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THE BILATERAL DISPUTES BETWEEN MUSEUMS AND STATES OF ORIGIN FOR THE RECOVERY OF CULTURAL OBJECTS: ARTISTIC CREATIONS AND INDIGENOUS HERITAGE

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To my loved grandma.

To the best discovery of my PhD:
my Colleagues Azzurra, Chiara,
Flavia, Ilaria, Laura, Leonilda, Maja,
Marzia, Roberta, Susanna.

"Les arts et les sciences formaient depuis longtemps en Europe une république dont les membres, liés entre eux par l'amour et la recherche du beau et du vrai (...), tendent beaucoup moins à s'isoler de leurs patries respectives qu'à en rapprocher les intérêts, sous le point de vue si précieux d'une fraternité universelle"
Quatremère de Quincy

Outline

Methodological Preface

The Elgin Marbles, the metopes from Selinunte, the Nefertiti bust and the Rosetta Stone from Egypt, the Pergamon Altar from Turkey and the Ishtar Gate from Mesopotamia, the massive collections that made unique some of the most famous American and European museums, such as the Metropolitan Museum of Art and the Brooklyn Museum of New York City, the Asian Art Museum of San Francisco, the Boston Museum of Fine Arts, the Yale Museum of British Art, the British Museum in London and the Louvre in Paris: this list includes only a smaller section of the internationally claimed cultural objects, removed from their original sites during the so-called Age of Imperialism, and that generally constitute the current best collections of the Western museums.[1]

The current examination will take into consideration the *recovery* of the cultural objects illegally removed from their Country of origin as its main focus.

First of all, it will analyze the core concepts and definitions, as a necessary background to move to the study-cases investigation, that will characterize the overall examination. The concepts will be fully taken into examination as following. It is sufficient to mention them in this passage: the emerging branch of the Cultural Heritage Law, as a specific area of the contemporary theory of International Law, and its related legal framework; the "evergreen" dispute over the terms of "cultural property", "cultural objects" and "cultural heritage"; the distinction, generally accepted in literature, among return, restitution, and repatriation.[2]

Secondly, the core section will be dedicated to a significant and selected list of cases, chosen among the vast number of disputes, litigations, and legal actions concerning the recovering actions of cultural objects. Pondering the extensive amount of cases, it has been necessary to define a clear-cut background.

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[1] See: John Henry Merryman, *Imperialism, Art and Restitution*, (New York: Cambridge University Press, 2006), 1-8. In particular, the expression "Age of Imperialism" pinpoints the lapse of time from the Roman sack of Veii in 396 B.C. to the end of the Second World War, underlining all the actions and wars which enabled the invaders and conquerors to remove and steal the cultural materials belonging to the defecate people. Mainly, this action was considered as a reward for the war expenses, and it is also known as *ius praedae*. Also the Napoleon's campaigns, the actions of suppression of the Aboriginal cultures in Oceania and America, the Nazi plunder activity during the Second World War are considered as part of the "Art Imperialism" epoch.

[2] It is the case to precise here that the difference among the three terms is not accepted by all scholars. Cf. Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter V, paragraph 13, in course of publication.

To be more precise, the choice has been operated assuming a specific paradigm of conditions: each case will refer to a bilateral dispute, involving Italy and a museum, as actors. Another adopted element regards the choice of a common law museum or country as counterpart of Italy in the dispute. This will give the possibility of including in the examination some features regarding the different implementation of the international legal tools, when applicable, for the return of cultural heritage. Considering the exposed criteria, the study-cases will be: the bilateral agreements between Italy and US museums, and a still pending dispute related to an Australian query for the return of Aboriginal items stored in two Italian museums.

Furthermore, a fundamental distinction must be operated between the US cases and the Australian one. The bilateral agreements with the US museums is due to their value as the beginning of a new paradigm in the resolution of bilateral disputes concerning the restitution of cultural objects between States Parties to the 1970 UNESCO Convention. It was a step of absolute importance. For this reason, the first case under analysis will be the agreement between the Metropolitan Museum of Art of New York and the Italian Ministry of Culture. It is the first of a series, but also the only publicly available. It is largely considered as a model in the art dispute resolutions, among museums experts and scholars.

Thirdly, the pattern offered by the cases will give the opportunity to illustrate different possible solutions in the return of cultural objects issue.

Later on, the agreements signed with the Boston Museum of Fine Arts and the Jean Paul Getty Museum of Los Angeles will be considered. They are two valuable examples, because of the high importance of the museums, as well as they follow the path ushered in 2006 by the Metropolitan of New York, giving back to Italy a huge and valuable amount of items, strengthening their mutual cultural cooperation.

Besides, exclusive interviews released by the legal advisors and curators from the three American museums will be reported in the Annex section of the study and will be taken into account in the dissertation.

With regard to the Australian case, it represents an interesting case involving not only the museum role and the query of cultural items from a foreign State, Party to the international Conventions on the illicit trade of cultural objects.

In addition, the Australian request to the Italian museums opens to new questions concerning the importance of the Human Rights issue concerning the restitution of cultural heritage (and not simply objects), in opposition to the general reluctant position of the museums in giving back objects in their possession, that is the basic common standpoint for all the museums involved in this kind of art disputes.

Finally, the conclusion aims to underline the difference that must be mull over approaching the bilateral disputes cases between museums and States of origin of a claimed cultural object, because of the fundamental distinction for the higher significance of the link embodied by an object of supreme value for the people it belongs to, due to unquestionable cultural religious reasons and traditions. Even though the other items are utmost artistic creations. Additionally, each case must be evaluated separately, as many questions raise in relation to the presence of such objects in territories other than the place of origin, or the possibility to better serve the intention of educating and contributing to the development of a shared common heritage of humankind.

Before entering in the core analysis, it is indispensable to underline here that the issue of the cultural heritage involves several legal layers: both Public and Private International Law, as well as all the domestic legal reference environment, dealing with criminal and civil profiles. It would be pretentious to include all these outlines, and probably impossible to properly cover all the needed features. This work will prefer to take in the setting only to Public International Law foundation, trying to assure a more rigorous examination of one profile, instead of fix too ambitious aims, but remaining on a too vague dissertation.

Noticeably, cultural heritage also represents the evidence of human culture evolution and of international community history: the nature of the diverse international cultures and their constant changes take place in the course of the centuries, giving rise to the creation of the universal culture and to human civilization itself. Therefore, as cultural heritage constitutes the common heritage of mankind, it concretely falls under the Public International Law discipline. At the same time, however, it belongs also to the class of Private International Law, in view of the large number of transactions that are concluded internationally and that involve not only individuals but also institutions of a public nature (state and religious organizations, museums, etc.), which act without any prerogative of

authority and power. Such complexity is reflected also in the regulation of cultural heritage, both domestically and internationally, and required the harmonization of certain basic principles in the international transactions.

In the current examination the relation among Law and Culture will be the real foundation to proceed into the analysis.

Introduction

One of the basic questions that might be addressed to the present study regards "why the International Law should be involved in and what is its role in safeguarding the International Cultural Heritage field?".

The first international instrument that must be taken into consideration to answer to this question is Article 38 of the International Court of Justice,[3] which lists the sources of the International Law, or to better say, which are the norms that have a binding force over International actors.

In the present analysis, main international legal instruments will be the Treaties concluded among the States concerning the measures to settle the disputes over the restitution of Cultural Heritage, which are binding tools only for those States that consent to be bound in their domestic law through the implementation of the Treaties, giving them full effect. This feature represents also the main limit of the International Treaties.

Customs represent the second typology of international element relevant under the legal perspective. They consist of the law of conscious of the community: in other words, the legal opinion is expressed in the practice. Custom is very difficult to identify. In common law, it is identified as a set of the legal opinions of the court, while in International Law is a distillation – not a mere addition – of what is considered as just and binding in a specific period. Accordingly, the comprehensive customs that seemed agree today as general common principles constitute the emerging customary rule. In the case of analysis, examples may be: the principles concerning the return of objects removed without the consent of the territorial rule, as occurred in the Iraq invasion in 2003; or the

[3] See Article 38 of the International Court of Justice:
"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto".

principle of needed co-operation among all States of the International Community. These examples have been later translated into conventional tools.

The general principles must be considered as a fundamental source in International Law. Generally, in common law systems, tribunals apply general principles by default, deriving them from domestic law analogy; whereas, in civil law systems, its validity is limited to the application of the conventional provisions for the parties to the conventional instruments. In fact, the different civil law foundation does not refer to the application of precedent judgments, but the aforesaid provisions will result in force only for the parties who have already signed and ratified the conventional tools. For those international subjects not parties to the conventions, they may apply the principle, in case they acknowledge it as valid *tout court*. The importance of principles such as the self-determination is also highly relevant also with regard to the Cultural Property.

While International Conventions, customary law, and general principles form the traditional tools of International Law, another instrument is represented by soft law. The latter is a category of norms not meant to be acquired of an express binding effect, but they imply an indirect manifestation of the behavior of the States. They may be considered as political or ethical principles that "prepare" to hard law. They help to interpret hard law and are a basic step to introduce new hard law. One of the most typical soft law tools are the declarations, that could be later on turned into a treaty, becoming a hard law tool. UNESCO praxis often recurred to introductory soft law tools, such as Declarations, that had been later translated into Conventions.

To this regard, limiting this evaluation to the UNESCO-based regime, an important example had been the Declaration concerning the Intentional Destruction of Cultural Heritage, promulgated by UNESCO in 2003.[4] It called for the protection of cultural heritage, with particular regard to territorial occupations[5]

[4]See: UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003, available at: http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 3, 2013).

[5] See: "When involved in an armed conflict, be it of an international or non-international character, including the case of occupation, States should take all appropriate measures to conduct their activities in such a manner as to protect cultural heritage, in conformity with customary international law and the principles and objectives of international agreements and UNESCO recommendations concerning the protection of such heritage during hostilities", UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003,

(as reminded before, in 2003 the invasion of Iraq occurred, producing a disastrous destruction of Iraqi cultural heritage), the State responsibility,[6] individual criminal responsibility,[7] international cooperation for the protection of cultural heritage, and the recognition from the International Community of the "need to respect international rules related to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations".[8]

Finally, considering soft law tools, Codes of Conduct represent important tools, especially in the museums' field. This category will be examined in the course of the research.

available at: http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 3, 2013).

[6] Cf.: "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", UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003, available at: http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 3, 2013).

[7] Cf.: "States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of 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", UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003, available at: http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 3, 2013).

[8] See: UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003, http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed on October 23, 2013).

Part One. International Dimension of Cultural Heritage Law

Chapter One. International Legal Framework

1.1. Historical Background of the Recovery of Cultural Objects

The foundation of the issue concerning the recovery of cultural objects moved from their place of origin is necessarily bound to the reason of their transfer. Historically, it is a war cause. Over time, in fact, wars originated the winners' praxis to gather defeats' goods, including valuable cultural objects. The war chest was a compensation for afforded expenses and a way to inflict also a humiliation to the losers. The importance of the gesture is worth of note at least as much as its economic meaning: looting the enemy's most representative and precious symbols show the will of revenge and of affirming the winner's superiority. As a consequence, coming in possession of their cultural distinctive symbols represents an appropriation of the identity of the defeated, also by diminishing the value of his cultural history and patrimony. It could be defined as a cultural conquest of the defeat, not only on the field, but also by monuments, works of art, books, and every other cultural production.

Depending upon the case, the spoil could represent the victory, the oppression, or simply an economic good. In particular, during the age of discovery, that covers the period between the Spanish conquests until the rising of the British Empire, the defeated cultural objects may be considered as completely assimilated to every other kind of mercy. And for these reasons, the objects started to be displaced from the original land to another – generally, from the conquered land to the land of the conquerors. The most easiest example regards the accumulation operated by the British empire, which allowed it to accrue the huge patrimony still nowadays shown at the – highly celebrated by the British people and conversely condemned by the former colonized peoples – British Museum.[9]

[9] Also the French Empire has operated a similar action of cultural conquest in its dominions.

The collecting phenomenon became intensely common especially in the Eighteenth and Nineteenth societies. Indeed, with the expansion of the Age of Empires and their foreign lands occupations a new increasing habit started to take place: the collection of several different kinds of cultural objects, especially the most bizarre became cult objects to parade around in exclusive circles of the wealth motherlands society, such as also the really common practice of collecting human remains. The most active roads moved from Africa, Asia and Middle-East towards Europe, obviously, fed both by private collectors and States. This pattern describes also the basis of the cases of study that will be consider in the current examination.

Concurrently, this new diffused phenomenon had the merit of favoring the rise of the development of archeology as a scientific autonomous discipline. Its interest is precisely based on the analysis of the past through the inspection of objects, generally excavated, and the reconstruction of the physical context, to better understand the historical conditions which determinate the existence if that precise item. Archeologist principally dedicate the most accurate attention to the scientific analysis of the information acquired by the object, not from the object itself. Instead, the collectors' interest is merely focused on the aesthetic appreciation of the cultural object, which is able to satisfied particular personal enjoyment or curiosity, mainly connected to the exclusivity of its shape, age, beauty. The more it is exclusive, the more it is precious, in fact, in the collection world.[10]

Subsequently, the decolonization period following the end of the Empires opened to the emergence of States of new independence. This process represented a huge change in International Relations, and it was highly relevant for the field of cultural heritage as well. Actually, the States of new independence launched claims for recovering all the lost patrimony of cultural objects displaced from their territories during the occupation regimes enforced by foreign motherlands. These States started also to promote and implement the adoption of specific regulations aimed to avoiding the practice of illegal and unfettered excavations and export of cultural objects.

[10] See: Colin Renfrew, *Loot, Legitimacy and Ownership*, (London: Duckworth, 2000), 19.

On one side, even the export of cultural objects is intended by some scholars and experts as the manifestation of the colonization exploitation of the subdued territories and peoples. On the other side, a different evaluation looks at the consequence of the imposition of new rules for the export of cultural objects from the former colonized lands as a factor which contributed to diminish the flow of art and antiquities trade for collection. As the collection trade has been regular and consolidated when the colonization collapsed, the request for art and antiquities remained elevated. Thus, the new impositions may be seen as a determinant factor pushing for the rising of a new illicit trade in the cultural field, to face the high demand created in the past.[11]

1.2. The International Nature of the Cultural Objects Market

The art and antiquities trade reflects a natural international attitude: the general normal exchange of this kind of objects implies the encounter between supply and demand deriving from different States. As the feature has an international nature, the answer to the problems arising from the concerned field must necessarily be of an international nature, as well: the 1970 UNESCO Convention on the Means of prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[12] and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[13] represent the two legal instruments adopted by the International Community. Unfortunately, the International Law nature has not a coercive power. Conventional legal tools cannot be imposed over States, that remain the principal subjects of the International Law. Consequently, the adoption of the single Treaty remains a free choice up to each State. Normally, in operating this choice, the single State prefers to independently evaluate if the effects emanating from the accession to the international rules included in the Treaty may represent a concrete advantage or, otherwise, an undesirable obligation, especially for national interests, both

[11] On the explanation of the illicit trade of cultural objects as a consequence of the protection regime imposed by the States of new independence, see: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 133.
[12] See: *Infra,* Chapter 2.
[13] See: *Infra,* Chapter 2.

economic and bound to its prestige. This reflection may help to understand, for example, the really low success experienced by the 1995 UNIDROIT Convention.

By the way, these two international tools aim principally to offer a solution for the conflicts that may occur in the international market of cultural objects, mainly attributable to the different system each State had decided to protect its own cultural heritage over time. The history of each State offers generally the best reason to understand the single decision, as it enshrines the roots of the people, the development of the society and their sense of belonging to the nation they are part of. Moreover, the taste for the beauty, exclusivity and wealth, for example, may determine the attitude to import art and antiquities, both for personal enjoyment, but also as a secure alternative economic investment. As it is generally recognized for British private collectors.[14]

The recourse to legal norms to regulate and tackle with social issues is ancient as human history itself. At the international level, the establishment of a shared and fulfilled system of rules is hard to accomplish. On one hand, the multitude of States and other subjects present such a variety of different instances, thus they may have diverse approaches to the same trouble. On the other hand, these composite nature of the international arena and the impossibility to impose *sic et simpliciter* rules and coercive measures for transgressors impede to achieve a stabilized order. International Law shall try to find the proper solution, by reconciling the issues and finding the common answer.

1.3. The Development of the Protection of Cultural Heritage[15]

The safeguard of the cultural heritage takes origins from the initial forms of preservation and protection of sacred buildings in time of war. However, this primary form had been extended to monuments and all buildings recognized as of

[14] On British interest for art market as an alternative economic investment, see for example: Georgina Adam, BBC, Culture, The Art Market, "Is Art a good investment?", November 4, 2013, available at: http://www.bbc.com/culture/story/20131104-is-art-a-good-investment , (accessed November 21, 2013). Cf. Philip Hook, *Breakfast at Sotheby's: An A-Z of the Art World*, (London: Particular Books, 2013), 368.

[15] The legal instruments described in this paragraphs will be analyzed in depth in the following section. The present description aims essentially to offer a general historical background and an overview of the historical path which led to the international legal evolution of the matter here under examination.

value because of their age and historical significance. The impossibility to reproduce the monument, its original materials, its testimony of the past represent the most important feature regarding the need of protect the cultural heritage: every piece is a unique evidence that must be preserved for future generations. For this reason, the protection started to be extended from time of war also to time of peace, including not only religious buildings, but all kinds of cultural heritage. From this basis, the specific attention for the safeguarding of the movable cultural heritage arose around 1800s, as an effect of the growth of antiquarianism, the collection practice and the progress of the archeology, a new scientific branch decisively bound to the study of the cultural heritage.[16]

European States had been the first ones to adopt precise legislation measures to protect cultural heritage. An action naturally pushed by particular richness in sites, monuments, churches and all other kinds of cultural heritage of the Old Continent. Taking into account the chronological order, the absolute first State was the Greece in 1832, followed by Italy in 1872, and France in 1887.[17] Other States decided to establish proper legislation making illegal all kind of export of their national cultural heritage. Turkey implemented its legislation which contemplated also the prohibition of the export of cultural heritage in 1874, followed by Egypt in 1879.

This choice opened also to the subsequent establishment of numerous national museums, such as the Egyptian one in 1835 and the Turkish one in 1847. Other British colonies and former Ottoman States adapted themselves to the new trends, establishing legislation which included some forms of protection for the cultural heritage: on the British side, Iraq in 1924, Palestine[18] in 1929, and India in 1932; on the Ottoman side, Iran in 1930, and Lebanon in 1933. Apart these cutting-edge States, the majority waited for the end of the colonization to implement their own national legislative protection of the cultural heritage.[19]

Besides, this background favored a growing consciousness of the need of an international cooperation to promote the adoption of similar protective

[16] Cf. Lyndel V. Prott and Patrick J. O'Keefe, *Law and the Cultural Heritage: Vol. I Discovery and Excavation*, (Abingdon: Professional Books Ltd, 1984), 31.
[17] Cf. Lyndel V. Prott and Patrick J. O'Keefe, *Law and the Cultural Heritage: Vol. I Discovery and Excavation*, (Abingdon: Professional Books Ltd, 1984), 34-38.
[18] Today, Israel and Jordan.
[19] See: Lyndel. V. Prott and Patrick J. O'Keefe, *Law and the Cultural Heritage: Vol. I Discovery and Excavation*, (Abingdon: Professional Books Ltd, 1984), 44.

measures aiming to avoid the illicit traffic of cultural heritage. This awareness process culminated in the League of Nations' recognition of the urge to implement legal protection for art and antiquities. Therefore, in 1933 the *Office International des Musées*, part of the League of Nations prepared a draft of the Convention on the Repatriation of Objects of Artistic, Historical, or Scientific Interest, Which Have been Lost, Stolen or Unlawfully Alienated or Exported. The limits of the draft dealt with the lack of a distinction between the private and public cultural heritage, while many States agreed only on promoting a legislative protection of their national public heritage.[20]

Another endeavor was the draft of the Convention for the Protection of Natural Historic Artistic Treasures, which designed a legal protective regime for public heritage, and States could decide on adopting a complementary regime for the specific protection of private cultural objects, even though many States (United Kingdom, United States of America, the Netherlands, and Sweden among the others) maintained a certain reluctance for the implementation of a similar regime, considering their prosperous level of art trade exchanges.

In any case, the attempt was definitely blocked by the Second World War. As a coincidence, the War itself was the most relevant demonstration of the urge to adopt a new international regime able to tackle with the problems of the protection of cultural heritage and to regulate its market.[21]

The Second World War made aware of the League of Nations' failure in maintaining peace in the international arena. This led to its transformation into a new international organization: the United Nations.[22] This change produced effects also in the international protection of cultural heritage field. In fact, on May 14, 1954 the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[23] was adopted by the Educational, Scientific and Cultural Organization (hereinafter, UNESCO), one if the United Nations

[20] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 134.
[21] See: Patrick J. O'Keefe, *Commentary on the 1970 UNESCO Convention*, 2nd ed. (Builth Wells: Institute of Art and Law, 2007), 1-4.
[22] On the history of the League of Nations and the establishment of United Nations, see: History of the United Nations, available at: https://www.un.org/en/aboutun/history/ (accessed November 3, 2013).
[23] The 1954 Hague Convention entered into force on August 7, 1956. As to November 3, 2013, 126 States are Parties to the 1954 Hague Convention. See: ICRC, "Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954", available at: http://www.icrc.org/ihl/INTRO/400 (accessed November 3, 2013).

specialized agencies. The 1954 Hague Convention partially deals with pillage, loot and restitution issues in time of war and with a particular attention on the occupied territories.

Later on, the International Community started to address to the illicit trade issue in time of peace.

The first step was the 1956 Recommendation on International Principles Applicable to Archeological Excavations, adopted by UNESCO.[24] As known the Recommendations are soft law legal instruments, acting as not-binding guidelines, and they may exercise an influence on States' behavior. The 1956 Recommendation provided some advices that were considered for – and partially included in – the 1970 UNESCO Convention. A brief example: the proposals included measures to preclude furtive excavation and export activities of archeological materials addressed to States, as well as the invitation for the museums to verify the provenance[25] of the works of art and all antiquities. The importance of the Recommendation is due mainly at the fundamental foundation it represented for the opening process which lead to possibility for each State to work on its own national legislative framework to avoid the illicit trade, starting from a common international background.

During 1960s, a new alarm arrived from Peru and Mexico, two States particularly rich in antiquities, which claimed for a higher level of attention for their national cultural patrimonies. The illicit excavations impoverished the two South American States, and for this reason they started to ask for international shareable measures to protect their domestic resources. The situation was complex because of the big gap dividing the different interest of source and market

[24] UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, General Conference, New Dehli, December 5, 1956, available at; http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 3, 2013).

[25] To be precise, art historians and archeologists make reference to the concept of "origin" of a cultural object with two different terms and meanings. "Provenience" is preferred to pinpoint the "precise location where an artifact or archeological sample was recovered archeologically". Instead, "provenance" better identifies the process of outlining with full details the history of the cultural objects, aiming at tracing its ownership history. This definitions are based on the lecture held by Professor Patty Gerstenblith on June 13, 2013, in the Course "From Black to Gray: The Markets in Stolen and Looted Art and Antiquities", in the Program "Tulane-Siena Institute for International Law, Cultural Heritage and the Arts", Tulane Law School, Summer 2013. See also: Kris K. Hirst, "Provenience, Provenance, Let's Call the Whole Thing Off", May 16, 2006, available at: http://archeology.about.com/b/2006/05/16/provenience-provenance-lets-call-the-whole-thing-off.htm (accessed November 3, 2013).

Countries, even though it was generally recognized the need of an international intervention under the legal point of view.

The first step implemented by UNESCO was the adoption of the 1964 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property. It is enough clear since the choice of the name that this was the preamble tool opening to the 1970 UNESCO Convention. The 1964 Recommendation aimed at principally support and favor the States' action for the implementation of domestic rules contemplating also international standards for a coordinated basis of cooperation to overcome the problems referred to the sector.

The international standards here intended would have – obviously – constitute the foundation of the following 1970 Convention. The latter had been, in fact, the result of six intense years, made of meetings and negotiations among States and their major experts, under the aegis of the UNESCO.[26]

After that a widespread understanding on the illicit trade was reached, the return issue remained a hard obstacle to overcome, because of the distant interests of the States. To drive a new positive stimulus, in 1973 the United Nations General Assembly approved the Resolution on the "Restitution of Works of Arts to Countries Victims of Expropriation".[27] It embraced the "wholesale removal" of works of art, nigh on avoiding any payment, generally intended as a the final stage of a past occupation regime from a foreign Country and demanding "the prompt restitution to a country of its objects of art, monuments, museum pieces, manuscripts and documents by another country, without charge", considering this action as preparatory for "strengthen[ing] international co-operation inasmuch as it constitutes just reparation for damage done". As a needed step, UNESCO decided to launch the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in 1978.[28]

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[26] See: Patrick J. O'Keefe, *Commentary on the 1970 UNESCO Convention*, 2nd edn. (Builth Wells: Institute of Art and Law, 2007), 5.

[27] See: United Nations General Assembly. Restitution of Works of Art to Countries Victims of Expropriation. 18 December 1973. U.N. Doc. A/RES/3187 (XXVIII).

[28] See: James A. R. Nafziger, "The Principles of Co-operation in the Mutual Protection and Transfer of Cultural Material", *Chicago Journal of International Law*, 8, (2007): 147-150. See also: Sabine von Schorlemer, "UNESCO Dispute Settlement" in A.A. Yusuf (ed.*), Standard-setting in UNESCO: Normative Action in Education, Science and Culture*, (Leiden: Martinus Nijhoff and

The consequent Diplomatic Conference which conducted to the adoption of the 1995 UNIDROIT Convention may be considered as a provisional final step of the conventional international process. In fact, the unsolved issue and still pending troubles emerging from the concrete application of the 1970 UNESCO Convention made it necessary. The main reason resided in the lack in the 1970 UNESCO Convention of a well-founded pattern to face private law issues, and to completely cover also the return and restitution themes.

By the way, the widespread lack of consensus rendered the UNIDROIT Convention an "inchoate" instrument, signed and ratified by an exiguous number of States, that made it quite completely ineffective for a concrete action. In order to tackle with this real impediment, UNESCO has recently promoted the establishment of the Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970), which held its First Session in Paris last July 1, 2013.[29] The Subsidiary Committee was established with the purpose of contributing to the development of operative guidelines, to better implement the 1970 Convention. As stated by Gerstenblith: "The goals of the Subsidiary Committee include promoting the Convention's objectives, reviewing national reports concerning implementation, and aiding in capacity-building to combat illegal trafficking in cultural property."[30]

The main arguments under discussion in the Committee regard the main limits in today's application of the 1970 Convention: the issue related to the "appropriate certificate" that authorizes explicitely the export of the cultural property, as provided by for Article 6 a) of the Convention, and the "burden of

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UNESCO Publishing, 2007), 101.

[29]The Meeting held on July 1, 2013 let to the election of the 18 temporary members of the Committee, to found the processing and drafting of the guidelines of the 1970 Convention and to develop new strategies for a better implementation of the Convention itself. See: UNESCO, First session of the Subsidiary Committee, available at: http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/meetings/subsidiary-committee/first-session-of-the-subsidiary-committee/ (accessed October 13, 2013). For all the details on the Subsidiary Committee rules of procedures, election criteria, functioning, see: Edouard Planche, "L'UNESCO et la Protection du Patimoine Culturel: Defis et Perspectives de la Convention de 1970. Mexican Seminar: The Globalization of the Protection of Cultural Heritage : the 1970 Convention : New Challenges", in *La Convencion de la UNESCO 1970 Sus Nuevos Desafios,* Jorge Sanchez Cordero ed., (Ciudad Universitaria, Instituto de Investigaciones Juridicas, Mexico, 2013), 262-265.

[30] See: Patty Gerstenblith, David Bright, Michael McCullough, and Kathleen Nandan, "International Art and Cultural Heritage", *The Year in Review*, 47 (Spring 2013): 425.

proof" and good faith principle, to which regard the establishment of certain criteria for the identification of who may be considered a "good faith purchaser" may play a role for a positive development of the international practices.

Considering the rising globalization process, that involves also practical profiles, such as the international cataloguing of cultural objects and assessing as a limit for underdeveloped countries the costs required for the inscription in Art Loss Register, Latin Countries require the implementation of new mechanisms for the international documentation process of cultural objects.[31]

1.4. The International Legal Framework of the Cultural Heritage Law

Over time, an evolution of all concepts connected to the protection and promotion of the cultural heritage of mankind has occurred in International Law. This introductory section tries to underline the historic process and will take into examination the different concepts, both as commonly used and intended, and their peculiar legal definitions.

The International Law evolution in the field of heritage protection follows different directions, according to the needs and specific emergencies of the time of this long legal process. For this reason, this issue encompasses a great variety of sectors: war crimes and peacetime perspective, tangible and intangible features, underwater environment, natural heritage protection, cultural property, and cultural diversity.

The concept of cultural property did not appear in the International Law taxonomy until the second half part of the XX century.[32]

The role played by the war is of fundamental importance: since the beginning, war destruction actions and plunders regarded the cultural heritage. Indeed, among the ancient Persian, Greek, and Roman societies, return obligations

[31] See: Blanca Alva Guerrero, "El Comité Subsidiario: Propuesta deFuturas Tareas", in *La Convencion de la UNESCO 1970 Sus Nuevos Desafios*, Jorge Sanchez Cordero ed., (Ciudad Universitaria, Instituto de Investigaciones Juridicas, Mexico, 2013), 43.

[32] See: Francesco Francioni, "Cultural Heritage", Max Plank Encyclopedia of Public International Law, 2013, in *The International Legal Framework for the Protection of Art and Cultural Property, Part II*, The Role of International Law and International Bodies, (Tulane Law School, course book, Summer 2013), 1-2.

of cultural material have been formerly present. The 1899 Hague Convention[33] on the laws and customs of war represents the first legal conventional tool including remedies for military pillages, confiscation or destruction of works of art, sites, and monuments.

This original frame has been followed by the Regulations of the 1907 Hague IV Convention, that is the first legal conventional tool that refers to the need of protecting "building dedicated to religion, art, science, or charitable purposes, historic monuments"[34] in conflict time and "of works of art and science".[35] The background has been completed by the Treaty of Versailles[36] and Saint-Germain.[37]

The International Court of Justice stated that Hague Convention (and its Regulations) must be considered as customary International Law.[38]

Later on, especially because of the damages to the national heritage produced by the Spanish Civil War, two initiatives were launched to reinforce its protection during non-international wars. They were: the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, signed in Washington in 1935;[39] and the Declaration for the Protection of Historic Buildings and Works of Art in Time of War of 1939. The latter project has never been adopted, remaining in the form of an incomplete project, never transformed by the League of Nations' International Committee for Intellectual Cooperation in a treaty.[40]

Finally, the Hague Convention[41] was the first detailed multilateral international agreement on cultural property, covering both international and non-

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[33] See: Hague Convention Respecting the Laws and Customs of War on Land, The Hague, July 29, 1899, 26 Martens Nouveau Recueil (Series 2), 949, 187 Consolidated Treaty Series 429, entered into force September 4, 1900.
[34] Article 27, Regulations of the 1907 Hague IV Convention.
[35] Article 56, Regulations of the 1907 Hague IV Convention.
[36] See: Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43, 3 Malloy 3329-3522, at arts. 245- 247.
[37] See: Treaty of Saint-Germain, September 10, 1919, reprinted in Arnold J. Toynbee, *Major Peace Treaties of Modern History*, (New York: Chelsea House publishers, 1967), 3, 1535.
[38] See: Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J., No. 131, July 9, 2004, para. 89.
[39] See: Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, April 15, 1935. ICRC, International Humanitarian Law – Treaties & Documents. http://www.icrc.org/ihl.nsf/FULL/325 (accessed September 15, 2013).
[40] See: Draft Declaration concerning the Protection of Historic Buildings and Works of Art in Time of War (1939), LN, LNOJ, 20th Year, No.1 (January 1939), 8, 136–37.
[41] See: Convention for the Protection of Cultural Property in the Event of Armed Conflict. The

international armed conflict protection of the cultural heritage, which set up precise principles that conceived to be applied during armed conflicts. Indeed, it is not by chance that the Hague Convention has been signed in 1954, after the Second World War. This legal tool inaugurated a new stream, as for the first time a new concept had been introduced by defined criteria: a definition of cultural property referring to sites, monuments, and repositories of cultural objects, and the category of the movable cultural objects.

