dealer on his own behalf, at first in other premises in Pall Mall and later in Jermyn Street. He made great gains from his transactions as an art dealer: after a couple of years he had made £10,000.¹⁰ In a short time – perhaps some five years – he had made his fortune in London. He was helped in doing so by his earlier training in picture cleaning and restoration: at Christie's he purchased a portrait thought to be by Sir Thomas Lawrence which, when cleaned by Lane, was revealed to be George Romney's portrait of Mrs Edward Taylor. Lane bequeathed the painting to the National Gallery of Ireland.¹¹

Lane then spent some time in Ireland, and was instrumental in the staging in 1902-1903 of a Winter Exhibition of old masters at the Royal Hibernian Academy's premises in Dublin. The success of the Exhibition led to calls by the President of the Academy for the establishment of a gallery of modern art – as advocated by Hugh Lane – as being “the least that Dublin amongst the English and Irish cities, should now stand for”. However, Lane soon concluded that the Royal Hibernian Academy might not be his best ally. Some fresh enterprise was needed to revive the interest in pictorial art. He looked for such enterprise “and found it, as he thought, in the forthcoming International Exhibition in St Louis, where he proposed to organise a great show of Irish paintings”. He started work on a collection of pictures, but he fell foul of civil service administration and his plans for St Louis were in ruins: the Department of Agriculture and Technical Instruction for Ireland was the British Government department responsible for official art activities, and that department refused to be responsible for the insurance of the borrowed pictures. Undeterred, Lane turned his

⁷ O'BYRNE, pp. 4-8, 73.

⁸ “Changing tastes and rising rents are squeezing traditional fine art and antique dealers out of Mayfair, as global fashion brands and mega-galleries specialising in contemporary art snap up expensive locations. Agnew, founded in 1817, and Colnaghi, the world's oldest commercial art gallery, have been edged out in favour of larger, more international dealers [...]” *Edged Out - Old Galleries Exit Mayfair*.

⁹ O'BYRNE, p. 16.

¹⁰ BODKIN, p. 3. Lane was working in a small area of London favoured by art dealers: Bond Street and Pall Mall. He later moved to nearby Jermyn Street.

¹¹ O'BYRNE, p. 23.

attention to the annual exhibitions held in London's Guildhall. His offer to stage an exhibition of Irish paintings there was accepted. In May 1904, his "Exhibition of a Selection of Works by Irish Painters" opened at the Guildhall. There were 465 exhibits, and over a period of 8 weeks some 80,000 people attended the exhibition.

In his introduction to the exhibition's catalogue, Lane wrote that "We have in the Dublin National Gallery a collection of the works of the Old Masters which it would be hard to match in the United Kingdom outside London. But there is not in Ireland one single accessible collection of masterpiece of modern or contemporary art [...]. A gallery of Irish and modern art in Dublin would create a standard of taste, and a feeling of the relative importance of painters".¹² Lady Gregory attended the Guildhall Exhibition, and wrote that Lane looked on its success "as another step towards the fulfilment of his purpose, now very definite, of creating a modern picture gallery in Ireland".¹³

Whilst the Guildhall exhibition was in progress, Lane was in contact with the executors of James Staats Forbes. A Scotsman, Forbes was on the boards of various companies involved in railways, electric light and telephones. He built up a considerable art collection. Forbes died at his home in London in April 1904. Lane now planned another exhibition at the Royal Hibernian Academy, and persuaded the Staats Forbes executors to send about 160 pictures and drawings to the exhibition. The Executors offered to sell these on special terms to any public body. The exhibition opened in November 1904. The Exhibition was a success, but not without "some cavillers". Colonel Sir Hutchison Poe, a governor of the National Gallery, initiated a purchase fund for the Dublin Municipal Collection of Modern Art, giving one thousand pounds.¹⁴ The Prince of Wales (the future King George) wrote expressing the hope that all the best works of the Loan Exhibition might be secured for Dublin. He presented four pictures: two by Constable and two by Corot. President Roosevelt sent to Lady Gregory a subscription.¹⁵ Lady Gregory said that the President's cheque came with a letter saying that he "believed this gallery would be an important step towards giving Dublin the position it by right should have". She added that George Bernard Shaw gave a bust of himself by Rodin.¹⁶

Returning to Dublin in October 1905 from travels in Europe, Lane appeared before a Commission of Inquiry. His evidence was concerned with a site for the Dublin Municipal Gallery. By the following year, Dublin Corporation resolved to hire temporary premises to

¹² BODKIN, pp. 6-11.

¹³ GREGORY, p. 54

¹⁴ Approximate value in 2016 is £95,000.

¹⁵ BODKIN, pp. 11-14.

¹⁶ GREGORY, p. 62.

house the valuable paintings which had been offered by Hugh Lane and others. By September 1907 the acquisition of Clonmell House at 17 Harcourt Street in Dublin was approved for the purposes of a temporary Art Gallery.

Thomas Bodkin was “requisitioned” by Lane to help with turning the premises into a gallery. In January 1908 “everything was ready for the opening ceremony. The old Georgian rooms, with their fine stucco ceilings, mahogany doors and marble mantelpieces” were beautified by the great collection of pictures.¹⁷

Lane wrote an introductory note to the catalogue of the Dublin Municipal Gallery of Modern Art. There were over 300 items. The artists represented included Constable, Corot, Manet, Millais, Monet and Renoir. In his introduction Lane stated that he was depositing “my collection of pictures by Continental artists, and intend to present the most of them, provided that the promised permanent building is erected on a suitable site within the next few years”.¹⁸

Lane’s work on behalf of the arts was now being recognised publicly. He received the freedom of the City of Dublin in 1908, and was honoured with a knighthood for his services to Irish art in the 1909 Birthday Honours list celebrating the birthday of King Edward VII: the eldest son of Queen Victoria and Prince Albert of Saxe-Coburg and Gotha¹⁹.

Later that year – and now Sir Hugh Lane – he purchased Lindsey House at 100 Cheyne Walk, Chelsea. Augustus John was asked to paint decorative paintings for the hall. Lane “packed the house with treasures of art: pictures, statuary, bronzes, ceramics and furniture; and made it a veritable museum. The double drawing-room, as I remember it best, was panelled in oak with carvings by Grinling Gibbons above the mantelpiece, and contained pictures by Titian, Rembrandt, Goya, Gainsborough and Van Goyen that subsequently formed part of Lane’s bequest to his native country. In the bay-window stood his writing-table, behind which was an antique marble statue of Venus, turning to look over her shoulder down the magnificent vista of the Thames as it bends past the Battersea power-house”.²⁰

¹⁷ BODKIN, p. 19.

¹⁸ *Ibid.*, pp. 21-22

¹⁹ Edward VII and his son, George V, were members of the German ducal House of Saxe-Coburg and Gotha by virtue of their descent from Prince Albert. During World War I the name of the British Royal Family was changed to Windsor.

²⁰ BODKIN, pp. 24-25.

III. Searching for a Gallery for Thirty-Nine Paintings

A. Search for a Gallery in Dublin

The search for a permanent gallery to house Lane's paintings continued following the move into the temporary home at Clonmell House. Lane had "pointed out that the provision of a permanent gallery was an essential preliminary to his formal transfer of that part of the collection which was known as his 'Conditional Gift of Continental Pictures'. This group has now grown to comprise the following thirty-nine works [...]"²¹ Two of the various proposed sites are of interest.

First, St. Stephen's Green. Lord Ardilaun had purchased and landscaped St. Stephen's Green and given it to the people of Dublin as a central park. To achieve this he had sponsored a Private bill that was passed as the Saint Stephen's Green (Dublin) Act 1877. Lane commissioned Edward Lutyens to design a gallery to be erected on the Green, occupying less than half-an-acre of the 22 acres of the Green. Lord Aardilaun, who had reserved rights of veto in his deed of gift, objected. Lane's critics "took ample advantage of their opportunities to ridicule his aims and decry his pictures. [...] Lane himself became a little angry and embittered. He felt that the time had come for him to take a firm stand". So on 5 November 1912, he sent a letter to the Town Clerk of Dublin stating that the "Lane Collection" would be moved from Dublin at the end of January 1913 if "the building of a new and suitable building is not decided upon". This warning was made public and a number of meetings took place in Dublin to consider the steps necessary to comply with Lane's conditions. The value of the "Conditional Gift" was put at £60,000.

The second site now came into play in relation to these meetings: a gallery over Dublin's River Liffey. This was again a proposal from Edward Lutyens. Lane said that if the proposal was not adopted he would withdraw his "Conditional Gift" from Dublin. Ultimately Dublin Corporation decided against Lane. The Corporation decided that the selection of the site and the nomination of the architect must be left to its own decision.²²

²¹ Ibid., pp. 28-29. He lists the thirty-nine paintings. The National Gallery list is set out in the Appendix to this article.

²² Objections had been made to Lutyens nationality. He was a British architect, born in London. His work in Ireland included the unbuilt Hugh Lane Gallery on St Stephen's Green and the unbuilt Hugh Lane gallery across the River Liffey on the site of the Ha'penny Bridge – which Bodkin described as "the ugly Metal Bridge".

Lane therefore carried out his threat: in September 1913 he removed his “Conditional Gift” of the thirty-nine paintings together with some other paintings from Clonmell House. Some were lent to Belfast, the rest were transported to London.²³

B. Search for a Gallery in London: The Will

Bodkin states that as far back as 1907 Lane had considered lending part of his “Conditional Gift” to the English National Gallery in the hope that the acceptance of such a loan would convince Dublin of its importance. There was a suggestion that the British government might provide a gallery and funds to create a Continental Art Gallery. In August 1913 a letter on behalf of the Board of the London National Gallery accepted unconditionally the loan of the thirty-nine paintings. On 11 October 1913, Lane made a new will in which he bequeathed various paintings to the Dublin Gallery of Modern Art “other than the group of pictures lent by me to the London National Gallery, which I bequeath to found a collection of Modern Continental Art in London”: “I bequeath the remainder of my property to the National Gallery of Ireland (instead of to the Dublin Modern Art Gallery which I considered so important for the founding of an Irish School of Painting) [...] I hope that this alteration from the Modern Gallery to the National Gallery will be remembered by the Dublin Municipality and others as an example of its want of public spirit in the year 1913 [...]”.²⁴

C. The Tate Gallery and the Bequest of the Paintings

Sir John Rothenstein was Director of the Tate Gallery in London from 1938 to 1964. In his “sketch of the Tate Gallery’s history”²⁵ he says that a gallery of modern foreign art had for some time been regarded as a matter of urgent importance. However, there was no nucleus of such a collection until there was the possibility of the transfer to London from Dublin of Sir Hugh Lane’s provisional gift of pictures. Rothenstein suggests that the loan of the thirty-nine paintings to the London National Gallery was actuated in part by the hope that Dublin would accept his conditions; in part to gauge British sentiment about the desirability of a collection of modern foreign art for London. The loan was accepted on 12 August; on 8 September Dublin finally rejected Lane’s conditions.

The thirty-nine pictures were removed from the Dublin Municipal Gallery on 27 September and reached Trafalgar Square some two months later. But in January of the following year the Trustees of the National Gallery informed Lane that they were only willing to

²³ BODKIN, pp. 30-36.

²⁴ *Ibid.*, p. 37.

²⁵ ROTHENSTEIN, p. 30.

exhibit fifteen of the thirty-nine pictures, and required to know what his intentions were with regard to the future disposition of those fifteen pictures. Lane repeated what he had originally told Lord Curzon, the Trustees' representative, "namely that he would make no definite promise but that he would be greatly tempted to give the collection to London if he thought that the gift would mean that steps were taken to create a Gallery for Modern Continental Art, which he felt was 'a crying want'".²⁶ In the event, an assurance was given by Joseph Duveen the younger that he would raise no objection to an exhibition of the collection in one of the Turner Galleries presented by his father.

IV. The Death of Sir Hugh Lane

A. The Lusitania

Towards the end of 1914 Lane was asked to go to America to give evidence as an expert witness in a court case. Although he was offered a large fee, Lane was unwilling to go. His health had been unsatisfactory for several years.²⁷ He had sailed to New York from Liverpool on 8 April 1915. He returned on the Cunard liner *Lusitania*, leaving New York on 1 May. The ship was torpedoed on 7 May by a German submarine. Over one thousand passengers and crew were drowned.

B. The Codicil

Some days after the sinking of the *Lusitania*, Hugh Lane's executors were at his London house. With his sister, Ruth Shine, they looked in all places where he had kept papers, for he had, before sailing for America, spoken of making a will to take the place of the one he had dictated to his sister in 1913, and which was acted upon in the end as no later one was found. No will was found. After a while, Lane's sister also wrote to the Dublin National Gallery asking for the desk of his room to be searched. A sealed envelope addressed to Ruth Shine was found. It "contained a codicil written in Hugh's own handwriting and signed by him, signed (or initialled) three times [...]".²⁸

²⁶ Ibid., p. 31.