Indeed, it stated the prohibition of military plunders during the time of war, avoiding its possible destruction due to dangerous operations, and the trafficking of this kind of property; asked to the States Parties to actively prevent in time of peace all the possible consequences of the conflicts; in conclusion, to identify protection sites and material considered as of "great importance for the humanity".[42] The 1954 Hague Convention merged both 1899 and 1907 Hague Conventions, and introduced a new comprehensive tool for the normative articulation of features related to cultural property, that will be implemented in future treaty practice and case law.

It seems noteworthy to underline here that this Convention express a principle of internationalism in stating as follows: "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".[43]

The request to the occupying forces in a Country to inhibit the illegal export of cultural materials and the obligation to return possible plundered objects is stated in the 1954 Protocol to the Hague Convention.[44] Instead, the 1999 Protocol[45] establishes the procedures in order to identify zones of protection,

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Hague, May 14, 1954, available at http://unesdoc.unesco.org/images/0014/001427/142765eb.pdf (accessed September 15, 2013).

[42] See: Francesco Francioni, "Cultural Heritage", Max Plank Encyclopedia of Public International Law, 2013, in *The International Legal Framework for the Protection of Art and Cultural Property, Part II,* The Role of International Law and International Bodies, (Tulane Law School, course book, Summer 2013), 1-2.

[43] See: Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, available at http://unesdoc.unesco.org/images/0014/001427/142765eb.pdf (accessed September 15, 2013).

[44] See: Protocol for the Protection of Cultural Property in the Event of Armed Conflict, signed on May 14, 1954, 249 U.N.T.S. 358.

[45] See: Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature on March 26, 1999, www.unesco.org. (accessed September 15, 2013).with regard to the 1999 Protocol, it was the result of a long process aimed by the will to improve the lacks of the 1954 Convention. Italy, Netherlands and Russia promoted a

foresee the possibility of prosecution or extradition for violators of the rules of the Convention, and introduces an implementing committee. This set of provisions is reasserted in the Protocol I of 1977[46] to the four 1949 Geneva Conventions on humanitarian treatment of persons during armed conflict.[47]

With regard to the current evolution of the issue under International Law, a great debate divides experts and scholars about the consideration of this specific branch as a customary law part or not, while considering the role of State sovereignty and non-intervention principles. In particular, it is interesting to underline that, according to Lenzerini, it is not acceptable to foresee a greater general attention and protection to cultural heritage only during war time. Promoting the heritage protection also during time of peace makes possible to provide a basis to fight against its intentional destruction, that may otherwise represent the starting phase of a conflict escalation as well.[48]

This new trend in the evolution of heritage protection under International Law, both in war- and peace-time, may be embraced as an additional step in the connection of this branch with crimes against humanity and genocide issues.

As Vrdoljak States: "Furthermore, international criminal law is increasingly prohibiting the intentional destruction of cultural heritage during period of peacetime when it has been targeted because of its affiliation to a particular ethnic or religious group".[49]

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proposal to strengthen the application of the 1954 Convention. They presented it to the Executive Board of UNESCO, who approved it in the Decision 5.5.1 of May 1993. Only after many meetings and on the basis of the report prepared by Lord Boylan, a British scholar, in 1999 a Conference in The Hague adopted the Second Protocol to the 1954 Convention.

[46] See: Protocol I Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature December 12, 1977, U.N. Doc. A/32/144, Annex I, reprinted in 16 I.L. M. 1391. It must be recalled here that the Geneva Conventions I-IV (1949) represent the codification of fundamental principles of international humanitarian law.

[47] With regard to the United States, they ratified the Hague Convention in 2009, only after almost fifty-five years it became a signatory instrument of International Law. See: Patty Gerstenblith, "International Art and Cultural Heritage", *International Law* 44 (Spring 2010):487.

[48] For a comprehensive analysis of this point, Cf.: Federico Lenzerini, "The UNESCO Declaration Concerning the International Destruction of Cultural Heritage: One Step Forward and Two Steps Back", *Italian Yearbook of International Law* 13 (2003): 131- 145; Roger O'Keefe, "World Cultural Heritage Obligations to the International Community as a Whole?", *International and Comparative Law Quarterly* 53 (2004):189-209. The first author supports the protection of cultural heritage as a customary International Law part; the second one is against this point.

[49] See: Ana Filipa Vrdoljak, "Intentional Destruction of Cultural Heritage and International Law", in *Thesaurus Acroasium Vol. XXXV: Multiculturalism and International Law*, ed. Kalliopi Koufa , (Thessaloniki, Sakkoulas Publications, 2007), 392. Available at SSRN: http://ssrn.com/abstract=1142806 (accessed September 15, 2013).

The concept includes also references to minority groups issues and their cultures preservation as a form of cultural heritage protection. In this meaning, International Law takes them into account such as actors of the legal protection process, that may be included in the category of "non-State groups". The latter can be intended as an additional category in the process, because States are normally considered the main actors involved.

Taking into consideration one of the more recent cases, the Yugoslavian war, it is worth of note that the Articles 3 and 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia[50] make reference to the destruction of "cities, towns and villages", as well as to crimes against person and against property, while article 7 concerns the individual responsibility, and the deliberate purpose and intent to commit these crimes.[51] This highlights how the Statute recalls the Hague principles.

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[50]See: Statute of the International Criminal Tribunal for the Former Yugoslavia Violations of the laws or customs of war The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. "Article 3 Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.
Article 5 – Statute of the International Criminal Tribunal for the Former Yugoslavia Crimes against humanity
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

[51] Article 7 – Statute of the International Criminal Tribunal for the Former Yugoslavia Individual criminal responsibility
1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to

With regard to the aim of this brief examination, the intentional "attack must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage inflicted to cultural property to qualify as persecution. [...] Similarly, cultural property is protected not for its own sake, but because it represents a particular group".[52]

The intent in perpetrating such actions against a group is a specific elements to identify the crime of genocide. Instead, according the Genocide Convention of 1948, also the ICTY Statute States that these aggressions figure a genocide crime, even though they do not take place during an armed conflict.[53] This Statement seems to support also the prevailing importance of paying attention to such crimes not only in war period, but in every moment, promoting a prevention vision. This may help to avoid both destruction of particularly meaningful symbols and monuments, as well as deliberate attacks against national, ethnic, racial or religious groups.

Taking into account the newer codification instruments in international law, the 2003 Declaration on Intentional Destruction has a precise connection with the protection of cultural heritage of non-State groups.[54] This Declaration recognizes "non-State groups" as the proper owner of human rights, as well as of all elements regarding collective and social cohesion dimension protection. International Law has recently deepened the attention on cultural rights of

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take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

[52]See: Ana Filipa Vrdoljak, "Intentional Destruction of Cultural Heritage and International Law", in *Thesaurus Acroasium Vol. XXXV: Multiculturalism and International Law*, ed. Kalliopi Koufa , (Thessaloniki, Sakkoulas Publications, 2007), 395. Available at SSRN: http://ssrn.com/abstract=1142806 (accessed September 15, 2013).

[53] See: Ana Filipa Vrdoljak, "Intentional Destruction of Cultural Heritage and International Law", in *Thesaurus Acroasium Vol. XXXV: Multiculturalism and International Law*, ed. Kalliopi Koufa , (Thessaloniki, Sakkoulas Publications, 2007), 395. Available at SSRN: http://ssrn.com/abstract=1142806 (accessed September 15, 2013). In particular, in this passage, Vrdoljak analyzes as the Trial Chamber in the Krstic Trial Judgment reflected on the opportunity to include the cultural features in the criteria to evaluate a genocide crime action. The established that in the draft of the Genocide Convention the destruction of cultural elements were not enlisted, but rejected as part of the features constituting genocide features. Nor any new development occurred in the following statutes of the *ad hoc* tribunals and ICC.

[54] The 2003 Declaration Preamble States as follows: "Mindful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights". Fifth recital, Preamble, 2003 Declaration on Intentional Destruction. On the details of this Declaration, see *supra* notes 3-7.

minorities and indigenous groups. In this pattern, it is possible to encompass also other UNESCO actions for the safeguard of diversity, cultural expressions, intangible heritage and cultural rights.

Besides, under customary law, the "deliberate destruction" of sites under protection and cultural material must be considered as a war crime, as it represents a "grave breach" of the laws of war.

As this passage shows, the historical foundation of the International Cultural Heritage Law has a strong connection with wars and conflicts, and their impact on cultural materials. Instead, over time, a new passage has been signed by the rising of the art market.

Among 1960s and 1970s some changes occurred, influencing the cultural heritage context and the legal consequences. First of all, at that time a new awareness raised about the illegal traffic and excavations of cultural objects, as well as about doubtful purchases made by private collectors, museums and other institutes. Secondly, new developments were due to the rising attention to the environment and the strict tie between natural and cultural heritage; and the action of some governments against the traffic of cultural objects, encouraged by the hunger for art, with disdain of respect for the heritage. In addition, the alert for money laundering phenomenon and the criminal organizations role promoted an international effort to improve laws and the intangible heritage protection. Thirdly, the Native Peoples Movement's claims for gaining back human remains from their ancestors, as well as indigenous materials, and the demand of recognition of particular rights based on their knowledge and traditions.[55]

For this reason, it is also important to recall here as follows the main international conventional legal tools, promoted by UNESCO, to strengthen the cultural heritage protection.

1.5. The UNESCO-based Regime for Cultural Heritage Protection and Preservation

The United Nations Educational, Scientific and Cultural Organization (hereafter, UNESCO) plays a distinctive role in "protecting, safeguarding and

[55] Cf. James A.R. Nafziger, Cultural Heritage Law, (Cheltenham: Edward Elgar Publishing Limited), 2012, xv.

managing of tangible and intangible cultural heritage".[56] It plays the highest role in promoting the respect of cultural heritage and property all over the world, through an intense effort and a global network of offices, seats of representation and its 715 UNESCO Chairs,[57] that actively contribute to research and cooperation activities.

One of the greatest UNESCO contributions refers to the promotion of several codification initiatives, that made possible to realize the most important international Conventions regarding the cultural field.

These Conventions are fundamental tools in the current examination and will represent a necessary juridical base, as they embody also the starting point for international peaceful settlement of disputes, as generally implemented at the international level after the end of the Cold War. This element could seem not so relevant, but it constitutes an undeniable legal basis. Furthermore, it enhances the role of International Law, generally considered as a too weak instrument, especially if compared to the force of International Relations.

The most important instruments of International Law take into due consideration a comprehensive action, inspired by the basic principles of protecting and promoting the cultural heritage, at all levels. Having in consideration the above mentioned Conventions related to time of war,[58] other fundamental International Treaties on the protection of Cultural Heritage should be here mentioned.

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage deals with properties of outstanding and universal value, establishing a collective cooperation system aimed to protect them. The so-called World Heritage Convention represents the most successful international legal tool among all the UNESCO Conventions in the field of cultural heritage protection.[59]

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[56] See "UNESCO. Culture. Strategy", http://www.unesco.org/new/en/culture/about-us/how-we-work/strategy/ (accessed August 29, 2013).
[57] This data refers to the 31/05/2011. http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/ED/UNITWIN/pdf/Doc_annexes/TB%20Chaires%2031052011.pdf (accessed August 29, 2013).
[58] The Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its additional Protocols (1954 and 1999).
[59] For a detailed analysis on the World Heritage Convention, see: Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary*, (New York: Oxford University Press, 2008), 504.

In fact, it has been adopted by 190 Countries,[60] and has the great merit of combining – throughout a holistic approach – the protection of both natural and cultural heritage in one tool.

Article 8 provides for a strong bureaucratic apparatus, given by the "World Heritage Committee", that is an intergovernmental board, with the support of a trust fund, composed by voluntary or compulsory contributions. Article 11 establishes two lists. The first regards the great cultural and natural treasures of humanity; the second attains the properties needing a special regime of care and preservation, since they are to be considered "at risk". This latter constitutes the list of "World Heritage in Danger". The sites inscribed in the lists are still subject the sovereignty of the national State.

The powerful consensus obtained by the Convention and the interest showed by States for the list inscription mechanism since its commencement testimony the common interest of the international community for the heritage protection, even though criticisms may be moved with regard to the political interest of single States in trying to promote their territories, through the World Heritage List. Indeed, in recent years, the phenomenon has opened to a real "race" for the inscription into the UNESCO List, with the risk of diminishing its concrete value over time.[61]

The safeguard of the marine cultural objects has been included for the first time in the 1994 United Nations Convention on the Law of the Sea. Article 303 states that "States have the duty to protect objects of an archeological and historical nature found at sea and shall cooperate for this purpose". By the way, as it possible to remark, its formulation resulted too vague and ambiguous in relation to the safeguard of cultural heritage. To some extent, it is possible to consider the 2001 UNESCO Convention on the Safeguarding the Underwater Cultural Heritage as a complement to 1994 UN Convention.

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[60] This data made of the World Heritage Convention the second most signed one by the International Community, only after the Convention on the Rights of the Child (1989), which counts 193 States Parties.

[61] Professor Francioni talked about a real "politicization" of the WHL (World Heritage List), due to the rising willing of all States parties to be included as much as possible in it, especially if a Country with whom relations are not good is yet included. The advice has been expressed by Professor Francioni during the lecture held on June 17, 2013, in the Course on "The Role of International Law and International Bodies", Part II of the Summer School International Law, Cultural Heritage and the Arts, Tulane Law School, Siena, Summer 2013.

It particularly cares for the protection of shipwrecks and materials, and provides for a specific maritime jurisdiction. This instrument recalls the international cooperation, and Article 1 states a definition of underwater cultural heritage based on standard of a 100-years permanence of the object underwater. States Parties are also required to establish precise rules against salvors of wrecks.[62] Generally speaking, the 2001 UNESCO Convention helped to sign important developments for the protection of the underwater cultural heritage, also considering the increasing economic interest for the exploitation if the marine sites.

The specialization of the UNESCO activity on the field is testified also by the 2003 Convention for the Safeguarding of Intangible Cultural Heritage, and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

The first one is a fundamental cornerstone, as it assume a new request of attention for non-Westernized forms of cultural expression. Indeed, the material realization of cultural objects exemplifies a Western way of interpreting the expression of the human creativity. Other cultures make recourse more to oral traditions, and generally to intangible ways. Article 2 (that will be widely analyzed in the following Section) provides for a comprehensive definition of intangible heritage, making reference to practices and all other means of express group cultures, different from the material, movable or immovable, standard. According to Francioni, a code of best practices could have been more functional to the scope. On the other side, it contributed to the general consciousness about the risk of a cultural standardization and uniformity due to the economic globalization phenomenon, with the threat of losing the peculiarity of expression of every ethnic group or society.[63]

The last one focuses its attention on the Diversity, for the benefits available for everyone coming from the vast flow of all communication means,

[62]For an extensive examination on the 2001 UNESCO Convention. See also: Tullio Scovazzi, "Convention on the Protection of Underwater Cultural Heritage", *Environmental Policy Law*, IOS Press, 32, (3-4) (2002): 152-ff.; Roberta Garabello, Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden: Martinus Nijhoff Publishers, 2003), 137.

[63] See: Francesco Francioni, "Cultural Heritage", Max Plank Encyclopedia of Public International Law, 2013, in *The International Legal Framework for the Protection of Art and Cultural Property, Part II*, The Role of International Law and International Bodies, Tulane Law School, Summer 2013, 14.

such as words, images, and – basically – ideas. The 2005 UNESCO Convention is considerable also as a complement to the 2001 Universal Declaration on Cultural Diversity. In particular, it has a clear connection with Articles 8-11 of the 2001 UNESCO Declaration. They refer to: the connection between identity and cultural goods, stating that their result should not be considered and treated as a mere economic factor; the States involvement in the protection of the "diversity of cultural expressions and ensuring the free flow of ideas and works".[64] Finally, it reaffirms the general need of international cooperation.

As the 1970 UNESCO and 1995 UNIDROIT Conventions will be treated in detail in the following Chapter, this part will take into consideration the analysis the overall of the UNESCO Conventions, representing a legal framework specialized in achieving five principal purposes for the cultural heritage field. First of all, the physical protection of cultural materials and their contextualization; secondly, the international cooperation to realize the final return of claimed objects to the legitimate original owner; thirdly, the rectification of past mistakes throughout civil remedies; fourthly, the fulfillment of criminal justice rules, making recourse to specific penal sanctions for violations related to cultural heritage; and fifthly, the arrangement of *ad hoc* alternative dispute resolution means.[65]

Two basic considerations result from this brief overview.

At the outset, the development and specialization of the cultural heritage protection and promotion under International Law proceeds mainly through the adoption of international agreements, as well as other instruments of soft law, generally under the aegis of the UNESCO. For this reason, one of the biggest questions relates to the existence of any principle of general application, able to express binding measures effective for non-signatory states of the Conventions regarding cultural heritage. According to Francioni, the "practice developed so far shows that a core of general principles is emerging at the level of customary international law".[66] With specific regard to recent practices implemented for the

[64] See: UNESCO, "Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expression", http://unesdoc.unesco.org/images/0014/001495/149502e.pdf (accessed September 3, 2013).
[65] See: James A.R. Nafziger, *Cultural Heritage Law*, (Cheltenham: Edward Elgar Publishing Limited, 2012), xvi.
[66] See: Francesco Francioni, "Cultural Heritage", Max Plank Encyclopedia of Public International

restitution of cultural object, also Professor Scovazzi arguments that an evolutionary trend in international law may be underlined. This process may lead to the affirmation of principles of general application.[67]

Even though Professor Francioni refers more precisely to the affirmation of principles, such as the prohibition of the destruction of cultural heritage, while Professor Scovazzi's analysis focuses more on the particular matter of the restitution of cultural objects, their considerations seem to be read in a global dimension, aiming here to share the same opinion on the evolution of international cultural heritage law. This vision results coherent with the path until here achieved in this field of studies. The development of general principles valid for all subjects of the international area is not a sure result. In this, Scovazzi's theory on the role of moral, ethical and cultural values comes out fundamental in guiding such an evolutionary trend, to determine principles able to overcome current provisions limits and states perspectives.[68]

In conclusion, the framework outlined clearly confirms the validity of the international law multi-layers codification applied to the field of cultural heritage, as introduced at the beginning.

Law, 2013, in *The International Legal Framework for the Protection of Art and Cultural Property, Part II*, The Role of International Law and International Bodies, (Tulane Law School, course book, Summer 2013), 15. Francioni also notes that the International Court of Justice has never had the occasion to give an authoritative pronouncement on the matter of the existence of principles of general application in the field of cultural heritage. So far only one claim relating to cultural Heritage law has been presented before the International Court of Justice, but the proceedings stopped at the preliminary objections stage. This was the case *Liechtenstein v. Germany*, June 1, 2001, available at: http://www.icj-cij.org/docket/files/123/7077.pdf (accessed September 1, 2013).

[67] On this point, see Chapter Six "Conclusion" of this research. See: Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter V, paragraph 32, in course of publication.

[68] See Chapter Six "Conclusion" of this research.

Chapter Two. International Legal framework for the Fighting to Illicit Traffic and Restitution of Cultural Property

This section will take into consideration the 1970 UNESCO and 1995 UNIDROIT Conventions,[69] as the main legal references needed to analyze the restitution issue. Here will be presented core innovations and general aspects introduced by the two multilateral international Conventions. When needed, more features will be consider in detail all along the examination.

This research will not take into consideration in detail the two Conventions and their implementation in national legislations of the countries involved in the case studies, focusing the analysis on the provisions that may be considered as the most important achievements realized in the field of cultural objects recovery. The reason of this choice is due to the necessity of limiting the information provided to a legal framework coherent with the case studies selected for this research. In fact, the cases that will be taken into account in Chapter Five aim to underline the limited applicability of the two Conventions. From this very preliminary consideration the present research founded the specific interest into the case studies that will be analyzed in the Chapter Five.

For the same reason, this research will not go into details on the implementation of source and market countries, considering this feature as not relevant for the scope of the central analysis. In fact, the interest of the cases will look at the possibility of applying alternative means to settle bilateral disputes over cultural objects requests of restitution. With regard to the UNIDROIT Convention, many states did not take part to it, because a reform in their contract law would be required. The main issues will be analyzed considering the two common law countries included in the case studies examination of this research. As a further limit to the general analysis, only issues directly related to the case studies and relevant for them will be taken into account.[70]

[69] A copy of both Conventions is set in Appendix section.

[70] For a detailed analysis of the implementation of the 1970 UNESCO Convention, see: Patty Gerstenblith, *Art, Cultural Heritage and the Law,* Second edn., (Durham, North Carolina: Carolina Academic Press, 2008), Manlio Frigo, *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, (Milano: Giuffré, 2007); Simon Mackenzie, *Going, Going Gone: Regulating the Market in Illicit Antiquities*, (Leicester: Institute of Art and

In the first three cases, the disputes countries involved will be Italy and United States, because they regard the Italian Ministry of Culture and the United States of America museums, while the fourth case will refer to Italy and Australia, examining an unsolved request of repatriation of human remains of Australian Indigenous and two Italian museums, where the remains are stored.

Looking at a general analysis of the countries involved, and their implementation of the international agreements regarding removal and restitution of cultural objects, all three countries signed and ratified the 1970 UNESCO Convention. Neither Australia, nor United States are Parties to the 1995 UNIDROIT Convention. [71]

The growth of pillaging of archeological and ethnological goods started to be recorded as an effect of the increasing demand for cultural goods in the art market. This effect was much more listed in those countries lacking effective means and measures to contrast thefts and illicit trade of cultural goods.[72]

In literature, a quite old discussion divides the supporters of the free trade and more protectionist theories concerning the management of cultural goods.

The most representative author in favor of the benefits carried out by the liberalization of cultural property is John Henry Merryman. In his vision, the free trade is much more able to bolster both the scientific expertise and the cultural exchange, recognized as the main advantages. On the opposite side, other scholars, as Francioni, asserted that the worse counter-effect of the liberalism in cultural property is the possibility to lose works of art, because of the illicit traffic, as well as the impoverishment of source countries, wasting precious resources that could help the tourism as a rising force for the domestic economy.[73]

Law, 2005); Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006).

[71] Specific reference to the implementation (or not) of the 1970 UNESCO and 1995 UNIDROIT Conventions in the countries involved in the case studies will be applied in the paragraphs dedicated to their analysis. See paragraphs 2.1. and 2.2.

[72] The division among source, market and transit countries is particularly related to the rising of the art market after the World War II.

[73] Cf. John Henry Merryman, "Two Ways of Thinking about Cultural Property", *American Journal of International Law* 80 (4) (1986):831-53; Francesco Francioni, "Controlling Illicit Trade in Art Objects: the 1995 UNIDROIT Convention", in *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, *Atti del Convegno – Roma, 8-9 maggio 1998,* ed. Francesco Francioni, Angela Del Vecchio, Paolo De Caterini. Quaderni 3, (Milan: Giuffré Editore, 2000), 119-139 .

In late 1960s, an article by the archeologist Clemency Coggins made the world more aware about the plundering condition that affected in particular the Latin America, attracting and feeding the art market.[74] The article focused mainly on the pre-Columbian archeological sites, but generally speaking it was an exceptional tool to rise the international moral responsibility at that time, laying the groundwork also for the 1970 UNESCO Convention.

2.1. The 1970 UNESCO Convention

Moving from the legal framework illustrated for the protection of cultural heritage, the international action continued through the adoption of measures applicable in peacetime, with the purpose of fighting the illicit international movement of cultural objects.[75] This step has been signed by the 1970 Convention.[76] It is still considered at the present time as the most comprehensive international treaty regarding the trade of cultural property issue.[77]

The 1970 UNESCO Convention has been drawn with the main scope to "provide a common framework among nations for alleviating abuses in the international trade of cultural property".[78] The need of working on the 1970 Convention was due to the incredible uprising phenomenon of the illicit trade of cultural property after the end of the Second World War, that stressed the urge to set up by law such a kind of international mechanism able to fight the illicit traffic of cultural objects.

One first consequence is that, due to its nature of international treaty, the 1970 UNESCO Convention has a limited application only among the states

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[74] See: Clemency Coggins, "Illicit Traffic of Pre-Columbian Antiquities", *Art Journal* 29 (1) (1969): 94. Cf. also Jennifer Anglim Kreder, "The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities", *University of Miami Law Review* 64 (2010):997, 999.
[75] Katherine D. Vitale, Note, "The War on Antiquities: United States Law and Foreign Cultural Property", *Notre Dame Law Review* 84 (4) (2009): 1839.
[76] The 1970 UNESCO Convention was signed on November 17, 1970 and subsequently entered into force on April 24, 1972. As October 2009, a total of 125 Countries (including Palestine) were Parties to the UNESCO Convention. See UNESCO, States Parties: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, http://portal.unesco.org/la/convention.asp?KO=13039&language=E (accessed September 1, 2013).
[77] See *infra*, with regard to the 1995 UNIDROIT Convention.
[78] See: Marie C. Malaro and Ildiko P. De Angelis, *A legal primer on managing museum collections*, (Washington: Smithsonian Books, 2012), 73.

Parties, and is not self-executing.[79] The following analysis will consider only the most important features characterizing the 1970 Convention.

Article 1 of the Convention provides for a comprehensive definition of the concept of cultural property.[80] Article 2 provides for the core foundation of the Convention. It call for an international cooperation system, intended as the measure to diminish the global level of thefts and illicit traffic of cultural property, acknowledged as key factors that highly damage cultural heritage of the countries of origin of the objects. States are called to cooperate also to remove the causes that generate the illicit import, export and transfer of cultural objects.[81] The Convention can be applied to the categories of cultural objects listed by Article 1, and that are part of the cultural heritage of a certain state, as provided for by Article 4.[82]

As provided for by Article 5, States Parties must "set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff" to implement a list of detailed functions.[83]

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[79] The Convention must be ratified by each state party, having respect for state constitutional provisions. See: Article 19 of the 1970 UNESCO Convention:
"1. This Convention shall be subject to ratification or acceptance by States members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.
2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization."

[80] On the definition issue, see Chapter Three of this research.

[81] See: Article 2 of the 1970 UNESCO Convention:
"1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations."

[82] See: Article 4 of the 1970 UNESCO Convention:
The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:
(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property."

[83] See Article 5 of the 1970 UNESCO Convention:

Article 6 introduces a procedure of export certification, that will used by the states of origin to authorize the export of precise cultural objects outside their national territories and ban non-authorized exports.[84] Article 7 (a) outlines the responsibility for States Parties to introduce rules able to avoid the acquisition of cultural objects illegally exported from territories of other States Parties to the Convention after its entry into force. This commitment to promote the adoption of such measures is limited to their compatibility with "consistent national provisions".[85] One of the criticism to the 1970 UNESCO Convention is related to

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"To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:
(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;
(b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;
(c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property;
(d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research;
(e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;
(f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;
(g) seeing that appropriate publicity is given to the disappearance of any items of cultural property."

[84] See Article 6 of the 1970 UNESCO Convention:
"The States Parties to this Convention undertake:
(a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
(b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
(c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property. "
As underlined by Professor Scovazzi, the Convention provides for a mechanism of control from the state of origin, but the same rule is not counterbalanced by a similar provision in order to impede the illicit import of cultural objects in states of destination. See: Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter III, paragraph 12, in course of publication.

[85] See Article 7 of the 1970 UNESCO Convention:
"The States Parties to this Convention undertake:
(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this

the fact that Article 7 limits its effects to fight illicit traffic of cultural objects illegally removed from their state of origin, and regards only some precise hypotheses: "museums, religious or secular public monuments or similar institution", as provided for by Article 7 (a) and (b) (i).[86] The provision shall be applied also for cultural objects registered into inventories of the said institutions. This implies that all cultural objects not documented and not included in those typologies of institutions will not be safeguarded. One of the biggest consequences is that it does not cover all cultural objects that can be found through not documented illegal excavations. The singular effect is that this provision leaves without any protection the important category of all the objects that can be found in illegal excavations, and this may cover a large number of objects.[87] Instead, Article 7 excludes circumstances regarding illicit import or export of cultural properties carried out by private parties. This feature became the main reason that lead to the Diplomatic Conference for the adoption of the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, held in Rome from 7 to 24 June 1995.[88] Article 7 (b) (ii) extends such commitment to the return of the proved illegally exported cultural objects, upon request of the State of origin, foreseeing a possible equitable compensation for the innocent purchaser. The action of request of recovery and return shall be implemented through the diplomatic offices.[89]

Convention in both States."

[86] See Article 7 of the 1970 UNESCO Convention:
"(b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution."

[87] Professor Scovazzi stresses that, leaving aside objects from illegal excavations, Article contradicts the preamble and Article 1 c) of the Convention itself. See: Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter III, paragraph 12, in course of publication.

[88] Diplomatic Conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects , Acts and Proceedings, http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-acts-e.pdf (accessed August 28, 2013).

[89] See Article 7 of the 1970 UNESCO Convention:
"(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne

Furthermore, according to some scholars, Article 7 (b) (ii) presents a too vague foundation with regard to the compensation to the subject who have a valid title to the possession of the illicitly transferred object, or to the innocent purchaser. In fact, the provision does not mention any detailed measure to ascertain what could or not determine a valid title.[90]

Article 9 represents a fundamental milestone, as it recalls the role of the cooperation among all States Parties to the Convention, in order to intervene in case of cultural patrimony (archeological or ethnological materials) endangered by pillaging. The cooperation may be issued as a shared effort to establish and implement "concrete measures", such as the import and export control on international trade of cultural materials.[91]

also Article 13 cannot be missed in this overview. In particular, Article 13 (d) of the final draft of the 1970 UNESCO Convention requires to member States to recognize and enforce foreign export and foreign cultural patrimony laws and to be prone to assist the restitution process of illegally exported cultural property in according to the domestic law of the country of origin of the object.

It must be underlined that a general awareness has arisen about the ethical and political impossibility to continue to experience the illicit traffic of cultural property. Nowadays, important market Countries, such as the United States of America, Japan, Switzerland and the United Kingdom have become Parties to 1970 UNESCO Convention.

The increasing promotion and adoption of codes of ethics - that will be wider taken into consideration in the current examination – represents another

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by the requesting Party."
With regard to this last point, it is interesting to remark here that with regard to many recent Italian requests, the extraordinary Carabinieri Art Squad cleverness made possible to obtain return of cultural objects at U.S. expenses. This information is on file with author.

[90] See, Francesco Francioni, "Controlling Illicit Trade in Art Objects: the 1995 UNIDROIT Convention", in *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura, Atti del Convegno – Roma, 8-9 maggio 1998*, ed. Francesco Francioni, Angela Del Vecchio, Paolo De Caterini. Quaderni 3, (Milan: Giuffré Editore, 2000), 123.

[91] See Article 9 of the 1970 UNESCO Convention:
"Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State."

relevant phenomenon encouraged by the 1970 Convention.[92] Instead, as mentioned, the exclusion of an obligation on import of cultural objects into states of destination similar to the obligation of an export certificate for states of origin remains one of the main contradiction features of the 1970 UNESCO Convention. In this way, the provision ends to create an advantage for states of destination, generally market countries, contributing to benefit private art dealers and collectors, as well as museums of the states of destination.[93]

The UNESCO Convention is not a self-executing treaty. It needs to be implementing by each member State through the domestic legislation. This mechanism allows to any member State to maintain a level of control over the Convention as a whole, as well as on specific articles that a single State may consider of higher importance or desires to limit in its efficacy. For instance, while the United States ratified the 1970 Convention in 1972, it refused to endorse a broad-based agreement requiring it to enforce foreign cultural export laws.[94]

One the main drawback of the UNESCO Convention is that it does not provide for any retroactive provision and there is not the possibility for source countries to seek for the repatriation of cultural property illegally stolen or exported prior to November 1970. Another drawback is that there is no mechanism to hold private party claims for the return of cultural goods that through theft ended up in a foreign country.

Italy adopted the 1970 UNESCO Convention by law October 30, 1975 n. 873 and entered into force on January 3, 1979, and it signed the 1995 UNIDROIT Convention on June 16, 1995 and entered in force on April 1, 2000.[95] United

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[92] Patrick J. O'Keefe, Commentary on the UNESCO 1970 Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. Second ed., (Builth Wells: United Kingdom, Institute of Art and Law (IAL), 2007), 110-117.