²⁷ BODKIN, p. 42.

²⁸ Ibid., p. 162.

C. The Will, the Codicil and a National Gallery of Modern Foreign Art in London

Thomas Bodkin in his book sets out the terms of the codicil. It is dated 3 February 1915 and states: “This is a codicil to my last will to the effect that the group of pictures now at the London National Gallery, which I had bequeathed to that Institution, I now bequeath to the City of Dublin, provided that a suitable building is provided for them within five years of my death [...]. The sole Trustee in this question is to be my aunt, Lady Gregory [...]”.

Hugh Lane’s signature is then followed by a further provision: “I would like my friend Tom Bodkin to be asked to help in the obtaining of this new Gallery of Modern Art for Dublin. If within five years a Gallery is not forthcoming, then the group of pictures (at the London National Gallery) are to be sold, and the proceeds go to fulfil the purpose of my will”.

Lane again signs and dates the codicil 3 February 1915. However, the codicil was never witnessed. Whereas Lane’s will “made and executed on the 11 October 1913, was, owing to his sister’s care, validly executed and witnessed in accordance with the provisions of the Wills Act, and so overruled the codicil which expressed his final wishes, but which, owing to his ignorance of the law, and the absence of legal advice at the crucial moment, remained unwitnessed. The will was, accordingly, duly admitted to probate on 29 September 1915”.²⁹

Sir John Rothenstein also stated that there was never any doubt of the validity of the will, “and after Duveen learnt of this he decided that since Lane had provided a nucleus of a foreign collection he would himself offer to provide a gallery to house it. The offer was formally accepted in November 1916. In consequence the National Gallery of Modern Foreign Art was built as an addition to the Tate Gallery and opened by King George V, accompanied by Queen Mary, on 26 June 1926”.³⁰

The story of the Tate began in 1889. Henry Tate, an industrialist who had made his fortune as a sugar refiner, offered his collection of British art to the nation. There was no space for it in the National Gallery, and the creation of a new gallery dedicated to British art was seen as a worthwhile aim and the search for a suitable site began. This gallery would house not only Henry Tate’s gift but also the works of British artists from various other collections.³¹

²⁹ BODKIN, pp. 43-44.

³⁰ ROTHENSTEIN, p. 32.

³¹ Tate, History of Tate, available at <http://www.tate.org.uk/about/who-we-are/history-of-tate#henry>.

The Tate Gallery was built on the site of Millbank Prison, demolished in 1892, and was designed to house the Tate collection of nineteenth-century paintings and sculpture, together with some British paintings transferred from the National Gallery in Trafalgar Square. Its responsibilities were specifically for modern British art, then defined as by artists born after 1790. The first eight galleries, including the portico and river frontage, opened in 1897.

In 1917, following the bequest from Sir Hugh Lane, the Tate Gallery was formally constituted as the National Gallery of Modern Foreign Art. The National Gallery, built as an addition to the Tate Gallery, was opened by King George V and Queen Mary in June 1926. Extensions in 1910 and 1926 were funded by Joseph Duveen to house paintings and drawings by J.M.W. Turner – and modern foreign art.³²

An Act of Parliament – The National Gallery and Tate Gallery Act (1954) – brought about the legal separation of the two galleries, establishing the Tate as an independent institution.

V. The Controversy Over the Codicil

Sir John Rothenstein says that ever since the discovery in Hugh Lane's desk "of the unwitnessed and therefore invalid codicil to his Will, this Bequest has been the cause of bitter controversy. Irish opinion [...] did not cease to urge Dublin's moral right to the thirty-nine pictures, and Dublin's case [...] has attracted many ardent English supporters".³³

Thomas Bodkin said that "The Irish recognise that the Lane Pictures are, in law, the absolute property of the British People. They also believe that the Irishman who collected them wished that, after his death, they should belong to his own countrymen, and did his best to secure that they should. A great and growing number of the British seem to share that belief, and to be uneasy about the morality of their Government's action in refusing to make any move to return them to Ireland. What is needed now is the effective display of

³² Joseph Duveen was the eldest of thirteen children. The Duveen brothers were successful businessmen and amongst other things traded in antiques. Joseph became one of the world's leading art dealers. His success is said to be attributed to the fact that he noticed that Europe had a great deal of art, and America had a great deal of money. He made his fortune by buying works of art from European aristocrats and selling them to American millionaires. Duveen gave paintings to many British galleries and he donated considerable sums to repair and expand several galleries and museums. Amongst other things he built the Duveen Gallery of the British Museum to house the Elgin Marbles, and funded a major extension to the Tate Gallery. For his philanthropy he was knighted in 1919, created a Baronet in 1927 and raised to the peerage as Baron Duveen in February 1933.

³³ ROTHENSTEIN, pp. 32-33.

a spirit of generosity on both sides. The British Government would do well to make up its mind at last that their proper course of action is to introduce a short Bill making Lane's codicil erective or, perhaps better still, a short Bill giving the pictures to the National Gallery of Ireland as an act of spontaneous generosity. No one would doubt that the Irish Government would instantly reciprocate by arranging to introduce legislation providing that the pictures should spend, as and when desired, at least six months in any year in England".³⁴

A Parliamentary Committee, chaired by the Secretary of State for Dominion Affairs to Parliament by Command of His Majesty, was appointed to consider the arguments advanced by the Irish Free State and the Trustees of the National Gallery in London, and to report on two questions: (i) whether Sir Hugh Lane, when he signed the Codicil of 3 February 1915, "thought that he was making a legal disposition"; (ii) if so, whether it is proper that, in view of the international character of the matter at issue, the legal defect in the Codicil should be remedied by legislation. The Parliamentary Committee issued a Report³⁵ which stressed the unusual care with which Lane drew up the codicil and the precautions he took to ensure its falling into the right hands in the event of his decease, which "leave little room for doubt that it was no mere draft or a memorandum for his own use, but a document to which at the time of signature he attached the greatest importance".

Having decided that Sir Hugh Lane thought that he was making a legal disposition when he signed the codicil, the Committee proceeded to consider the question whether the legal defect in the codicil should be remedied by legislation. The Committee stated that validation by Act of Parliament of Lane's imperfect codicil would be justified only in the presence of an overwhelmingly strong case on grounds of general public interest. The Committee concluded that it was not proper to remedy the defective codicil by legislation, but stated that in December 1916 the Trustees of the National Gallery had intimated to representatives of the Dublin Corporation their conditional readiness to respond to any request for a loan of some of the thirty-nine pictures: "on lines such as these lies the best hope of reaching an amicable settlement of this long-drawn controversy".

VI. A Controversy Over Ownership

When John A. Costello became Taoiseach (Irish Prime Minister) in 1948, he initiated negotiations with Harold Macmillan, the British Prime Minister. This eventually led to a compromise in 1959, under Taoiseach Sean Lemass: half of the Lane Bequest would be

³⁴ BODKIN, pp. 95-96.

³⁵ Published by His Majesty's Stationery Office, 1926, CMD. 2684: National Gallery, NG/14/22/7.

lent and shown in Dublin every five years. Macmillan in a statement to the House of Commons said that an agreement had been concluded between the Commissioners of Public Works of the Irish Republic and the Trustees of the National Gallery in London, and that the British government welcomed the arrangements which offered a solution to a question which had been the subject of controversy for a long time.

In 1993, the agreement was varied so that 31 of the 39 paintings would stay in Ireland. The remaining 8 were divided into two groups, so that 4 would be lent for 6 years at a time to Dublin. These 8 include works by Manet, Monet, Pissarro, Renoir, Morisot, Vuillard and Degas. In 2008, in celebration of its first centenary, the Hugh Lane Gallery negotiated with the National Gallery London for the return of the entire bequest for a period of three months, the first time they were reunited with the rest of Hugh Lane's collection since 1913. Barbara Dawson says that the "Hugh Lane 100 Years" is an historic exhibition: "For the first time since 1913 all of Lane's thirty-nine paintings will take their place with the rest of the collection in Dublin".³⁶

Nevertheless, the controversy over the pictures continues. There is no difference of view between London and Dublin: both agree that the dispute is about ownership. More precisely, the dispute is whether, notwithstanding the fact that the London Gallery has legal ownership (as a consequence of Hugh Lane's 1913 will), yet that ownership should be transferred by London to Dublin.

Various views have been put forward in recent times. An article was published on 30 May 2015 in *The Guardian* under the headline "How Ireland was robbed of Hugh Lane's great art collection. The Irish art collector Hugh Lane, who drowned on the *Lusitania* 100 years ago, left his priceless impressionist paintings to the people of Dublin. So why are they in the ownership of the National Gallery in London?" The article, by Roy Foster, concludes: "[...] by acknowledgement of the true ownership of the Lane pictures, however belatedly, a long-standing historical injustice might actually be righted, and thus, in time, forgotten. Which is surely the best way to commemorate history".³⁷

A similar article appeared in the *Independent* newspaper on 10 January 2016 under the headline "Political pressure mounts on Britain to return disputed Sir Hugh Lane art collection to Dublin. Dublin City Council is set to debate demanding the return of the paintings to Ireland". The article by Doug Bolton states that "Irish politicians have renewed calls for a disputed collection of impressionist paintings to be returned to Dublin from London, in the latest episode of a controversy which has lasted over a century. The paintings, a collection of 39 works by artists including Monet, Manet and Renoir, were left to London's National Gallery in the will of Sir Hugh Lane, an Irish-born art collector who was one of

³⁶ Dublin City Gallery The Hugh Lane, *Hugh Lane 100 Years*.

³⁷ FOSTER.

the 1,198 people who died on board the RMS Lusitania after it was sunk in the Atlantic by a German submarine in 1915. The important collection was transferred to the National Gallery, before it was discovered that Lane had made an amendment to his will, in which he said he wanted the paintings to be left to the National Gallery in Dublin instead”.³⁸

VII. ADR Mechanisms for Solving the Question of Ownership

Is the ownership problem capable of being resolved? As long ago as 1954, the British Member of Parliament Edward Mallalieu said that nobody questioned that, according to law, the Hugh Lane pictures “are rightly in the possession and ownership of the trustees in London, but some people argue very seriously that, upon moral grounds, the possession and ownership of these pictures should be in the Dublin gallery [...]”.³⁹

More recently is the decision by Dublin City Council to pass the motion of Councillor O’Callaghan calling for the return of “priceless impressionist paintings bequeathed to Dublin by Sir Hugh Lane”. Speaking in February 2016, he urged the National Gallery “to recognize that the moral right to these paintings rests in Dublin. The passing of my motion is important as it adds weight politically and mounts pressure on the National Gallery in London who will be informed in writing of the decision by Dublin City Council. Dublin is the rightful home of this collection which was the wish of Sir Hugh Lane [...]”.⁴⁰

Is there a mechanism that might lead to a non-adversarial resolution of this ownership claim? In what remains, only arbitration, conciliation and mediation will be considered.⁴¹

A. Arbitration

Arbitration was suggested at one stage. Thomas Bodkin said that a citizens’ committee was set up at his suggestion in Dublin. That committee “nominated deputations to interview various Chief Secretaries for Ireland while she was still under English rule. [...] Mr

³⁸ BOLTON.

³⁹ MALLALIEU.

⁴⁰ Hugh Lane Collection – Dublin City Council Motion.

⁴¹ For a full examination of these ADR means see CHECHI.

Duke expressed sympathy with our aims, but said it would be impossible to bring in a Bill during the War. Mr Short proposed, but we refused, arbitration".⁴²

It is difficult to see how traditional commercial arbitration might help.⁴³ Even if wording could be agreed for a *compromis* (issues to be decided, for example), arbitrators acting strictly as arbitrators would have little room for manoeuvre: they are not mediators.

However, arbitration operating on an inter-State level might be appropriate: perhaps along the lines of the Alabama Claims Commission.⁴⁴ The Commission dealt with a dispute between the American and British governments concerning the involvement of Liverpool in the American Civil War. During the American Civil War one of the leading Liverpool cotton firms acted for the Confederate Government, financing the supply of arms in return for cotton.

The controversy began when Confederate agents contracted for warships from British boatyards. Disguised as merchant vessels during their construction in order to circumvent British neutrality laws, the craft were actually intended as commerce raiders. The most successful of these cruisers was the *Alabama*, which was launched on 29 July 1862. It captured 58 Northern merchant ships before it was sunk in June 1864 by a U.S. warship off the coast of France. The United States demanded compensation from Britain for the damage caused by the British-built, Southern-operated commerce raiders: the argument was that the British Government, by aiding the creation of a Confederate Navy, had inadequately followed its neutrality laws.

The exploits of the *Alabama* and other ships built in the boatyards on Liverpool's River Mersey developed into a diplomatic dispute between Britain and the United States. The peaceful resolution of the Alabama Claims seven years after the American Civil War ended set an important precedent for solving serious international disputes through arbitration, and laid the foundation for greatly improved relations between Britain and the United States.

The Treaty of Washington and the Alabama Claims Commission had a number of consequences beyond the immediate dispute concerning the CSS *Alabama*. The cause of arbitration as a means of settling disputes peacefully was advanced.

⁴² BODKIN, pp. 50-51. A Chief Secretary for Ireland was a British government minister responsible for governing Ireland. The Chief Secretary was nominally subordinate to the Lord Lieutenant, and sat in the British Cabinet. Henry Duke was Chief Secretary from July 1916 to May 1918, and Edward Shortt (Bodkin spelled his name with one "t") followed as Chief Secretary from May 1918 to January 1919. A barrister, Shortt was Home Secretary in Lloyd George's government from 1919 to 1922.

⁴³ Decisions of arbitral tribunals are final and are enforceable in many countries worldwide under the provisions of the New York Convention.

⁴⁴ CONNERTY, pp. 295-317.

B. Mediation and Conciliation

Generally speaking, mediation and conciliation involves the resolution of disputes by a third party neutral whose aim is to bring the parties to a settlement on terms acceptable to them. The neutral party has no power to impose a settlement on the parties.

An example of conciliation can be seen in the Framework Agreement between the United Kingdom and Norway concerning Cross-Boundary Petroleum Co-operation.⁴⁵ The Agreement deals with matters such as a “Cross-Boundary Pipeline”, a Pipeline crossing the Delimitation Line transporting Petroleum from the continental shelf of one State to the continental shelf or the territory of the other State. Provision is made in the Agreement for disputes to be resolved by the appointment of a Conciliation Board, consisting of five members. Each Government shall designate two members, and the four members so designated shall designate the fifth (who shall not be a national of or habitually reside in the United Kingdom or in the Kingdom of Norway) who will act as the Chairman of the Conciliation Board. If either Government fails to designate one or more members of the Conciliation Board within one month of a request to do so, either Government may request the President of the International Court of Justice to designate the required number of members.

Both mediation and conciliation offer the flexibility that would be needed to deal with the Lane controversy.

VIII. A Commission of Conciliation to Settle the Hugh Lane Dispute?

But is the London-Dublin controversy capable of resolution? Is London likely to agree to a settlement on ownership? Lane today, Elgin Marbles tomorrow?

The London/Dublin dispute can perhaps be regarded as being in a special, if not unique, category. Relations between London and Dublin are obviously good: the sharing arrangements shows that.

Three matters are relevant in looking at a proposal for a Lane Commission: (A) Hugh Lane’s London/Dublin life leading to the will/codicil issue; (B) the nature of the Lane controversy; and (C) a consideration of the controversy which leaves aside the strict legal position in relation to the will and the codicil.

⁴⁵ See the Framework Agreement between UK and Norway.

A. Lane's Life in London and Dublin

Although born in Ireland, Hugh Lane was brought up in England. He began his career as an art dealer in London at the age of 18, and made his fortune in London. Later, he was knighted and bought a house in one of the most expensive areas of London. London was his home. He evidently never bought a house in Dublin, and on his visits there he stayed in a St Stephen's Green gentlemen's club.⁴⁶ Dublin rejected Lane's favoured sites for a gallery. Dublin did not comply with Lane's requirement to provide a home for the paintings within five years of his death (I now bequeath to the City of Dublin, provided that a suitable building is provided for them within five years of my death).

London, on the other hand, did provide a gallery. After Joseph Duveen learned of the validity of the will, he decided that since Lane had provided a nucleus of a foreign collection he would himself offer to provide a gallery to house it. The offer was formally accepted in November 1916. In consequence the National Gallery of Modern Foreign Art was built as an addition to the Tate Gallery and opened by King George V, accompanied by Queen Mary, on 26 June 1926.

B. The Nature of the Lane Controversy

The Lane controversy does not involve the return of cultural property to its country of origin, nor its restitution in the case of illicit appropriation. It is not a case of Irish works of art illegally taken from Ireland. This is not a case of looted art. This is not a Benin Bronzes case. The "Ireland was robbed" approach does not stand up to scrutiny, and in any event seems unhelpful. The short answer to the Dublin claim is that, even if the codicil had been witnessed, Dublin would not have gained the thirty-nine paintings: Lane's five year condition was not satisfied. As the 1926 Committee's Report stated, London and not Dublin provided the gallery for the Lane collection.

C. Leave Aside the Strict Legal Position

If the strict legal position in relation to the will and the codicil is put to one side, and a broad view is taken of Hugh Lane and his life and the nature of the Lane controversy, what do we have?

Lane was born in Ireland but was brought up in England, made his living and his fortune in England, and bought a house in England. He was knighted by the English king. His "cronies" were in Chelsea and he spoke with an English accent. Lane was a London art

⁴⁶ O'BYRNE, pp. 28, 203.

dealer and the disputed paintings are mainly by “continental” artists. They are not Irish works of art illegally taken from Ireland. However, despite all of those factors, and despite the fact that Hugh Lane’s views on Dublin and London changed from time to time, it is not unreasonable to say that Lane did have a wish to see a Gallery of Modern Art in Dublin.

Against that background – and on the particular facts of this unique case – is some form of joint ownership a possible solution? Perhaps reached by one of the dispute resolution processes suggested above? Say a Lane commission of conciliation appointed at the request of the two Galleries and the British and Irish governments?

D. Outline for a Commission of Conciliation for the Lane Dispute

Such a Commission might be fashioned along the lines of the Alabama Claims Commission and the UK-Norway Framework Agreement. Five members, two appointed by the British Government and two by the Irish Government, the fifth (who shall not be a national of or habitually reside in the United Kingdom or in the Republic of Ireland) to be chosen by the four appointees, and failing agreement to be appointed by the President of the International Court of Justice.

The Commission’s Terms of Reference to be drawn up and agreed between the two governments. Such Terms of Reference to include the Commission’s approach to its task and issues to be decided. For example, to consider general legal principles, and not simply the provisions of English law. To look at methods used to resolve art law disputes in other jurisdictions. To hear evidence and views from appropriate parties and organisations: not necessarily only British and Irish views.

The members of the Commission to meet in both London and Dublin over a period of time for the purpose of taking evidence and discussing its approach to the issues. A time limit to be fixed by which the Commission is to deliver its Report or Decision.

Whether the Commission’s procedure is described as arbitration, mediation or conciliation, should its decision be binding on the respective governments? Given the history of the Lane controversy, it may be that the Commission’s decision should not be binding, but should be one which each government should consider with care and not reject save for exceptional reasons. Depending on the outcome, legislation may be required by both governments.

Conclusion

The time may be now be right to seek to bring to an end the century-old controversy concerning the Hugh Lane bequest. The controversy is different from disputes such as that relating to the Elgin Marbles. A solution reached by means of a commission of Conciliation on the lines of the Alabama Claims Commission and the UK-Norway Framework Agreement would not set a precedent for disputes such as the Elgin Marbles issue: the history of the Lane controversy and the London-Dublin relationship put the Lane controversy in a category of its own.

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9. Codes of Conduct and the Regulation of the Art Trade in England: Between Hard and Soft Law

Abstract

This Chapter critically assesses museums and art dealers' codes of conduct through the concept of legalization developed by Abbott et al. Legalization differentiates hard law from soft law and has three components: obligation to the rule, precision of the rule, and the delegation of its execution. This framework of analysis is transposed to museums and dealers to assess to what extent their voluntary codes have become legalized: heightened obligation, greater precision, and enforced delegation and to what extent they have led to behavioural change (a feeling of being bound by the rule and a higher standard of care when dealing with cultural objects). The analysis shows that soft law can become binding from a political, social or moral viewpoint, and can succeed in better regulating the art trade when the legal framework (hard law) has failed to alter the parties' behaviour. However, museums' and art dealer's codes have a different level of legalization. Museums work towards preserving cultural heritage and educating the public, they are often not for profit organisations that have a trust relationship with the public, might be under some kind of State supervision and either are or become the owners of the object; as a result there is a high degree of legalization of codes of conduct; whereas dealers are generally agents rather than owners (and as such will have fiduciaries duties to their clients), are for profit businesses and are not supervised by the State which results in a lower level of legalization of their codes of conduct.

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Introduction

The art market is a rich man's game that was worth \$63.8 billion worldwide in 2015; the UK was in third place with a share of 21% representing \$13.5 billion in value.¹ This game is played according to opaque and arcane rules where gentlemen's agreements, unwritten contracts, secret prices and anonymous parties are common practices perceived as normal.² In the case of *Accidia Foundation v. Dickinson*, which concerned the sale, through several intermediaries, of a Da Vinci drawing entitled *Madonna and Child with St Anne and a lamb* for \$7 million, Justice Vos concluded that the seller (Accidia Foundation) could not "be taken to have ratified [a convention] that was made without its consent, and allowed a

¹ MCANDREW.

² BURNS; MANEKER; RIVETTI; *Spencer-Churchill v. Faggionato Fine Arts Ltd and others* [2012] EWHC 2318 (Ch), [2012] All ER (D) 55 (Aug).

secret commission [of \$1 million] to be retained by [one of the intermediaries] which it had neither authorised nor approved”.³

This rich man’s game is poorly regulated by legal principles categorised as hard law and by codes of conduct that are categorised as soft law. The emergence of soft law is linked on the one hand to international public law and the increase of economic relationships between developed countries and developing countries in the 1970s; and on the other hand to the improvement of relationships between international public and private institutions independent from sovereign States in the 1980s.⁴ Soft law has several advantages: it is flexible, facilitates cooperation between private actors to better define a standard of behaviour through codes of conduct, it easily adapts to national and local specificities, it offers a quick alternative dispute resolution system.⁵ However, it can also have disadvantages: it can be opaque, inaccessible, and there is often a lack of consensus as to its effect with the consequence that it might be neither enforceable nor binding.⁶

In a seminal article entitled “The Concept of Legalization”, Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal defined three elements to differentiate soft law from hard law: obligation of the rule, precision of the rule and the delegation of its execution.⁷ Those three elements are cumulative and their intensity might vary from soft law to hard law.⁸ Hence, soft law “begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation”,⁹ and the rule’s softening or hardening can happen in different degrees over each element and over time. Abbott’s analysis focuses on the process of creation rather than the legitimacy of the creator of the rule (including its participation to its creation), it centres on international institutions and sovereign States rather than public and private stakeholders, it ignores the principle of non-retroactivity, and it does not take into consideration the rule’s consistency.¹⁰ Nevertheless, this framework is useful to analyse the process of legalization, which explains the hardening of soft law, or in other words, the strengthening of voluntary codes of conduct.¹¹ This Chapter transposes this framework of analysis to the actors of the art trade (museums and dealers) to assess to what extent voluntary codes have become legalized: heightened obligation, greater precision and enforced

³ *Accidia Foundation v. Simon C Dickinson Ltd* [2010] EWHC 3058 (Ch), [85].

⁴ STEFAN.

⁵ STEFAN; WOODROFFE.

⁶ STEFAN.

⁷ ABBOTT ET AL.

⁸ ABBOTT/SNIDAL.

⁹ Ibid.

¹⁰ Ibid; STEFAN.

¹¹ STEFAN.

delegation. It also shows that legalization has led to behavioural change, i.e. a feeling of being bound by the rule and a higher standard of care when dealing with cultural objects.¹² Hence, soft law becomes binding from a political, social or moral viewpoint, and can succeed in better regulating the art trade when the legal framework (hard law) has failed to alter the parties' behaviour.

Firstly, this analysis will explain the three elements of legalization and outline the international conventions and instruments that serve as a framework of reference to evaluate the relevant behavioural change of museums and art dealers in England. Then, the Chapter will successively apply the three elements of legalization first to museums' codes of conduct and then to art dealers' codes of conduct to assess why their level of legalization is different. Indeed, museums work towards preserving cultural heritage and educating the public, they are often not for profit organisations that have a trust relationship with the public,¹³ might be under some kind of State supervision and either are or become the owners of the object; as a result there is a high degree of legalization of codes of conduct. Whereas dealers are generally agents rather than owners (and as such will have fiduciaries duties to their clients), they are for profit businesses and are not supervised by the State which results in a lower level of legalization of their codes of conduct.¹⁴ However, in the past two decades there has been a hardening of codes of conduct that has significantly changed standards of behaviour, albeit more for museums than dealers.¹⁵

I. Elements of Legalization

This section will briefly outline the three elements of legalization (obligation to the rule, precision of the rule and delegation of its execution) to determine the framework within which codes have developed, in particular when addressing the trafficking of cultural objects.

A. Obligation

The first element of legalization is the obligation of the rule and is defined as an agreement to comply with a rule that is compulsory or is perceived as having binding force by the relevant parties. Laws and regulations adopted by institutions with law making authority

¹² Ibid.; SNYDER.

¹³ FINCHAM; ULPH/SMITH.

¹⁴ FORREST; FRIGO; STAMATOUDI; ULPH.