[93] On this criticism, see: Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter III, paragraph 12, in course of publication. For a general overview on achievements and weaknesses of the Convention, cf.: Lyndel, V. Prott, "Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption", Background paper for participants in the meeting "The fight against the illicit trafficking of cultural objects.The 1970 convention: past and future", held in Paris, UNESCO Headquarters, 15-16 March 2011, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the1970%20convention.pdf (accessed September 3, 2013).

[94] See *infra* this paragraph for U. S. implementation of the 1970 UNESCO Convention.

[95] On the entry into force in Italy of the 1970 Convention see: *Gazzetta Ufficiale della Repubblica Italiana* supplement no. 49, February 24, 1976. On Italian ratification of the 1995 UNIDROIT Convention see: UNIDROIT, "Status", available at: http://www.unidroit.org/status-cp (accessed September 1, 2013). The the 2009 PMCH Act Review (Recommendation 64) called for Australian

States implemented it through the Convention on Cultural Property Implementation Act (CPIA), in force in January 1983. The CPIA made Articles 7(b)(1) and 9 of the 1970 UNESCO Convention effective in the U.S. system.[96] Finally, Australia ratified the Convention in 1986 and gave it force in its domestic law with the Protection of Movable Cultural Heritage Act 1986 (PMCH Act), with reservation on Article 10.[97]

Making a comparison among the three countries, in opposition to Italy, the United States implementation of the 1970 UNESCO Convention has been limited only to two articles. Furthermore, this restrictive interpretation and implementation, operated by the Department of State, delimited the value of the Convention effectiveness especially to export controls. The U. S. Department of State considered the national interest in preserving cultural objects in their country as testimonies of past civilizations.[98] A clear difference between Italy and the United States is attributable to their opposed positions, respectively of source and market countries. In contrast, even though Australia is a market country, as the

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ratification of the 1995 UNIDROIT Convention, introducing consistent legislation. See: Submission for the National Cultural Policy Discussion Paper, "Executive summary of the international workshop, 'Illicit traffic in cultural objects: Law, Ethics and the Realities'", University of Western Australia, October 24, 2011, available at: http://creativeaustralia.arts.gov.au/assets/Submission%20407_Redacted.pdf (accessed September 1, 2013).

[96]See the CPIA as Public Law 97-446, or as 19 U.S.C. 2601 et seq. United States, Department of State. Bureau of Education and Cultural Affairs. "Cultural Heritage Center", available at: http://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/background#sthash.fxGHwuY2.dpuf (accessed September 1, 2013). With regard to the 1970 UNESCO Convention implementation in the U.S. and on its bilateral cultural relations with Italy, see paragraph 5.1. of this research.

[97] Australian Government, Ministry for the Arts, "Movable cultural heritage laws", available at: http://arts.gov.au/movable/laws (accessed September 1, 2013). See also UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 . Declarations and Reservations" , available at: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed September 1, 2013).

[98] In particular, in implementing Article 9 of the Convention, the CPIA allows the President to establish detailed import restriction for certain categories of cultural objects, in accordance with requests from another state party to the Convention itself. Section 303 of the CPIA (19 U.S.C. § 2602 in its alternative numbering system of the Act) provides for the possibility of concluding *Memoranda* of Understanding (MoU) with other states parties to the Convention, that may last at the maximum five years and renewable. As to 2014, the United States concluded MoU with 17 countries (Belize, Bolivia, Bulgaria, Cambodia, Canada, China, Colombia, Cyprus, El Salvador, Greece, Guatemala, Honduras, Iraq, Italy, Mali, Nicaragua, Peru). On the Memoranda of Understanding concluded with Italy, that constituted the basis for the conclusion of the bilateral agreements with the U.S. Museums, see: paragraph 5.1. of this research. See also: United States Depertment of State, Cultural Heritage Center, "Bilateral Agreements", available at: http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements (accessed February 4, 2014).

United States, the former implemented the 1970 UNESCO Convention in a more extensive way than the latter, providing a wider interpretation of it. Furthermore, Australia provides for specific restrictions on designated categories of cultural heritage. Among them, Indigenous cultural objects and in particular human remains are included.[99]

One of biggest problem in the application of the 1970 UNESCO Convention is that it may produce different solutions, according to the actual legal system in which the provisions are adopted. A movement of a certain cultural object may be unlawful in the state of origin, but perfectly lawful in the state of destination. Another obstacle to the actual realization of the return of illegally exported cultural objects is that in many domestic legislations agree a certain degree of protection to innocent purchaser, such as the French and Italian ones.[100]

2.2. The 1995 UNIDROIT Convention

The International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects[101]– as partially aforesaid – was the result of the need of including also provisions concerning the private dimension of the cultural heritage protection, involving also private subjects, overcoming the limits posed by the 1970 UNESCO Convention.[102]

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[99] On the restrictions imposed by the Australian government see: Australian Government, Ministry for the Arts, "The National Cultural Heritage Control List", available at: http://arts.gov.au/movable/export/list (accessed September 1, 2013).

[100] See: CECOJI-CNRS, "Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Final Report", October 2011, paragraph 1.1.2., available at: http://ec.europa.eu/dgs/home-affairs/doc_centre/crime/docs/report_trafficking_in_cultural_goods_en.pdf (accessed September 1, 2013). On the implementation process of the 1970 UNESCO Convention and for a discussion on positive and negative outcomes related to this process in national legislations, see also: Lyndel V. Prott, "Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption", Background paper for participants in the meeting "The fight against the illicit trafficking of cultural objects. The 1970 convention: past and future." Paris, UNESCO Headquarters, 15-16 March 2011, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the1970%20convention.pdf (accessed September 1, 2013).

[101] See: Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Rome, June 24, 1995). A copy of the full text of the 1995 UNIDROIT Convention is attached in Appendix section.

[102] For a wider examination of the 1995 UNIDROIT Convention, see: Francesca Squillante, "La tutela dell'acquirente a non domino di beni culturali rubati secondo la Convenzione UNIDROIT ed

This preliminary aspect exemplifies the reason why the 1995 Convention was drafted with the support of the UNIDROIT. This Convention represents a consistent *corpus* of common standardized rules, designed to consider on the same ground the claims coming from private individuals and contracting States, in order to get the restitution of stolen or the return of illegally exported cultural objects, located in foreign countries.[103]

This common structure is effective also in case a contracting State would request to the Court of another State Party to the Convention for the return of a cultural object illegally exported from the requesting State, due to its status of country of origin of the object itself.[104] In fact, the 1970 UNESCO provides for diplomatic procedures that a state may activate to obtain the restitution of cultural objects from another state; instead, the 1995 UNIDROIT Conventions aims to design a set of uniform laws to make it possible for each individual to commence legal proceedings for the request of restitution of illegally exported or stolen cultural objects.

It has been entered into force on July 1, 1998, after the signature of the fifth State Party, as established by Article 12 of the Convention. Differently from the 1970 UNESCO Convention, the UNIDROIT Convention has a self-executing nature:[105] no other legislation is required to implement it into national law. This implies that its provisions may provide an immediate legal foundation for States

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il disegno di legge per l'esecuzione della Convenzione", *Rivista Di Diritto Internazionale*, 82 (1), (1999): 120-137; Manlio Frigo, *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, (Milan: Giuffré, 2007), 17-42; CECOJI-CNRS, "Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Final Report", October 2011, paragraph 1.1.2., available at: http://ec.europa.eu/dgs/home-affairs/doc_centre/crime/docs/report_trafficking_in_cultural_goods_en.pdf (accessed September 1, 2013).

[103] Article 1 of the 1995 UNIDROIT Convention defines the categories of "restitution" and "return" of cultural objects. See: Article 1:
"This Convention applies to claims of an international character for:
(a) the restitution of stolen cultural objects;
(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage".See *infra* Chapter II.
Professor Scovazzi does not share the formal distinction operated by the Convention, arguing that a substantial identity characterizes these two categories. Cf: Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter III, paragraph 13, in course of publication. See *infra* Chapter Six.

[104] See *infra* Chapter III.

[105] See: Carol A. Roehrenbeck, "Repatriation of Cultural Property – Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments", *International Legal Information* 38 (2010):196.

Parties claiming for the restitution of stolen or the return of illegally exported cultural objects.

With regard to the claims of restitution of cultural objects (as provided under Chapter II of the Convention, as with regard to possible requests of return of cultural objects illegally exported, as under Chapter III), they may be put forward national courts or other authorities of the States where the object is located.[106] Moreover, the UNIDROIT Convention is not retroactive,[107] such as the UNESCO Convention. This implies that the Convention applies only since the moment the State party moves into to the Convention.[108] As of February 2014, there were thirty-five contracting States to the UNIDROIT Convention.[109]

The UNIDROIT Convention is specifically addressed to the issue related to the legal title of stolen or illegally exported cultural objects. In particular, with regard to the hypotheis of stolen cultural objects, the Convention had among its scopes the resolution upon the contrast between the interests of the party deprived of the object and those of the good faith purchaser. This conflict emerges from the comparison of the common law and civil law system. Common law countries applies the principle *nemo dat quod non habet:* nobody can transfer to someone else a title that he/she does not own; in civil law countries the good faith purchaser may find different degrees of protection.[110]

Article 3 (1) states that the "possessor of a cultural object which has been stolen shall return it". It results as a firm principle. Article 3 does take into consideration the generally shared rule adopted by civil law countries: it refers to the possibility of acquiring a cultural object *a non domino*[111] in case the purchaser

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[106] Convention: Chapter IV, Art. 8 (1).
[107] This principle cannot be interpreted as an approval or legitimacy upon unlawful export or stealing of cultural objects occurred before the entry into force of the Convention. The retro-activity is nowadays one of the most discussed issues concerning the International restitution of cultural objects and it was a central theme also in the Subsidiary Committee Meeting held in Paris, at the UNESCO on July 1-3, 2013.
[108] Convention, Chapter IV, Art. 10 (1).
[109] On February 1, 2014, the Former Republic of Macedonia became the thirty-fifth state party to the 1995 UNESCO Convention. See UNIDROIT, "Status. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects", http://www.unidroit.org/status-cp (accessed February 10, 2014).
[110] See: Walter Rodinò, "La Convenzione UNIDROIT sui beni culturali rubati illecitamente esportati", in *La Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura, Atti del Convegno – Roma, 8-9 maggio 1998*, ed. Francesco Francioni, Angela Del Vecchio, Paolo De Caterini. Quaderni 3, (Milan: Giuffré Editore, 2000), 103, 105, 107.
[111] "A non domino" literally means "from a non-owner". Used to describe a disposition of property

is in good faith and the acquisition of the possession occurred on the basis of a good transfer title, under the form of a donation or through a contract among the Parties. Besides, Article 3 (2) represents an implicit recognition for all States whose domestic legislation automatically assigned the designation of "public property" to all the objects of archeological nature found underground. Indeed, the Article asserts that all the items illicitly excavated, or licitly excavated but illicitly held on should be considered as "stolen objects". Another essential element in the UNIDROIT Convention text is the introduction of a uniform system of norms related to the time period to issue a request of return or restitution. Articles 3 (3) and 5 (5), respectively in relation to a restitution or a return claim, provides for a maximum time of three years from the moment when the claimant finds out about the location of the cultural object and the identity of its possessor, "and in any case" for a maximum period of fifty years since when the theft has taken place.

In general, no time limit is applicable when a claim is related to an item that is part of an "identified monument or archeological site, or belonging to a public collection", as specified at Article 3 (4); States Parties to the Convention may, however, establish a time limit of seventy-five years or a longer period, even in the case of a claim brought by a Contracting State concerning the restitution of a cultural object removed from "a monument, archeological site or public collection" held in another Contracting State who made a declaration concerning an extension of the time period to ensue the request of restitution, as Article 5 (5) states.

Furthermore, Article 4 (1) states that the possessor of a stolen cultural object may receive a "fair and reasonable compensation", if the possessor did not know of the stolen origin of the object and can prove the due diligence at the moment of the transaction conclusion. This Article introduces the relevant principle of due diligence for the acquisition of cultural objects, returning the good faith or innocent purchaser criteria into the new one. The verified presence of the due diligence constitutes the pre-condition in Article 4 (2) (3) to proceed with the payment of a reasonable compensation to the possessor, when "consistent

granted by a *disponer* who does not have title to it. An *a non domino* disposition is used to *dispone* property with no traceable owner. For further details, see: Manlio Frigo, *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, (Milan: Giuffré, 2007), 27-31.

with the law of the State in which the claim is brought". In this way, the Convention places the burden of proof on the possessor and makes it clear the circumstances that must be taken into account to verify the effective possessor's due diligence exercise, under Article 4 (4.).[112]

Under Article 5 (1) "a Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State". In the case of a return claim for an illegally exported cultural objects, the Court or the designed competent authority shall order the return when the claimant State is able to provide evidence of the incomparable damage to the national interest related to the "integrity", and "the preservation of the […] scientific or historical value of the object, or the "traditional or ritual use of the object by a tribal or indigenous community", or the State recognized that the object itself assumes an outstanding cultural meaning for the national community, as Article 5 (3) (a) (b) (c) (d). Furthermore, under Article 5 (8) the time lapse established for "public collections" must be adopted as criterion also for all restitution claims regarding "sacred or communally important cultural object[s]" of a tribal or indigenous groups from a Contracting State, recognized as "part of that community's traditional or ritual use".[113]

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[112] See Article 4 of the 1995 UNIDROIT Convention:
"(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.
(2) Without prejudice to the right of the possessor to compensation referred to in thepreceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.
(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.
(4) In determining whether the possessor exercised due diligence, regard shall be had toall the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.
(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously."
[113] See Article 5 of the 1995 UNIDROIT Convention:
"(1) A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.
(2) A cultural object which has been temporarily exported from the territory of the requesting

Similarly, also the possessor of a illegally exported cultural object has the right to get a "fair and reasonable compensation", as provided for by Article 6 (1), but in this case the conditions do not refer to the principle of due diligence.[114] In fact, Article 6 (2) highlights that "circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State" will be taken into account. In addition, under Article 8, the request for return or restitution may be brought before courts or other competent authorities that have jurisdiction according the rules in force in States Parties to the Convention, and before "courts or other competent authorities of the Contracting State where the cultural object is located". [115]

State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.
(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:
(a) the physical preservation of the object or of its context;
(b) the integrity of a complex object;
(c) the preservation of information of, for example, a scientific or historical character;
(d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.
(4) Any request made under paragraph 1 of this article shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 to 3 have been met.
(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

[114] See Article 6 of the 1995 UNIDROIT Convention:
"(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.
(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.
(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:
(a) to retain ownership of the object; or
(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.
(4) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.
(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously."

[115] See Article 8 of the 1995 UNIDROIT Convention:
"(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

According to some scholars, the 1995 UNIDROIT Convention provides for generic provisions. According to some others, it is the result of a difficult compromise, considerino the general aim of the Convention: not encreasing the number of restitutions or returns, but promoting a global chenge in art trade behavior.[116] As aforesaid, the United States and Australia have not already signed the 1995 UNIDROIT Convention.[117] This position is very common among market countries, mainly because the UNIDROIT Convention provides for specific situations and legal elements not currently present in their legal system.[118]

Following the legal analysis above, two main features become particularly prominent: first of all, under Article 3 of the Convention, the restitution claim must be raised within three years following discovery by the original owner of the possessor's identity and the related setting of the claimed cultural object, and in any case not later than fifty years after the theft. If such a period passed without any claim, the right to call for the restitution expires under the Convention. Under the United States law in force, one cannot get title to property from a thief or from the transferee of a thief. This provision should result modified by the adoption (and the subsequent direct implementation) of the UNIDROIT Convention, with particular regard to the limitation period, the then-current possessor and repose of possession concepts.

The second feature that must be analyzed from the United States perspective regards the compensation to an innocent possessor. The Convention States that the possessor of a stolen cultural object has the duty to return it, but at the same time it provides that the innocent possessor is entitled to receive a "fair

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(2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration.

(3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State."

[116] On the criticism over the generic provisions, see: Alessandro Catelani, Salvatore Cattaneo, Paolo Stella Richter, *I beni e le attività culturali*, (Padova: CEDAM, 2000), 230-ff. Cf. Walter Rodinò, "La Convenzione UNIDROIT sui beni culturali rubati illecitamente esportati", in *La Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, *Atti del Convegno – Roma, 8-9 maggio 1998,* ed. Francesco Francioni, Angela Del Vecchio, Paolo De Caterini. Quaderni 3, (Milan: Giuffré Editore, 2000), 117.

[117] Having in consideration the legal *vacuum*, several situations of potential "violations" of the Convention (if in force in those countries) have occurrred.

[118] This analysis will refer directly to the US legal system. The same considerations can be taken into account with regard to the Australian law.

and reasonable compensation"[119] at the moment of the restitution, considering that the possessor could not be aware about the thief and the stolen origin of the cultural object, giving proof of due diligence at the time of the purchase of the cultural object. Under the Convention, the possessor of an illegally exported cultural object could be entitled to a "fair and reasonable compensation"[120] in case he did not know and could not be aware that object had been illegally exported at the moment of the purchase. On this point, the law of the United States does not agree any kind of compensation to the innocent purchaser neither in case of stolen, nor in case of illegally exported cultural object.

A specific Statement[121] has been drawn up in the United States to demand to the government to not become a member of the UNIDROIT Convention. One of the main weak points in the UNIDROIT Convention regards the lack of definition of the terms used in the text. Especially for the American legal system, that normally defines all terms, this could cause a lot of troubles in the application of the Convention.

One example may be given with regard to the term "possessor", which is not defined in the text of the UNIDROIT Convention. It could open to disputes in deciding on the determination of the compensation issue.

2.3. European Union legislation

For the reasons aforesaid on the necessity of limiting the analysis to the aspects actually relevant for the case studies of this research only an overview of

[119] Convention, Chapter II, Art. 4(1).
[120] Convention, Chapter III, Art. 6(1).
[121] See: Statement of Position of Concerned Members of the American Cultural Community Regarding the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, May 31, 1995. The initiative had been promoted on the behalf of the following subjects: the American Association of the Museums, the Association of Art Museum Directors, the Association of Systematics Collections, James King (President of the Association of Science Museum Directors), the Metropolitan Museum of Art, the Detroit Institute of the Arts, the Museum of Modern Art, the Carnegie Natural History Museum, the Art Institute of Chicago, the Museum of Fine Arts of Houston, the Carnegie Museum of Art, Christie's, Inc., Sotheby's, Inc., the Art Dealers Association of America, and the National Association of Dealers in Ancient, Oriental and Primitive Art by Richard A. Rothman and Josh A. Krevitt of Weil, Gotshal & Manages and James F. Fitzpatrick of Arnold and Porter. On this point, see also: John Henry Merryman, "The UNIDROIT Convention: Three Significant Departures from the Urtext", *International Journal of Cultural Property* 5 (1996): 11-18; Emily Sidorsky, "The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration", *International Journal of Cultural Property* 5 (1) (1996):19-72 ; Paul Jenkins, "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects", *Art Antiquity and Law* 1 (1996): 163-169.

the European Union legal instruments on the return of cultural objects will be illustrating. Some considerations on the recent recast procedure on the Directive 93/7/EEC will be illustrated in the conclusive evaluations of this research, aiming to consider it in the evolutionary framework of the legal international developments over the recovery of cultural objects issue. [122]

The European Union (at the time, European Economic Community) was born as a free movement of goods, people, and services area. The "protection of national treasures possessing artistic, historical or archeological value"[123] must be intended as an exception to the general free movement rule applied to the all other kinds of goods, object of movement in the European Union[124] territory.

The gradual abolishment of border checks through the Treaty of Schengen among all the signatories' States,[125] aimed at the realization of a

[122] See Chapter Six. For an extensive analysis on the EU legal instruments on the protection of cultural heritage, see: European Parliament, "Report on the proposal for a directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (recast) (COM(2013)0311 – C7-0147/2013 – 2013/0162(COD)) ", available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0058+0+DOC+XML+V0//EN (accessed March 28, 2013).

[123] See: Article 36 Consolidated Version of the Treaty on the Functioning of the European Union (ex Article 30 TEC): "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Available at:http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.doc (accessed August 6, 2013).

[124] European Community at that time. The difference today is also given by the larger number of countries that became member states of the European Union. To briefly recall the path of the passage from the European Economic Community to the European Union, here follow the main relevant steps. This reconstruction is important also to underline the political and legal basis that has an impact on the restitution of cultural objects issue in the European Union territory. On February 7, 1992, the then twelve member States of the European Economic Community (Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, The Netherlands, Portugal, and the United Kingdom) signed the Treaty for European Union in Maastricht, in The Netherlands. See: *Treaty on European Union, February 7, 1992, O. J. C. 224/01 (1992), [1992] 1 C.M.L.R. 719, reprinted in 31 I.L.M. 247 (1992).* On January 1, 1993, the European Union became a real political subject. As of August 2013, twenty-eight countries were member States of the European Union, after the admission of Croatia on July 1, 2013 (the latest previous admissions were for Bulgaria and Romania in 2007). See: http://europa.eu/about-eu/countries/index_en.htm (accessed August 4, 2013). As of August 2013, the full members of the EU are (with year of entry): Austria (1995), Belgium (1952), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (1952), Germany (1952), Greece (1981), Hungary (2004), Ireland (1973), Italy (1952), Latvia (2004), Lithuania (2004), Luxembourg (1952), Malta (2004), Netherlands (1952), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995), United Kingdom (1973).

[125] The treaty was signed on June 14, 1985 in the city of Schengen, in Luxembourg. Five out of the then ten member States of the European Economic Community became part of it: Belgium,

complete borderless area, comprehensive of the abolishment and harmonization of visa policies required for travelers in the European territory.

The innovation given by the implementation of the Schengen measures produced some concerns with regard to cultural objects, considered as at risk of being displaced without sufficient control. In November 1989, the European Commission presented to the Council the "Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archeological Value: Needs Arising from the Abolition of Frontiers in 1992", drafted with the scope of setting out proper legal tools able to guarantee a coordination between national and EEC measures on the protection of the national cultural heritage, before the constitution of the Internal Market of the then European Community.[126]

For this purpose the European Economic Community worked at two proposals in 1992. The first one was a directive on the return of cultural objects unlawfully removed from the territory of a member State to that of another member State. The second initiative regarded a regulation concerning the export of cultural properties to non-EEC countries.[127]

The first legal instrument, the Council Directive No. 93/7/EEC was adopted on March 15, 1993, and came into force on March 15, 1994, and the Council Regulation No. 3911/92[128] on March 30, 1993. The main aim which inspired the adoption of the Council Directive 93/7/EEC of March 1993 dealt directly with the need to guarantee the return of the cultural properties unlawfully

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France, Luxembourg, the Netherlands, and West Germany. At the moment only two member States are not party to the Schengen Agreement: Ireland and the United Kingdom. On the other side, it is noteworthy that many non-EU countries decided to become party and join the free movement area, underlining the positive result achieved by the borderless area initiative.

[126] See: Communication from the Commission to the Council on the protection of national treasures possessing artistic, historic or archaeological value: needs arising from the abolition of frontiers in 1992. COM (89) 594 final, 22 November 1989. See also: Talbot J. Nicholas II,"EEC Measures on the Treatment of National Treasures", *Loyola of Los Angeles International and Comparative Law Review* 16 (1993): 127-128, available at: http://digitalcommons.lmu.edu/ilr/vol16/iss1/4 (accessed August 4, 2013).

[127] Commission Proposal for a Council Regulation on the Export of Cultural Goods; Commission Proposal for a Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, COM (91) final – SYN 382; See Victoria J. Vitano, "Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects", *Fordham International Law Journal* 17 (1994): 1164-1201; Joanna Goyder, "Treaties and EC Matters", *International Journal Cultural Property* 3 (1994):125-130.

[128] Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, O. J. L 395, December 31, 1992.

removed from the territory of another member State. For this reason, a classification of the cultural objects must be provided by the single EU member State.

This process mainly concern those countries which present a relevant national treasure and from where such cultural objects has been removed, being recognized as pieces of artistic, historic, or archeological value as asserted through national acts, and listed as included in a collection of a museum, library, archive, or of an ecclesiastical institution.

On May 25, 2000 the European Commission underlines the lack of an operational functioning of the Council Regulation 3911/92, and the necessity of a higher degree of coordination among the European police forces, to ensure more effective customs control over cultural objects exported outside the EU territories.[129] On June 12, 2001 the European Parliament expressd its approval for the strengthening of preventive control mechanisms on the export of cultural objects, as provided for by the Council Regulation.[130] Since 2002 the Europeam Police Office (EUROPOL) has the additional competence on the investigation of illegal traffic of cultural objects.[131]

The Council Regulation No. 3911/92 has been replaced by the Council Regulation No. 116/2009,[132] providing for a secure uniform control over the export cultural objects that must be carried out of the European Union external borders. Coming to the core issue of the Regulation, it states that an export license must be provided to export a cultural object outside the territory of the European

[129] Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. COM(2000)325 def.

[130] European Parliament resolution on the Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2000) 325 - C5-0509/2000 - 2000/2246(COS))

[131] The Europem Police Office is the EU's law enforcement agency. The treaty of Maastricht provided for its establishment. Its actual activities started in 1994, with then limited competencies to Drugs control, as European Drugs Unit. See: "Guidelines on Administrative Co-operation Between the Competent Cultural Authorities", available at: http://www.circulation-biens.culture.gouv.fr/pdf2/Cooperation_en.pdf (accessed August 5, 2014).

[132] Council Regulation 116/2009 of 18 December 2008 on the Export of cultural goods, O.J. L. 39/1, February 10, 2009, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:039:0001:0007:en:PDF (last visited August 4, 2013).

Union.[133] A country that is member State of the EU may refuse to accept the license in case the specific cultural property is protected by a national legislation on treasure of historical, archeological or artistic value. The national administrative authorities are invited through the Regulation to provide mutual assistance to their counterparts in other member States, and to establish "dissuasive penalties"[134] in case of any kind of infringement of the norms provide by the Regulation itself.

A certain margin of freedom is recognized by the Directive, considering that an EU country is allowed to classify such kind of cultural goods as a national treasure even after it has yet abandoned the national territory and the classification may be extended also to categories of cultural objects not listed in the annex to the Directive.

The Directive application is temporally active only for cultural objects unlawfully removed from the national territory on or after January 1, 1993. However, it allows to the single national legislation the possibility to provide for a prior temporal limit of application. The European Directive provides also a system to guarantee the return of the unlawfully exported cultural goods to the EU member State who claims for it. The order to return the object may be granted only by the courts of the requested nations, in case the possessor or the holder refuse to agree it. The proceeding may be activated only by an EU country, while private owners may only lead to a proceeding activated under ordinary law. The time limit for the return proceeding brought is no more than one year after the moment when the EU appellant State discovers the location of the cultural good and the identity of the current possessor or holder, and in any case no more than thirty years after the time when the cultural good has been effectively removed from its (EU) country of origin. An exception to the latter provision is made for those cultural objects part of public collections or ecclesiastical goods where the time limit is subject either to national legislation or to bilateral agreements between EU countries).

[133] Art. 2 (1), Council Regulation 116/2009 of 18 December 2008 on the Export of cultural goods, O.J. L. 39/1, February 10, 2009, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:039:0001:0007:en:PDF (last visited August 4, 2013).

[134] http://europa.eu/legislation_summaries/culture/l11017b_en.htm (last visited August 4, 2013).

2.4. Stakeholders in the International Regulation of Cultural Property

The Cultural Heritage field is a really composed world, normally populated by different classes of stakeholders. Specifically, Cultural Heritage Law presents administrative, legal and judicial features and depends on governmental authorities, intergovernmental and non-governmental organizations. All of them compose a vast mosaics of actors that must here considered. Looking at the general framework, it is not possible to simply consider the field of cultural property only under the recovery issue dimension. In fact, the removal and restitution attain the cultural heritage field in its complexity, even representing a specific feature of it. For this reason, it is necessary to review all the major subjects involved in the Cultural Heritage field as stakeholders.[135]

As mentioned, the current research will focus on bilateral disputes involving only two categories of stakeholders: a State and a museum.

2.4.1. States[136]

The first stakeholders that must be taken into consideration are the States. They are the real center of gravity of the International Law world. Generally speaking, States are the main actors called to conclude the treaties and aim to preserve the international cultural heritage.

2.4.2. Private Stakeholders

Secondly, private stakeholders include: art dealers, collectors, action houses. They are all joined by the common commercial motivation to act in the open market. This profit-oriented nature made the private stakeholders the main advocacy group – globally considered – acting in the art world: they are generally devoted to favor free trade and abolish any restriction on the movement of cultural

[135] The selection of stakeholders here proposed is founded on the Lecture held by Professor Francioni on June 13, 2013, during the Course "The International Legal Framework for the Protection of Art and Cultural Property, Part II, The Role of International Law and International Bodies", Tulane Law School, Summer 2013. Nafziger substantially agrees on the subjects included as stakeholders in Francioni's list. Possible differences in Nafziger's opinion are duly point out.
[136] States are not expressly included in Nafziger's list.

objects and their movement, defending the open world market for art and antiquities items. For this reason, all these stakeholders emphasize the role of market and private ownership of cultural objects and collections, focusing more on the object itself, its economic value, and prestige. Instead, cultural scientists and archeologists recognize a greater value to the context of cultural material and to the public interest that must be addressed on it.[137]

2.4.3. Museums and Art Galleries

Museums and Art Galleries may be considered both as assimilated to the previous category of "private stakeholders",[138] or for their specific role in the Art market could be considered separately. Moreover, it must be underlined that they may have both public or private nature, with a remarkable distinction.[139]

In recent decades, some new challenges have arisen for these two stakeholders, basically connected to financial needs. More specifically, two main events have affected the sector: the lack of financial funds, and the changes occurred in the publicly funded institutions, related to the decisions and features of the involved institutions in each country. One of the biggest consequences resulted in the increasing number of epic exhibitions for the most representative museums and a new attention for cultural diversity and ethnic minorities in the staff memberships of cultural institutions.[140]

2.4.3.1. National or Regional Associations of Museums

National and Regional Associations of Museums represent other groups that must be included for their importance. Especially, for their contribution in

[137] The cleavage between art dealers, auction houses, and collectors on one side and archeologists on the other is remarkable also with regard to the distinction between the concepts of "provenience" and "provenance". See *infra*, paragraph 1.3. "The development of the protection of cultural heritage".
[138] As considered also by Professor Francioni.
[139] In the interview kindly released by Mr. Stephan W. Clark, he underlines as for a private US Museum could be hard to face a bilateral dispute when the counterpart is represented directly by the State, as in the Italian case, where the Cultural Heritage management is pivoted on the State bureaucratic system, and the cultural heritage is founded on a national patrimony vision. See the interview released by Mr. Clark in the Annex section of this study.
[140] James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law. International, Comparative, and Indigenous* (New York: Cambridge University Press, 2010), 220.

encouraging and disseminating both codes of conduct and ethics, with a binding value for their members. To briefly include the most known and representative, it is noteworthy to cite here: the American Association of Museums, the Canadian Museums Association, the Commonwealth Association of Museums. At the same time, also individual institutions promote the adoption of internal rules, aimed to regulate acquisitions, de-accession and repatriation of cultural objects.[141]

2.4.4. Art Related Associations, Governmental and Non-Governmental Organizations involved

The third category is represented by Associations and Organizations connected with the Art Market and Cultural Heritage protection.

The legal protection of the heritage has recourse to extremely different kinds of tools, which act in different fields of application. Therefore, a coordinated action among all the specialized bodies involved is essential, to make the joint efforts effective. A particular attention will be paid to their development of codes of conduct.

The current analysis will take into consideration the single bodies and their specific action, as follows.

This paragraph will take into consideration before the Art-related associations, and the Governmental and Non-Governmental Organizations internationally active.

Looking at the Art-related associations, the International Association of Dealers in Ancient Art (IADAA), established in London in 1993, deals with legal and business issues related to the art and antiquities dealers' activity. Its members must adhere to a rigorous code of conduct, intended to be respectful of the integrity of the cultural objects, and not only to accomplish the membership interests of its affiliates. Its strictly examined applications for membership process represents the distinctive feature of the IADAA, which promoted also a code of ethics and practice.[142]

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[141] James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law. International, Comparative, and Indigenous* (New York: Cambridge University Press), 2010, p. 221.