¹⁵ MARKS.

(such as Parliament) indicate a high level of obligation, which means that people are legally bound to follow those obligatory rules. In contrast, agreements that negate intent to be legally bound, or are adopted by non-law making authorities such as professional associations indicate a low level of obligation.¹⁶ Therefore, the obligation's binding force can vary from *pacta sunt servanda*, of which breach will be punished by a third party (e.g. judge), to norms, recommendations and guidelines of which breach will not be punished. The former has a high level of obligation (hard) whereas the latter has a low level of obligation (soft).¹⁷

In the field of Cultural Heritage Law, there are several international and regional norms that show different levels of obligation according to each State's agreement to be bound by them. The highest level is found in European Union (EU) law in areas where Member States have delegated their national sovereignty and for which violations are enforced by the European Court of Justice; which is true for the UK until its withdrawal from the EU.¹⁸ For example, Article 36 of the Treaty on the Functioning of the European Union (TFEU) excludes cultural objects from the scope of the principle of free movement of goods. Similarly, Directive 2014/60 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State creates a high level of obligation since it is part of EU secondary legislation and binds Member States as to the result to be achieved even if it is not directly applicable (Article 288 TFEU).¹⁹ However, Member States have the freedom to define what a national treasure is according to their national laws.

Other international conventions on the protection of cultural heritage show a lower level of obligation, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict with its two Protocols. However, the UK ratified the former in 2002 (Dealing in Cultural Object Offences Act 2003) and the latter in 2017 (Cultural Property (Armed Conflict) Act 2017). Both Acts, show a high level of obligation as they were enacted by Parliament, a law making institution.

¹⁶ ABBOTT ET AL.

¹⁷ Ibid.

¹⁸ At the time of writing, the British Prime Minister, Theresa May, triggered Article 50 of the Treaty on European Union that started the process of withdrawing the UK from the EU in March 2017. However, rules of EU origin should be incorporated into English law by an act of Parliament, that is currently discussed as the European Union (Withdrawal) Bill. Thus, all regulations and statutory instruments implementing directives that are currently in force in the UK should remain so until repealed.

¹⁹ For the implementation of this Directive in France: VIGNERON, The Return of Illicitly Exported Cultural Objects.

There is a long list of non-binding instruments that includes UNESCO recommendations and declarations, as well as Operational Guidelines for the implementation of the 1970 UNESCO Convention and the 1954 Hague Convention.²⁰ Similarly, UNESCO has drafted an international code of ethics for dealers in cultural property that creates no obligation to State Parties in contrast to the 1970 Convention.²¹ Finally, the International Council of Museum (ICOM) has drafted two codes of conduct (a Code of Ethics for Museums and a Code of Ethics for Natural History Museums) as well as standards and guidelines. ICOM does not have law making powers in the traditional sense (delegation of power by a sovereign authority) but as stated in the preamble, the code “reflects principles generally accepted by the international museum community” to which ICOM museums agree to comply with by becoming a member.

Similarly, a lower form of obligation is found in the Washington Conference Principles on Nazi-Confiscated Art 1998, which is not a treaty that can be ratified by States. It is a statement of principles that shows States’ willingness to address the issue of looting during the Nazi era (1933-1945). Its preamble clearly states that it has developed “a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated property”. The EU Parliament also adopted two resolutions on the return of spoliated artefacts that are not binding as stated in Article 288 TFEU.²² Notwithstanding this lack of compulsory binding effect, it has had impact on States’ behaviour and willingness to be bound by the rules. For example, the UK created the Spoliation Advisory Panel in 2000 as an alternative

²⁰ Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989; Recommendation for the Protection of Movable Cultural Property, 28 November 1978; Recommendation concerning the International Exchange of Cultural Property, 26 November 1976; Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, 26 November 1976; Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, 16 November 1972; Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works, 19 November 1968; Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, 19 November 1964; Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone, 14 December 1960; Recommendation on International Principles Applicable to Archaeological Excavations, 5 December 1956; UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003; Charter on the Preservation of Digital Heritage, 15 October 2003; UNESCO Universal Declaration on Cultural Diversity, 2 November 2001; Declaration on the Responsibilities of the Present Generations Towards Future Generations, 12 November 1997; Declaration of Principles of International Cultural Co-operation, 4 November 1966.

²¹ UNESCO International Code of Ethics for Dealers in Cultural Property.

²² European Parliament resolution on the return of plundered property to Jewish communities (OJ C 17, 22.1.1996, Bull. 12-1995); European Parliament resolution on the restitution of property belonging to Holocaust victims (OJ C 292, 21.9.1998, Bull. 7/8-1998).

way of resolving disputes between museums and victims of spoliation; thus showing willingness to participate in the restitution process.

B. Precision

The second element of legalization is the precision of the rule or of the behaviour that is required to comply with the rule. It varies from prescriptive instructions to vague statements of principles. The former covers clear and non-ambiguous instructions as to the behaviour that is required, to the objective and the means to get to this objective and does not leave much scope of appreciation to the participant; whereas the latter covers guidelines and recommendations that widen the scope for reasonable interpretation.²³ In Cultural Heritage Law, international instruments vary greatly regarding the level of precision, some include detailed conditions of application, such as a clear description of the required behaviour in prescribed situations, whereas others are vague and leave a wide margin of appreciation to the parties; for example, Article XX(f) of the General Agreement on Trade and Tariffs that allows restrictions on the principle of free trade to protect “national treasures of artistic, historic or archaeological value” has a low level of precision.²⁴

The 1970 Convention contains principles that are too vague to create a prescribed behaviour. By contrast, its Operational Guidelines adopted in 2015 have defined a precise set of rules that are elaborated and detailed as to the required comportment of State Parties.²⁵ One example is found in paragraph 36 that refers to the Object-ID standard that should be used by States Parties when inventorying cultural property in museums and religious or secular public monuments or similar institutions (Article 5(b) of the 1970 Convention). The Object-ID provides for eight key identifying elements (type of object, materials and techniques, measurements, inscriptions and markings, distinguishing features, title, subject, date or period, maker) and a photograph. Another example is found in paragraphs 49 to 51 of the Operational Guidelines that explain Article 5(e) of the Convention according to which States Parties should have “undertaken to set up national services which have as a function establishing [...] rules in conformity with the ethical principles set forth in the convention; and taking steps to ensure the observance of those rules”; such as refusing objects that have a faulty or dubious provenance and notifying relevant authorities. Finally, the Operational Guidelines refer to both the ICOM Code of Ethics and the UNESCO Code for Dealers.

²³ ABBOTT ET AL.

²⁴ BRUSCHI; TABERNERO DE PAZ.

²⁵ UNESCO Operational Guidelines for the Implementation of the 1970 Convention.

In the domain of illicit trafficking, the Directive 2014/60 defines clear obligations for Member States and possessors.²⁶ According to Article 10, “In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances”. Similarly, the Cultural Property (Armed Conflict) Act 2017 that implements the Second Protocol of the 1954 Convention criminalises serious violation of the Second Protocol (Part 2) as well as the act of dealing in unlawfully exported cultural property (sections 16-17).

Those international instruments define, with different level of precision, what should be done in order to fight the trafficking of cultural objects.

C. Delegation

The third element of legalization focuses on how the breach of the obligation is controlled, punished, enforced (or not) by a third party whether a judge, arbitrator or independent organisation. Delegation, according to Abbott, includes not only the enforcement of a breach but also the interpretation of the obligation by a third party, i.e. a court, an arbitrator, a national or international organisation.²⁷ Enforcement by a judge is an indicator of hard law whereas the lack of enforcement mechanism is an indicator of soft law (the enforcement is left to diplomacy). For example, violations of EU law are strictly enforced by national courts as well as European institutions; depending on the kind of violation: the Commission will penalize a Member State for non-implementation of an EU Directive while the European Court of Justice will punish Member States for a direct breach of EU Law, which is indicative of hard law.

In the case of cultural property, the European Court of Justice found that export duties on works of art that were not classified as national treasures according to Article 36 where measures that had equivalent effect to restricting the free movement of goods in violation of Article 16 of the EEC treaty (now Article 28 TFEU).²⁸ Hence, a breach of the Treaty itself or of secondary legislation such as Directive 2014/60 is enforced by a judge showing a high degree of legalization (hard law).

²⁶ CORNU.

²⁷ ABBOTT ET AL.

²⁸ *Commission of the European Communities v. Italian Republic*, Case 7-68 [1968].

Similarly, international conventions that are implemented into domestic laws by statutes have a high degree of delegation since they can be enforced by a domestic judge like the new Cultural Property (Armed Conflict) Act 2017 that implements the 1954 Convention and its two Protocols. Another example is found in Section L.111-8 of the French Cultural Heritage Code according to which an illegal export of a cultural object within the scope of Article 1 of the 1970 Convention becomes an illegal import in France.²⁹ It shows a high level of delegation since any breach of this section will be enforced by a French judge, up to two years imprisonment and a 450,000 euro fine.³⁰ A breach can also be enforced through alternative dispute resolution mechanisms;³¹ for example, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation is a permanent intergovernmental body, independent from the 1970 Convention, that acts as a mediator/conciliator to facilitate the restitution or return of cultural property to its countries of origin, whether the illicit removal took place before or after the 1970 Convention came into force. It is an independent institution that is indicative of a medium level of delegation since it is entirely dependent on States' decision to agree to the negotiation. Furthermore, some of those norms have had an impact beyond State Parties. For example, the European Investment Bank takes into consideration norms created by UNESCO in order to define a social and responsible governance policy.³² There is also a developing case law of international institutions taking into consideration cultural rights and the protection of cultural heritage.³³

To conclude, some elements of Cultural Heritage Law are obligatory and precise but all fall short on the criteria of delegation, unless they are found in EU law or incorporated into national laws and are within the remit of hard law (heightened obligation, great precision and delegation). By contrast, the 1970 Convention, UNESCO recommendations and declarations, the ICOM Codes of Ethics create a low level of obligation because they are not directly enforced by international institutions or national courts and are indicative of soft

²⁹ Section L111-8 Cultural Heritage Code (Act 2016-925): "L'importation de biens culturels appartenant à l'une des catégories prévues à l'article 1er de la Convention [UNESCO de] 1970, en provenance directe d'un Etat non membre de l'Union européenne et partie à cette convention est subordonnée à la production d'un certificat ou de tout autre document équivalent autorisant l'exportation du bien établi par l'Etat d'exportation lorsque la législation de cet Etat le prévoit. A défaut de présentation dudit document, l'importation est interdite."

³⁰ Section L114-1 Cultural Heritage Code (Act 2016-925): "Il-Est puni [de deux années d'emprisonnement et d'une amende de 450 000 euros] le fait, pour toute personne, d'importer un bien culturel en infraction à l'article L. 111-8".

³¹ CHECHI.

³² European Investment Bank; GALERA; VADI.

³³ CHECHI; POLYMENOPOULOU.

law (low obligation, lack of precision and no delegation).³⁴ Nevertheless, they have had an influence on national codes of conduct.

II. The Museums Association's Code of Conduct: A High Degree of Legalization

This section will analyse the code of the Museums Association (hereafter MA) which applies to museums and individuals working in the museum sector as well as to those who advise museums: employee, consultant and volunteers in the United Kingdom. This section will successively analyse the three elements of legalization: obligation of the rule, precision and delegation to highlight the code's high degree of legalization.

A. Obligation

The MA is an independent professional organisation of museums that was set up in 1889. Today, it has a large membership: 7,500 professionals, 600 public and private museums and 250 companies.³⁵ The MA adopted its first code in 1977 and has regularly updated since, in order to reflect the changes that have taken place in the stewardship of collections and the role of museums in society. The code and additional guidance that are currently in force were adopted in November 2015 and are founded on three principles: public participation, collection stewardship and professional integrity.³⁶ Drafters referred the different international conventions as well as recommendations and guidelines drafted by the Department for Culture, Media and Sport (DCMS) on the trafficking of cultural object.³⁷ This demonstrates a high level of agreement amongst professionals within the museum sector as to their required behaviour. This consensus shows a high level of obligation.

B. Precision

The code and additional guidance clearly state the objectives of the rule (public participation, collection stewardship and professional integrity), the means to get to this objective and the required behaviour. Firstly, in the case of trafficking, the code complies with the

³⁴ FRANCIONI/GORDLEY; FRANCIONI.

³⁵ Museums Association, available at <http://www.museumsassociation.org/about>.

³⁶ Museums Association, Additional Guidance; ULPH.

³⁷ Department for Culture Media and Sport (Cultural Property Unit); Department for Culture Media and Sport.

ICOM code and the DCMS guidelines. The MA code details the actions that should be followed, for example, the museum “must” control the origin of the item, and additional guidance add that the date from which checks must be made is 1970 (which is now widely accepted as the cut-off date for checking the provenance of an object).³⁸ The museum should reject the object if there are any doubts as to its provenance or the legality of its export (para 2.5). The code also requires its members to comply with international treaties on the protection of cultural heritage whether the UK has ratified them (1954 Hague Convention, 1970 Convention and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora) or not (the code referred to the 1954 Convention that had not then been ratified by the UK). Furthermore, members must contact English and foreign museums to obtain further information, share information with other museums, contact the police if there are any suspicions that the object is part of a criminal activity. According to paragraph 2.5 museums must “Reject any item for purchase, loan or donation if there is any suspicion that it was wrongfully taken during a time of conflict, stolen, illicitly exported or illicitly traded, unless explicitly allowed by treaties or other agreements, or where the museum is co-operating with attempts to establish the identity of the rightful owner(s) of an item”.

Drafters of the code have chosen a vocabulary that indicates an obligation and the imperative that indicates an order to follow, a precise behaviour with instructions that clearly identify the different steps to follow, which indicates a great level of precision, and consequently a high degree of legalization.

C. Delegation

A breach of the code or its additional guidance can be enforced by a third party which shows a high degree of legalization. Firstly, contract of employment of museums employees refer to the code which is annexed to it. It means that an employee can be disciplined and sued in a court if s/he breaches these obligations,³⁹ which strengthens its delegation.⁴⁰ Secondly, national museums that acquire human remains and spoliated artefact take the risk that these objects could be deaccessioned. Indeed, the Holocaust (Return of Cultural Objects) Act 2009 allows for an object that was spoliated during the Nazi era to be returned to its original owner. Similarly, human remains can be returned to their communities of origin according to section 47 of the Human Tissue Act 2004. Thirdly, Arts Council England (ACE) is in charge of an accreditation system that guarantees that museums abide by

³⁸ Museums Association, Additional Guidance.

³⁹ ULPH/SMITH.

⁴⁰ O’KEEFE, Codes of Ethics.

certain rules. One of the conditions of the accreditation is that museums comply with the code of conduct of the MA as well as guidelines from DCMS that refer to the different international conventions (1970 Convention and 1954 Convention).⁴¹ It means that ACE can withdraw an accreditation if a museum is in breach of these obligations, which it did in the recent sale of the Sekhemka Statue by Northampton city council.⁴² Finally, the museum takes the risk of negative publicity and pressure from public opinion if its behaviour does not comply with what is expected from a similar institution.

To summarise, as defined by Abbott the degree of the obligation, its precision and its delegation show that the legalization of the Museum Association's code is high. They are not yet hard law obligations but soft law obligations with legal (disposal, loss of accreditation) and practical (reject new acquisition, public opinion) consequences. This is linked to the dual institutional role of museums: preserving cultural heritage and educating the public as not for profit organisations that are under State scrutiny. This high level of legalization is in contrast with the art dealers' codes.

III. Art Dealers' Codes of Conduct: A Low Degree of Legalization

The landscape for dealers is fragmented. Several associations have defined codes of conducts for their members showing a lack of consistency. To cite a few, the Association of Art and Antique Dealers (LAPADA), the Antiquarian Booksellers' Association (ABA), the Antiquities Dealers Association (ADA), British Antique Dealers' Association (BADA), International Association of Dealers in Ancient Art (IADAA), Portobello Antiques Dealers (PADA), the Society of Fine Art Auctioneers (SOFAA). This section will focus on the British Art Market Federation's (BAMF) guidelines or 'Principles of Conduct'⁴³ and the Antiquities Dealers Association's Code (ADA). The three elements of legalization applied to those two codes show a low level of legalization. However, the duopoly situation of the two main auction houses, Christie's and Sotheby's illustrate an interesting development as they both have created in-house worldwide compliance models.

⁴¹ Department for Culture Media and Sport (Cultural Property Unit): "The funding bodies expect museums to adhere to these guidelines when applying for funding for acquisitions".

⁴² BAILEY.

⁴³ For ease of lecture, the BAMF's 'Principles of Conduct' are referred to as a code.

A. Obligation

Obligation is the first element of legalization and is defined as an agreement to comply with a rule that is either compulsory or is perceived as having binding force by the relevant parties, hence codes are the “product of consent, emanating from negotiation rather than compulsion”.⁴⁴ Self-regulation has been encouraged by the Office of Fair Trading since the 1970s based on section 124 (3) du Fair Trading Act 1973 (abolished in 2002).⁴⁵ Several groups were created to encourage their members to comply with a minimum level of compliance, protect consumers and deal with conflict.⁴⁶ These codes are important in the regulation of trade as even though there is no obligation to belong to a professional society, in practice most professionals adhere to one.

The British Art Market Federation is the umbrella association that encompasses most art dealers’ association as well as the main auction houses: ABA, ADA, BADA, LAPADA, SOFAA, Bonham, Christie’s, and Sotheby’s. The BAMF’s code of conduct was adopted in 2000 and was drafted by its members to define a common standard of behaviour accepted by the majority of stakeholders in the art market (dealers, antiquarians, gallerists, auctioneers).⁴⁷ Hence, the introduction states that “The Members of the British Art Market Federation (“BAMF”) believe it is important to restate the principles that guide their business practices. [...] *Members have voluntarily agreed* to abide by certain basic professional standards of operation” (emphasis added). By contrast, the new Antiquities Dealers Association (ADA) code that was adopted in December 2015, shows a higher degree of obligation but has been adopted by fewer professionals (19), noticeably, Bonham’s is the only auction house. However, this multiplicity of associations and codes of conduct show that it is difficult to regulate the trade and find a consensus amongst professionals of the art trade as to the rules perceived as having binding force. This lack of homogeneity is reinforced by the fact that there is no State control on access to the profession or minimum legal requirement to become an auctioneer, art dealer or expert in England (which can be different in other countries, such as France).⁴⁸

⁴⁴ PALMER.

⁴⁵ GRIFFITHS.

⁴⁶ WOODROFFE.

⁴⁷ O’KEEFE, Codes of Ethics.

⁴⁸ VIGNERON, Etude Comparative.

B. Precision

The BAMF's current code is more detailed today than it was in 1984,⁴⁹ but it is still below what is required by the Museums Association's code and the code for dealers drafted by UNESCO.⁵⁰ The precision of the rules concern first the trafficking of cultural objects and then the implementation of anti-money laundering regulations.

Firstly, the two codes outline the behaviour to follow to address the illicit trade in cultural objects. The BAMF code comprises seven paragraphs that define vague and general principles. For example, its members agree not to buy or sell an item that "they know" was stolen, or illegally exported. Members agree to record names, addresses of seller (which is compulsory for VAT purposes and anti-money laundering legislation), they agree to take the necessary steps if they know, suspect or have reasons to believe that the object was stolen (such steps "may include conducting further inquiries by checking with a registry of stolen art, or reporting the concern to appropriate legal advisors or law enforcement authorities"). The vocabulary refers to the knowledge of a criminal activity (theft, handling of stolen goods, illicit export) and not the steps of due diligence that should be followed in order to avoid dealing in those objects. In contrast, the code of the ADA goes further as it requires its members to check a database of stolen artefact, preferably the Art Loss Register for objects valued at more than £3,000.⁵¹ This shows a high degree of precision as it becomes compulsory to check a database of stolen artefact even if there are no suspicions as to the legality of the purchase. It is, however, limited as the ALR or other databases do not record illicitly excavated archaeological artefacts. Finally, the ADA code also requires its members to "know and comply with all applicable export control requirements including licensing requirements for art and cultural property" and at paragraph 4 "Where the vendor acquired the objects outside the United Kingdom, confirmation that the item has been exported or imported in conformity with local laws and where available evidence of that", which the BAMF code completely ignores. The two codes show a step in the right direction to fight against the trafficking of cultural objects even though neither mention the cut-off date of 1970, nor an obligation to cooperate with countries of origin that request the return of an object or the original owner of the artefact; and only the ADA code mentions illicit export and illicit excavation.

Secondly, anti-money laundering legislation has had considerably more impact on the BAMF code than other criminal provisions that have not been similarly incorporated in its

⁴⁹ ULPH/SMITH.

⁵⁰ STAMATOUDI; UNESCO, *International Code of Ethics for Dealers in Cultural Property*; O'KEEFE, *Faisabilité d'un Code International*; UNESCO, *Why an International Code for Dealers?*.

⁵¹ ADA code of conduct, available at <http://theadaco.uk/code-of-conduct/>. It is worth noting that the Art Loss Register, a private company, has been able to present itself as one of the most reliable database of stolen artefact. NEUHAUS/BALAY.

guidelines. It is however likely that section 17 of the Cultural Property (Armed Conflict) Act 2017 that criminalises the act of dealing in cultural property that was unlawfully exported from a territory which at the time was occupied by a State that was a party to the First or Second Protocol, will be included in a new draft code. In contrast to the section on due diligence that has not been updated since 2000, the section on anti-money laundering was updated in 2016. Money laundering is defined as the process by which criminal profits are laundered to disguise their illicit origin, so that the illicit becomes licit.⁵² A work of art or a cultural object becomes criminal property under the Proceeds of Crime Act when it constitutes a person's benefit from a criminal offence committed either in the UK or abroad if the laundering happens in the UK. For example, a work of art becomes criminal property if it was stolen, or given as payment for a criminal activity. Sections 327 to 329 of the Proceeds of Crime Act 2007 identify three offences: concealing criminal property by disguising, converting, transferring or removing it from England and Wales (disguising an object to facilitate its export); arranging or facilitating money laundering for oneself or others (providing fake export certificate or fake authenticity certificates); acquiring, using or possessing criminal property.⁵³ Dealers and auctioneers are treated as high value dealers if they accept 10,000€ or more in cash as payment in a transaction and in these situations must verify the seller's identity, and if they have any money laundering suspicions, report the matter to the relevant authorities.⁵⁴ For all those offences (concealing, arranging, acquiring), the prosecution must prove the intention or knowledge of wrongdoing by the perpetrator which, in legal terms is called "*mens rea*" (knowing or believing). Knowledge exists if the dealer did not ask the questions that a reasonable person would have asked or queried about. Hence, the code illustrates that diligence is required in the following situations: the seller refuses to disclose his/her identity, to answer questions, asks for a low price, wants to be paid in cash or pays in cash. Furthermore, the code reminds its members that a dealer is liable for his/her employees' breach of the law, that archives should be kept for 5 years, and that each dealer should have its own code of conduct for his/her employees.

To conclude this section on precision, the codes show a poor level of consensus amongst professionals as to the minimum due diligence required which is enhanced by the fact that numerous codes cover different objects, different countries and different specialisations.⁵⁵ However, the line between hard law and soft law is blurred by the implementation of statutory requirements in codes of conducts such as anti-money laundering statutes and due diligence found in Regulation 7(2A) Return of Cultural Objects (Amendment) Regulations SI 2015/1926. This regulation states "In determining whether the possessor exercised due

⁵² ULPH/SMITH.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ CHRIST/VON SELLE.

care and attention, the competent court shall consider all the circumstances of the acquisition, in particular— (a) the documentation on the object’s provenance; (b) the authorisations for removal required under the law of the requesting member State; (c) the character of the parties; (d) the price paid; and (e) whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances”. The duty vests on the possessor and not the dealer but one hopes that buyers would become more diligent and put pressure on dealers and auction houses, even though Neil Brodie has argued that auto-regulation of art collectors is not yet an effective way of addressing codes of conduct’s shortcomings.⁵⁶

C. Delegation

Initially, codes of conduct showed a low level of delegation. However, there has been a recent move towards more enforcement by a third party whether a judge, or arbitrator, thus showing a move towards a higher level of delegation.⁵⁷

Firstly, there is a low level of delegation from within the professional organisation because if a member fails to comply with the code of conduct, the penalties are warning, suspension, or “expulsion from membership of a trade association or professional body, as appropriate”. Both are rather weak as there is no obligation to belong to a professional organisation.⁵⁸ However, a dealer who lies as to his membership of the code is criminally liable according to the Consumer Protection from Unfair Trading Regulations 2008.⁵⁹ In the case of *R. v. Piper*, a builder had deceptively written on his headed paper that he was a member of the Guild of Master Craftsmen, which was a false statement according to section 14 of the Trade Description Act 1968 that was then in force.

Secondly, a breach is not directly enforceable by a judge as illustrated in the case of *Spain v. Christie’s*.⁶⁰ A Goya painting entitled *La Marquesa de Santa Cruz* (1805) was advertised by Christie’s in 1986 after it had been illegally exported from Spain in 1983. The painting had travelled to Switzerland, and the United States where it was offered to the Getty museum in 1983. Spain had then informed the museum that the painting had been illegally exported and the museum refused to buy it. It was put up for auction in London in 1986. Spain sued Christie’s to suspend the auction on the ground that the export certificate was a fake. Christie’s argument was that the Spanish government did not have standing to sue

⁵⁶ BRODIE.

⁵⁷ FINCHAM.