[142] "IADAA", Code of ethics, http://www.iadaa.org/en/about-us (accessed October 23, 2013).

Since 1996, IADAA has also work together with the Art Loss Register (ALR),[143] to build up the database of stolen antiquities. In order to actively contribute to this practical tool, each IADAA member is required to verify all cultural objects with a resale value exceeding 5,000 Euros with the Art Loss Register. It is considered as a due diligence practice for all IADAA members.[144]

A similar organization is the Association of International Antiquities Dealers (AIAD), based in London. It promulgated its own Code of Conduct, recalling for the responsible behavior of all art dealers towards their customers.[145]

The *Confederation International des Collecteurs des Oeuvres d'Art* (CINOA) is the major global association of art dealers. It currently gathers together 32 art and antique dealer association members, representing almost 5,000 individual dealers in 22 countries. CINOA also developed its own Code of Ethics, with the intent of applying it to all cultural objects negotiated on the market. The CINOA Code of Ethics has been agreed in 1987 in Florence, during the General Meeting of the Confederation. The text had been later amended in Stockholm on June 26, 1998 and in New York on May 11, 2005.

The lines of conduct contemplated in the CINOA Code are specifically intended as addressed to stop the illicit traffic and export of stolen art and antique objects all over the world, drawn up a list of principles that all art dealers are invited to apply in their professional activity.[146]

Another important association is the International Foundation for Art Research (IFAR), founded in 1970s as an answer to the increasing number of art frauds occurred during 1960s. IFAR is mainly dedicated to the verification of all features related to the works of art authenticity and integrity. The control over objects passes through accurate information concerning ownership, past thefts and all type of legal, ethical and artistic details of the art objects, putting in connection art trade, scholars and experts. IFAR promotes its action also through: a quarterly

[143] The Art Loss Registrar represents a fundamental source also for museums and all art stakeholders, as confirmed by Mrs. Sharon Cott in her Interview, fully included in the Annex Section of this study. Other important databases of stolen art and cultural objects are those of: Interpol (France); national agencies, as for example the Federal bureaus of Investigation (United States), the Royal Canadian Mounted Police (Canada), the Italian Carabinieri Commander for the Protection of Cultural Heritage.

[144] International Association of Dealers in Ancient Art, http://www.iadaa.org/en/about-us (accessed October 23, 2013).

[145] "Association of International Antiquities Dealers", Code of Conduct, http://aiad.org.uk/about-us/code-of-conduct/ (accessed October 23, 2013).

[146] "CINOA", Code of Ethics, http://www.cinoa.org/page/2273 (accessed October 23, 2013).

journal, contributing to the scientific development of the visual art field; the Art Authentication Research Service; and the Art Theft Database.

IFAR played an important role also for the construction of the Art Loss Registrar (ALR). After a first period of co-operation, the Art Loss Registrar gained full responsibility for the verification of art thefts in 1998, while IFAR is still the owner of this indispensable tool. The collaboration between the two entities actively continues with the research for and publication of the "Stolen Art Alert" section of the IFAR Journal.[147]

Among all the international specialized bodies related to UNESCO, operating in both global and regional levels, the 1972 Paris Convention expressly refers to three: ICCROM (International Centre for the Study of the Preservation and the Restoration of Cultural Property) [148], based in Rome, ICOMOS (the International Council of Monuments and Sites) [149], in Paris, and IUCN (International Union for Conservation of Nature and Natural Resources)[150], based in Gland.

These three organizations take on the function of operational bodies, both in the field of real research in the conservation and promotion of world heritage, through the collaboration with UNESCO for the achievement of the various goals of the Convention, and consequently, for the world heritage protection.

ICCROM is an intergovernmental organization. At the end of the 9th session of the General Conference of UNESCO, held in New Delhi in 1956, it was expressly requested to establish an international center for the study and coordination with research, documentation, training and assistance tasks for the purpose of dissemination of scientific knowledge, for the proper conservation and restoration of cultural heritage. The Centre was based in Rome in 1959, with the form of an intergovernmental organization of a scientific nature.[151]

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[147] "IFAR", http://www.ifar.org/home.php (accessed October 23, 2013).
[148] "International Centre for the Study of the Preservation and the Restoration of Cultural Property", http://www.iccrom.org/eng/00about_en/00_00whats_en.shtml (accessed November 9, 2013).
[149] "International Council on Monuments and Sites", http://www.icomos.org/en/ (accessed November 9, 2013).
[150] "International Union for Conservation of Nature" http://www.iucn.org/ (accessed November 9, 2013).
[151]" ICCROM Headquarters Agreement", available at: http://www.iccrom.org/eng/00about_en/00_03history_en/Gazzetta723-1960.pdf (accessed November 9, 2013).

On April 27, 1957 a bilateral agreement was concluded between UNESCO and Italy, as State of the seat of the Centre, giving to the ICCROM an Italian juridical personality, with capacity to contract, acquire, dispose of and to appear in court and provide for immunity of jurisdiction of the Italian officers for acts performed in the exercise of their functions.[152]

States may have the status of members or associated States. The second option only give the possibility to take part as an observer to the sessions of the General Assembly of ICCROM, without voting rights, but having the right to propose suggestions.

The admission procedure to ICCROM may differ depending on whether the State Party is or not a member of UNESCO. In the former case, the State has simply to submit its declaration of accession to the Director-General of UNESCO, in the latter case the application for membership shall be forwarded to the Director-General of ICCROM. In this case, the admission must be approved by the General Assembly after the evaluation of the application by the Council.[153] ICCROM has its own institutional independence by UNESCO, as provided by Article 2 paragraph 2 of the Statute. Incidentally, there is a strong cooperation between UNESCO and ICCROM, such as the participation of the ICCROM representatives at the meetings of the World Heritage Committee and of the UNESCO Bureau. ICCROM itself plays an advisory role at the World Heritage Committee, and at the Secretariat of the Convention. An ICCROM representative takes part into the meetings of the Committee which co-operates with, in conjunction with representatives of ICOMOS and IUCN .

ICCROM organs are: General Assembly, the Council, and the Secretariat.[154]

The General Assembly is composed of the Member States, represented by delegates chosen among the most qualified experts in the field of conservation

[152] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, Records of the General Conference, Ninth Session New Delhi 1956, Resolutions, http://unesdoc.unesco.org/images/0011/001145/114585e.pdf (accessed November 9, 2013). See also, ICCROM, "The First Decade. 1959-1969", available at: http://www.iccrom.org/pdf/ICCROMhistory_10years_en.pdf (accessed November 9, 2013).

[153] See Article 2, ICCROM Statutes, available at: http://www.iccrom.org/eng/00about_en/00_01govern_en/statutes_en.shtml (accessed November 5, 2013).

[154] ICCROM Statutes, available at: http://www.iccrom.org/eng/00about_en/00_01govern_en/statutes_en.shtml (accessed November 5, 2013).

and restoration, as well as associate members represented by agencies specialized in the field. Meetings are normally held in Rome, in ordinary sessions, every two years. Experts have their seat in the Assembly. This choice is widely criticized, as it seems to demonstrate a formal submission of scientific decisions to political ones.[155]

The Assembly has the duty to address the function and choices of ICCROM and to approve its biennial budget. The Assembly detains binding powers on the Member States only to fix the amount of the due financial contribution, while normally it adopts resolutions for activities that must be undertaken.[156]

The Board members is composed of: the members of the Assembly, a representative of the Director-General of UNESCO, a representative of the Italian government, a representative of the Central Institute of Restoration, and finally, the representatives of ICOM and ICOMOS, who are non voting members of the Council.

Among its duties, the Council shall suggest proposes, and execution functions, such as formulation and evaluation policy of the applications for accession of new members, that must be admitted by the Assembly. Article 5 paragraph 3 provides for the procedures for meetings of the Board and provides that it shall meet before and after the regular sessions of the Assembly, in order to ensure the needed institutional continuity to the action of the Centre.[157]

The Secretariat is composed of the Director General, appointed by the General Assembly, and of the staff needed by the Director General. The

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[155] ICCROM, Governance, available at: http://www.iccrom.org/eng/00about_en/00_01govern_en.shtml (accessed November 5, 2013).
[156] ICCROM, Governance, available at: http://www.iccrom.org/eng/00about_en/00_01govern_en.shtml (accessed November 5, 2013).
[157] ICCROM Statute, Article 5, para. 3:
Procedure
The Council shall:
immediately after an ordinary session of the General Assembly;
immediately before the following ordinary session of the General Assembly; and
once in the interval between its sessions referred to in (i) and (ii) above;
meet in Rome, Italy, unless the General Assembly or the Council itself decides otherwise;
adopt its own Rules of Procedure;
at the beginning of the first session following an ordinary session of the General Assembly, elect a Chairperson and other officers who shall hold office until the closure of the following ordinary session of the General Assembly;
establish such committees as may be necessary for it to carry out its functions.", available at: http://www.iccrom.org/eng/00about_en/00_01govern_en/statutes_en.shtml, (accessed November 5, 2013).

Secretariat performs international duties, according to the nature of ICCROM, ensuring the independence of Member States and from any authority external to the Centre.[158]

ICCROM focuses on the problems of preservation of cultural heritage under five main aspects: scientific methods for their conservation, preservation methods, inspection, analysis and legal features. ICCROM pursues these objectives through the collection, study and dissemination of scientific, technical and ethical information; through the coordination, promotion and conduct of research in the field, by assigning tasks to bodies or experts, through the organization of international meetings.[159]

Current trends of development of ICCROM aim to enhance increasingly more the protection of cultural heritage through research, techniques of conservation and interdisciplinary studies on cultural heritage.[160]

Considering the NGOs, ICOMOS is the unique international non-government organization active in the conservation and protection of architectural and archaeological cultural heritage places, through the promotion of the application of theory, methodology, and scientific techniques.[161]

Its origin dates back to the II International Congress of Architects and Technicians of Historic Monuments of Venice of 1964, when the creation of an

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[158] "ICCROM Statute", "Article 6", available at: http://www.iccrom.org/eng/00about_en/00_01govern_en/statutes_en.shtml, (accessed November 5, 2013).

[159] "ICCROM Statute", Article 1, "Purpose and functions.
The "International Centre for the Study of the Preservation and Restoration of Cultural Property", hereinafter called "ICCROM", shall contribute to the worldwide conservation and restoration of cultural property by initiating, developing, promoting and facilitating conditions for such conservation and restoration. ICCROM shall exercise, in particular, the following functions:
a. collect, study and circulate information concerned with scientific, technical and ethical issues relating to the conservation and restoration of cultural property;
b. co-ordinate, stimulate or institute research in this domain by means, in particular, of assignments entrusted to bodies or experts, international meetings, publications and the exchange of specialists;
c. give advice and make recommendations on general or specific questions relating to the conservation and restoration of cultural property;
d. promote, develop and provide training relating to the conservation and restoration of cultural property and raise the standards and practice of conservation and restoration work;
e. encourage initiatives that create a better understanding of the conservation and restoration of cultural property." Available at: http://www.iccrom.org/eng/00about_en/00_01govern_en/statutes_en.shtml, (accessed November 5, 2013).

[160] ICCROM, World heritage, available at: http://www.iccrom.org/eng/prog_en/3world-heritage_en.shtml (accessed November 9, 2013).

[161] Introducing ICOMOS, available at: http://www.icomos.org/en/about-icomos/mission-and-vision/mission-and-vision (accessed November 9, 2013).

International Council of Monuments and Sites (ICOMOS) was proposed, under the patronage of UNESCO. The body was concretely established in Krakow in 1965, with the adoption of its Statute, precisely in the form of professional non-governmental organization with headquarters in Paris, in order to promote research and dissemination of information, to encourage the conservation and enhancement of monuments and sites, and to stimulate the interest of the authorities and public opinion for the same.[162]

The center has six main objectives: acting as a collection center for the conservation specialists from different countries to lead professional opportunity for dialogue and exchange of information; collecting, evaluating and disseminating information on the principles, techniques and conservation policies; collaborating with national and international authorities for the purpose of establishing documentation centers specialized in the field of conservation; collaborating for the adoption and implementation of international conventions on the conservation and enhancement of the architectural heritage; participating in the organization of training programs for specialists in the conservation worldwide; making available professional experiences for the international community and highly qualified specialists in the field.[163]

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[162] "ICOMOS en brief", available at: http://www.icomos.org/fr/a-propos-de-licomos/mission-et-vision/licomos-en-bref, (accessed November 9, 2013).

[163] See: Article 5, ICOMOS Statutes, Adopted by the Constituent Assembly of ICOMOS in Warsaw (Poland) on 22 June 1965 and amended by the 5th General Assembly (Moscow, USSR) on 22 May 1978 .

"ICOMOS shall:

a. Provide a mechanism for linking public authorities, institutions and individuals concerned with the conservation of monuments, groups of buildings and sites, and ensure their representation with international organisations;

b. Gather, study and disseminate information concerning principles, techniques and policies for the conservation, protection, rehabilitation and enhancement of monuments, groups of buildings and sites;

c. Co-operate at national and international levels in the creation and development of documentation centres dealing with the conservation and protection of monuments, groups of buildings and sites, and with the study and practice of traditional building techniques;

d. Encourage the adoption and implementation of international recommendations concerning monuments, groups of buildings and sites;

e. Co-operate in the preparation of training programmes for specialists in the conservation, protection and enhancement of monuments, groups of buildings and sites;

f. Establish and maintain close co-operation with UNESCO, the International Centre for the Study of the Preservation and Restoration of Cultural Property, Rome, regional conservation centers sponsored by UNESCO, and other international or regional institutions and organizations pursuing similar goals; and

g. Encourage and instigate other activities consistent with these statutes."

Since 1966, the Council works in close collaboration with UNESCO. The Council has been created basically for the need to identify the technical criteria to define conservation, restoration, monumental sites, discovery, monumental groups, and to provide for the training of skilled technicians in the field, to promote research and to protect and revitalize the historic centers.

Different categories of members can become part of ICOMOS: individual members, experts in the field of monuments conservation, art historians, archaeologists, planners, all sitting on an individual basis as institutional members; but also supporting members, honorary members, appointed by the General Assembly.[164]

The organizational structure of ICOMOS is made up of several organs: the General Assembly, the Executive Committee and its Bureau, the Advisory Committee and its Bureau, the National Committees, International Committees and the Secretariat. Each of these organs is autonomous: they can adopt specific rules of procedure, including those relating to the election of their officials.

The General Assembly is the main organ. It has a legislative, a planning and control nature, and establishes the working programs, monitoring their implementation. In addition, it adopts the amendments of the Statute of ICOMOS, approves the budget and the reports of the Secretary General and the Treasurer. Moreover, it elects the President, the five Vice-Presidents, the Secretary General, the Treasurer and the members of the Executive Committee.

The Executive Committee is exclusively composed of individual members of ICOMOS, whose division must ensure the geographical division of the regions of the world, and are chosen for their professional qualifications. The Executive Committee also approves the Report of the Treasurer General and the final account.[165]

The Bureau is responsible of carrying out the current business, and shall be convened by the President, as it acts on the behalf of the latter.

The Advisory Committee is composed of the President and the Presidents of ICOMOS National Committees and international. It plays an advisory role for

[164] "Join" ICOMOS, available at: http://www.icomos.org/en/get-involved/join-icomos, (accessed November 10, 2013).
[165] ICOMOS, "Executive Committee", available at: http://www.icomos.org/en/about-icomos/governance/general-information-about-the-executive-committee, (accessed November 10, 2013).

the General Assembly and the Executive Committee, and defines the guidelines and processes to be implemented by the Organization.

The National Committees represent the distinguishing element of the ICOMOS institutional framework. The number of individual members of each committee shall not be less than five. They give effect to the decisions of the General Assembly and to the programs proposed by the Executive Committee and the Advisory, as well as being an ideal forum for the exchange of information and ideas for the restoration and enhancement of sites and monuments.[166]

The International Committees are purely technical bodies, that carry out studies and research on specific problems through the establishment of specialized committees to study scientific, technical, methodological, administrative matters.

Finally, the International Secretariat and the Treasurer General complete the international framework of the organization. The first is chaired by the Secretary General and is in charge of implementing the directives of the General Assembly and the Advisory Committee. The second is responsible for the financial management and the preparation of the budget and the final account.[167]

Another NGO is the International Union for Conservation of Nature (IUCN). It has its headquarters in Gland and was founded on October 5, 1948, at Fontainebleau, under the *aegis* of UNESCO with the French government. It took the nature of a non-governmental organization of a scientific nature. The Statute of the Association sets out different categories of members. They may have different procedures of admission, suspension, rescission, withdrawal and expulsion, as well as a different legal scope with regard to their rights and obligations.

The admission of States or international organizations is done by the Act of Accession, notified to the Director General of the Union. The other categories of membership shall be granted upon approval of the Council.

The objectives pursued by the Union basically consist of influencing, encouraging and assisting the several state-owned companies in the world, in order to preserve the integrity and diversity of nature and to ensure that the use of

[166] "ICCROM Governance", available at: http://www.iccrom.org/eng/00about_en/00_01govern_en.shtml (accessed November 10, 2013).
[167] "ICCROM and the Conservation of Cultural Heritage, A History of the Organization's First 50 Years, 1959-2009", available at: http://www.iccrom.org/pdf/ICCROM_ICS11_History_en.pdf, (accessed November 10, 2013).

the sustainable use of natural resources is equitable and ecologically sustainable. The purposes can be categorized into four major subjects: ensuring that economic development is achieved in a manner consistent with the concept of sustainable development; ensuring that the spaces on land or sea not subject to special protection are used to ensure the conservation of resources and the maintenance of an adequate number of species of both plant and animals; protecting the land and marine areas of fresh water; taking appropriate measures to ensure that the flora and fauna are not damaged or destroyed.[168]

The IUCN works closely with a number of non-governmental organizations, first of all UNESCO. Its main activities are focused on nature conservation and sustainable use of natural resources and are implemented in a variety of areas: biodiversity, species, protected areas, ecosystem management, forests, marine and coastal environment, environmental planning, social policy, environmental training, communication, and information management.

The main IUCN organs are: the General Congress[169] of the world conservation, a body of management, coordination and consultancy, that defines the intervention strategy of the organization; the Council, which ensures the continuity of its action through its Bureau, which is permanently active, it appoints the Director General, which is the executive body of the Union, and that, with the support of the Secretariat, plans and coordinates the execution of the program and ensures the institutional link between the various governing bodies participating in their meetings; National and Regional Committees were created in order to facilitate cooperation among members; Commissions of volunteer experts offer a great contribution to the preparation, development and implementation of the working program; the Treasurer performs a support function of the Director General on financial and accounting matters.

Each of the six Technical Committees has a particular area of intervention: the Commission for the survival of the species; the Commission on National Parks and Protected Areas; the Ecological Commission; the Commission for projects on the environment; The Educational Commission; the Commission for policy, law and administration environment.[170]

[168] "About IUNC", available at: http://www.iucn.org/about/ (accessed November 10, 2013).
[169] Formerly the General Assembly.
[170] "IUNC. Commissions", available at: http://www.iucn.org/about/union/commissions/ (accessed

Another NGO that deserves at least a minimum interest is the Blue Shield International.

Also known as the "Cultural Red Cross", it dues its origin to the 1954 Hague Convention, and precisely to articles 16 and 17,[171] which describe the emblem used to mark cultural sites at risk for possible attacks, in need of protection. Even though its role is not directly related to the restitution issue, the Blue Shield promotes activities and has relations with public and private cultural stakeholders, contributing to the general objective of the protection and promotion of the Cultural Heritage.[172]

Briefly, others NGOs active in the cultural heritage field must be recalled: the Art Dealers Association of America and the Antique and Tribal Art Dealers Association, the American Council for Cultural Policy (United States); the British Antique Dealers Association and the Society of Fine Art Auctioneers and Valuers (United Kingdom). Among the club of collectors: the American Ceramic Society and the Oceanic Art Society of Australia.[173] The role of collectors is relevant as

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November 10, 2013). For an extensive analysis, see also: Maria Clelia Ciciriello, *La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla Convenzione UNESCO del 1972*, (Naples: Editoriale Scientifica, 1997).

[171] 1954 Hague Convention, Article 16. "Emblem of the Convention"
"1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, *per saltire* blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).
2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17."
Article 17. "Use of the Emblem"
"1. The distinctive emblem repeated three times may be used only as a means of identification of: (a) immovable cultural property under special protection; (b) the transport of cultural property under the conditions provided for in Article 12 and Article 13; (c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.
2. The distinctive emblem may be used alone only as a means of identification of:(a) cultural property not under special protection; (b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention; (c) the personnel engaged in the protection of cultural property; (d) the identity cards mentioned in the Regulations for the execution of the Convention.
3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.
4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party."

[172] For further details: "Blue Shields", see: http://www.ancbs.org/cms/index.php/en/home (accessed November 10, 2013).

[173] See: James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law. International, Comparative, and Indigenous,* (New York: Cambridge University Press, 2010), 209.

much as all other stakeholders. Furthermore, they are the stimulating force asking for artifacts, antiquities and all kinds of cultural objects.[174] As Nafziger highlights, NGOs may be able to preserve the equilibrium of the art trade, also through their important ethical awareness activities, but only governments shall fully implement the control over the art market, with the coordinated sustain of the intergovernmental organizations.[175]

Finally, among the main Cultural Heritage and Art related Associations, the International Council of Museums (ICOM) must be taken into account. It is the International Non-Governmental Organization that congregate museums and museum professionals, principally devoted to the issues of conservation and information of the natural and cultural heritage, both tangible and intangible. It is a public interest organization, composed by experts from 137 Countries all over the world, established in 1946, based in Paris, with 117 National Committees and 31 International Committees.

This diplomatic forum has also consultative status with the United Nations Economic and Social Council. Particularly devoted to the ethical matters of the Art and Cultural heritage world, one of the main outcomes produced by ICOM are the Code of Ethics for Museums and the latest Code of Ethics for Natural History Museums. Adopted in 1986 and revised in 2004 and 2006, the Code of Ethics for Museums sets up values and principles promoted by ICOM, defining minimum standards of professional practice addressed to the whole international museum staff community.[176]

The newest Code of Ethics for Natural History Museums was adopted unanimously on August 16, 2013 in Rio de Janeiro, in occasion of the 28th ICOM General Assembly. It has been conceived as a complementary tool for the previous ICOM Code of Ethics, and aims to specifically address life and earth

[174]See: Ricardo J. Elia, Looting, Collecting, and the Destruction of Archeological Resources, 6 Nonrenewable Resources, 2 (1997): 85 -88.
[175] See: James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law. International, Comparative, and Indigenous*, (New York: Cambridge University Press, 2010), 249.
[176]ICOM Code of Ethics for Museums, available at: http://network.icom.museum/fileadmin/user_upload/minisites/icom-us/PDF/code2006_eng.pdf (accessed October 23, 2013). The ICOM Code of Ethics will be analyzed in Chapter Four, with regard to the Codes of Conduct.

sciences matters, establishing also in this case a minimum standard of practice for museum professionals.[177]

Moreover, ICOM is decidedly involved in the promotion the restitution activity of cultural property, by providing support to museums interested by this kind of disputes. In addition, in enhancing this action, ICOM has also settled specific alternative dispute resolution services, developing its own Art and Cultural Heritage mediation service, in partnership with the World Intellectual Property Organization.[178] The cooperation resulted in a remarkable innovation, offering a concrete answer to the need of alternatives to trials and long lasting legal proceedings. ICOM and the World Intellectual Property Organization (WIPO)[179] defined a precise system of rules to regulate the disputes resolution, and assistance in negotiation procedures.[180]

ICOM has official institutional relations with UNESCO, appointed with a recognized consultative status with the United Nations' Economic and Social Council. Among all its duties, ICOM works for the spread of the information on the museums world, the professional training of the museums' personnel, the development of professional ethical standards,[181] and what is more interesting for the current study it fights against the forms of illicit traffic of Cultural Heritage. ICOM is adviser both to UNESCO and UNIDROIT, and for this reason it took active part in the drafting process of the two Cultural Heritage Conventions on the Illicit traffic and return issues. ICOM also promoted in partnership with the World Customs Organization an Official Cooperation Agreement with Interpol, signed in Brussels, on January 25, 2000.[182] One of the most important results through their cooperation had been achieved in 2006, with the recovering of about 600 pre-

[177] See: "ICOM Code of Ethics for Natural History Museums", available at: http://icomnatistethics.files.wordpress.com/2013/09/nathcode_ethics_en2.pdf (accessed October 23, 2013).
[178] See: "ICOM, Art and Cultural Heritage Mediation", http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed October 23, 2013).
[179] See *infra* Chapter Four.
[180] See: "ICOM-WIPO Mediation Rules", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/icom-wipo-mediation-rules/ (accessed October 23, 2013).
[181] The ICOM Code of Ethics represents probably the most important set of ethical rules for the museums world.
[182] See: "Memorandum of Understanding between the World Customs Organization (WCO) and the International Council of Museums on Combating the Illicit Traffic in Cultural Property", http://people.exeter.ac.uk/watupman/undergrad/serena/website/pages/icom.html (accessed October 23, 2013).

Columbian artifacts from Ecuador, previously stolen and illegally exported in the United States.[183]

In its extensive activity, ICOM also works in partnership with national bodies for the enforcement of national law measures able to implement the international rules. Some examples are the collaborations with: the Italian Carabinieri Commander for the Protection of Cultural Heritage, the Art and Antiquities Unit of the Belgian Police, included in the *Direction de la lutte contre la criminalité contre les biens (DJB)*, with an office dedicated to the fight against organized thefts in Art and Antiquities[184], the FBI Art Theft Program[185], the Central Office for the Fight against Traffic in Cultural Goods (OCBC) in France[186], the Federal Office of Police in Switzerland (FedPol)[187], the Art & Antiques Unit of the Scotland Yard Metropolitan Police[188], and the aforesaid Columbian police, whose action had been determinant in 2006.[189]

2.4.5. Artists

According to Professor Francioni, artists themselves should be included in the current list of the Cultural Heritage stakeholders, especially when they constitute precise lobbying groups. Probably, the most relevant is the International Association of Art (IAA/AIAP), whose origins date back to 1948, during the Third General Conference of UNESCO, held at Beirut. The IAA project was

[183] See: "ICOM, Red List of Cambodian Antiquities at Risk. Fighting the illicit traffic of cultural goods", available at: http://icom.museum/uploads/tx_hpoindexbdd/RedList_Cambodia_PressFile.pdf (accessed , October 23, 2013).
[184]See: "La Direction de la lutte contre la criminalité contre les biens (DJB), Belgian Police official website", available at: http://www.polfed-fedpol.be/org/org_dgj_djb_fr.php#djb04 (accessed October 23, 2013).
[185]See: "FBI Art Theft Program", available at: http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft (accessed October 23, 2013).
[186] See: "L'office central de lutte contre le trafic de biens culturels", available at: http://www.police-nationale.interieur.gouv.fr/Organisation/Direction-Centrale-de-la-Police-Judiciaire/Lutte-contre-la-criminalite-organisee/Office-central-de-lutte-contre-le-trafic-de-biens-culturels (accessed October 23, 2013).
[187]See: "Federal Office of Police in Switzerland", available at: http://www.fedpol.admin.ch/content/fedpol/en/home/themen/sicherheit/polizeistruktur/polizeiarbeit_auf.html , (accessed October 23, 2013).
[188] See: "Art & Antiques Unit, Scotland Yard Metropolitan Police", available at: http://content.met.police.uk/Site/artandantiques (accessed October 23, 2013).
[189] See: "ICOM, Red List of Cambodian Antiquities at Risk. Fighting the illicit traffic of cultural goods", available at: http://icom.museum/uploads/tx_hpoindexbdd/RedList_Cambodia_PressFile.pdf (accessed October 23, 2013).

based on the purpose of supporting artists in their contribution to the UNESCO activity, removing all kinds of obstacles – economic, political, social and ethical – to make them really free in practicing their artistic creativity.

The theme of artists' freedom became the central issue of a study commissioned during the UNESCO Conference in 1951. A real Association and its Secretariat, finally established in Paris, arrived only in 1952, ant its first official General Assembly was held in Venice in 1954, with 18 States Parties and the participation of artists like Mirò and Braque. The IAA has also contributed to develop a list of criteria for the professional identification of artists. The IAA has been admitted since its foundation to UNESCO as a partner NGO, with the status of consultative Association, preparing proposals and taking part into discussions with UNESCO Member States.[190]

2.4.6. Indigenous Peoples and Minority Ethnic Groups

The indigenous movements acquired extremely power in recent years. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples had a relevant influence also on the general field of studies of Cultural Heritage Law,[191] and practical consequences on the repatriation requests for stolen cultural property, carried out from their native lands. This specific category of stakeholders will be taken into due consideration in one of the cases of study in the course of the current examination. As underlined also by Nafziger, in tracing back the evolution of the field the international legal framework, "the native peoples' movements sparked efforts to regain possession of indigenous material".[192]

Indigenous minorities present specific instances of self-governement and their cultural claims have undeniable political value. As affirmed by Cowan, "the

[190] See: "International Association of Art", available at: http://www.iaa-europe.eu/ (accessed November 3, 2013).
[191] "The United Nations Declaration on the Rights of Indigenous Peoples" had been adopted by the General Assembly on September 13, 2007, by a majority of 143 states in favor, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine)". The text of the Declaration is available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed November 3, 2013).
[192] See: James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, *Cultural Law. International, Comparative, and Indigenous,* (New York: Cambridge University Press, 2010), 249.

view of a minority as a 'natural' ethic unit prevails as common sense within international human rights discourse".[193]

2.4.7. Archeologists and Anthropologists

These two profession categories have in common the attention for the context of cultural objects, trying to preserve it correctly, and preventing conditions that may threat the information on the place of origin and contest. For this reason, they have a relevant role also under the ethical point of view, and actively take responsibilities in their relations with national governments, engaging themselves in the fight against illegal excavations and trade of cultural material.

The most important worldwide associations are: the International Union for Prehistoric and Protohistoric Sciences (IUPPS), founded in 1931 in Ghent (Belgium); the American Anthropological Association; the Archeological Institute of America; the Society for American Archeology (United States); the Institute for Archeologists (United Kingdom); and the World Archeological Congress.

It must be underlined that many of the archeologists, individually or some of their associations, strenuously oppose every form of trade of cultural material, with the purpose of preserving and protecting both context and sites. Even though their position could be understandable, art market's and art consumers' demand will not stop, feeding the trade. This opposition against all forms of trade (even legal ones) could also result in an increasing demand for cultural objects on the illegal market.[194]

Also maritime salvors and marine adventures have a role in the field of the underwater cultural heritage. Besides, lobbying groups representing charitable

[193] See: Jane K. Cowan, "Ambiguities of an Emancipatory Discourse: The Making of a Macedonian Minority in Greece", in *Culture and Rights: Anthropological Perspectives,* Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson (eds.), (Cambridge: Cambridge University Press, 2001), 168; Bruce Robbins and Elsa Stamatopoulou, "Reflections on Culture and Cultural Rights", The South Atlantic Quarterly 103 (2/3), (2004): 419-434. Cf. Elsa Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond*, (Leiden, Boston: Martinus Nijhoff Publishers), 2007, xi-333. For an extensive examination of the Indigenous self-determination and the related restitution process issue, see: Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006), 197-298.

[194] See: James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln, Cultural Law. *International, Comparative, and Indigenous*, (New York: Cambridge University Press, 2010), 221.

foundations, architects, scientific and cultural advocacy groups must be considered in the comprehensive cultural heritage law stakeholders. In conclusion, it must be underlined as the singular list outlined by Nafziger includes also Criminals and Criminal Organizations. For the high volume of the illicit traffic of cultural heritage, in fact, criminal organizations may intended as a clear interest group on the field.

Chapter Three. Fundamental concepts

The following examination of the concept of "cultural heritage" is founded on the idea of taking into consideration first of all the letter of the international multilateral Conventions related to the subject. This choice will allow to deem the international legal tools, rather than the different positions on a so high debated argument, without completely excluding some authoritative viewpoints.