⁵⁸ Unfortunately, little has changed since O’Keefe highlighted this in 1998. O’KEEFE, Codes of Ethics

⁵⁹ *R. v. Piper* (1996) 160 JP 116; WOODROFFE.

⁶⁰ *Kingdom of Spain v. Christie, Manson & Woods Ltd. and Another* [1986].

as it was neither the owner nor the possessor of the painting. The Court judged that Spain had a sufficient interest in suing Christie's, which was the protection of its citizens' patrimonial interest in asking for the withdrawal of the fake export certificate. The judge acknowledged that fake documents were causing a specific harm to original documents protecting Spanish heritage by undermining their authority. One of Christie's argument was that: "2. Members of the U.K. fine art and antiques trade undertake, to the best of their ability, not to import, export or transfer the ownership of such objects where they have reasonable cause to believe [...]. (b) That an imported object has been acquired in or exported from its country of export in violation of that country's laws [...]. 4. Where a member of the U.K. fine art and antiques trade comes into possession of an object that can be demonstrated beyond reasonable doubt to have been illegally exported from its country of export and the country of export seeks its return within a reasonable period, that member, if legally free to do so, will take responsible steps to co-operate in the return of that object to the country of export. Where the code has been breached unintentionally, satisfactory reimbursement should be agreed between the parties".

Christie's argued that the duty existed towards the person that illegally exported the painting and not to the successive good faith purchasers. The Court did not engage with Christie's argument and decided that Spain could not refer to the code of conduct because they were not party to it.⁶¹ The outcome of the case was that the judge required Christie's to withdraw the fake certificate which, consequently, forced Christie's to withdraw the painting from the auction. The owner then agreed to sell the painting to Spain for 6 million dollars instead of the 12 million initially asked for.⁶² If the same case was decided today, the issue would be different as the illegal export from Spain would fall within the scope of the Directive 2014/60 implemented by the Return of Cultural Objects (Amendment) Regulations SI 2015/1926.⁶³

The second case of *Marcq v. Christie's*⁶⁴ concerns the advertisement, by Christies, of a painting entitled the Backgammon Players by Jan Steen painted in c1667, and stolen from Marcq in 1979. The theft had been reported to the police and the Art Loss Register. In 1997, Christie's failed to auction the painting because the reserve price had not been met and returned it to its consignor/possessor. The original owner, Marcq, sued Christie's in conversion which is defined as a wrongful interference with someone else's property. Christies was found not guilty because it did not sell the painting and returned it to the consignor without knowing that there was a claim on the painting. However, the court

⁶¹ Ibid.

⁶² GREENFIELD.

⁶³ VIGNERON, Protecting Cultural Objects.

⁶⁴ *Marcq v. Christie Manson & Woods Ltd (trading as Christie's)* [2003].

mentioned that auction houses should research the provenance of objects that they advertise, that they should not exclusively rely on the seller's declaration as mentioned in the British Art Market Federation's code and in the Directive 1993/7/EEC Return of Cultural Objects Regulations SI 1994/501.⁶⁵

Finally, in the case of *Kurtha v. Marks*, the owner of several stolen painting successfully sued their possessor Marks in conversion, Tugendhat Justice in the last paragraph of his judgment stated that: "A dealer in valuable works of art who pays in large amounts of cash, keeps no records, and asks no questions as to provenance of his supplier, exposes himself, and those who buy from him, to other very serious risks. These risks include that the dealer will be unable to answer queries relevant to tax from HMRC. But they also include the risks that he may face a prosecution under the Proceeds of Crime Act 2002 (sections 327 to 332) and that, whether or not there is a prosecution, he may be made subject to a civil recovery order under Part 5 of that Act".⁶⁶

Those cases show that even though codes of conduct are not directly enforced in a court of law, judges refer to them to assess the acceptable standard of diligence required from dealers. This is strengthened by the fact that the codes are now implementing hard law requirements found in anti-money laundering legislation and the Return of Cultural Objects Regulations, both of which are enforceable by an English court, which represents the highest level of delegation.

D. Towards In-House Worldwide Compliance?

A final issue is the development by the two biggest auctioneers of in-house worldwide compliance services. Christie's and Sotheby's are the leaders in the auction market with sales that are equal to 42% of worldwide auction results, up to 70% in the sale of contemporary art and 72% for old European masters.⁶⁷ Each company has created a special branch that defines the required standard for fighting the trafficking of cultural objects (Sotheby's)⁶⁸ or the sale of spoliated artefact (Christie's).⁶⁹ Sotheby's has a main compliance officer based in New York and several officers in its offices worldwide. Both Christie's and Sotheby's codes clearly state that the company and its branches should comply with

⁶⁵ Ibid.

⁶⁶ *Kurtha v. Marks* [2008].

⁶⁷ MCANDREW.

⁶⁸ Sotheby's, Code of Business Conduct.

⁶⁹ Christie's, Corporate Social Responsibility; Christie's, Restitution <http://www.christies.com/about-us/corporate-social-responsibility/>.

national and international laws that are in force.⁷⁰ It is likely that this self-regulatory movement was influenced by three American cases where antiquities dealers were found criminally liable for dealing in looted antiquities in violation of the National Stolen Property Act which had a major impact on the art market.⁷¹ The decisions of *Hollinshead*,⁷² *McClain*⁷³ and *Schultz*⁷⁴ concerned antiquities that had been stolen respectively from Guatemala, Mexico and Egypt. In each case, firstly the State of origin was able to show that they owned the antiquities through national ownership laws and that they had been stolen; and secondly, the American prosecutor was able to show that the dealers knew that the antiquities had been stolen (*mens rea*), which is a high threshold that is rarely met.

Worldwide compliance is a great step forward but should not be seen as a panacea since those in-house compliance services have shortcomings, the main being that it does not publicly state the different steps that due diligence should take for fighting the trafficking of cultural objects. It highlights questions that staff should ask themselves “Is it legal?”, “Is it fair?”, “Would this action hold up under scrutiny by others?”, “What would this look like if reported on the ‘front page of a major news publication’?”, and “Is it in violation of Sotheby’s Code or other Policy?”.⁷⁵ It does not clearly state the different steps that should be taken but only that ‘there are no known legal obstacles to selling and passing title and that Sotheby’s adheres to relevant domestic and international laws’. The code mentions that employees should take into consideration bad publicity, when deciding whether to sell an object, in particular if the object was stolen or illicitly exported.

In conclusion, there is a lack of consensus amongst dealers as to the general standard of care that is required from them. The different professions (art dealers, auctioneers and galleries) are not homogenised, on the contrary, they are fragmented according to objects (sculptures, coins, paintings, pottery, jewellery), trade (numismatic, antiquities, furniture, musical instruments, Old Masters, contemporary art, modern art, etc.), and country of trade. This lack of homogeneity, poor regulatory framework and profit making aim of the business contribute to a low level of legalization of their codes of conduct.

⁷⁰ Sotheby’s, Code of Business Conduct, p. 51; LEVINE.

⁷¹ GERSTENBLITH, For Better and for Worse; GERSTENBLITH, Controlling the International Market.

⁷² *United States v. Hollinshead* (1974).

⁷³ *United States v. McClain* (1977); *United States v. McClain* (1979).

⁷⁴ *United States v. Schultz* (2003).

⁷⁵ Sotheby’s, Code of Business Conduct, p. 12.

Conclusion

In conclusion, the three elements of legalization as defined by Abbott (obligation, precision and delegation) that differentiate hard law from soft law, show that museums' codes of conduct have a high level of legalization whereas dealers' codes of conduct have a lower level of legalization. Nevertheless, these soft law codes have had practical and legal impacts that have contributed to changing social and legal norms for museums, dealers and private collectors. Public opinion, echoing international institutions (UNESCO, UNIDROIT, ICOM), also plays a role in their execution which illustrates the necessity to educate the public. Finally, the most important shift of the last five years is that statutory measures (such as anti-money laundering legislation) have found their ways into codes of conduct, therefore hardening/strengthening these soft law instruments. This evolution is commendable and should eventually lead to a more open and transparent art market where gentlemen's agreements, unwritten contracts, secret prices and anonymous parties are no longer perceived as normal.

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- United States v. McClain*, 545 F.2d 988; 551 F.2d 52; 545 F.2d 988; 551 F.2d 52 (1977); 593 F.2d 658 (1979) (5th Circuit (1977)).
- United States v. McClain*, 593 F.2d 658; 545 F.2d 988; 551 F.2d 52 (1977); 593 F.2d 658 (1979) (5th Circuit (1979)).
- United States v. Schultz*, 333 F.3d 393; 333 F.3d 393 (2d Circuit (2003)).

10. Cultural Goods Looted by Nazis or Sold under Duress. The Situation in Switzerland: Status and Ways Forward

Abstract

The Chapter discusses certain legal and ethical questions relating to looted art, cultural goods appropriated by the Nazis or sold under duress, with a focus on Switzerland as one of the most important hubs for art dealings during the Nazi Era. An historical overview is followed by an analysis of the Swiss legal situation and the difficulties for the victims of Nazi persecution when it comes to restitution of looted art. Strictly legal avenues are shown as frequently unsatisfactory, especially in light of the “good faith acquirer” principle inherent in continental European law. The author reviews the Washington Principles of 1998 and considers the vexed issue of cultural goods sold under the duress of Nazi persecution (“flight assets”). The Chapter argues that Switzerland needs to establish an independent commission tasked with the resolution of open cases when it comes to both looted art and flight assets, and to adopt non-confrontational means of dispute resolution alternative to litigation.

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Introduction

How to redress the injustice done to the victims of Nazi persecution where – as in the case of cultural goods taken illegally or by morally dubious means – a restitution is still possible? The aim of this Chapter is to address certain legal and ethical issues relating to this question. In a democratic society founded on humanity and justice, there has to be not only a strong statement against the injustice inherent in looted art and flight assets, but action needs to follow on a private as well on a public level, not only as a legal proposition, but also on moral grounds.

While the proposition that cultural goods looted by the Nazis (“looted art”) should wherever possible be returned to the former owners or their heirs has been widely accepted, the issue of cultural goods sold under the duress of Nazi persecution (“flight assets”) remains inadequately addressed. In the case of flight assets, the question ultimately is this: If the artwork had to be sold – even at a then-market price – by the owner in order to finance his flight from the Nazi terror regime, is there a case for restitution?

I. Historical Overview

The Nazi killing machinery did not only cause immense human suffering and destruction, but cultural destruction as well. During the Holocaust, many Jewish families lost everything: their homes, their belongings, their artworks and in many cases their lives or the lives of their loved ones, all under the horrible threat and criminal dictatorship of the Nazis.¹ Cultural goods looted by Nazis or forcibly sold under the threat Nazi persecution were not only artistically important or valuable financial assets. Ultimately, they were part of the identity of Jewish families in Europe, who built up some of the most beautiful and special art collections. By looting these collections or forcing their owners to sell them, the Nazis also robbed an important part of Jewish identity throughout Europe.²

Some may say that these criminal acts occurred a long time ago, so why belabor the past. Most victims are dead and the living ones should move on. Also, some might say, our laws clearly state what is right and wrong – and that most often, statutes of limitations prevent a legal solution. The answer to these lines of argument is clear. First of all, there is no such thing as “to move on” when it comes to the Holocaust. The remembrance of the biggest crime of the 20th century and the unbelievable pain it caused must live on. Secondly, the laws were not drafted with atrocities like the Holocaust and the criminal energy of the Nazis in mind. Statutes of limitations are an amoral, practical expedient, not a judgment on right or wrong in a given situation. Therefore, the question of looted art or of flight assets is not primarily a matter for the courts to determine, but first and foremost a matter of ethics, to find fair and reasonable solutions for the disappropriation of cultural goods during the Nazi dictatorship.

The Nazis used a very subtle legal approach for appropriating assets belonging to Jews. It started with their racial laws, under which Jews were progressively “outgrouped”, depredated of their belongings under the so called “Arianization” policy and finally murdered in concentration camps. Then, there was also the so-called “Reichsfluchtsteuer” (Flight from the Reich Tax), which Jews had to pay if they wanted to leave the country. The tax was introduced in April 1931 for individuals with German domicile wanting to leave Germany and comprised 25% of the total of assets of a person; the goal was to dissuade wealthy people from leaving the country.³ In 1938 came another 25% with the so called “Judenvermögensabgabe” (Jewish Property Tax), which focused on Jewish citizens and

¹ LOWENTHAL, pp. 25 et seqq.

² ALY, *Hitlers elegante Räuber*, pp. 41 et seqq.; RONALD, pp.165 et seqq.

³ FRIEDENBERGER, p. 39.

led to a burden of 50% on the total of assets, with the goal of expropriating Jewish emigrants who had to flee their country.⁴ The terms used by the Nazis already show the hypocrisy and especially the monstrosity of their approach – it also shows the power of wording and the manipulative mechanisms in politics.⁵

II. Situation in Switzerland

Switzerland maintained close relations with Germany and was largely spared from the war. No confiscation or looting of cultural goods took place before and during World War II, because Switzerland was not occupied by Germany and the rule of law prevailed throughout this period. Nevertheless, cultural objects were shipped to and through Switzerland during the war. Assets of dubious provenance, including robbed ones, were smuggled into and through Switzerland by representatives and middle-men of Nazi Germany, and with the help of the leading exponents of Swiss art. Some of these looted and extorted works of art later found their way into Swiss museums and Swiss private collections.⁶

The conflicts of interest which may occur when considering the restitution of looted art or flight assets are the following. On the one side, there is a Jewish family that has lost everything, their loved ones, their belongings and often their artworks and religious artifacts. On the other side, there are the current owners who claim that they have acquired the art in good faith, especially under continental European law. On a strictly legal basis, the “good faith acquirer” principle means there are seldom solutions – especially in civil law systems like Switzerland or Germany.⁷ In fairness, one should add that the purpose of this civil law principle is to provide legal and commercial certainty. Common law systems present different, but no less expensive challenges.⁸ Exceptions to the civil law rules are possible if you can prove that the artwork was acquired in bad faith, or if you can prove that the buyer did not exercise due diligence; the burden of proof is with the claimant. The analysis of Swiss law shows how very difficult it is for the depredated families to prove these exceptions.

⁴ SCHACK, p. 255; WASMUTH, p. 748.

⁵ ALY, *Hitler's Beneficiaries*, pp. 102 et seqq.

⁶ BUOMBERGER, pp. 30 et seqq.; Independent Commission of Experts Switzerland – Second World War; MEIER/FELLER/CHRIST, pp. 15 ss.; RASCHÈR, *Raubkunst*, pp. 395 et seqq.; RASCHÈR/MÜNCH, pp. 130 et seqq.; TISA FRANCINI, *13 Jahre*, pp. 27 et seqq.; TISA FRANCINI/HEUSS/KREIS, pp. 53 et seqq.

⁷ ERNST, pp. 91 et seqq.; MÜLLER-CHEN/RENOLD, *Zivilrechtliche Bestimmungen*, pp. 302 et seqq.; WEBER, pp. 46 et seqq.

⁸ LINE, pp. 37 et seqq.; URICE, pp. 95 et seqq.

A. The Legal Situation

Swiss court jurisdiction is conferred by the Lugano Convention (LugÜ)⁹ and the Swiss Private International Law Statute (PILS).¹⁰ According to Article 1 para. 1 PILS and Article 2 para. 1 LugÜ, the place of jurisdiction for property law matters is the place of residence or domicile of the defendant in Switzerland. For chattels such as cultural goods, Article 98 para. 2 and Article 98a PILS provide an alternative forum at the place in Switzerland where the chattel is located.¹¹

The applicable law is governed by the principle of *lex rei sitae*. Thus all facts that lead to the loss or acquisition of title to cultural goods are considered under the law of the country where the chattel was located at the moment a transaction took place (which can lead to a high fragmentation of applicable laws if the cultural object was sold and re-sold several times in various countries). Therefore, Swiss law is applicable only if the ownership has been acquired in Switzerland. In the case of chattel, the Swiss Civil Code (CC) gives the rightful owner of chattel the right to claim for restitution of property against anybody who deprives him of his property. However: if the recipient of a chattel has acquired it in good faith, either through a legal transaction (Article 714 para. 2 in connection with Article 933 or 934 CC), or by adverse possession for the duration of the statute of limitations (Article 728 CC), then he can acquire title; only if the purchaser has acted in bad faith must he return possession to the rightful owner and former possessor (Article 936 para. 1 CC).¹² Under certain circumstances, a good faith acquirer can acquire title of chattels within five years after the dispossession. Either from an unauthorized person (who did not have permission by the rightful owner to transfer title), or from a transferor in bad faith.

Taking into account the long time since World War II, the five-year statute of limitations after which a good faith acquisition is possible is a significant obstacle when it comes to restitution. Swiss law presumes the good faith of a person in legal transactions (Article 3 CC), unless the acquirer has acted negligently and failed to exercise the diligence required by the circumstances of the actual case at the time the object was acquired. The burden of proof that the defendant did not exercise due diligence lies with the claimant (Article 8

⁹ Übereinkommen über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, Lugano Übereinkommen, unterzeichnet in Lugano am 30. Oktober 2007, SR 0.275.12 (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007).

¹⁰ Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987, SR 291 (Swiss Federal Private International Law Statute of 18 December 1987).

¹¹ MÜLLER-CHEN/RENOLD, Kulturgütertransfer, pp. 293 et seqq.

¹² MÜLLER-CHEN, pp. 276; SCHÖNENBERGER, Der Einfluss des Zeitablaufs, pp. 116 et seqq., 126 et seqq.; SIEHR, Rechtsfragen, pp. 135 et seqq.; SIEHR, Restitution, pp. 74 et seqq.

CC). According to the Swiss Federal Court, the diligence due depends on the expertise of the individual acquirer and especially on the circumstances of each individual case.¹³

Immediately after World War II and under strong pressure from the Allies, the Swiss Federal Council (executive) issued two urgent federal decrees to facilitate the restitution of cultural goods looted in territories occupied by the Nazis. The federal decrees were adopted in 1945 and 1946. The first decree, of 10 December 1945, gave victims the right to reclaim their stolen property which was located in Switzerland from the new owner, even if the latter had acquired the assets in good faith:¹⁴ if a good faith purchaser had to return the object, he was entitled to claim fair and reasonable compensation from the Swiss Confederation. The second decree, of 22 February 1946, obliged every resident in Switzerland to report the known existence of stolen art works and imposed penalties in case of a failure to comply:¹⁵ professional and bank secrecy provisions were lifted. These resolutions were *de facto* a suspension of the applicability of Article 3 CC:¹⁶ based on these decrees, former possessors of looted cultural goods were able to claim back their artworks. By the time the two resolutions expired on 31 December 1947, only seven plaintiffs had filed claims for restitution of 73 objects, whereof 69 could be restituted to the rightful owners.¹⁷ Even though the two decrees led to restitutions which otherwise would not have been possible, today they are criticized as having been too narrow in scope (only applying to objects looted in occupied territories) and time (in force for two years only).¹⁸ Another problem was that the existing rules of the CC (and not the exceptions introduced by the decrees of 1945 and 1946) applied to cultural goods looted in Germany and Austria.

In later years, it became obvious that looted art and flight assets reached Switzerland during the war which were not tracked down despite the federal decrees, but such cultural

¹³ Swiss Federal Court BGE 113 II 397 E. 2a with further references; LINDENMANN, pp. 116, 118; SCHÖNENBERGER, *Der Einfluss des Zeitablaufs*, pp. 118 et seqq.

¹⁴ Raubgutbeschluss des Bundesrates vom 10. Dezember 1945 über vorsorgliche Massnahmen bei Eigentums- und Besitzesrechtsklagen betreffend in Kriegsgebieten abhanden gekommener Sachen (AS 1945, pp. 628 et seqq.).

¹⁵ Raubgutbeschluss des Bundesrates vom 22. Februar 1946 betreffend die Klagen auf Rückgabe in kriegsbesetzten Gebieten weggenommener Vermögenswerten (AS 1945, pp. 1052 et seqq.) (Urgent resolutions on looted artworks of the Swiss Federal Council, dated 10 December 1945 and 22 February 1946).

¹⁶ GIOVANNINI/RENOLD/OLSBURGH/RINGE, p. 345.

¹⁷ TISA FRANCINI/HEUSS/KREIS, pp. 360 et seqq.

¹⁸ GIOVANNINI/RENOLD/OLSBURGH/RINGE, p. 346; RASCHÈR, *Raubkunst*, pp. 398 et seqq.

goods also and in large volumes reached Switzerland in later years through trade or exchange and are today found in Swiss collections. To shed light on these questions, various projects were initiated in Switzerland since the final years of the 1990s.¹⁹

B. Developments

The Swiss Federal Office of Culture systematically examined all cultural goods owned by the Confederation with a view to determining their origin, the time at which they were acquired and, if warranted, detailed circumstances of their acquisition. The study's results, which were published in a report in August 1998, can be summarized as follows:²⁰ within the study's framework, no object was found that had been acquired through illegal or immoral dealings. No object figured in the looted-art inventories published by various countries.

In 1996, the Independent Commission of Experts Switzerland – Second World War (ICE),²¹ known as the “Bergier Commission”, was set up. The Commission was an international body tasked with carrying out historical research into the assets imported into Switzerland before, during and after World War II from a historical and legal point of view. Its comprehensive mandate covered all assets moved to Switzerland, including cultural assets, both of the victims of the Nazi regime as well as of its perpetrators and collaborators. The Commission enjoyed unfettered access to all relevant public and private archives (e.g. museums, art dealers). It is unique in international comparison that even private archives were open to the Commission's investigators.

The members of the Independent Commission included Jean-François Bergier, (Chairman), Wladyslaw Bartoszewski, Saul Friedländer, Harold James, Helen B. Junz, Georg Kreis, Jacques Picard, Jakob Tanner, Daniel Thürer, and Myrtha Welti (Secretary General). The areas of research covered gold and foreign currency transactions, industrial relations between Switzerland and Germany in that period, as well as the transfer of cultural goods belonging to the victims of Nazi Germany to the Nazis and their collaborators. The role of Switzerland as a platform for the art market and conduit for cultural goods in the

¹⁹ For an overview on the various projects see: Swiss Confederation, FDHA/FDFA Report on the status of work of the Swiss Confederation in the field of Nazi-looted art in the period from 2011 to 2016, Bern, Federal Department of Home Affairs FDH, Federal Department of Foreign Affairs FDFA, 2016.

²⁰ Kulturgüter im Eigentum der Eidgenossenschaft; Untersuchung zum Zeitraum 1933 bis 1945. Bericht der Arbeitsgruppe des Bundesamtes für Kultur, Bern, 1998, available at <http://www.bak.admin.ch/kulturerbe/04402/04711/index.html?lang=en> (accessed 22 May 2017).

²¹ Available at www.uek.ch/en/.

Nazi era as well as in the immediate post-war period was examined by a team under Georg Kreis.²²

The results can be summarized as follows: Switzerland became flourishing art market and was an important hub for legitimate and non-legitimate traffic and trade between 1933 and 1945; however, the Bergier Commission was not able to quantify the involvement, concluding that “the notion that the trade in looted art – compared with the occupied territories of Western Europe – took place on a particularly large scale could not be confirmed. Conversely, one could argue that it is astonishing that this trade assumed such dimensions in Switzerland, a non-occupied country, which continued to function in accordance with the rule of law”.²³ The Bergier Commission introduced the term “Fluchtgut” (“flight asset” or “property in the possession of refugees”) – as counterpart to the term “Raubkunst” (“looted art”) – to reappraise the role of Switzerland during the Nazi era; it was a topic not hitherto addressed.

The Bergier Commission used the term “Fluchtgut” in its report (also known as the “Bergier Report”) and defined the term as “cultural property that was brought by its [Jewish] owners themselves into or by way of Switzerland on their journey into exile”. It comprises transfers of ownership in a country where the Holocaust did not take place.²⁴ Also the Conference on Jewish Material Claims Against Germany (Claims Conference) and the World Jewish Restitution Organization (WJRO) likewise make a distinction between countries where the Holocaust took place and those where it did not.²⁵ As will be discussed later, issues surrounding the restitution of flight assets still remain to be satisfactorily addressed.

III. Washington Principles of 1998

As shown above, today’s legal instruments are not sufficient to satisfactorily address the restitution of looted art or of flight assets resulting from Nazi persecution. The biggest

²² TISA FRANCINI/HEUSS/KREIS.

²³ Independent Commission of Experts Switzerland – Second World War 2002, p. 365.

²⁴ For the historical and terminological background see: TISA FRANCINI/HEUSS/KREIS, pp. 347 et seqq., 391 et seqq., and 472 et seqq.; Independent Commission of Experts Switzerland – Second World War 2002, pp. 355 et seqq.

²⁵ See the joint report of the Claims Conference and WJRO of 10 September 2014 (Holocaust-Era Looted Art: A Current World-Wide Overview), p. 5, available at www.claimscon.org (accessed 22 May 2017) and <http://wjro.org.il> (accessed 22 May 2017).

problems – especially in Europe – are the statutes of limitation and the fact that it is the claimant who has to prove the bad faith of the acquirer at the moment of acquisition.