The two fundamental Conventions in relation to the restitution of Cultural objects are: the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. One of the main differences between the two Convention is that the former represents an objective description of the phenomenon and it was the expression of the general desire and commitment to contain the illicit traffic of cultural objects, while the latter makes clear since its preamble that the Convention itself will not be enough as a means to stop the phenomenon.[195]

3.1. The Definition of Dispute Over the Cultural Heritage Concept

Nowadays, the definition of "cultural heritage" still represents an intricate concept in the cultural studies field. Under the legal point of view, it has different implications. This will be the aim of the subsequent analysis.[196]

Generally, every discipline has a clear definition of its specific subject of

[195] "UNESCO, Illicit Traffic of Cultural Property", available at http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/ http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/1995-unidroit-convention/ and (accessed August 13, 2013). The full texts of the two 1970 UNESCO and 1995 UNIDROIT Conventions are attached in the Annex Section of the present study. The relevant passages useful for the currently analysis will be reported in the text, as well as for all the other cited documents (Recommendations, other Conventions, EU Directives, etc.).

[196] On the concept of "cultural heritage" and its wide spreading evolution, see David Lowenthal, *The Heritage Crusade and the Spoils of History*, (Cambridge: Cambridge University Press, 1998), 127-147.

study. It is not so for the International Cultural Heritage Law.[197] In particular, as noted by Prott in 1989, the difficulty does not refer to the generic category used by cultural experts, but attains its legal definition. In particular, the definition of this concept becomes arduous, especially considering it under International Law. In fact, the idea of "cultural heritage" is a category borrowed by other disciplines, such as archeology or anthropology. Thus, it has a complete distant foundation under the legal point of view.[198]

The terms of "property", "heritage", "objects", "good", "patrimony", or "antiquities" are generally interchangeably used, but they have different legal meanings.[199] For this reason, the current analysis will take into consideration especially the international legal tools, as each of the Conventions concerning the safeguard of the cultural heritage make recourse to specific terms. As noted by Forrest, in last 200 years a continuous evolution process in national statutes has given to the simple concept of goods a sounder legal basis, elevating them to a "higher realm of protection".[200]

Concurrently, at the international level, the biggest influence has been exercised through the adoption of five UNESCO Conventions,[201] the UNIDROIT Convention of 1995, the related European Directives and Regulation,[202] and other

[197] See: Lyndel V. Prott "Problems of Private International Law for the Protection of the Cultural Heritage", *Recueil da Cours* V (1989): 224.
[198] See: Lyndel V. Prott "Problems of Private International Law for the Protection of the Cultural Heritage", *Recueil da Cours* V (1989):224-317. In particular, see p. 224: "While cultural experts of various disciplines have a fairly clear conception of the subject-matter of their study, the legal definition of the cultural heritage is one of the most difficult confronting scholars today."; and see also: Janet Blake, "On defining the cultural heritage*", International and Comparative Law Quarterly* 49 (1) (2000): 64: "There may be no difficulty, for example, in understanding the intention of the 1970 UNESCO Convention as to the nature of the "cultural property" which it protects. There is, however, a difficulty with any attempt to identify exactly the range of meanings encompassed by the term cultural heritage as used now in International Law and related areas since it has grown beyond the much narrower definitions included on a text-by-text basis".
[199] On the difficulty to properly defining in a definite way the key concept of "cultural heritage", see Janet Blake, "On defining the cultural heritage*", International and Comparative Law Quarterly* 49 (1) (2000): 61-58; Manlio Frigo,"Cultural Property v. Cultural Heritage: A "battle of Concepts" in International Law?", *International Review of the Red Cross* 86 (584) (2004): 367-378; Kathryn Last, "The Resolution of Cultural Property Disputes: Some Issues of Definition" in Wojciech W. Kowalski, *Resolution of Cultural Property Disputes*, (The Hague: Kluwer International, 2004), 54-64; Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 1-30.
[200]See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), Preface, IX.
[201] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), Preface, IX.
[202] Council Directive No. 93/7/EEC; Council Regulation No. 3911/92; Council Regulation No.

tools, that can be considered as "soft law",[203] thanks to the contribution of the stakeholders acting in the field of the protection of cultural heritage, such the Code of Ethics for Museums promoted by ICOM.[204]

The core focus on the current analysis will be firstly based on the examination of the definition and terms used by the five UNESCO Conventions. Each of them deals with a precise aspect of the protection and safeguard of the cultural heritage, which is the general purpose noticeable in the wider trend designed by UNESCO over the last five decades.

At the same time, any interaction among the five Conventions has been drawn, as everyone is intended as a separated tool, to be able to act on a specific theme[205] – generally generated by environmental, social, economic emergencies or disasters.[206]

On one hand, it is necessary to make a comparison among all the legal instruments addressing the issue of the Cultural Heritage protection, because they form all together a complex legal framework. On the other hand, this complexity itself reveals an overall interest of UNESCO in promoting a global action for the safeguarding of the Cultural Heritage, in all its forms and facing all the emerging problems.

Under the methodological perspective, it is necessary to consider here the

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116/2009.

[203] "Soft law" describes international tools which are not able to create binding legal obligations on subjects of International Law. Soft law instruments are used to encourage states to act in a certain ways or to avoid of undertaking determined measures. Malcolm N. Shaw, *International Law*, Sixth edn., (Cambridge: Cambridge University Press, 2008), 117-118. "This is a body of standards, commitments, joint Statements, or declarations of policy or intention (think, for instance, of the Helsinki Final Act of 1975), resolutions adopted by the UN GA or other multilateral bodies, etc. Normally, "soft law" is created within international organizations or is at any rate promoted by them. It chiefly relates to human rights, international economic relations, and protection of the environment." Antonio Cassese, International Law, 2 Second edition, (Oxford University Press, New York, 2005), 196.

[204] See: "Appendix", available at http://archives.icom.museum/ethics.html (accessed August 6, 2013).

[205] See: Lyndel V. Prott and Patrick J. O'Keefe *Law and the Cultural Heritage,* Vol.I, (Abingdon: Professional Books, 1984), 8: "... for various reasons each Convention and Recommendation has a definition drafted for the purposes of that instrument alone; it may not, at this stage be possible to achieve a general definition suitable for use in a variety of contexts".

[206] In particular, the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage is the answer to two environmental accidents: the construction plan for the Aswan Dam, which provoked the flooding of the Upper Nile Valley, and the two floods in Florence and Venice in November 1966. See: Francesco Francioni, "Thirty Years On: Is the World Heritage Convention Ready For the 21st Century?" *The Italian Yearbook of International Law*, 12, (2002): 15.

general evolution of the commitment promoted by UNESCO, even though, for the wider purpose of the examination here developed, this analysis will focus more on the tools that are concretely related only to the specific issue of the recovery and restitution of stolen and illegally exported cultural objects.

Referring to the examination of the texts of the UNESCO Conventions, Blake underlines: "The three UNESCO multilateral Conventions are similar to human rights instruments in setting standards worldwide and the Recommendations can have great influence on national practice despite not being binding on Parties".[207] This sentence opens-up to two different – but related - evaluations: the comparison to the human rights tools represents a high recognition of the Conventions value, also for its practical applicability; moreover, the presence of a detailed list or description of the Convention subject[208] made them an independent legal instrument, not needing any additional reference to an "external" international legal means.

It is not possible to fully explain here the significance that the comparison with the human rights tools will have for the following analysis, but it is worth of underlining it, because this element will be recall in one of the cases of study under analysis.

The general meaning of this brief study finds a first landing point, considering that the comprehensive impact of the current recognized international legal body is bigger than the simple count of the separated issues taken into consideration by each UNESCO Convention in the field of the protection of the Cultural Heritage.

On the whole, the most important result produced by the UNESCO action of codification has been the creation of an international legal framework itself, made by conventional norms and the design of a desired co-operation system that should be implemented by State Parties, which overcomes the original regime only addressed to the material protection of culture.[209]

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[207]See: Janet Blake, "On defining the cultural heritage", *International and Comparative Law Quarterly* 49 (1) (2000): 64.
[208] Generally, the list is located at the end of each Convention, as an Annex.
[209] Reflection inspired by: George Abi-Saab in *Standard-setting in UNESCO: Normative Action Education, Science and Culture*, A. A. Yusuf, (ed.), (Leiden: Martinus Nijhoff and UNESCO Publishing, 2007), 396.

Going ahead with an order, the main basic trouble regards the separated broader concepts of "culture" and "heritage", which together identify the field of action where this analysis moves into. In particular, "culture" is such a wide and holistic concept that it could cover every kind of feature dealing with the existing world, or one could say the existing culture.[210]

Considering the evolution of the concept of "Cultural Heritage" and its inclusion in the UNESCO codification process, Blake states: "The danger therefore exists of creating future international instruments which extend the range of the term without having settled on a clear understanding of its meaning as employed in existing texts".[211]

As the concept of cultural heritage has been composed of two different basic terms, it is necessary to take here into consideration these two elements independently.

The term "culture" has a wide range of application, as it refers to all the expressions and manifestations of human knowledge, customs, arts, beliefs, and behaviors, belonging to a specific society.[212]

Conversely, the term "heritage" enshrines the idea of the path made over times by one people, underlining the transmission of its own origins to new generations, both in an intangible way (through habits, expressions, language, practices), as well as in a tangible way (through objects, instruments totally new, created by inventory and experience). In one word, it consists of the transmission of a particular culture, able to identify a people or a group, settled in a precise area.[213]

Even though the term "patrimony" has never been adopted in the international Conventions, it is considered as one of the most important concept of Cultural Heritage Law, because it identifies a specific part of cultural heritage strongly connected to the "identity and character of a nation, tribe, or other ethnic

[210] See: Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*, (Leicester: Institute of Art and Law, 2006), 22.
[211] See: Janet Blake, "On defining the cultural heritage", *International and Comparative Law Quarterly* 49 (1) (2000): 63.
[212] For an extensive study of the concept of "Culture", see Thomas. S. Eliot, *Notes towards the definition of Culture*, (London: Faber and Faber Ltd, 2010), 137.
[213] This definition has been freely developed by the author, on the basis of her studies.

group that its members deem it inalienable. The term embraces tangible historic or archeological sites and objects as well as intangible phenomena, such as folklore, rituals, language, music, and craft skills".[214]

A fundamental passage links together Culture, Heritage and Law (intended as norms) in a society. In fact, norms are the result of a long process experienced by a society that adopts a scheme of rule to constitute an order, starting from the lessons learned by the ancestors and felt as needed to preserve the current society for the future generations. Law reflects society and social changes. It is the needed tool to rule society, and for this reason must walk along time and its evolutions. Concurrently, "cultural property and cultural heritage have different legal and societal meanings. The first suggests property law and the second human rights law. They are not, however, mutually exclusive, but integrating them across cultural divides calls for understanding and respect, open-mindedness and goodwill, and above all patient listening to each other".[215]

One of the most eminent definition attempt in the field of the Cultural Heritage Law has been given by Prott and O'Keefe, identifying the concept of "cultural heritage" as "manifestations of human life which represent a particular view of life and witness the history and validity of that view".[216] Successively, Prott deepened the concept as: "those things and traditions which express the way of life and thought of a particular society, which are evidence of its intellectual

[214] See: James A. R. Nafziger, *Cultural Heritage Law*, (Cheltenham: Edward Elgar Publishing, 2012), xiii.
[215] See: Williard L. Boyd, "Museums as Centers of Cultural Understanding", *Imperialism, Art and Restitution*, (ed. John Henry Merryman), (New York: Cambridge University Press, 2006), 49. See also, Patty Gerstenblith, "Identity and Cultural Property: The Protection of Cultural Property in the United States", *Boston University Law Review* 75 (1995): 559, 567-586; John Henry Merryman, "Cultural Property, International Trade and Human Rights", *Cardozo Arts & Entertainment Law Journal* 19 (2001); Daniel Shapiro, "Repatriation: A Model Proposal", *New York University Journal of International Law and Politics* 31 (1998): 95-96, 100; John Henry Merryman, "Two Ways of Thinking about Cultural Property", *American Journal of International Law* 80 (1986): 831.
[216] See: Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage or Cultural Property", *International Journal of Cultural Property* 1 (1992): 307. It is possible to remark a connection of this contribution also with the Preamble to the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works, which identifies the notion of cultural heritage as: "the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world".

and spiritual achievements".[217]

Cultural heritage may be sum up, at the end, as everything "made by a man or given value by a man".[218]

3.1.1. Cultural Property v. Cultural Heritage Through the Conventions and Their Stakeholders. A "Definition Battle" at Its End?[219]

Every Convention provides for a specific definition cultural *property*[220] or *heritage*, in accordance with the purpose of the single Convention, adapting one or another term to the precise historical, economical, social and political framework that characterized the choice and need of adopting a detailed set of rules and measures in each epoch.

The definition given by Blake and the comparison of the UNESCO Convention to human rights instruments is bound to a fundamental evolution in the International Cultural studies.[221]

The basic passage has been signed by the evolution of considering at the beginning "culture" more as a mere property towards a new understanding of its

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[217] See: Lyndel V. Prott, "Problems of Private International Law for the Protection of Cultural Heritage", *Recuil Des Cours*, (1989): 219, 224.

[218] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 2. See also, Lyndel V. Prott, "Problems of Private International Law for the Protection of Cultural Heritage", *Recuil Des Cours*, (1989): 308; Prott and O'Keefe, *Law and the cultural heritage,* (Abingdon: Professional Books Ltd., 1984), 153.

[219] Giving reference to the well-known and cited Manlio Frigo,"Cultural Property v. Cultural Heritage: A "battle of Concepts" in International Law?", *International Review of the Red Cross* 86 (584) (2004): 367-378 about the problem of definition and the meaning attributed to these two distinct concepts at the international level, it is interesting to remind here the definition contained in the 1985 European Convention on Offences Relating to Cultural Property. This Convention was an instrument providing administrative and criminal measures with the purpose of avoiding new offenses to the cultural property, introducing also possible co-operation practices for the restitution of cultural property. In its preamble, it contains a definition of cultural property, even though based on the concept of heritage: "unity is founded to a considerable extent in the existence of a European cultural heritage". The convention considers also the "cultural property" as a minor category, part of the "cultural heritage". See: 1985 European Convention on Offences Relating to Cultural Property, available at http://conventions.coe.int/Treaty/en/Treaties/Html/119.htm (accessed August 28, 2013).

[220] Prott and O'Keefe defined "cultural property" as a generic term referring to all types of artistic, archeological, and ethnological material" in Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage or Cultural Property", *International Journal of Cultural Property,* 1 (1992): 309.

[221] See note 13.

value as heritage, to the heritage of mankind, and underling the difference between the materiality of the tangible in respect to the intangible cultural heritage.

Furthermore, as magnificently underlined by Frigo, the different concepts of "property" and "heritage" may lead to significant differences of meaning when "declined" in national languages. This factor opens to concrete troubles, for example, during the drafting of bilateral or multilateral negotiations.[222]

Moving from the basis, the 1954 Hague Convention has been the first one adopted under the auspices of the UNESCO. This instrument signed a revolutionary change, registered both under the International Relations,[223] as well as under the International Law profiles, passing from a previous consideration of the correctness of gathering and plunder of cultural properties as spoils of war for the winner, to a new concerned, mainly due to the World War II and its destructions experienced in Europe, as well as in Asia and Africa.

The historical background has deep value for the 1954 UNESCO Convention: the bombing and destruction of cities and the plunder to which people – especially the Jewish population – has been subject to, the risk of losing invaluable buildings and sites. All these issues are characterized by the consideration of culture as a property, putting it in connection with the International Law of War rules, mainly focused on the consideration of the need of protecting civilian targets or public buildings at risk.[224] The Hague Convention represented the codification passage of a recognized rule of customary International Law: the pillage, destruction, confiscation or looting of all items part of cultural property must be considered an unlawful action during the event of

[222]See: Manlio Frigo,"Cultural Property v. Cultural Heritage: A "battle of Concepts" in International Law?", *International Review of the Red Cross* 86 (584) (2004):370.

[223] A fundamental step occurred since the half XVII century, when in several Treaty of Peace new provisions had been introduced for the restitution of the looted cultural properties during the time of war. The action has a political background in decisions taken at international level, as a shared vision among the international community, reflected in the agreed multilateral Treaties concluded by the Parties. These new obligations and provisions can be considered as the introduction in International Law of the general principles to decree the spoliation as an illicit act, as well as the obligation to return the looted objects back to the original Country. For this reason, it seems here possible to accept the interpretation which sees in the Second World War Peace Treaties the legal foundation able to legitimate the claim over the restitution of a spoiled cultural object as a private property.

[224] 1907 Hague Regulations, articles 23 (g); 28 and 56.

armed conflict.[225]

For these reasons, the 1954 Hague Convention is the first international instrument that aimed to protect cultural property, but because of the motivations that originated it, its application is reserved to those objects, *rectius* "properties", that could be concretely destroyed during time of war.

Reporting the letter of the 1954 Convention,

Chapter 1. General Provisions regarding Protection, Article 1.

Definition of cultural property.

***"For the purposes of the present Convention**, the term "cultural property" shall cover, irrespective of origin or ownership:*

Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art, or history, whether religious or secular; archeological sites; groups of buildings which, as a whole, are of historical or artistic interests; works of art; manuscript, books and other objects of artistic or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

Buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

Centers containing a large amount of cultural property as defined in sub-paragraph (a) and (b), to be known as "centers containing monuments".

As it is immediately possible to read and note, the usage of the concept of "cultural heritage" is present since 1954, even in the Preamble to the Convention.[226] This has been the first time that the concept of "heritage" had been

[225] See: Manlio Frigo,"Cultural Property v. Cultural Heritage: A "battle of Concepts" in International Law?", *International Review of the Red Cross* 86 (584) (2004): 367.

[226] See: "Preamble of the 1954 Hague Convention": "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all

used in association to that of "culture", even if only to point out a kind of property that must be preserved and protected for the cultural value owned in it. If one consider, instead, the idea of "heritage" as applied to the desired definition scope, it has been used the first time only in the 1956 UNESCO Recommendation on International Principles Applicable to archeological excavations,[227] that mentioned the "archeological heritage". However, the following UNESCO Conventions did not adopt the same taxonomic choice, preferring the term "property".

Analyzing this issue under the concept evolution perspective, the idea and the role applied to it represent the main changes occurred. Taking a look at the letter of the 1954 Convention, the willing of dedicating its high scope to the "protection", "safeguarding" and "respect"[228] is instantly clear, starting from the title of the Convention itself.[229] The fundamental innovation is due to the willingness of protecting the cultural goods, intended mainly as a property, especially under the legal point of view.[230]

Other relevant issues regard the inclusion in the list provided in Article 1 both of movable and immovable cultural sites and building. Moreover, it is referred only to those cultural properties of great importance,[231] letting understand that the protection and safeguarding will be enforced and efforts will be make to

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mankind, since each people makes its contribution to the culture of the world", and following.

[227] "1956 UNESCO Recommendation on International Principles Applicable to Archeological Excavations", available at: http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed August 8, 2013). Also the Council of Europe adopted the term "heritage" in the 1969 Convention on the Protection of the Archeological Heritage, that expressly consider as "archeological heritage" "all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavation or discoveries are the main source or one of the main source of scientific information shall be considered as archeological objects". See: "European Convention on the Protection of the Archeological Heritage", available at: http://conventions.coe.int/Treaty/en/Treaties/html/066.htm (accessed August 8, 2013). This text, beneath focused on providing a definition of archeological heritage and its scientific applications, resulted broad in its terminology, as not interested to firmly define a classification of archeological objects. In its new 1992 version, the European Convention on the Protection of the Archeological Heritage, arrived to limit the definition, by listing a limited number of examples: "structures, groups of building, developed sites and movable objects". See the full text of the revised "1992 European Convention on the Protection of the Archeological Heritage" at: http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm (accessed August 8, 2013).

[228] See articles 2, 3, and 4 of the 1954 Hague Convention.

[229] See Chapter 1 of the 1954 Hague Convention.

[230] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 20.

[231] See Article 1 of the 1954 Hague Convention. As reported by Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 21, even though may criticisms underlined the insufficient nature of the definition of cultural property provided by the Hague Convention, it has not been changed in 1999 Protocol on the Convention.

guarantee them, but not for every kind of common cultural property.[232]

As to the term "cultural property", Patty Gerstenblith has defined it as "those objects that are the product of a particular group or community and embody some expression of that group's identity, regardless of whether the object has achieved some universal recognition of its value beyond that group".[233] While some have made a deliberate distinction between the terms "cultural property" and "cultural heritage", I use the two terms here interchangeably.

In this process, another historical step has been registered with the decolonization era, when States of new independence arrived on the international scene, with the emergence of the return issue concerning all the properties removed from their territories during the occupation by the motherlands. Considering this background, and the rising of the commerce of antiquities and other pieces of art as a market commodity set the stage for a convention on this problem: the 1970 UNESCO Convention.

Reporting the letter of the Convention, Article 1:

"***For the purposes of this Convention***, *the term `cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science and which belongs to the following categories:*

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;

(c) products of archeological excavations (including regular and clandestine) or

[232]To some extent, it is possible to put into connection this aspect with the criticisms expressed especially against the UNESCO list of cultural heritage, judged as becoming too wide according to many experts and scholars. One of the main reasons is the expanding politicization of the list. This evaluation has been illustrated by Professor Francesco Francioni, during one of his lectures, on June 19th, 2013, in the Course of "The International Legal Framework for the Protection of Art and Cultural Property", in Siena.

[233]See: Patty Gerstenblith, "Identity and Cultural Property: The Protection of Cultural Property in the United States", *Boston University Law Review*, 75 (1995): 559, 569.

of archeological discoveries;

(d) elements of artistic or historical monuments or archeological sites which have been dismembered;

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

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

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

(iii) original engravings, prints and lithographs;

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

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

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

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

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

As remarked by Forrest, the Convention in its complexity tries to address and enlighten the value of cultural heritage, considering it not as a good, but for its higher meaning. In any case, in its title the main reference to the scope is defined as "property".[234]

One could say that the basic willing would be of enforcing measures against practices that attack the cultural heritage, but the concrete shape took the form of protecting the objects. The long list of objects included in the Article 1, even could be evaluated as quite complete, as it makes reference to several categories of culture, intended as art, literature, science, history, prehistory, archeology, and ethnology, seems to be elusive. The difficulty of concretely define

[234] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 22.

what cultural heritage is becomes even more clear during the codification moment.

On the other side, it is not only a problem of rendering definite an indefinable broad concept, but Article 1 makes possible to let free every State party to the Convention to decide which objects it wants to include in the list, as of great importance for its own national culture.[235]

A basic similarity is recognizable in the definition given the Article 1 of 1954 Convention and Article 1 of 1970 Convention. The difference is due to the need for the latter to better define the list of objects, that are generally contented between market and source countries, while in the former the protection from the war made it an immediate necessity to address to larger categories, which could "easily" include the properties in order to guarantee them a possible protection from the destruction.[236]

The expression "cultural heritage" has been used in text of a Convention title for the first time only in the 1972 UNESCO World Heritage Convention.[237] The adoption of this Convention represented a relevant contribution in the field of the cultural heritage protection, because for the first time an international legal instrument made reference to the cultural heritage intended as both a collective and public interest, overcoming the concept of a private economic property right.[238]

The 1972 Convention represents a fracture with the past, as it encompasses two main features acquired as "lessons-learned" by the International Community. First of all, the strong correlation that bound together culture and nature, and then, the new awareness about the necessity of a stable defensive legal framework, able to cope with administrative and financial needs.

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[235] See: Sharon Williams, *The International and National Protection of Movable Cultural Property. A Comparative Study*, (Dobbs Ferry, NY: Oceania Publications, 1978), 52.
[236] See: Patrick J. O'Keefe, Commentary on the 1970 UNESCO Conventions, Second edn., (Builth Wells: Institute of Art and Law, 2007), 35.
[237] The complete name of the 1972 UNESCO Convention is: "Convention Concerning the Protection of the World Cultural and Natural Heritage", available at: http://whc.unesco.org/archive/convention-en.pdf (accessed August 8, 2013).
[238] See: Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, (Ann Arbor: The University of Michigan Press, 1999). On the 1972 Convention, for a detailed analysis, given by the Chair of the World Heritage Committee in 1997-1998, see Francesco Francioni, *The 1972 World Heritage Convention*, (Oxford: Oxford University Press, 2008), 3.

For this specific Convention, making reference to its full title, two different categories of heritage are taken into consideration. Thus, the Definition of the object to which the Convention is addressed is covered both by article 1 and 2:

"Definition of the Cultural and Natural Heritage.

Article 1

***For the purpose of this Convention**, the following shall be considered as "cultural heritage":*

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Article 2

For the purposes of this Convention, the following shall be considered as "natural heritage": natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."

One important added value expressed by this Convention, registering in a deep vision the *esprit* of that time, regards the reference made in the Article 4 to "the duty of each State Party to identify, protect, conserve and transmit the cultural and natural heritage to future generations". Indeed, during 1960s and

1970s a great international consciousness raising regarding the environment protection challenge, claiming for an active and coordinated international cooperation.[239]

Moreover, the 1972 UNESCO Convention marks another necessary step in the evolution of the International Cultural Heritage Law, due to the introduction in an international conventional tool of the intangible meaning of the cultural heritage concept, surpassing the "classical" idea bound to the physical manifestation of the cultural items. This passage has represented a fundamental contribution towards the development of a new conception of the field, opening to a deeper vision and defining the concept even more as a cultural *heritage*, which needs to be defended and preserved for the future, transmitting the values inherited from the past, than the mere protection of material ancient *properties*.[240]

Another *temporal* fundamental step forward has been signed by the 1995 UNIDROIT Convention in relation to the swift from the idea of property to that of heritage. The effort is quite clearly exemplified by the negotiations and reported in the adopted definition used in the Convention itself. The 1995 UNIDROIT Convention has been conceived since its birth as a complementing tool for the 1970 UNESCO Convention, filling the gaps under the private law profile.

As a main effect, the term cultural heritage has been more preferred. The effort is quite clearly exemplified by the negotiations and reported in the adopted definition used in the Convention itself. The 1995 UNIDROIT Convention, in fact, adopts the terms "cultural objects". It seems a more objective definition, limited to the description of the material concept object of the Convention.

The definition is present at the Article 2, postponed having made clear

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[239]See, Raffaele Cadin, "Il concetto integrato di sviluppo umano"in *Sviluppo e diritti umani nella cooperazione internazionale. Lezioni sulla cooperazione internazionale per lo sviluppo umano,* 2nd edn., (Torino: Giappichelli, 2007), 81-97. See also: "Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972)", http://sustainabledevelopment.un.org/index.php?menu=1373, and http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503, "United Nations Conference on Environment and Development (UNCED), (Rio de Janeiro, 1992), Johannesburg Summit 2002", http://www.un.org/jsummit/html/basic_info/basicinfo.html, and "United Nations Conference on Sustainable Development, Rio+20", http://sustainabledevelopment.un.org/rio20.html (accessed November 29, 2013).

[240] S.M. Titchan, "On the Construction of Outstanding Universal Value", (Ph.D. thesis, Canberra: Australian National University, 1995), 94, as reported by Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 26.

the purpose of the Convention at the Article 1.[241] Article 2 States as follows:

"*For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archeology, prehistory, literature, art or science and belong to one of the categories listed in the Annex to this Convention*".

The first interesting feature is that the definition is not so extensive, on one side considering the previous definitions as an acquired result, but on the other side preferring here to include a list of categories as an Annex to the Convention.[242]

Moreover, making reference to the cited Article 1, it mentions the category of "cultural object" as for the concrete *element* intended to be protected by the thief or other international illegal activities of cultural properties, but the specific purpose is clearly defined as referred to willing of the Contracting Parties of protecting their own cultural heritage. It seems that this first article sums up in few lines the whole complex idea of the object under exam. It refers to: its concrete meaning of material object under threat of being illegally exported or stolen, as to the wider concept of the national patrimonies that States want to preserve, and finally, as expressions of the identity of the national patrimonies themselves.

Prott underlines, by the way, the adoption of the term "heritage" in a Convention that mainly refers to ownership and property values – as it is here the case – can be considered as an "emotive language", even taking into account that the idea of heritage embraces a wider definition in comparison to idea of the

[241] See: Article 1. "This Convention applies to claims of an International character for: a) The restitution of cultural objects; b) The return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects")."

[242] See: Annex section of the present study. The Annex includes only the 1970 UNESCO and 1995 UNIDROIT Conventions. The other Conventions are taken here into consideration only for the selected passages useful to describe the evolution of the concept of "Cultural Property".

object property issue.[243]

The usage of the category of "cultural object" may be intended as a *vox media,* a neutral solution, between the two main "contrasting" terms of "property" and "heritage", comparing it also to the 1970 UNESCO Convention definition of the comprehensive list of the "cultural property" categories.

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage presents many traits in common with the 1970 UNESCO Convention, considering the recall to the need of protecting the historical, archeological, or cultural value of the cultural heritage. The main difference regards the character of the list of cultural objects, intended to exemplify – and not to identify – a complete extensive list of objects encompassed in the category. It must be underlined that the main innovation is here bound to the precise cultural heritage application to the sea field and, more precisely, to the cultural heritage found underwater. It does not provide a fully detailed definition of what the "underwater cultural heritage" is as a category, but aims to define an international conventional regime for this sector. Here following the Article 1, which contains the definition of what the Convention identifies as "Underwater cultural heritage".

Article 1 – Definitions

"For the purposes of this Convention:

1. (a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

(i) sites, structures, buildings, artefacts and human remains, together with their archeological and natural context;

(ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archeological and natural context; and

[243]See: Lyndel V. Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995*, (Builth Wells: Institute of Art and Law, 1997), 17.

(iii) objects of prehistoric character.

(b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.

(c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.

2. (a) "States Parties" means States which have consented to be bound by this Convention and for which this Convention is in force.

(b) This Convention applies mutatis mutandis to those territories referred to in Article 26, paragraph 2(b), which become Parties to this Convention in accordance with the conditions set out in that paragraph, and to that extent "States Parties" refers to those territories."

The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage focus the attention on cultural heritage, starting from its title. Moreover, this Convention contributed in marking a sensitive new step in the developing concept of Intangible cultural heritage, as a new generally shared one at the international level.

In particular, Articles 1 and 2 must be read together, as the former States the purpose of the Convention, while the latter, by explaining the meaning of what "intangible cultural heritage" is, represents the concrete field of application, with a list of "domains" at paragraph 2, that may be judged as representative, but probably not exhaustive.

"General provisions

Article 1 – Purposes of the Convention

The purposes of this Convention are:

(a) to safeguard the intangible cultural heritage;

(b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

(c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;

(d) to provide for international cooperation and assistance.

Article 2 – Definitions

For the purposes of this Convention,

1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.

3. "Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

4. "States Parties" means States which are bound by this Convention and among which this Convention is in force.

5. This Convention applies mutatis mutandis to the territories referred to in Article 33 which become Parties to this Convention in accordance with the conditions set out in that Article. To that extent the expression "States Parties"

also refers to such territories."

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions covers an overwhelming field, embracing tangible and intangible features at one time, and perhaps it may be defined as the current final fulfilled step of international codification process regarding the protection of cultural heritage. Indeed, this Convention embraces issues concerning indigenous peoples and minorities right to freely express themselves, as well as the concept of intellectual property, which covers several fields nowadays and recalls the copyright system. As a further manifestation of its variegated nature, Article 1, regarding the objectives of the Convention, at letter (g) includes: "to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning"; unifying together cultural elements and their concrete manifestations.

The definition of "cultural diversity" is provided at the Article 4, at the beginning of a series of definitions.

"For the purposes of this Convention, it is understood that:

1. Cultural diversity

"Cultural diversity" refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used."

The 2005 Convention tackles with the hard duty of covering a truly endless area, passing from the protection of tradition manifestations of cultural

expressions, as in the case of minority groups and indigenous peoples, to the need of including forms of safeguarding for all kinds of intellectual properties applications, including the most recent ones, applicable to cultural goods, activities and services.

To move on, an analysis of the concept of "property" seems needed at this point, in relation to its use in the Conventions.

3.1.2. The Concept of Property

The idea of "Property" represents a crucial basic concept, that originated several implications. It can be real or personal, movable or immovable, public or private, tangible or intangible, or intellectual.

Furthermore, the cultural objects are decisively bound to their commercial value, their demand in the art and antiquities market, and their circulation as a consequence of the desire for culture, both legal or illegal. George Stocking points out as follows: "Material Culture was, in a literal economic sense, 'cultural property'. The very materiality of the objects entangled them in Western economic processes of acquisition and exchange of wealth".[244]

Especially in the common law system, property law is regarded as a fundamental basis for the society, because it characterizes the sphere of the owner rights. The peculiarity attains to the title of the owner of a particular property to his or her "exclusive right to exploit, alienate, exclude others and even to destroy it".[245]

As stated by Prott and O'Keefe, "The fundamental policy behind property law has been seen as the protection of the rights of the possessor. If this policy is carried to its logical conclusion then the owner can be buried with a

[244] See: George Stocking, History of Anthropology, Vol. 3 Objects and Others Essays on Museums and Material Culture, (University of Wisconsin Press, 1985), 5.
[245] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 24. The property issue and the related right to be entitled to freely destroy it, even though an art masterpiece of invaluable meaning inspired the provocative Sax's book, above mentioned, (Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, (Ann Arbor: The University of Michigan Press, 1999), see: infra paragraph 3.1.1.) with the aim of opening to a deeper reflection of the "ethic" limits of this rights, considering the value that such an art piece represents for the humanity.

painting that he purchased for millions of dollars but which represents a peak achievement of human culture. The fundamental policy behind cultural heritage law is the protection of the heritage for the enjoyment of the present and later generations".[246]

In any case, all legal systems consider an individual right as to be limited in comparison to a public interest. A simple example of the application of this principle to the cultural property field could be rendered by the restrictions imposed on the owner when the cultural object in his possession is considered of a greater importance for the society, or for the nation, in relation to the State action.[247] On one hand, this concept regards the protection of the material owned object; on the other hand, this last passage implies the possibility for other than the real owner to enjoy the object itself, especially in the case of art property.

Under this point of view a fundamental difference may be underlined between the Common law and Civil law countries. If one considers the archeological items, in several States of the United States of America, for example, excavations in private lands are allowed without any kind of control, as otherwise it would represent a limitation to the individual freedom and the full right exercise of private property rights. In Civil Law countries, as Italy, the State provides for the control on excavation activities related to archeological objects, as they are considered as part of the national patrimony, even when found in a private property.[248]

These two different systems refer to two different ways of intending the

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[246] See: Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage or Cultural Property", *International Journal of Cultural Property,* 1 (1992): 307, 309. See also, Patty Gerstenblith, *Art, Cultural Heritage and the Law,* Second edn., (Durham, North Carolina: Carolina Academic Press,2008), 17.

[247] An example of this could be found in the case of Bayeler v. Italy, in which the State expressly declared its national interest for the Van Gogh's painting "Portrait of a Young Peasant". Precisely Italy stated that the painting was "a work of historical and artistic interest within the meaning of section 3 of Law no. 1089 of 1 June 1939". See: European Court of Human Rights, "Case Bayeler v. Italy", available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58832#{"itemid":["001-58832"]} (accessed August 8, 2013). The case concluded with the judgment of 5 January 2000, of the European Court of Human Rights, which condemned Italy to pay to Mr. Beyeler an amount of 1,355,000 €. The controversial case has been originated by the attempt of Bayeler to buy the painting through an intermediary and opening to a very long legal dispute, concluded legally deducting the painting from the market.

[248] Article 90, Italian Code of the Cultural and Landscape Heritage, Legislative Decree n. 42 of 22 January 2004, Italian Ministry for Heritage and Cultural Activities, available at: http://www.unesco.org/culture/natlaws/media/pdf/italy/it_cult_landscapeheritge2004_engtof.pdf (accessed July 25, 2013).

cultural property. In the first case, the individual right is considered the most important to preserve and protect; instead, in the second case the community interest is privileged.

With regard to the diverse consideration of the property concept, it is noteworthy to refer here to an example that will be essential in the examination of one case of study that will be take into consideration in the present work. It refers to the fundamental difference of considering the property in the Western society in comparison to other cultures and traditions. The example is given by Prott and O'Keefe to underline how in the Aboriginal communities the idea of *possession* is completely different, and maybe it can be better replaced by the idea of *belonging*. They mention the case *Milirrpum v. Nabalco Pty*. Ltd. In this case, in making reference to the relation that bound together the Australian Aboriginals and their tribal land, the Judge States: "rather than believing that the land belonged to them, they believe that they belong to the land".[249]

The given example properly exemplifies both the different value that the concept of property has in the different societies, as well as the relativity of the value that each society or group may confer to it. Moreover, this passage renders also clear that the concept of cultural property discloses of a fundamental dichotomy: the same idea of property varies, as shown, at the different latitudes. At the same time, talking about "cultural property" brings inside a break between two potentially conflicting categories. "Culture" attains the description of the link that bring together a specific group of people, their habits, language, traditions; in other words, their relationship that characterize them as a unique, homogeneous group, and the objects that they recognize as important. While "property" traditionally identifies the legal individual rights concerning an object.[250] The latter distinguishes totally the meaning of belonging to a community and the feeling of sharing with the others.

The idea of "property" mainly refers to a commercial value, not underling its cultural instance. Instead, probably, the category of "cultural object" states in a more appropriate objective way its meaning. The idea subtended by the

[249] See: Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage or Cultural Property", *International Journal of Cultural Property*, 1 (1992): 310.
[250]See: Patty Gerstenblith, *Art, Cultural Heritage and the Law*, Second edn., (Durham, North Carolina: Carolina Academic Press, 2008), 17.

category of "heritage" seems to embrace a larger concept, deeply connected with the protection issue, in its global perspective. Also considering the examination of the concept of property and its different interpretation in every society or group, the use of "heritage" seems to be preferable to that of property. In this, the adoption of the definition "cultural property" in some UNESCO Conventions seems to leave room to the criticisms of certain Countries against the Western vision adopted in those Conventions, referring more to the commercial economic value of the ownership of the objects than to the deeper cultural meaning of the heritage.[251]

By the way, it is probably possible to go also ahead the Western conception. A last reflection is here proposed: should we ever had a concept of property intended in its commercial meaning without the existence of national States and the adoption of copyrights?

For all these reasons, the object under analysis seems to be better defined as "cultural heritage" in relation to the purpose of protecting this category as a whole; on the other hand the idea of "cultural property" seems to be more suitable to define the context of safeguarding and establishing rules in relation to their management ownership regime, providing an international setting of common rules among the States and the international stakeholders involved in the field. Moreover, the concept of "cultural object" could be considered the taxonomic best choice when addressed to identify a "single item, […] or cultural object".[252]

The differences between the terms of "property" and "heritage" are reflected also in the UNESCO multilateral Conventions, as shown. It seems possible to affirm that the scheme adopted by the UNESCO Conventions supports the previous conclusion, and its value will be recall in the current study, in application to the cases that will be examined.

[251] "Heritage creates a perception of something handed down; something to be cared for and cherished. These "cultural manifestations" have come down to us from the past; they are our legacy from our ancestors". See: Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage or Cultural Property", *International Journal of Cultural Property,* 1 (1992): 310.
[252] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 30.

3.1.3. Cultural Rights and Cultural Heritage

To accurately conclude this first section, it seems here necessary to frame the exposed principles, concerning cultural heritage and identity, in the general legal background they belong to.

When a theme focuses on cultural heritage as its main issue, it deals with the cultural identity of the people involved. Cultural identity is a crucial topic, as it constitutes the core asset to build one peoples' cultural heritage. A clear example may be given by the war destruction of enemy's material cultural objects (such as monuments, works of art, etc.), conceived by the destroyers as particularly representative of the people's identity. In fact, culture is perceived as a symbol, a manifestation of the people's identity. As Blake says: "It could be seen that it is the intangible heritage – the relationship of a people to their cultural heritage – which is really under attack in such conditions".[253] It is clear that identity and heritage issues are related to human rights, and can be considered as part of them.

This concept is exemplified in the following passage, expressed by Kamenka, underlining the relationship between the concepts of cultural rights, cultural identity and cultural heritage: "...the importance to human beings of the sense of identity, given not so much by material improvement, but by customs and traditions, by historical identification, by religion... [That sense of identity] is, for most people, essential to their dignity and self-confidence, values that underlie in part the concept of human rights itself".[254]

In general, the protection of the cultural heritage needs to be further developed as a concept, in order to be encompassed in Cultural Heritage Law. The co-existence of "cultural rights" and "cultural heritage" may lead to divergent perspectives and ways of interpreting them. In fact, even if human rights – based on generally recognized values that must be guaranteed to every person, such as of human dignity, freedom of expression and religion, including the rights of persons belonging to minorities – encompass in themselves also cultural rights, at the same time the inclusion of specific rights related to the protection of cultural

[253] See: Janet Blake, "On defining the cultural heritage", *International and Comparative Law Quarterly* 49 (1) (2000): 76.
[254] See: Eugene Kamenka "Human Rights and Peoples' Rights" in James Crawford, *The Rights of Peoples,* (Oxford: Clarendon Press, 1992), 134.

heritage is a still relatively new theory in the International Law field.

With regard to the international legal foundation of the cultural rights, their existence is a precondition for the protection of culture. Also UNESCO activity is specially devoted to this issue, as stated in Article 1 (1) ["Purposes and Functions"] of its Constitution: "The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations".[255]

Other fundamental legal roots of the cultural rights are: the International Covenant on Civil and Political Rights (hereinafter, ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966. By the way, it must be underlined as cultural rights have always been subordinated to the economic and social ones, making of the two Covenants limited instruments for their effective promotion and protection.

A particular case is Article 22.1 of the African Charter on Human Rights and Peoples' Rights (the so-called "Banjul Charter") of the Organization of African Unity, adopted in 1981, for its direct reference to a specific right to cultural heritage: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".[256] Doubts have been expressed on this article, thinking about the potential risk of putting in connection two opposing categories, as peoples' development (that may be intended as an action of increasing the buildings and infrastructures engineering, as well) and their contextual right to preserve the heritage itself.

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[255] "UNESCO Constitution", full text available at : http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed September 23, 2013). For further details, see also: Lyndel V. Prott, "International Standards for Cultural Heritage" in UNESCO *World Culture Report* (UNESCO publishing, Paris 1998), 222-236. In addition, the Preamble to the Universal Declaration of Human Rights (1948) [U.N.G.A. Res.l27A (III); UN Doc. A/811] refers to "economic, social and cultural rights" and, in 1966, the UN adopted the International Covenant on Economic, Social and Cultural Rights [993 U.N.T.S. 3].

[256] "African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986", available at: http://www1.umn.edu/humanrts/instree/z1afchar.htm , (accessed September 23, 2013).

There is a strict correlation binding together material and non-material cultural heritage with human rights. Cultural identity covers the entire society: the individual, as well as the global people, or its inner minority groups, and at an upper level the humanity. Each constituent of the society are the manifestations themselves of the meaning and nature of the cultural heritage.

The current analysis aims to illustrate the link between restitution and cultural rights. In fact, both in the case of a restitution claim addressed to a work of art, or to human remain belonging to an indigenous community, the basic feature is the respect of fundamental principles: the people's identity would be affected by an irreplaceable lost, in case the bound between people and cultural object would be broken, keeping it apart from the territory of origin.

In particular, as Blake writes in her article: "The relationship between material remains and cultural identity is well illustrated by the case of grave sites and human remains of indigenous peoples".[257]

The exact definition of the matter related to the definition of cultural rights is not simple, as the same definition of what should be intended for "culture" under a legal point of view is still an unsolved issue in International Law. The rising of a well-delimited branch, as the Cultural Heritage Law is, seems to sign a first landing place. It testimonies the increasing interest among scholars to deepen the issue, and the opening to a major contribution may lead in future to an evolution for the concrete protection of the cultural heritage, not only for theoretical reasons.

3.2. Return, restitution and repatriation of movable cultural heritage

The central topic of this study regards the restitution of cultural objects.

Under the taxonomic point of view the three terms of Return, Restitution and Repatriation are used interchangeably, but "restitution" is commonly used to identify all the issues related to the claim of cultural objects. Instead, a more

[257] See: Janet Blake, "On defining the cultural heritage", *International and Comparative Law Quarterly* 49 (1) (2000): 82.

accurate distinction among the appropriate terms of "restitution", "return", and "repatriation" is preferable, as the following section will try to illustrate.

The general background connecting all the cases is the international transfer of cultural heritage, involving the change of place and its related entity in possession of the item. When the object is displaced, the entity – that may be a State, a minority group, an individual – who owns the object changes as well. For this reason, the issues related to the problem are several and attain different legal profiles: the basic one is the right of the individual, group, or State over the object, contesting the other entity's ownership. In addition, another feature is the time when the transfer and consequent loss of possession from the original entity occurred. As a final point, the current traffic of cultural heritage is much more exposed to the influence of a rising business-related market of cultural heritage.[258]

The basic reason for a differentiation of the three concepts is principally due to their related ownership and export control dimensions in the international traffic of cultural heritage market.

Before moving to the close examination of the three typologies, a brief overview of the market is needed.

3.2.1. The cultural heritage market

For definition, a market is constituted by the co-presence of a demand and a reciprocal supply of a determined good. The same occurs in the case of the cultural heritage, intended as the specific good category here under analysis. The cultural heritage market is a particularly diversified kind of market, as it may include a vast amount of goods, from different time periods, divided for materials, provenience, type of products, and so on. For example, one of the main categories is covered by art and antiquities.[259] This embraces antiquity-dated good, from antique furniture, works of art as sculptures and paintings, coins, including also

[258] See: Jeanette Greenfield, *The Return of Cultural Treasures*, Second edn., (Cambridge: Cambridge University Press, 1996), 23-25.
[259] See: Morag M. Kersel, "From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities", in *Cultural Heritage and the Antiquities Trade*,ed. Neil Brodie, Morag M. Kersel, Christina Luke and Kathryn Walker Tubb, (Gainesville: University Press of Florida, 2006), 188-205.

shipwrecks, ancient buildings, places of worship, monuments, homes, old cities sites, graves, and battlefields.

The market is fed mainly by rich Countries. Traditionally, the United States of America, the United Kingdom, Switzerland, Japan, France and Sweden are identified as "market" Countries. Instead, the supply is mainly offered by all those Countries particularly rich for their archeological treasures and antiquities, such as: Iran, Iraq, Egypt, Cambodia, Peru, China. In recent years new trends are occurring, registering the rising of Countries as the United Arab Emirates, Russian Federation and China as main importing States.[260]

Even though these terms correspond to a form of oversimplification, they reproduce both the 1970 UNESCO Convention and 1995 UNIDROIT Convention negotiation phases background.[261] The UNIDROIT Convention, in particular, assisted to the division into two blocks: the first one was composed by a group of States supporting the free movement and trade of cultural objects, aiming to favor the purchasers position in the market. On the opposite position, the States intending to extend as much as possible the principle of the restitution of all illegally exported or stolen cultural objects. This situation lets clearly look at the a real market dominated in rich developed States by little wealthy elites, desirous of coming into possession of exclusive items, or better, simply one-off pieces.[262]

Not all Countries participate to the market, because some of them decided to adopt restrictions and controls, especially among the developing ones rich in archeological artifacts and other antiquities. Consequently, part of the market is founded on illicit traffic of cultural objects, that can be divided into three main types.

The first category embraces cultural objects illegally removed from the archeological sites in a source Nation. The additional negative condition is that normally the robbers are not experts, or anyway do not care enough about

[260] Cf. the Interview to Mr. Stephen W. Clark in the Annex section. About the definition of "market" and "source" Nations, see: John Henry Merryman, "Two Ways of Thinking about Cultural Property", *American Journal of International Law*, 80 (4) (1986):831-853.
[261] See: Patrick O'Keefe, Commentary on the UNESCO 1970 Convention on Illicit Traffic, Second edn., (Builth Wells: Institute of Art and Law, 2007), 7-8. Lyndel V. Prott, Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995, First ed., (Builth Wells: Institute of Art and Law, 1997), 16.
[262] See: Christine Adler and Ken Polk, "Stopping This Awful Business: The Illicit Traffic in Antiquities Examined as a Criminal Market", *Art and Antiquity Law*, 7 (1), (2002): 37-39.

preserving the objects. The second one regards the stolen cultural objects. The third kind of illicit trade regards the export in violation of the permit requirements imposed by the Nation of origin: the reason may be due to the higher profit realized on a foreign Nation by the legitimate owner, or it may be an action of illegal excavation or robbery.[263]

The "market" and "source" States can also be identified as "importing" and "exporting" States, and as a consequence a third category may be included, that is the "transit" State, characterized by a major flow of cultural objects across its territory in comparison to the amount of imported or exported cultural materials.[264]

Taking into consideration one of the Countries involved in the case studies that will be examined as follows, the United States represent one of the biggest market Nations of cultural objects, but simultaneously they are also the suppliers of the Native Americans' cultural heritage. The cultural trade market of illicit objects in the United States is generally oriented to the domestic destination, as it is easier to sell them, avoiding export controls.[265] This explains better the reason why the illicit cultural objects are generally imported in, but not exported from, the United States. Because of this social power, the leading elites demanding for art in developed States may act legally, considering their influence on the political and economic classes; instead, the main actors illegally providing the desired objects in the majority of the "source" States are generally the inferior layers of the State.

The battle on the possibility to introduce a certain degree of regulation in the international traffic of cultural objects is an issue still pending among all the States Parties to the UNESCO and that participated to the negotiations of the UNIDROIT Convention.

The crucial point is the lack of incisiveness of the International Law, as easily understandable also for the non-works personnel. Indeed, the problem over

[263] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 138.
[264] See: Lyndel V. Prott, Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995, First ed., (Builth Wells: Institute of Art and Law, 1997), 16.
[265] Information on file with the author, from an interview with Mr. Anthony Amore, Security Director at the Isabella Stewart Gardner Museum of Boston, September 10, 2013.

the sanctions, as well as over the impossibility to oblige all States to adhere to the Conventions, and implement them, is one of the most debated issue. The supporters of the free trade and circulation of cultural objects establish their position on their belonging to the cultural heritage of mankind, and on the possibility to promote a self-regulation of the market, increasing the stakeholders' awareness about the meaning of the heritage and its power in contributing to the cultural exchange among societies.[266]

This position is considered as not well-founded by some experts, because not sufficient to propose a real solution to the question, and too weak to agree on the positive effects of the free trade.[267] Instead, the defenders of the licit trade contest the inefficacy of simple export controls and limitations. Besides, this may decisively favor the black market activity.[268]

Starting from this confrontation, the 1970 UNESCO Convention tries to compose the clashes, by working on a compromise between the two positions: the establishment of import controls applied in the form of agreements among the importing and exporting States. The hope is that this vision would lead to a higher consciousness founded on the recognition that the archeological objects of every State, generally labeled as "national" patrimony, have also an international dimension as part of the human heritage of mankind, and the State they belong to is logically the best preserver and curator "on behalf of all humankind".[269]

3.2.2. The choice of terms

As briefly anticipated, the terms of "return", "restitution", and "repatriation" are sometimes used as synonyms, and the discussion over their

[266] See: John Henry Merryman, "Protection of the Cultural Heritage?", *American Journal of Comparative Law* 38 (1990): 513; John Henry Merryman, "A Licit International Trade in Cultural Objects", *International Journal of Cultural Property* 4 (1995): 13.
[267] See: Lyndel V. Prott, "The International Movement of Cultural Objects", *International Journal of Cultural Property* 12 (2) (2005): 225- 248.
[268] John Henry Merryman, "A Licit International Trade in Cultural Objects", *International Journal of Cultural Property* 4 (1995): 20.
[269] Craig Forrest, International Law and the Protection of Cultural Heritage, (Abingdon, New York: Routledge), 2010, 140. See also: Lyndel V. Prott, Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995, First edn., (Builth Wells: Institute of Art and Law, 1997), 16.

correctness is still open among the scholars.[270] One of the reasons is due to the trouble of identifying the precise conditions in which an object has been displaced or removed from its place of origin, to be moved in another site, that is generally located abroad, trying to get a greater economic profit.

Even if the difference among the three terms is not universally accepted, its analysis seems a needed step in the current study, in order to verify the origins of the terms, their possible precise usage, to decide about their adoption or not.

3.2.2.1. Restitution

According to Kowalski, the term "restitution" should be used to identify the cases in which a "violation of the prohibition of theft and pillage imposed by the binding law" occurred.[271]

The general aim is the *restitutio in integrum* of the cultural object, that consists of reinstating the situation as before the object has been moved from its place of origin.[272]

This is also the case of the displacement of cultural heritage taken in violation of the laws of war. It remarks the development of this concept from the international law of war: the Peace Treaty of Westphalia in 1648 has become a crucial historical passage, with the rising of the international law of nation-States, and as a consequence also of the right to the restitution of the illegally taken away cultural heritage during the time of war. At that time, the looted cultural heritage were commonly considered as an economic source for Sovereigns and their troops. In fact, the Napoleonic wars signed a fundamental cornerstone for the legal foundation of the restitution principle, and the end of the application of the *jus gentium*, that is the winner's right to plunder, justified by the necessity to finance the wars.

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[270] See: Wojciech W. Kowalski, *Art Treasures and War*, (Leicester: Institute of Art and Law, 1998), 2. In many articles and books the terms, especially "return" and "restitution" are used interchangeably.
[271] See: Wojciech W. Kowalski, "Claims for Works of Art and Their Legal Nature" in *Resolution of Cultural Property Disputes*, (ed.) International Bureau of the Permanent Court of Arbitration (The Hague: Kluwer International, 2004), 31-35.
[272] See: Wojciech W. Kowalski, *Art Treasures and War*, (Leicester: Institute of Art and Law, 1998), 2-4.

Frigo points out that the old justification laying on the *jus predae* was not still acceptable in the Modern Age, as shown also by Napoleon's decision to include in the Peace Treaties open clauses defining the cession of hundreds of works of art as a reward title for France. Frigo considers the adoption of this method as a way to give an international legal foundation to the appropriation of the works of art, through these clauses. Thus, even if born as a Treaty praxis to hide the spoliations, at the end it determined the consolidation of the adopted legal principles and led to their codification.

At the end of the Napoleonic Empire, a new awareness raised about the need of rethinking the European cultural heritage, in reaction to the *Grande Armée* invasion and spoliations, but also because the idea of Nation consolidated the consequent presence of a national cultural patrimony. Thus, the restitution legal foundation is based on the principle of the integrity of every single national cultural patrimony, and the conception of the spoliation as an illicit action derives as its corollary. Besides, the restitution had to be destined to the last place where the object had been removed, but to the original one, making an adequate historical research, if necessary.

With regard to the historical path from the *jus predae* to the right of restitution, the English philosopher John Locke contested the commonly accepted theory at that time on the natural right to spoil the losers' cultural heritage: taking advantage from the enemies' goods simply transform soldiers into thieves, even if he accepted the human killing as a normal condition of the war.[273]

After the First World War, the Peace Treaty of Versailles constituted the foundation establishing the restitution of cultural objects to the place of origin, introducing also the principle of "restitution in kind", that is the relocation of the cultural heritage from one State to the rivals in war to reimburse the lost cultural heritage. As clear, this new principle totally reversed the old praxis descending

[273] On the history of the restitution principle development, see: Justinus Gentilis, *Dissertatio de eo quod in bello licet*,(Argentorati, 1690); Grotius, *De iure belli ac pacis*, L. III, capp. VI e VII. (Amsterdam ,1712); John Locke, *Two treatises of gouvernement*, II, 1738; Quatremère de Quincy, *Lettres au général Miranda sur le préjudice qu'occasionneraient aux arts et à la science le déplacement de monuments de l'art de l'Italie, le démembrement de ses Ecoles et la spoliation de ses galléries, musées*, (Rome, 1825).

from the *jus praedae*[274]. For example, Article 247 provided for imposing to Germany to reward the Library of Louvain with a number of books, maps other cultural objects able to equalize the number and value of the items damaged and looted by the German Army.[275]

Under the International Law of war, the concept of restitution is firmly identified, intending the situation in which a cultural object has been illegally transferred from one State to another one, generally through the intervention of an unlawful military plunder. The obligation to restore the original condition through the action of restitution derives from the illegal removal of the cultural heritage, thus this principle is applicable also in time of peace. An example can be given by a theft of a cultural object stolen to its proper owner.

One of the most common cases regards objects that are acquired on the market by museums and that are claimed by their original owners once publicly displayed for exhibitions. The Metropolitan Museum of Art in New York had acquired golden items between 1960s and 1970s. When the objects were shown to the public in 1984 Turkey claimed for their restitution, as they were from some tombs in the region of Ushank. It was discovered that the Metropolitan Museum was aware about the looted origin of the objects. The restitution was a due action to solve the question.[276]

The adoption of the term may be extended to categorize possible reward actions in all cases of violation of State's laws, including the illegal export of cultural heritage. By the way, the difference with the "return" particular case may be referred to diverse moral kind of foundation of the latter in recognizing an ethical – higher – condition that lead to reward the caused tort. Instead, the restitution can be seen more as a consequence of a breach of State's laws.[277]

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[274]See: Manlio Frigo, La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno, (Milano: Giuffré, 2007), 122.
[275] See: Wojciech W. Kowalski, "Claims for Works of Art and Their Legal Nature" in *Resolution of Cultural Property Disputes*, (ed.) International Bureau of the Permanent Court of Arbitration (The Hague: Kluwer International, 2004), 36.
[276] See: Colin Renfrew, *Loot, Legitimacy and Ownership* (London: Duckworth, 2000), 12.
[277] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 142.

3.2.2.2. Return

For those authors and scholars agreeing about the difference between the concepts of return and restitution, the former encompasses two possible applications. The first hypothesis specifically refers to the colonization period, when countless cultural objects were removed from the States of origin to reach the motherlands' territory. In this case, there is no certainty about the occurred breach of international rules. This case may be applied to occupations extremely remote in past, as well as to actions occurred before the development of the International Law of war. Instead, the second hypothesis is extended to all issues of illegal export of cultural object.[278]

Analyzing the terms used in the International legal tools, "return" has been adopted in the 1993 EU Directive on the "Return of the Cultural Objects Unlawfully Removed from the Territory of a Member State" and it has been proposed also in the draft of the 1995 UNIDROIT Convention, in which the title of the Chapter III is "Return of Illegally Exported Cultural Objects", underlining the difference with Chapter II one, entitled "Restitution of Stolen Cultural Objects". Forrest points out that in this case the use of term "restitution" would have been preferred, considering its closer reference to the idea of illegality. On the other hand, Kowalski supports the use of "return" applies to the illegal export of cultural objects, as it takes origin from a national norm and perspective: the export represents a clear damage for the national patrimony, thus it does not completely represent an international issue. Or, *rectius*, there is not a full question raising under the international point of view, considering the customary norms of International Law.[279]

To this regard, the 1995 UNIDROIT Convention grants a conventional international framework to the return issue of illegally exported cultural objects; while the norms concerning thefts are established at a national level, with due differences according the single set of rules, as it occurs in the cases of States which decide to forbid any kind of export of cultural objects.

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[278] See: Wojciech W. Kowalski, *Art Treasures and War*, (Leicester: Institute of Art and Law, 1998), 2-4.

[279] See: Wojciech W. Kowalski, "Claims for Works of Art and Their Legal Nature" in *Resolution of Cultural Property Disputes*, (ed.) International Bureau of the Permanent Court of Arbitration (The Hague: Kluwer International, 2004), 51.

With regard to the return of cultural objects legally removed from their State of origin in past times, the solution must be settled with a tailor-suited analysis of the precise case, generally recurring also to the intervention of nationals diplomacies. The latter are supplied by a specific committee of good offices created by UNESCO, that is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in Cases of Illicit Appropriation. It has a precise role when international conventions cannot find an application, even though they concern UNESCO Member States who claim for the return or restitution of their lost cultural property.[280]

As provided by the UNESCO measures, each State willing to start this procedure before the Intergovernmental Committee is obliged to begin bilateral negotiations with the state where the claimed object is situated. If the negotiation fails, the claimant state can resort the Intergovernmental Committee.

The return of cultural heritage doesn't necessarily address only States, but also a national minority group, both ethnic or indigenous, who may give evidence of the suffered repression experienced in the past, when the theft of their own cultural objects came to pass. In other cases, the return procedure may involve local administrations, as in the case of the Swiss Canton of Saint-Gall and the Canton of Zurich. Their opposition started with the religious wars in the eighteenth century. The cases has been re-opened in 1996, when a reader sent a letter to a journal of Saint-Gall, asking for the restitution of their Canton ownership, stored at the Central Library and National Museum in Zurich.

The Parties tried to negotiate between them, but without any success. Finally, the dispute has been solved by the Confederation through a mutual recognition: Saint-Gall accepted Zurich's ownership of the claimed objects still located in Zurich ever since the end of the war (Article 1), while the counterpart recognized the particular meaning of the objects for Saint-Gall's cultural identity (Article 2).[281] This case exemplifies also the role of the mediation applied to solve the dispute. In fact, the Swiss Confederation played as mediator, and the action

[280] See *infra* paragraph 4.6.
[281] For a detailed legal analysis, see: Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Ancient Manuscripts and Globe – Saint-Gall and Zurich," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

has been based on the formal recognition to testimony respect and appreciation for their mutual Cultural Identity.

Forrest points out that the distinction applied to the terms of "restitution" and "return", here taken into consideration, is the same implemented by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. As a consequence, the recourse to the category of "return" would result better applied to cases of cultural objects transferred in absence of illegality, at least in the earliest stages of said transfer, and given back to their State(s) of Origin.

3.2.2.3. Repatriation

According to some scholars, as Kowalski, the term "repatriation" may be considered as a sub-category of the concept of "restoration". To be precise, Kowalski deems that when the transfer of cultural objects has passed during the change of territorial extension of the State of origin, the claim over the objects cannot be simply assimilated to one of the previous examined categories of "restitution" or "return".[282] It refers to the case of boundaries variation between two existing States, cessions of portions from one State to another one, or the rise of a new State born from the disappearance of pre-existing multi-national State. Repatriations result connected to the issue of boundaries changes, because they normally occur after an armed conflict, which produce both the transformation of the territorial dimensions and is concluded by a peace treaty which includes the repatriation measures.

At the same time, Forrest remarks that, in many similar situations, the transfer of cultural objects would be covered by the category of the restitution, because it would has considered as an opposite act to the International Law of war, generally applied to the cases of removal of cultural objects from occupied

[282] See: Wojciech W. Kowalski, "Claims for Works of Art and Their Legal Nature" in *Resolution of Cultural Property Disputes*, (ed.) International Bureau of the Permanent Court of Arbitration (The Hague: Kluwer International, 2004), 33.

territories.[283] Otherwise, in other cases the transfer of cultural objects may refer to non-belligerent occupations, such colonizations, or the emergence of new States rising from a pre-existing multi-national State.[284] Furthermore, it must be considered that whether the transfer of cultural objects occurred in a time in which it was not an action contrary to the International Law, the restoration claim should be better assimilated to return than restitution demand. And for this reason, Forrest supposes that the repatriation may be comprised both under the restitution and return categories.[285]

Under a different perspective, the term "repatriation" would better identify the situation concerning a cultural objects restoration in the same State, or between the Parties that are going to constitute a new State, such as federations. A famous example is the repatriation of the Stone of Scone (also known as Stone of Destiny) in 1966, from England to Scotland. Originally, the Stone of Destiny had been carried off from Edinburgh to London for want of King Edward I in 1296. Since that time, the stone had been used for the Royal coronation of every British Sovereign, including Queen Elizabeth II in 1953.[286]

The most accredited usage of "repatriation" as a specific term regards the restoration of cultural heritage to communities of indigenous, ethnic or local groups, located in the same national State. In fact, it is generally the situation of groups who experienced colonization and in the most of the cases were subjects to repressions in the past from the National Government, leaded by foreign representatives of the motherland. The indigenous groups became generally minorities communities in their original lands and segregated in reservations,[287] as occurred to the Australian Aboriginals of the Torre Strait Island. The most common case regards a restoration from the National Government – to be precise,

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[283] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010), 144.
[284] See: Wojciech W. Kowalski, "Claims for Works of Art and Their Legal Nature" in *Resolution of Cultural Property Disputes*, (ed.) International Bureau of the Permanent Court of Arbitration (The Hague: Kluwer International, 2004), 30.
[285] See: Craig Forrest, *International Law and the Protection of Cultural Heritage*, (Abingdon, New York: Routledge, 2010),144.
[286] See: Richard Blystone, "Scotland's 'Stone of Scone' finds its way home", CNN, available at: http://edition.cnn.com/WORLD/9611/15/stone.of.scone/ (accessed October 25, 2013).
[287] The name used by the Australian Aboriginals for the reservation areas is "missions". The information is based on a personal conversation with a member of an Aboriginal Community , located in the area of Townsville, Queensland, Australia.

it is normally a national museum – to the local community or to the ethnic or indigenous group.