There was the need for new approaches to solve this issue: They were found in the Washington Conference Principles on Nazi-Confiscated Art (Washington Principles of 1998), drafted with active Swiss participation.²⁶

A. Soft Law Principles

The Washington Principles are an international agreement and belong to the so-called “soft law”.²⁷ The conference provided a new impetus to the need to coordinate international efforts to locate and find “just and fair solutions” when it comes to looted art.²⁸ Although soft law, the efforts are driven by important moral obligations to the victims of the Holocaust. As such, the Principles themselves send a strong signal to the art world and provide relevant guidance to find just and fair solutions when it comes to looted art. The Chair of the Washington Conference, Under Secretary of State Stuart Eizenstat said: “Several weeks ago, we prepared a discussion paper of 11 general principles, which was used as the basis of extensive consultations and which all of you have today. These principles are not, in themselves, a solution. They are a means by which nations can fashion their own solutions consistent with their own legal systems. The principles try to capture the spirit of this conference for nations engaging in this task. If these principles are properly applied, the discovery of Nazi-confiscated art will no longer be a matter of chance. Instead, there will be an organized international effort – voluntary in nature but backed by a strong moral commitment – to search provenance and uncover stolen art. This effort will be undertaken by governments, NGOs, museums, auctioneers and dealers”.²⁹

“In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws” (preamble).

Non-juridically speaking the main requirements of the Washington Principles of 1998 are:

- Artwork looted during the Nazi-era should be located.
- All countries will endeavor to open their archives and simplify research.

²⁶ For the text of the Washington Conference Principles on Nazi-Confiscated Art, see <https://www.state.gov/p/eur/rt/hlcst/270431.htm> (accessed 22 May 2017).

²⁷ SCHÖNENBERGER, *The Restitution*, pp. 229 et seqq.; SCHNABEL/TATZKOW, pp. 192 et seqq.

²⁸ For the origin of the terms “just and fair” as well a view from the United States see DAVIDSON, pp. 91 et seqq.

²⁹ EIZENSTADT.

- A central registry should be created to list cultural objects of unknown origin and to act as a repository for informational queries.
- Evidentiary requirements should be relaxed since property rights often extend over decades and can no longer be traced when it comes to looted art properly documented (e.g. without gaps of ownership).
- Once artwork looted during the Nazi era has been identified as such, the fact should be made public and its original owners identified.
- Subsequently, the original owners' claims should be resolved on a just and fair basis.
- In the event that the original owner or the owner's heirs can be located, countries should offer an extrajudicial procedure – for example mediation – designed to find an expedient and equitable solution in the individual case.

Although not legally binding, the principles as accepted by the community of nations nevertheless represent an important step, providing new dynamics to the complex dossier of looted art: as soft law, they represent a new legal reality and will open new avenues to resolve related issues, ultimately expanding our understanding of international public law. We should note that in the field of looted art, it is simply impossible to create a universal solution. Each case is unique, requiring different approaches. The parties can choose an approach that best fits their needs (mediation by an independent judicial authority or an arbitration panel come to mind).³⁰

B. Nazi Looted Art Commissions

An important step forward was the establishment of a number of Nazi Looted Art commissions in Austria, France, the Netherlands, Germany and the United Kingdom.³¹ Their main function was to provide a neutral ground on which both parties could find solutions outside the courts,³² and cope with the “complexity and the moral weight of the considerations when assessing cases”.³³

Differently from most European countries to date Switzerland did not set up such a commission and thus is not compliant with the Washington Principles of 1998. Although fair and just solutions can be found without the involvement of national commissions and with the use of non-confrontational means an independent commission should be established in Switzerland for the resolution of open cases regarding looted art and flight assets. Even if

³⁰ JAYME, pp. 151 et seqq.; RASCHÈR, *Raubkunst*, pp. 403 et seqq.; SCHACK, p. 256.

³¹ For an overview of the various national commissions as well as mandate and working methods see MARCK/MULLER, pp. 41 et seqq.

³² ROWLAND, pp. 83 et seqq.

³³ MARCK/MULLER, p. 89.

each case is unique, a commission adds a further avenue to finding solutions and especially helps to develop best practices, which can be shared and compared.

IV. Litigation or Out-of-Court Settlement?

To illustrate different approaches (court decision or out-of-court settlement) with regard to restitution claims, this section shall more closely examine the resolution of two claims in Switzerland. In 2010 and 2012, claims were filed involving restitution claims relating to cultural goods owned by the Confederation.

The first claim regards the drawing *View of Les Saintes-Maries-de-la-Mer* by Vincent van Gogh (1888), located in the Oskar Reinhart collection *Am Römerholz*. In 2010, a restitution claim was brought against Switzerland by a private individual before a court in New York. The plaintiff called for the return of the drawing by Vincent van Gogh, alleging that his great-grandmother, Margarethe Mauthner, was obliged to sell the painting for a sub-market price under duress during the Nazi era. The Confederation rejected the claim, arguing that provenance research had yielded the conclusion that the work could not be seen as Nazi-looted art in the sense understood by the Washington Conference Principles. The collector Oskar Reinhart had acquired the work under the auspices of a business relationship existing since 1928, purchasing it directly from the vendor in November 1933. The collector had already purchased a similar drawing at a comparable price from the lady in question in 1928. In its 11 March 2011 decision, the United States District Court, Southern District of New York³⁴ as the court of first instance, dismissed the complaint against the Swiss Confederation for lack of subject matter jurisdiction. Based on the Foreign Sovereign Immunities Act (FSIA),³⁵ the court ruled that a court of law can assert jurisdiction only when the initial taking of an object was committed by a State or a person or entity acting on a State's behalf.³⁶ The plaintiff filed an appeal before the United States Court of Appeals for the Second Circuit, which in its decision of 12 October 2011³⁷ affirmed the judgment of the district court in favor of the Swiss Confederation,³⁸ again basing itself on

³⁴ *Andrew Orkin v. The Swiss Confederation, et al.*, 770 F. Supp. 2d 612, 2011 U.S. Lexis 24507 (S.D.N.Y., March 11, 2011).

³⁵ 28 USC 1330, 1602-1611.

³⁶ CHECHI/BUNDLE/RENOLD (accessed 22 May 2017).

³⁷ *Andrew Orkin v. The Swiss Confederation, et al.*, 2011 U.S. App. Lexis 20639 (October 12, 2011), 4.

³⁸ Press Release of the Confederation from 7. June 2010, Nationalmuseum übergibt dem Nachlass einer jüdischen Kunstsammlerin ein silbernes Trinkgefäß, available at <https://www.ad-min.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-43525.html> (accessed 22 May 2017).

the formal question of jurisdiction.³⁹ The crucial substantive issues in the case in question were not addressed, i.e. whether Margarethe Mauthner was forced to sell the painting as a result of Nazi persecution (even if a then-market price was paid).

The second claim regards the silver drinking vessel *Lerber Lark* made by Nicolas Matthäy (1670/80) then in the Swiss National Museum. In 2012, the Museum handed over the drinking vessel to the estate of the Jewish collector Emma Budge. Based on provenance research, the museum had already established in 1998 that it had acquired the drinking vessel at a public auction of the collection of Emma Budge in Berlin in 1937. Subsequent provenance research⁴⁰ by the Confederation, in conjunction with representatives of the executor of the heirs of Emma Budge, showed that the profits from the public auction of the drinking vessel were never passed on to the heirs of Emma Budge, but were transferred to a blocked account controlled by the Nazis. At no time were the profits from the sale ever made available to the lawful heirs. In light of the proven facts that had emerged in the interim (involving confiscation, the auction and its consequences), and in the interest of a just and fair solution as understood by the Washington Conference Principles, the Federal Council gave permission for the work to be handed over to the heirs without compensation.⁴¹ In this case, no legal battle ensued, but the claimants did resort to the means of dispute settlement alternative to litigation: a just and fair solution was found through conjoint provenance research and negotiation in the spirit of the Washington Principles of 1998.

V. “Looted Art” (“Raubkunst”) v. “Flight Assets” (“Fluchtgut”)

One important question Switzerland has to face is how to deal with “flight assets”, namely property in the possession of refugees or people who had to sell their cultural goods to finance their flight or the flight of their family members. Such sales were a direct consequence of the persecution of the refugees in need raising money to save their lives.⁴²

³⁹ CHECHI/BUNDLE/RENOLD (accessed 22 May 2017).

⁴⁰ This case shows the importance to pro-actively conduct provenance research and to make complete transparency on all aspects of the research: MOSIMANN, pp. 105 et seqq.

⁴¹ See Press Release of the Confederation from 23. February 2012, Van Gogh’s “View of Les Saintes-Maries-de-la-Mer” remains in the Oskar Reinhart Collection “Am Römerholz” in Winterthur, available at <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-44840.html> (accessed 22 May 2017).

⁴² JOLLES, pp. 137 et seqq.; OSSMANN, pp. 17 et seqq.; SCHÖNENBERGER, Der Einfluss des Zeitablaufs, pp. 126 et seqq.; TATZKOW, pp. 43 et seqq.

This distinction may work on paper or as an academic construct – but it hardly works if one takes into account the whole situation of the victims during the Nazi era, and what it in particular meant for the Jewish community. The fact is that Jewish families had to sell their collections – mostly at a very low price, be it in Germany or elsewhere – to finance their escape from certain death. However, especially art museums in Switzerland are still of the opinion that “flight assets” are not covered by the Washington Principles.

As noted before, Switzerland was an important market place for looted art and flight assets. The two claims at Federal level described earlier show the problems (see above section IV). The one from 2012, *Lerber Lark*, is an exemplary solution based on a thoroughly conducted provenance research and on the will on both sides to find a fair and equitable solution. The one from 2012, *View of Les Saintes-Maries-de-la-Mer* by Vincent van Gogh, is a case that was resolved with prejudice on a formal level, and so prevented an individual case-by-case approach to this very delicate question. The question being, if the artwork had to be sold – even at a then-market price – by the owner in order to finance his flight from the Nazi terror regime, is there a case for restitution? Hence the need to differentiate between “looted art”, as in the 2012 case, and “flight assets”, as in the 2010 case. This latter 2010 case also shows the need for an independent Commission, which deals with possible solutions when it comes to looted art and flight assets.

If one looks at the situation during the time of the Nazi regime, the logical solution in the discussion is that “looted art” and “flight assets” must be treated in the same way, and that the Washington Principles are applicable in both cases. For the Jewish family affected, it makes no difference whether the Nazis confiscated a piece of art or the family had to sell it to finance their escape from the Nazi terror. The result is in both cases the same: Because of the racial laws, because of Nazi persecution, a family has lost its – often culturally defining – valuable belongings. The suffering, the loss and the injustice are the same in both cases. Therefore – and contrary to the point of view of some museums – both cases fall under the Washington Principles, and in both cases fair and equitable solutions have to be found.

Unlike most art museums in Switzerland, the Kunstmuseum Bern has taken an important step in this direction: In accepting the so-called “Gurlitt Collection”, the museum clearly stated that it is committed to treating “looted art” the same way as “flight assets”.⁴³ The director of the Federal Office of Culture, Madame Isabelle Chassot, stated in a radio interview in September 2015 that although Switzerland makes the distinction between “Raub-

⁴³ FREHNER.

kunst” (looted art) and “Fluchtgut” (flight assets), the term used in Germany – “NS-verfolgungsbedingt entzogene Kulturgüter”, i.e. “art losses that were caused by Nazi-persecution”⁴⁴ – would be more precise and appropriate in specific cases.⁴⁵

In its most recent report on the status of work of the Swiss Confederation in the field of Nazi-looted art in the period from 2011 to 2016, the Swiss Confederation has stated: “With reference to the applicability of the Washington Conference Principles, the Federal Office of Culture assumes that, independently of any kind of categorization, a comprehensive investigation needs to be made in each individual case. Crucial for the Confederation, in the light of the Washington Conference Principles, is the question whether a transfer or change of ownership in the period between 1933 and 1945 effectively amounted to a confiscation. In so far as this was the case, ‘Fluchtgut’ [‘property in the possession of refugees’] and ‘Fluchtkunst’ [‘art in the possession of refugees’] may well prove to be Nazi-looted art as understood by the Washington Conference Principles”.⁴⁶ This is an important step in Switzerland: To start treating “flight assets” the same way as “looted art”, and to recognize that both are the fruit of the same evil.⁴⁷

In the end, it is not only about law – it is also about ethics and historical responsibility, and ultimately about human conscience. One cannot undo what has been done, but one can acknowledge what has been done and show that one does not want the injustice of that time ago to be perpetuated. Not more – but also no less.

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⁴⁴ See <http://www.lostart.de/Webs/DE/LostArt/Index.html>.

⁴⁵ See <http://www.srf.ch/kultur/gesellschaft-religion/von-fluchtgut-profitieren-museen-und-nicht-erbe> (accessed 22 May 2017).

⁴⁶ Swiss Confederation, FDHA/FDFA Report on the status of work of the Swiss Confederation in the field of Nazi-looted art in the period from 2011 to 2016, Bern: Federal Department of Home Affairs FDH, Federal Department of Foreign Affairs FDFA, 2016, p. 51.

⁴⁷ See also Terezin Declaration on Holocaust Era Assets and Related Issues of June 30, 2009, para. 4: “Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 [...]”, available at <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (accessed 22 May 2017).

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