When considered as applied to a minority group, in comparison to the return to a State or the restitution to an owner (that may be both a State or an individual), the repatriation could be considered as connected to the groups' rights issue, rather than the protection of individual rights. As Moustakas underlines, the development of groups' rights could lead in the future to the definition of a distinct legal system for the repatriation of their own cultural heritage.[288]

Scovazzi considers the differences among the three terms as not needed: the general recourse to the category of restitution is sufficient. In any case, at least under the academic perspective a certain difference due to the precise historical origin of the transfer and the application of the particular taxonomic choice could be contemplated, even taking into account that the terms of "restitution" or "return" are commonly used in a general way and as interchangeably.[289]

[288] See: John Moustakas, "Groups Rights in Cultural Property: Justifying Strict Inalienability,", Cornell Law Review 74 (6) (1989):1181.
[289] The reference to the opinion of Professor Scovazzi is based also on a personal exchange of opinions, held in March 2013.

Part Two. Art-Law ADR and its Practical Application

Chapter Four. Art-Law Dispute Resolutions and ADR

4.1. The Disputes Over Cultural Objects

International disputes may be solved both through "traditional" means of resolutions, such as ordinary diplomatic procedures, arbitration or judicial decisions, and the "alternative means to resolve disputes" (the so-called ADR). This study aims to focus principally on the second category of resolution, because ADR is even more considered as a valid option to avoid long trials and ordinary legal measures also in the field of cultural objects recovery, as illustrated by recent developments.

Addressing the issue under the international legal perspective, peaceful resolution and the role of law must be taken into high consideration. The fundamental legal basis is Article 33 of the United Nation Charter, stating as follows: "The Parties to any dispute... shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".[290] Taking into account the specific nature and criticalities of the art sector from a legal perspective, the final aim in affording any related disputes must be found in establishing solutions that must be shared and accepted by the Parties involved. Only a mutually satisfactory agreement may lead to an actual resolution. In general, this fundamental statement is applicable to the art sector as well as in every field.

This research will take into examination the scenario of successful and less successful attempts of alternative disputes resolutions applied to bilateral disputes involving a museum asked to return one or more cultural objects and the related country of origin from where the objects were removed in the past, aiming

[290] "Charter of the United Nations", "Chapter V: Pacific Settlement of Disputes", available at: http://www.un.org/en/documents/charter/chapter6.shtml (accessed November 20, 2013).
"Article 33.
1. The Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the Parties to settle their dispute by such means."

to illustrate both possibilities.[291] In particular, the third case concerning the Italian request of the "Athlete of Lysippus" statue[292] aims to show that sometimes ADR fails, because the Parties involved in the dispute do not find a proper way to cooperate.

Generally speaking, three main positive effects of ADR are acknowledged: out-of-court solutions results to be "more cost-effective, less time-consuming and less adversarial than traditional litigation".[293]

In addition, other positive features may be highlighted. The decision to resort to this methodology is voluntarily taken by the involved Parties, who consensually accept to refer the situation usually to a third independent party that will adopt a decision. The alternatives are usually mediation and arbitration.[294]

The features that characterize ADR constitute the basis of its benefits. The choice of applicable law, for example, helps to overcome the issue concerning the lack of harmonization among different national legislations, as explained above. In fact, as the case studies of this research will show, fragmentation highly characterizes the field under analysis, both considering the number of stakeholders and the possible hypotheses of restitution, return and repatriation.[295]

Moreover, the resolution through alternative means involves a different *corpus* of instruments, such as guidelines, codes of conduct, directives promulgated by specific stakeholders. All these instruments may not be considered as full normative legal tools, but can be assimilated to soft law. ADR is favorably considered also in the specific field of art law disputes. ADR procedures are flexible, and also non-legal interests may find a more extensive consideration, because of their out-of-court status. This is particularly clear in cases concerning Art-Law restitution.

However, Art-Law disputes present a high degree of complexity, because they involve a large number of different fields and issues: "It encompasses all the aspects of law that are connected with the creation, exhibition, reproduction, sale

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[291] The case studies on successful and failed application of ADR to the international recovery of cultural objects issues are analyzed in Chapter 5.
[292] See *infra* paragraph 5.3. of this research.
[293] See: Dune Morris, "Arbitration, Mediation and Alternative Dispute Resolution", available at: http://www.duanemorris.com/practices/arbitration_mediation_adr.html (accessed November 20, 2013).
[294] See: Susan B. Meek, *Alternative Dispute Resolution.* (Tucson: Lawyers and Judges, 1996), 373. See also: Stephen J. Ware, *Alternative Dispute Resolution.* (St. Paul: West Group, 2001), 300.
[295] This consideration is discussed also in the Conclusion of the research. See *infra* Chapter Six.

and transfer of property of both works of art and cultural objects. Art law also intersects with legal fields as varied as international law (both public and private), property law, copyright, insurance, customs and tax law."[296] Considering the mentioned problem of international legal harmonization in Art-Law disputes, ADR turns into a very useful response, thanks to its mechanism of application and capacity in facilitating dialogue and the research of a mutual profitable solution, satisfying the involved Parties.

In addition, ADR may have also a positive impact on bilateral (or multilateral) relations between the countries involved in the dispute, promoting their cooperation and cultural exchange. Litigation generally produces opposite consequences. These effects may be easily identified also comparing the scenario given by the four case studies considered in this research: international cultural cooperation is one of the mail goal achieved through the conclusion of bilateral agreements between U.S. museums and the Italian Ministry for Cultural Heritage and Activities (hereinafter, the Italian Ministry of Culture). Conversely, even though the Italian Ministry of Culture and the J. Paul Getty Museum (hereinafter, Getty) had concluded a similar agreement in 2007 for the restitution of 40 art antiquities, the two institutions were not able to solve the dispute over the bronze statue, for example including it in the same agreement. The current Getty's regret and complain for the money and time wasted for the trial, instead of strengthening the bilateral cultural cooperation is clearly states in the interview granted by Mr. Clark.[297]

With regard to the procedures and experienced resolutions, a WIPO[298] study conducted in 2006[299] underlines how ADR procedures can adopt also customary law as applicable law, providing useful guidelines and solutions for pending disputes. This study emphasizes also the attention of WIPO for traditional knowledge and traditional cultural expressions, as well as the adoption of *sui*

[296] See: "Art-Law Centre. Objectifs", available at: http://www.art-law.org/centre/objectifs_en.html (accessed November 20, 2013).
[297] See *infra* Annex Section of this study. Interview III
[298] WIPO is a United Nations agency, seated in Geneva, Switzerland. Its main scope is the promotion of innovation and creativity to support the economic, social and cultural development, through intellectual property means, such as patents, copyright, trademarks, designs. http://www.wipo.int/portal/index.html.en (accessed November 20, 2013).
[299] "WIPO. Customary Law and the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge", WIPO Revised Paper (December 2006), 32-33, available at: http://www.wipo.int/export/sites/tk/en/consultations/customary_law/issues-revised.pdf (accessed November 20, 2013).

generis systems. Their role is highly relevant especially in relation to the indigenous issues. To this end, WIPO attempt of including customary law in ADR procedures may result as an outstanding added value in restitution cases related to indigenous communities, where the traditions protection and preservation should always be taken into account.[300]

Finally, ADR procedures stand out as different from judicial proceedings because they provide non-monetary solutions able to satisfy either of the Parties. Considering this background, this analysis will consider the solutions adopted in ADR art disputes proceedings.

4.2. Actors Involved in the Dispute Settlement Procedures

The international activity of disputes settlement in the Art-Law field involves both public and private actors. Particularly relevant is the institutional role of States, international organizations and bodies, called to cooperate in an intertwined dimension, especially to improve the fighting against the illicit traffic of cultural objects. In fact, it is an indubitable data that a coordinated activity at the international level among art institutions, States, international organizations, and international law enforcement can help in avoiding further cases of art looting and reducing also the recourse to dispute resolutions, through the prevention of the phenomenon. This analysis focuses on cases that need to be settled, with the involvement of actors, such as states, museums and private galleries, or auction houses.

The restitution of cultural property has traditionally involved the States as principal actors of the disputes. In fact, the main issue, concerns the ownership of the cultural property, with a claim clearly founded on a nationalistic position; i.e., a State claims possession of an object on the basis of their sovereignty and the

[300] As stated in the WIPO study: "[…], the IGC now commences each session with a panel, chaired by a representative of an Indigenous or local community, that discusses the experiences and concerns of the traditional holders and custodians of TK, TCEs and genetic resources." See: "WIPO. Customary Law and the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge", WIPO Revised Paper (December 2006), 11, available at: http://www.wipo.int/export/sites/tk/en/consultations/customary_law/issues-revised.pdf (accessed November 20, 2013).

presence of a national cultural linkage.[301]

The positive effect of ADR also in the Art field has been recognized at different levels by a consistent number of institutional actors, and primarily by UNESCO. With regard to the recovery of cultural objects, institutional provisions recall ADR measures.

4.3. Mediation and Arbitration

As aforesaid, alternative dispute resolutions result less expensive, require less time than regular trials, and allow the involved parties to choose the experts, mediators, or arbitrators they prefer. This part will go to analyze now mediation and arbitration.[302]

The mediator is an independent intermediary, having the aim to design a mutually satisfactory solution for the parties involved in the dispute. Settlements will take the form of enforceable contracts, but the parties are not obliged to accept the mediator's proposal, as this procedure has a voluntary nature. The mediator's duty is helping the parties in finding a common solution. Mediator must act as a neutral and non-coercive party, trying to underline and suggest possible sharable interests that may represent the basis to reach an agreement between the involved parties. Mediator has a primary role in communicating and promoting a reciprocal understanding. As it is an informal procedure, parties remain free to abandon the mediation any time after the first reunion. The parties may share only the information they want, and are not obliged to reveal any confidential declaration.

Confidentiality and non-binding features constitute the main advantages for the parties in resorting to this procedure, because it results less risky and may produce profits.

Making a comparison, arbitration provides a final binding decision

[301] Also the 1970 UNESCO Convention and the Council Directive 93/7/EEC of 15 March 1993(see supra Paragraphs 2.1. and 2.3.) has adopted the State's sovereignty as fundamental basis to identify a common background to cope with this issue.

[302] For a details analysis, see: Michael Mcilwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (The Hague, London : Kluwer Law International, 2010), 93-115; 173-326.

prospected by the third party, that is the arbitrator. The decision is also called "arbitral award".

As for mediation, arbitration has a consensual basis. One of the main differences with the mediation is that one party cannot unilaterally decide to abandon the procedure. The arbitration procedure may take origin because of a dispute regarding a contract: in this case, the parties agree to include an arbitration clause, referring to a future dispute. With regard to an existing dispute, a submission agreement can be established between the parties involved to resort to the arbitration.

4.4. Codes of conduct

In the field here under examination, recent developments illustrated an increasing importance of the codes of conduct in the Art-Law field. Generally, codes of conduct set professional guidelines with binding force for the members of the association or body they are part of.[303] More precisely, they refer to professionals acting both in public and private institutions, such as museums, art dealers, and art traders. Codes of conducts and codes of ethics address several issues and provides ethical standards, in particular for: acquisition and provenance of cultural objects, their sale, the professional conduct of associations' members.[304]

Some of the Codes of conducts for art trade have been yet mentioned during the examination of the stakeholders active in the recovery of cultural objects field. Other examples can be here recalled.

In 1984, several famous British art dealers and Auction houses, as Christie's and Sotheby's, signed the Code of Practice for the Control of Trading in Works of Art.[305] All the members agreed on avoiding any import, export, or

[303] On the value of the ethical guidelines for museums' professionals, see: Interview to Mr. Garlandini in the Annex Section of this research.
[304] See: CECOJI-CNRS, "Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Final Report", October 2011, available at: http://ec.europa.eu/dgs/home-affairs/doc_centre/crime/docs/report_trafficking_in_cultural_goods_en.pdf (accessed September 1, 2013).
305 See: Manus Brinkman, "Reflections on the causes of Illicit Traffic in Cultural Property and Some Potential Cures", in *Art and Cultural Heritage: Law, Policy, and Practice,* ed. Barabara

transfer of cultural objects illegally exported from their country of origin.[306]

Great relief has also the UNESCO International Code of Ethics for Dealers in Cultural Property,[307] adopted by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its Tenth Session in January 1999 and approved by the 30th General Conference of UNESCO, in November 1999. The UNESCO Code of Ethics addresses to professional traders of cultural objects. They are required to commit themselves in not taking part in any transaction for objects suspected to be the result of illegal export, clandestine excavation, stolen or illegally alienated.[308]

All traders who adopt the UNESCO Code are required to use due diligence in determining the provenience of the properties. The dealers who decide to subscribe the Code commit themselves in contrasting and avoiding all forms of illicit trading, by accurately checking the origins of the objects. According to the UNESCO Code, traders must examine the materials background and must be sure about their licit provenance and the position of the sellers. It is not sufficient the absence of evidence about a possible illegal provenance.[309]

Hoffman, (Cambridge : Cambridge University Press, 2006), 64-65. See also: "House of Commons", "Code of Practice for the Control of Trading in Works of Art, available at: http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcumeds/371/0052308.htm , (accessed November 23, 2013).

306 See: Article 2, Code of Practice for the Control of Trading in Works of Art:
"Members of the UK 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:
(a) The seller has not established good title to the object under the laws of the UK, ie whether it has been stolen or otherwise illicitly handled or acquired;
(b) That an imported object has been acquired in or exported from its country of export in violation of that country's laws; and
(c) That an imported object was acquired dishonestly or illegally from an official excavation site or monument or originated from an illegal, clandestine or otherwise unofficial site."

307 "UNESCO International Code of Ethics for Dealers in Cultural Property", available at: http://unesdoc.unesco.org/images/0012/001213/121320M.pdf (accessed November 20, 2013).

308 See: "Article 1" of the "UNESCO International Code of Ethics for Dealers in Cultural Property":
"Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported", available at: http://unesdoc.unesco.org/images/0012/001213/121320M.pdf (accessed November 20, 2013).

309 See: "Article 3" of the "UNESCO International Code of Ethics for Dealers in Cultural Property":
"A trader who has reasonable cause to believe that an object has been the product of a clandestine excavation, or has been acquired illegally or dishonestly from an official excavation site or monument will not assist in any further transaction with that object, except with the agreement of

Another example is given by the ICOM Code of Ethics appears fundamental in this analysis. Even if it has been introduced before, all along the stakeholders' presentation,[310] its role is important to better analyze some of its ethical standards and for the interesting settlement dispute mechanisms developed by ICOM in partnership with WIPO.[311]

These guidelines result of high interest also because they fully recall important provisions of the international Conventions, aiming to make effective duties of conduct in the art trade market. Looking at the provenance issue, closely related to the central question for this research of recovery of cultural objects, the ICOM Code of Ethics Principle 2 particularly refers to museums' Collections Acquisitions. In particular, Article 2.1. addresses the "Collection Policy", Article 2.2. "Valid Title" and 2.3 "Provenance and Due Diligence", providing for strict rules that all museums' professionals members of ICOM must rigorously apply, imposing precise criteria for provenance research and due diligence requirements.[312]

In addition, having in mind that Articles 3 and 5 of the 1995 UNIDROIT Convention separate the two categories of return and restitution, the same distinction is adopted by Article 6 of the ICOM Code, including a precise

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the country where the site or monument exists. A trader who is in possession of the object, where that country seeks its return within a reasonable period of time, will take all legally permissible steps to co-operate in the return of that object to the country of origin.", available at: http://unesdoc.unesco.org/images/0012/001213/121320M.pdf (accessed November 20, 2013).

[310] See *infra* paragraph 2.4.4. of this research.

[311] See *infra* in this paragraph.

[312] See: 2013 ICOM Code of Ethics ", available at: http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (accessed January 11, 2014).
"Principle 2: Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal."
See: "Article 2.1 Collections Policy. The governing body for each museum should adopt and publish a written collections policy that addresses the acquisition, care and use of collections. The policy should clarify the position of any material that will not be catalogued, conserved, or exhibited".
See: Article: "2. 2 Valid Title. No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title."
See: "Article 2. 3 Provenance and Due Diligence. Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production."

reference to "Objects from an occupied Country", which recalls the 1954 Hague Convention.[313]

The fundamental meaning of this evaluation does not simply attain the relation between the text of the two tools, but that fact that the same rule have been adopted before in a international convention – but with limited binding force only for its member states – and later as an ethical principle in Code of conduct. Paradoxically, it is true that the conventional tool should be looked as the most effective. However, as said, the limited number of states that became parties to the 1995 UNIDROIT Convention determine an obstacle for its international force. Conversely, a soft law tool may produce positive binding consequences among its members, even though with a limited range of applicability.[314]

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[313] See: 2013 ICOM Code of Ethics ", available at: http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (accessed January 11, 2014).
"Principle 6: Museum collections reflect the cultural and natural heritage of the communities from which they have been derived. As such, they have a character beyond that of ordinary property, which may include strong affinities with national, regional, local, ethnic, religious or political identity. It is important therefore that museum policy is responsive to this situation."
On the return of cultural objects, see: "Article 6.2 (Return of Cultural Property). Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level".
On restitution, see: "Article 6.3 (Restitution of Cultural Property). When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to cooperate in its return".
Finally, for the reference to international norms stated in the 1954 Hague Convention, applicable in the event of armed conflict, see: "Article 6.4 of the Code (Cultural Objects From an Occupied Country). Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respectfully all laws and conventions that regulate the import, exportation and transfer of cultural or natural materials".

[314] Cf: "[…] an intrinsic weakness in codes of ethics can, on the contrary, be turned into an effective strength. While these rules are intended only for the members and/or structures belonging to the category concerned, it should not be forgotten that, not infrequently, the international conventions that give rise to norms capable of having an impact on the workings of the market often encounter a considerable obstacle to their effectiveness in the behaviour of States. The case of the UNIDROIT Convention is especially significant in this regard, as it has experienced numerous problems because of the lack of enthusiasm on the part of many States with a high profile in the art market that have not yet ratified the Convention. As is known, this seems to be due to the distrust generated by the content of some of the norms in the Convention, in particular as to the abandonment of the rule that "possession amounts to title" in the circulation of cultural property, the reversal of the burden of proof on the good faith possession of goods, and the duty of restitution to the legitimate owner irrespective of the good faith of the acquirer." CECOJI-CNRS, "Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Final Report", October 2011, available at: http://ec.europa.eu/dgs/home-affairs/doc_centre/crime/docs/report_trafficking_in_cultural_goods_en.pdf (accessed September 1,

The most important advantages deriving from the implementation of the Code of Ethics regard both dealers and collectors. The practice of the unique legal trade for collectors represents a guarantee from risks, that may apply by concluding business only with ethical dealers. Dealers need to protect also the market from dishonest agents who provide illegal cultural objects, by making accurate investigations on the provenience. The adoption of the Code of Ethics is one of the highest demonstrations of ethical commitments for all the stakeholders involved, by accepting values and criteria expressed in the Codes. It shall promote also the adoption of the ICOM Code of Ethics among art collectors, as underlined by Lieutenant Colonel Alberto Deregibus.[315]

These considerations seem to proper recall the value of ethical and cultural standards that can offer a valid support for legal instruments in the fight against illicit trade of cultural objects, when law does not succeed to be effective alone. This step will constitute one of the final evaluations of this research.[316]

4.5. WIPO-ICOM Cooperation in Art-Law Disputes Settlement

As mentioned in the previous paragraph, recently a new interesting mechanism for cultural heritage dispute settlement has been developed by WIPO and ICOM, through the establishment of the "Art and Cultural Heritage Arbitration and Mediation Center". WIPO and ICOM collaboration due its origin to an idea outlined by ICOM in 2006.

The mechanism is based on the ICOM-WIPO Mediation Rules, contract clauses and submission agreements, procedural information for cases submission, as well as mediation workshops to train experts, shaping a complete framework for Art mediation.317 Its engagement regards both the mediation process in return

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[315] On the "UNESCO International Code of Ethics for Dealers in Cultural Property", see: Lieutenant Colonel Alberto Deregibus, "Fight against illicit traffic of cultural property in South-East Europe", Gazientep, Turkey, 19-21 November 2012, available at: http://www.slideshare.net/UNESCOVENICE/alberto-deregibus-the-international-code-of-ethics-for-dealers-in-cultural-property (accessed November 21, 2013).

[316] See *infra*, Chapter Six of this research.

317"Recommended ICOM-WIPO mediation contract clause and submission agreement", available

or restitution of cultural property and all other kinds of acquisition or loan actions, or dispute concerning artworks' authenticity disputes.[318]

It has a wide competence in ADR field, but above all, built up a proper Art-Law Dispute division on Art and Cultural Heritage, with its own apparatus of experts and mediators to settle eventual pending cases.

ICOM role consisted of providing its technical and specialized contribution, proactively assisting museums during difficult negotiation processes and through alternative dispute resolution procedures.

This specialized ADR assistance is open also to non-ICOM member subjects, through precise mediation rules and the support of experts in Art and Cultural Heritage and in Mediation, appointed by WIPO and ICOM. This innovated dispute settlement system takes advantage also of the ICOM Code of Ethics for Museums, a tool that provides useful principles and recommendations sustaining the benefits deriving from the return of cultural property.

It reaffirms the absolute central role of museums in promoting "the cultural and natural inheritance of humanity", in protecting collections, and their management activity. Great attention is paid both for their legal and professional way to work in the Art field.[319]

In the list of responsibilities related to "Professional Conduct" of museum agents, any kind of support to the Illicit Market is forbidden.[320]

Other specific ethic dispositions are provided for museum employees in the section related to the "Conflict of Interests", stating, for example, that they "must not accept gifts, favors, loans, or other personal benefits that may be offered to them in connection with their duties for the museum (point 8.12), in

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at:
http://icom.museum/programmes/art-and-cultural-heritage-mediation/recommended-icom-wipo-mediation-contract-clause-and-submission-agreement/ (accessed November 21, 2013).

[318] "ICOM-WIPO Art and Cultural Heritage Mediation", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed November 21, 2013).

[319] "ICOM-WIPO Art and Cultural Heritage Mediation", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed November 21, 2013).

[320] See: "ICOM Code of Ethics", "Article 8.5. Illicit Market. Members of the museum profession should not support the illicit traffic or market in natural or cultural property, directly or indirectly." http://network.icom.museum/fileadmin/user_upload/minisites/mpr/code2006_eng_02.pdf (accessed November 21, 2013).

line with ICOM Code of Ethics guidelines."[321]

The result of WIPO and ICOM collaboration is a unique method of ADR specifically designed for Art and Cultural Heritage sector, with the former contributing on the side of expertise in intellectual property and its Mediation and Arbitration Center, and the latter providing its professional and international museums-based network.[322]

This system provides for a selected procedure, divided into specific phases, elaborated to design a tailor-suited solution for each case. The procedure starts with the decision of both parties involved to submit the dispute to a mediation process. The second step marks the involvement of ICOM, who receives the request for mediation and evaluates it. Finally, ICOM forwards its assessment of eligibility for mediation to WIPO.

In case of a positive evaluation by ICOM, the third step takes place with the notification to the parties of the commencement of the mediation procedure, and fixing the date for the beginning of the mediation. The fourth step regards the choice of the mediator and his appointment. Generally, the parties decide together, choosing among Art sector experts. In case no agreement is reached by the parties, the mediation is nominated by WIPO.[323]

Subsequently, the mediation process enters into its core phase through meetings and preliminary exchanges of documents, to prepare the dossiers with the information for the identification of the dispute elements. As usual for all mediation processes, the following phase is characterized by all the meetings necessary to investigate the interests aiming the positions of each party, and the following identification, development and proposal of the possible solutions of the dispute, that must be evaluated by the parties involved. The seventh and final step

[321] See: "ICOM Code of Ethics", http://network.icom.museum/fileadmin/user_upload/minisites/mpr/code2006_eng_02.pdf (accessed November 21, 2013).
[322] "ICOM-WIPO Art and Cultural Heritage Mediation", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed November 21, 2013).
[323] "ICOM-WIPO Art and Cultural Heritage Mediation", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed November 21, 2013).

is the final outcome reached by the parties, through the mediator.[324]

As established in the WIPO Arbitration Rules, parties may also decide for a three-member arbitral tribunal. In this case, every party chooses one arbitrator, and then the two appointed decide for the presiding arbitrator; or the WIPO Center may suggest experts or directly appoint the member of the arbitral tribunal, through its permanent roster of arbitrators. To guarantee the arbitrators' impartiality, parties can decide the following elements: the applicable law, the language, and the place of the procedure, as well as arbitrators' nationality. Even in the arbitration procedure, all information has a confidential nature.[325]

Finally, decisions prospected by the arbitral tribunal are binding for the parties. Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[326] international arbitral awards are enforced by national courts.[327]

This new mechanism helps to value the actual contribution of Codes of Conduct in the ADR applied to the field of cultural objects return. However, as aforesaid, the Codes of Conduct in the cultural heritage field play a wider role, especially for their promotion of ethical and professional guidelines.

4.6. The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP)

In this overview on Art-Law disputes another body must be included, as part of the UNESCO system related to the recovery and return of cultural objects: the Intergovernmental Committee for Promoting the Return of Cultural Property

[324] "ICOM-WIPO Art and Cultural Heritage Mediation", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed November 21, 2013).
[325] "ICOM-WIPO Art and Cultural Heritage Mediation", available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/ (accessed November 21, 2013).
[326] "UNCITRAL. 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York Convention", available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed November 21, 2013).
[327] See: "WIPO ADR Arbitration and Mediation Center website", available at: http://www.wipo.int/amc/en/ (accessed November 21, 2013).

to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP). It has a precise role when international Conventions cannot find an application, even though they concern UNESCO Member States who claim for the return or restitution of their lost cultural property.[328]

The ICPRCP has been created on the occasion of the 20th Session of the UNESCO General Conference.[329] Since 2005, also mediation has been authorized as a possible means to work on the disputes concerning the return and restitution of cultural property.[330] The ICPRCP developed also the process that Member Parties and observer states must follow to request the restitution of cultural properties having an essential importance for the state of origin and objects of illicit appropriation.[331]

As provided by the UNESCO measures, each State willing to start this procedure before the Intergovernmental Committee is obliged to begin bilateral negotiations with the state where the claimed object is situated. If the negotiation fails, the claimant state can resort to the Intergovernmental Committee.

So far, ICPRCP has successfully concluded few cases. UNESCO divides them into "historical" cases, and "recent examples of successful operations of cultural property restitutions". The first category includes also a case submitted to the Committee in 1976 and solved after 7 years, concluded with the Italian return of 12,000 pre-Columbian objects to Ecuador. The most recent examples refer also to the bilateral disputes between Italy and the U.S. Museums concluded through agreements, analyzed in the Chapter Five of this research.[332]

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[328] See: "UNESCO", "Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation", available at: http://portal.unesco.org/culture/en/ev.phpURL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html

[329] See: Resolution 20 C4/7.6/5, http://unesdoc.unesco.org/images/0011/001140/114032e.pdf#page=92 (accessed November 21, 2013).
ICPRCP includes 22 Member States, its ordinary meeting sessions take place every two years, but extraordinary session are feasible.

[330] "UNESCO. Records of the General Conference, General Conference, 33rd Session, October 3-21, 2005 (33 C/Resolution 44)" available at: http://unesdoc.unesco.org/images/0014/001428/142825E.pdf (accessed November 21, 2013).

[331] "UNESCO, Modalities of requesting return or restitution", available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=36196&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 25, 2013).

[332] "UNESCO. Recent examples of successful operations of cultural property restitutions in the

4.7. Examples of possible ADR solutions for Art-Law Disputes

Having concluding the presentation of ADR scope, possible subjects involved and its relation with the recovery of cultural objects issue, this part moves now to focus on its possible application through detailed examples.

Restitution may occur under unilateral or bilateral formula. The former is normally founded on laws or other administrative decision, the latter is the result of negotiation that can involve mediation or arbitration.

The description of the different methods of restitution may result as follows: the simple restitution of objects; conditional restitution; including cultural cooperation measures; formal recognition of the relief of cultural identity; donations as form of reparation; loan-agreements.[333] Alternative solutions are also possible: transferring the property ownership to a third party, usually a museum; purchase on the market by the claimant state, to avoid a long and expensive trial or other legal measures; imposition of restriction on the national territory in art activities for "stealer" actors who refuse to return the property to the legitimate owner State.

A description of the possible results of international recovery of cultural property follows. These solutions were reached through alternative dispute resolution procedures and are supported by brief descriptions of recent cases.

4.7.1. Simple Restitution

It is the basic form, when the claimant party succeeds in obtaining the restitution or return of the art property. One of the most known cases is *Maria V. Altmann et al. v. The Republic of Austria,* regarding the restitution of five Klimt's paintings (*Adele Bloch-Bauer I, Adele Bloch-Bauer Il, Apfelbaum I, Buchenwald/Birkenwald, Häuser in Unterach am Attersee).* The parties involved

world", available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=36505&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed November 25, 2013).

[333] This attempt of summing up the different categories of restitution methods makes direct reference to the partition pinpointed by Cornu and Renold (see below), because considered here as one of the most complete academic publication on the topic here examined.

signed an Arbitration Agreement in May 2005. On this basis, the arbitral court decided the case.[334] At the end of its evaluation, the appointed arbitration panel decided that Austria had to return five out of six claimed paintings to Maria Altmann.[335]

4.7.2. Conditional restitution

This kind of restitution establishes precise conditions to be realized. An example is the restitution of human remains held by the British Natural History Museum to their original Aboriginal community located in Tasmania. The condition imposed by the Museum regarded the obligation accepted by the Aboriginal community to preserve at least part of the DNA samples from a traditional burial ceremony, with the aim to use them for future scientific researches. In any case, this scientific employment remained subject to the Aboriginal community approval.[336]

4.7.3. Restitution including cultural cooperation measures

This category provides possible extended measures of cooperation, agreed by the involved parties, as counterbalanced measures associated to the restitution action.

Among the most recent cases of restitution involving the role of museums and a claimant State, the negotiation between the Metropolitan Museum of Art of New York and Italy can be taken into account as a model for all other

[334] Maria Altmann claimed for six paintings, stolen by Nazis to her uncle, Ferdinand Bloch-Bauer, during II World War. Maria Altmann succeeded in submitting the case in the form of arbitration in Austria, even though the Supreme Court of the United States raised the jurisdiction immunity in favour of the Austrian State.
[335] Arbitral Award: 5 Klimt paintings, Maria V. Altmann and others v. Republic of Austria, 15 January 2004, Arthemis, Art-Law Centre, University of Geneva, available at: https://plone2.unige.ch/art-adr/Affaires/case-adele-bloch-bauer/Maria%20V.%20Altmann%20and%20others%20v.%20Republic%20of%20Autria%20-%20Austrian%20Arbitration%20Court%20January%202006.pdf/view (accessed November 25, 2013).
[336] Martin Bailey, "Natural History Museum Returns Aboriginal Remains", *The Art Newspaper* 818, London, June 1, 2007, 1.

similar following agreements.[337]

4.7.4. Formal Recognition of the importance of Cultural Identity

Formal recognition may result of high relief to testimony respect and appreciation for mutual Cultural Identity. A well-known case is represented by the dispute between the Canton of Saint-Gall and the Canton of Zurich. This case has been solved through the intervention of the Swiss Confederation, called by the two parties to intervene as a mediator, for the restitution of ancient manuscripts, and other cultural objects. Their opposition started with the religious wars in the eighteenth century. The cases has been re-opened in 1996, when a reader sent a letter to a journal of Saint-Gall, asking for the restitution of their Canton ownership, stored at the Central Library and National Museum in Zurich. The parties tried to negotiate between them, but without any success. Finally, the dispute has been solved by the Confederation through a mutual recognition: Saint-Gall accepted Zurich's ownership of the claimed objects still located in Zurich ever since the end of the war (Article 1), while the counterpart recognized the particular meaning of the objects for Saint-Gall's cultural identity (Article 2).[338]

4.7.5. Loans

Loans are a very common adopted solution in Art-Law dispute filed. Loaning may result as an alternative to the simple or conditional restitution, as the above exposed case concerning the two Swiss Cantons.

Otherwise, the restitution can be concluded thanks to a temporary or a

[337] See: "Agreement between the Ministry for Cultural Heritage and Activities and the Metropolitan Museum of Art (MET) of New York", February 21, 2006. The full text is available in the Annex Section of this research. The famous Krater of Euphronios effectively came back to Italy on January 15, 2008, and the Hellenistic silver collection, supposed to come from Morgantina, returned in Italy in 2010. For its importance, this case will be analyzed in detail as first case of study of the current examination in paragraph 5.1.

[338] See: Anne Laure Bandle, Raphael Contel, Marc-André Renold, "Case Ancient Manuscripts and Globe – Saint-Gall
and Zurich," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, (accessed November 25, 2013).

long-term loan to the claimant party. It acts as an exchange condition. An example is given by the case of an ancient religious manuscript, the so-called "Benevento Missal", from a little old half-Roman, half-Longobardic town in Campania Region, Italy. The restitution in this case was not possible, even though the United Kingdom Spoliation Advisory Panel asked for the restitution to its national museum, because this action should have required an amendment to the British law, with a procedure that should have needed a long time.[339] This case registered a new end that makes of this loan a partial solution. In fact, a change in UK law occurred in 2010. A new claim was submitted to the Advisory Panel, and a great role was played by The Art Newspaper. The Missal had been returned to its town "where it was written and belongs."[340] It is noteworthy that, as the missal does not belong to the category of Holocaust property, its final return in 2010 to the Benevento Cathedral from the British Library makes of it a unique case.

4.7.6. Donations

This kind of solution is considered by Cornu and Renold not as the preferable one, because the party that must proceed to the donation is supposed to be the proper owner of the cultural objects, even though the counterpart does not recognize it. For example, also in the exposed case concerning the Swiss manuscripts, the Zurich Canton agreed in donating an item, not included in the list of claimed objects.[341]

4.7.7. Other possible adoptable solutions

Other measures may consist in the financial compensation, and production of replicas of the claimed objects by one party. This evaluation is

[339] Martin. Bailey, "Benevento Missal returns home", *The Art Newspaper*, November 24, 2010, available at: http://www.theartnewspaper.com/articles/Benevento+Missal+returns+home/21936 (accessed November 25, 2013).
[340] Martin Bailey, "How The Art Newspaper changed the law", *The Art Newspaper*, November 10, 2010, available at: http://www.theartnewspaper.com/articles/How-i-The-Art-Newspaper-i-changed-the-law/21774 (accessed November 25, 2013).
[341] Marie Cornu and Marc-André Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property*, 17 (2010): 21.

possible through the alternative means of resolution, because as a neutral activity it makes possible for parties to define the concrete interests and aims.

Three other situations are considered by Cornu and Renold. In the first one, both parties could not be interested in the object possession. In this case, it can be transferred to a museum, or other subjects, as third party. In the second one, the claimant State may decide to purchase the object on the art market, because of a particular wish to not invest any further time and money in litigations or other legal procedures. In the third one, some specific limitations can be imposed by the claimant State against the counterpart accused to illegally own its cultural objects. For instance, Egypt adopted this strategy, by allowing archaeological excavations only for the experts arriving from the States who accept the Egyptian claims of art restitution.[342]

4.8. Advantages of ADR

The methods and possible solutions above examined draw attention to a certain evolution in art dispute cases, with an increasing refusal of resorting to traditional legal procedures.

Indeed, as litigations and trials has high costs, considering also the current economic crisis, two main considerations can be here assumed.

Firstly, alternative resolutions in cultural property probably will be even more preferable to legal procedures, when direct mutual interests of the parties can be assured.

Secondly, the future adoption of a stable international court for art disputes on cultural property restitution seems progressively unconvincing, also for the experts of art sector.[343] The motivation of the latter is especially related to the high costs needed for the institution of an international specialized court for

[342] Marie Cornu and Marc-André Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property*, 17 (2010):23.
[343] The author based the expressed statement on an interview with Daniel Berger, former responsible for the management of the Metropolitan Museum of Art of New York and currently advisor for the Italian Ministry for Culture. He took part in the Agreement between the Italian Ministry for Culture and the Metropolitan Museum of Art of New York in 2006.

the art sector.

This implies that negotiation measures probably shall find an increasing application, implying the necessity of examining every situation on a case-by-case analysis and basing its resolution on the will of the parties, without having a coherent institutional litigation framework. At the same time, the highlighted ethical evolution in the field will support a decisive innovation and consolidation of the alternative resolutions, in an internationally shared vision, thanks to the action emphasized by ICOM and other institutional actors. Ethical impact on legal issues is always the sign of future development.

Finally, the most interesting evolution affirmed by the success of the resort to alternative means of resolution in the Art and Cultural Heritage sector is, anyway, the refusal of perpetrating a "winner and loser" perspective, rather preferring to underline the presence of legitimate interests for both parties. As shown by the listed cases, mediation and arbitration favor solutions that consider real interests and expectations, reducing the closing in national positions by the claimant States. ADR provides for the improvement of tailor-suited solutions, able to agree on better answers to each single claim.

This encourages the settlement of the disputes and may constitute in future a new path to the recognition of a collective ownership of cultural objects.

For these reasons, the rising resorting to alternative means of disputes resolution may be considered as one of the best answers to international restitution claims of art property.

Typical examples are alternatives to the litigation process for the restitution of cultural property stolen by Nazi forces during the II World War period, or artworks illicitly acquired. Considering the role of institutions, it is noteworthy that the statutes of many museums often recognize them the power to make restitution and to start the negotiation procedures in a total autonomous way with the states they are in dispute. An example concerning the particular freedom regime about their status, the control over their art property collections, and the possibility to conclude agreements with other museums and institutions, without

involving the diplomatic authorities, is given by the Australian museums.[344]

[344] Marie Cornu and Marc-André Renold. "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," *International Journal of Cultural Property*, 17 (2010): 7.

Chapter Five. Bilateral Disputes Between Museums and States of Origin for the Recovery of Cultural Objects

This Chapter will take into consideration different cases of requests regarding the recovery of different kinds of cultural objects.

The choice of the cases has been founded on three common elements. First of all, all cases regard a request of recovery for cultural objects in a bilateral dimension. Each dispute refers to situations involving Italy, as country of civil law, in opposition to a country of common law. More precisely, the first three cases dealt with Italian requests of restitution of works of art that were in possession of United States museums; while the last case completely overturns the situation, looking at Italy as the addressee of a request of repatriation of human remains advanced by the Australian Embassy.

Secondly, all cases have as subjects a State of origin claiming for the recovery of cultural objects, and museums as the places where the objects are stored.

Thirdly, the choice of the term "recovery" has been adopted to include the different kind of requests in a more generic formula. As above mentioned, in the first three cases Italy asked for the restitution of artistic creations, in the fourth case Australia asked for the repatriation of human remains. The typology of request and the objects requested are completely different.

Apart from the common features, the interest for including precisely these four cases regards the different resolution options adopted.

The first case is characterized by the bilateral agreement concluded by Italy and the Metropolitan Museum of Art of New York, that for its importance and innovation is generally recognized as a "model". As a proof, the second selected case regards another bilateral dispute between Italy and another U.S. museum, the Boston Museum of Fine Arts, that adopted the same model of agreement. The choice of including it among the case studies is also due to the clause of the accord regarding the willing of the museum of informing the Italian Ministry of Culture about future Museum's acquisitions of works of art from Italy.

In opposition to this kind of solution based on the negotiation process, the third case represents the resort to trial hypothesis. It is generally the case in which a possible negotiation is failed and no other means can be applied to find a resolution. This examination aims so to demonstrate how resorting to trial is not the best resolution, in comparison to the possible resolution throughout mediation and negotiation processes. As illustrated, out-of-court resolutions present some advantages, especially in terms of time, money and for their impact on mutual relations. Actually, the alternative disputes resolution opens to the possibility of strengthening even more the cultural cooperation, generating a positive stream of collaboration in a situation originated by a controversy.[345] In particular, the third case refers to the trial opposing Italy and the J. P. Getty Museum of Los Angeles, for the request of restitution of the statue of the Athlete of Fano. The verdict of this trial was initially scheduled to be delivered on February 25, 2014. At the moment of the conclusion of this study, the verdict has still not been delivered.

In the fourth case, the presence of opposite interests and different domestic legal regimes is currently determining an *impasse*, but considering some previous preparatory steps, it is possible to foresee the application of an alternative solution based on a cooperative methodology. The efforts to reach this kind of outcome seems to be also the only applicable strategy, considering the legal obstacles posed by the inalienability of the items requested, under Article 54 of the Italian Code of Cultural and Landscape Heritage provisions.

The main aim of the comparative analysis among the four cases is to underline that the recourse to bilateral agreements, in *lieu* of litigations in foreign courts, allows mutual benefits for both parties and opens-up to new cooperative cultural exchanges between States and their cultural institutions.

In sum, as effectively Scovazzi summarizes: "The agreements on the return of cultural property allow the State of origin to overcome the obstacle posed by the fact that, in several cases, in the State of destination there are few legal means to compel private persons to return cultural objects which are claimed by another State, as well as the obstacle posed by the uncertain outcome of litigation before a foreign court on the ownership of the claimed objects. These

[345] See *supra*, Chapter Four.

agreements also allow foreign museums to preserve their reputation as truthful cultural institutions that do not encourage the pillage of the heritage of foreign countries and do participate in the fight against the destruction of cultural contexts and the illegal traffic resulting there from. Both parties count on the possibility to strengthen their relationship through future cooperative activities."[346]

5.1. Cases Concerning Resolution Through Bilateral Agreements: Italy and the MET[347]

The bilateral agreement between the Italian Ministry of Culture and the Metropolitan Museum of Art can be considered as a basic model in the field of the recovery disputes over cultural property. It represents the first of a subsequent list of bilateral agreements between others museums or cultural institutions of the United States and the Italian Ministry of Culture, for the resolution of bilateral disputes over the recovery of cultural objects.

Before proceeding to the analysis of the bilateral agreements for the restitution of cultural objects with the museums, it must be recalled that Italy and United States since 2001 signed a series of Memoranda of Understanding, providing for the export controls from Italy on all pre-Classical, Classical, and Imperial Roman archaeological material.[348]

One of the basic elements that must be taken into account in the analysis is the presence of two different subjects under the Public International Law: on one side, an American Museum, that is effectively a private institution, on the

[346] Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 380.
[347] The author desires to particularly thank Mrs. Sharon H. Cott, Senior Vice President, Secretary and General Counsel of the Metropolitan Museum of Arts of New York, for the intwerview she granted and sources suggestions.
[348] The first MoU between Italy and U.S. import restrictions on pre-Classical, Classical, and Imperial Roman archaeological material from Italy has been concluded on January 19, 2001. It has been amended and estende for five yeras on January 19, 2006, and later on January 19, 2011, for a period of five years more.
The MoU has been concluded on the basis of the CPIA provisions. As introduced in Paragraph 2.1., these forms of bilateral agreements with U.S. must be activated on request of the source country asking for a import restriction into the U.S.
See more at: United States, Department of State, Bureau of Educational and and Cultural Affairs, "Italy. Cultural Property Agreement with the U.S.", available at: http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/bilateral-agreements/italy (accessed November 25, 2013).

other one, a State. It must be underlined that this element has a great impact on the Museums Legal Advisers in leading their legal action for the dispute resolution.[349] The agreement concluded by the two subjects, in fact, cannot be comprised in the category of the international treaties, as it belongs, more properly, to the category of the contracts between a State and foreign citizens.[350] This kind of agreement is mainly common in other fields of application, such as the exploitation of natural resources. Instead, it finds here a different scope of application.

As said, this kind of bilateral agreements implies an advantage, both for the State and for the Museum involved. With regard to the State of origin, it represents a possibility of avoiding a legal action of an uncertain outcome - that should depend on the decision of a foreign judicial system, which could foresee inadequate or insufficient legal instruments able to oblige the most recent owner to recover the cultural objects claimed by the said State, because illegally exported or stolen. As to the Museums, their will in concluding bilateral agreements represents the public demonstration of their intention of fighting the phenomenon of the looting of foreign cultural heritage. This allows them to be internationally recognized as directly active and involved in the fight against the smuggling of national patrimonies, in favor of the preservation and safeguard of national heritages, coming to the relevant result of obtaining leading agreements on works of art or cultural items of a pair value of the recovered objects.

In the perspective of a common advantage must be read the usual clause, generally present in this kind of bilateral agreements, concerning the development and strengthening of the cultural cooperation between the interested subjects for the promotion of further cultural activities, normally involving scientific and artistic research, excavations, and restoration activities.[351]

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[349] See: Interviews to Mrs. Sharon Cott and Mr. Stephen Clark in the Annex Section of this study.

[350] "Other avenues are also followed to ensure the return of cultural objects to the State of origin. A notable practice is presently being developed to conclude understandings between a State, represented by ministries or other public entities, on the one hand, and foreign museums or cultural institutions, on the other. The instruments in question, usually called "agreements", cannot be considered as international treaties, but properly belong to the category of contracts between States and foreign nationals. This category of legal instruments, which has an important background in the field of exploitation of natural resources (foe example, concessions for oil exploration and exploitation), is now used also to pursue a rather different purpose." See: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 380.

[351] It must be here underlined that the question over the *bona fide purchaser* is generally the main

Coming to the case, a long negotiation process led to the conclusion of the Agreement between the two parties, finally signed in Rome on February 21, 2006 between the Italian Ministry of Cultural, and the Commission for Cultural and Environmental Assets and Education of the Region of Sicily and the Metropolitan Museum of Art.[352]

The famous Krater of Euphronios effectively came back to Italy on January 15, 2008, while the Hellenistic silver collection, supposed to come from Morgantina, Sicily, returned in Italy in 2010.[353]

This agreement is not the first long-term agreement signed by the Metropolitan Museum of Art, in the person of Philippe de Montebello, and an Italian Ministry of Culture. For instance, on May 6, 1982, de Montebello himself and the Minister Vincenzo Scotti have already signed the third bilateral agreement in Rome, aimed to enhance the cultural cooperation for the organization of international exhibitions, as well as long-term loans of art works and the exchange of professional personnel. It had an automatic renewal after nine years formula.[354]

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issue impeding a clear resolution and verification of the disputes, in relation to the actual responsibilities of the museums and cultural institutions involved. So that, the doubts about their real bona fide characterize the cases, and the agreements appear a means to overcome also the embarrassment. "Between 1983 and 2000, the Getty published six volumes of *Greek Vases in the J. Paul Getty Museum*, which purported to be a reputable academic publication. In fact, it was an ostensibly reputable academic publication that dealt in considerable detail with loot. There is probably no equivalent in the history of antiquities scholarship that has so betrayed its high ideals". See: Watson & Todeschini, *The Medici Conspiracy. The Illicit Journey of Looted Antiquities from Italy's Tomb Raiders to the World's Greatest Museums*, (Public Affairs: New York, 2006), 92.

[352] Agreement between the Ministry of Culture of the Italian Republic and the Metropolitan Museum of Art (MET) of New York, February 21, 2006. The Agreement was signed by Prof. Giuseppe Proietti, Director of the Department of Research, Innovation and Organization, and Prof. Francesco Sicilia, Director of the Department of Cultural and Natural Assets, as representatives of Ministry for Cultural Assets and Activities of the Italian Republic, and by the pro tempore Commissioner, Hon. Alessandro Pagano, as representative of the Commission for Cultural and Environmental Assets and Education of the Region of Sicily, and by the Director Philippe de Montebello, as representative of the Metropolitan Museum of Art of New York. It must be underlined the presence of the Sicilian Region representative is due to the art. 14, c. 1, lett. *n*, of the Statute of the Sicilian Region (Legge costituzionale February 26, 1948, n. 2), stating that: the Region "has exclusive legislation" on "antiquities and works of art conservation" in its own territory. See also: Elisabetta Povoledo, "Italy and U.S. Sign Antiquities Accord," *The New York Times*, February 22, 2006, accessed August 17, 2011, available at: http://www.nytimes.com/2006/02/22/arts/design/22anti.html?_r=1&pagewanted=print (accessed December 3, 2013).

[353] See: Michele A. Miller, "Introduction to Feature Section: Looting and the Antiquities Market", *Athena Review* 4 (3) (2007):18-26. See also: Michele A. Miller, "Editor, Old World Archaeology", available at: http://www.athenapub.com/15-intro-looting.htm (accessed December 3, 2013).

[354] The New York Times, "MET MUSEUM SIGNS ACCORD WITH ITALY", published May 7, 1982, available at: http://www.nytimes.com/1982/05/07/arts/met-museum-signs-accord-with-italy.html (accessed on December 22, 2013). It must be underlined that this article yet described

The same features are still present in the 2006 agreement. However, the latter has a higher and different value, as it is not only a cultural cooperation agreement, but it represents the resolution designed by the museum and the foreign State to end an international dispute, and to find a solution for the recovery of an absolute inestimable piece of art.

The case examination will take into consideration a brief reconstruction on the history of the krater, for the outstanding value of the object, and as it represents a good example of the intricate network working in the illicit trade of antiquities.

5.1.1. The History of the Krater of Euphronios

The origin of the Euphronios krater – defined by Thomas Hoving[355] as "one of the ten greatest creations of the Western civilizations"[356] dates back to the Ancient Greece, around the year 515 B.C. It was a bowl, precisely a terracotta calyx-Krater, commonly used at that time for blending wine and water. Its value is due to the perfect condition of conservation and to the generally celebrated craftsmanship of the author, Euphronios. This Krater is probably the unique still complete available exemplar painted by this famous Greek author. The vase has high capacity, about seven gallons.[357]

The Krater is a renowned red-figure style pottery. Invented in Athens

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the hypothesis of an exchange of ancient remains fragments: "In addition, the possibility of exchanges of fragments of Greek vases between the Metropolitan and archaeological museums in Italy is being studied." Furthermore, as stated by the 2006 bilateral agreement at letter K: "This Agreement is part of a continuing program of cultural cooperation between Italy and the Museum involving reciprocal loans of archaeological artifacts and other works of art consistent with Article 67, Paragraph 1, letter (d) of the Code of Cultural and Natural Assets.". See: Agreement between the Ministry of Culture of the Italian Republic and the Metropolitan Museum of Art (MET) of New York, February 21, 2006, as included in the Annex Section of this study.

[355] Thomas Hoving was the Director of the Metropolitan Museum of Art between 1967 and 1977. See the following paragraph for further details on his involvement in the case.

[356] Russell Bernman, "Met Chief to Discuss "Hot Pot" in Rome", The New York Sun 1, November 11, 2005, available at: http://www.nysun.com/new-york/met-chief-to-discuss-hot-pot-in-rome/22903/ (accessed December 3, 2013).

[357] See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums*, (New York: Public Affairs, 2006), ix.

Thomas Hoving was the Director of the Metropolitan Museum of Art between 1967 and 1977. He published some articles on the Magazine Artnet on the negotiation and purchase process of the Krater. In these articles merged also his doubts about the illegal provenance and excavation of the object.

around 520 B.C., the red-figure vase painting became a very common technique used in all the Ancient Greek World, especially in the Region of Attica, as well as in Southern Italy, in the area also known as "Magna Graecia", and Etruria. The basic feature characterizing this pottery painting style is the presence of red drawn figures on a painted black background. During the Fifth Century B.C. this technique became even more popular, and on its foundation a new style had been developed by artists: the black-figure pottery, that consisted of the simple reverse of the red one.[358] As to the red-figure pottery, the scenes are depicted on basis the classical red-orange color of the clay. This technique allows to paint with a higher detailed effect and a good result also in third dimension. Instead, the black-figure method had a limited application, as only figures in profile could be easily painted. The classification of the antique vessels lead to the identification of the painters. Among them, Euphronios was one of the most popular and appreciated artists, part of the "Pioneer Group" with Euthymides and Phintias, all specialized to work both on black and red figures.[359]

The Euphronios krater represents two scenes: on the obverse side, the death of Sarpedon, son of Zeus and Laodamia; on the reverse one, some young Athenians arming themselves for the battle. The scenes clearly evokes the Trojan war, and the particular accuracy in the representation of details, such as the anatomy of the characters is one of the elements characterizing Euphronios' art. Generally, uniquely the painter signed his creation. Therefore, in this case, one of the particularity related to this Krater is the double signature: Euphronios as the painter, and Euxitheos as the potter.

Finally, an inscription on the reverse side – "Leagros is handsome" – allowed to date with better certainty the vase: probably around 520-510 BC, as at that time, Leagros was famous in Greece as one of the handsomest men.

[358] John Boardman, *The History of Greek Vases*, (London: Thames & Hudson, 2006), 286-287. See also: Joseph Veach Noble, *Techniques of painted Attic pottery,* (New York: Watson-Guptill Publications, 1965), 23- 57.
[359] John D. Beazley, *Attic red-figure vase-painters*, Vol. 1, 2nd edn., (Clarendon Press: Oxford, 1963), 349.

Obverse side of the Euphronios krater depicting the death of Sarpedon.
Source: http://www.mlahanas.de/Greeks/LX/EuphroniosKrater.html

Source: Front side
http://www.villagiulia.beniculturali.it/index.php?it/141/selezione-di-opere/17/cratere-di-euphronios

5.1.2. Provenance and Acquisition

According to the reconstruction of the events made by Vernon Silver, the Krater was probably excavated and looted in Cerveteri, an Etruscan town in the province of Rome,[360] by tomb robbers, in a private property in Greppe Sant'Angelo, an Etruscan tomb complex, around 1971.[361]

The Krater is supposed to have been sold by the tomb robbers to Giacomo Medici – a famous Italian art-dealer, who was convicted in 2004 for selling stolen art – at the price of 88,000,000 US dollars. Medici then smuggled the Krater in Switzerland, to sell it for 350,000,000 US dollars to Robert Hecht Jr., an American art-dealer who has been living in Rome for 25 years.[362] Finally, Hecht sold the krater to the Metropolitan Museum of Art of New York, on November 10 , 1972, for the sensational amount of 1 million of dollars.[363]

The news had been announced on the New York Times the subsequent November 12.[364] At that time, the museum preferred to keep the secret on the original provenance of the vase, sustaining it was a needed measure to preserve the channel for further acquisitions.[365]

As a matter of fact, the acquisition process implemented by the museum remains one of the most controversial feature of the case. The museum revealed at that time that Dietrich von Bothmer, the then curator of the Greek and Roman Department,[366] received a letter from Robert Hecht Jr., who offered the vase, describing it as "the equivalent – in beauty, importance, and price – to an

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[360] The ancient "Etruria" region consists of the modern area which goes from the northern part of Rome, Grosseto, Siena, Florence and Perugia.
[361] See: Vernon Silver, *The Lost Chalice*, (New York: HarperCollins, 2009), 287-290.
[362] See: Vernon Silver, *The Lost Chalice*, (New York: HarperCollins, 2009), 37-52. At that time, the Government of Istanbul had yet file on Hecht as *persona non grata* after an antiquities-smuggling scandal, occurred in 1960s.
[363] See: Thomas Hoving, 'Super art gems of New York City: "Hot Pot" part II – Unexpectedly, the money source opens up', 2001, artnet.com, available at: http://www.artnet.com/magazine/features/hoving/hoving7-2-01.asp, (accessed 19 July 2012); and Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), ix.
[364] See: James Mellow, 'A new (6th Century B.C.) Greek vase for New York', *New York Times Magazine,* November 12, 1972, 42, 43, 114-16.
[365] See: Nicholas Gage, 'Farmhand tells of finding MET's vase in Italian tomb', New York Times, 25 February 1973.
[366] About the Departments division of the Metropolitan Museum of Art, see the interview to Mrs. Sharon Cott, in the Annex Section of this study.

impressionist painting."[367] Thomas Hoving, Director of the Metropolitan Museum of Art between 1967 and 1977,[368] his deputy Theodore Rousseau, and von Bothmer went to Zurich during the summer of 1972, to examine the object.[369] Watson and Todeschini brilliantly report in their book – currently recognized as a best seller for the accuracy in the reconstruction of the krater story – Hoving's reaction to the view of the vase:

"*To call* [the vase] *an artifact is like referring to the Sistine Ceiling as a painting. The Euphronios krater is everything I revere in a work of art. It is flawless in technique, is a grand work of architecture, has several levels of heroic subject matter, and keeps on revealing something new at every glance. To love it, you only have to look once. To adore it, you must read Homer and know that the drawing is perhaps the summit of fine art... I found the drawing the finest I had virtually ever observed. One long, unhesitating line that sped from the wing of Sleep through his arm in a pure stroke was genius... I tried to think of something comparable, from any time or any master. I could only think of the so–called Alexander sarcophagus in Istanbul, the precious drawings in the illuminated Book of Hours created for the Duke of Berry by the Limbourg brothers around 1410, and the watercolor of the bird's wing by Albrecht Dürer in the Albertina in Vienna. They were all unique masterworks, yet none had the same sense of soul."*[370]

The following August, the Museum decided to purchase the vase. In order to gather all the needed amount, the Durkee and Ward collections – consisting of about 11,000 pieces (coins and medals) donated to the MET at the beginning of the Twentieth Century – were sold in a Sotheby's auction. The

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[367] See: Peter Watson and Cecilia Todeschini, The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums (New York: Public Affairs, 2006), x.

[368] See: Thomas Hoving, "Super Art Gems of New York City: The Grand and Glorious 'Hot Pot' - Will Italy Snag It?" Artnet, June 29, 2001, available at: http://www.artnet.com/Magazine/FEATURES/hoving/hoving6-29-01.asp (accessed December 17, 2013). Hoving published some articles on the Magazine Artnet on the negotiation and purchase process of the Krater. In these articles merged also his doubts about the illegal provenance and excavation of the object.

[369] See: Hoving, Thomas 'Super art gems of New York City: The grand and glorious "Hot Pot" – Will Italy snag it?', (2001), *artnet.com*, available at: http://www.artnet.com/magazine/features/hoving/hoving6-29-01.asp, (last ccess19 November 2013).

[370] See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), xi.

Auction House paid 1,5 million dollars in advance to obtain the selling, adding the 84 percent of all gross receipts exceeding the one million of dollars.[371] The final compensation obtained from the museum for the sale of the collections amounted at 2.3 million dollars. The Euphronios' masterpiece arrived in the United States on August 31st.[372]

In order to provide enough evidence for the acquisition committee, Hecht presented, as a pedigree, two letters from Dikran A. Sarrafian, an Armenian dealer who lived in Beirut and whose family had been in possession of the artwork since 1920. The first letter was dated July 10, 1971 – that is just before the presumed illegal excavation occurred in Cerveteri – and referred also to the price of "one million dollars and over if possible" for the future purchase of the vase, and foresaw a ten percent commission price for Mr. Hecht.[373] The second one was dated September 9, 1972, affirmed that his father purchased the vase in London in 1920, exchanging some ancient Greek and Roman coins.[374] Moreover, the vase had been sent to Switzerland in order to be restored in 1969.[375]

Nonetheless, many doubts about the provenance started to open up at the acquisition time of the vase. In fact, on February 19, 1973 a series of articles were published by the press. They queried about the provenance of the incredible piece of ancient Greek art, supposing it was illegally dug in Cerveteri two years before.[376] As a result, the price paid by the Metropolitan Museum became of

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[371] See: Thomas Hoving, 'Super art gems of New York City: "Hot Pot" part II – Unexpectedly, the money source opens up', 2001, artnet.com, available at: http://www.artnet.com/magazine/features/hoving/hoving7-2-01.asp, (accessed 20 November 2013).

[372] See: Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art*, (New York: Simon and Schuster, 1993), 319.

[373] An excerpt of the first letter is reported in Watson and Todeschini's book: "In view of the worsening situation in the M.E. [Middle East], I have decided to settle in Australia, probably in N.S.W. [New South Wales]. I have been selling off what I have and have decided to sell also my red figured crater which I have had so long and which you have seen with my friends in Switzerland." Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), xiii.

[374] See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), xiii.

[375] See: Hoving, Thomas 'Super art gems of New York City: The grand and glorious "Hot Pot" – Will Italy snag it?', (2001), *artnet.com*, available at: http://www.artnet.com/magazine/features/hoving/hoving6-29-01.asp (accessed , November 13, 2013).

[376] See: Nicholas Gage, 'How the Metropolitan acquired "the finest Greek vase there is"', *New York Times*, February 19, 1973, available at:

public domain, and the articles divulged the names of Robert Hecht and the Lebanese seller, Sarrafian.[377] As the news raised the clamor on the Metropolitan Museum, its lawyers were sent in Lebanon to meet Mr. Sarrafian, who provided the payment receipts of the vase, corresponding to an amount of 909,000 Swiss Francs, dated October 25, 1971.[378]

Investigations into the origin of the piece led to interesting testimonies. The first one was rendered by a Sarrafian's clerk, who declared he had effectively seen the vase fragments in Beirut in the initial 1960s. The second one was a testimony offered by Fritz Bürki, the Swiss restorer living in Zurich where the vase was left by Hecht for an intervention before the acquisition process from the Museum. Bürki affirmed in an affidavit for the Metropolitan lawyers that a crater had been sent by Sarrafian in August 1971, while a photographer settled in Basel confirmed he had seen the fragments of the crater in the subsequent September.[379] These testimonies became relevant elements, made public in June 1973, and contrasting the supposed illicit excavation in Italy during the next December 1971 and the related claims of illicit provenance.[380]

In July 1973, a new testimony arrived to Mr. Hoving. It was a copy a Muriel Newman's letter sent to Sarrafian. Mrs. Newman was a collector, and declared in the letter that she had seen – with Sarrafian – in Beirut some

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http://graphics8.nytimes.com/packages/pdf/arts/Metacquired.pdf (accessed December 23, 2013).

[377] See: Nicholas Gage, 'Farmhand tells of finding MET's vase in Italian tomb', *New York Times*, February 25, 1973. In this period, Mr. Hoving took place in a TV program, referring to the vase with the expression "the hot-pot". See: Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" III – The shit hits the fan'", 2001, artnet.com, available at: http://www.artnet.com/magazine/features/hoving/hoving7-5-01.asp, (accessed December 23, 2013).

[378] See: Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" V – Utterly unexpected good news', 2001, artnet.com, available at: http://www.artnet.com/magazine/features/hoving/hoving7-13-01.asp, (accessed December 23, 2013).

[379] See: Nicholas Gage, 'Dillon stands by vase', *New York Times*, June 27, 1973, available at: http://graphics8.nytimes.com/packages/pdf/arts/Dillonstands.pdf, (accessed December 23, 2013; Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art,* (New York: Simon and Schuster), 1993, p. 333; Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" V – Utterly unexpected good news', artnet.com, 2001, available at: http://www.artnet.com/magazine/features/hoving/hoving7-13-01.asp, (accessed November 23, 2013).

[380] See: John Hess, "The Vase: Not Easy To Piece Together," *The New York Times*, February 25, 1973. See also Nicholas Gage, "How the Metropolitan Acquired 'The Finest Greek Vase There Is'," *The New York Times*, February 19, 1973; and Nicholas Gage, "Met's Evidence Backs Vase Dillon Says," *The New York Times*, June 27, 1973. See also: Nicholas Gage, 'Dillon stands by vase', *New York Times*, June27, 1973, available at: http://graphics8.nytimes.com/packages/pdf/arts/Dillonstands.pdf, (accessed November 20, 2013).

fragments of an Euphronios' vase in 1964. As a further formal proof, Mrs. Newman signed a formal affidavit, confirming her declaration.[381]

Even though the provenance issue seemed to be of a positive resolution in favor of Mr. Hecht and the Metropolitan Museum, considering the Sarrafian's ownership of the krater admissions, Hoving continued to nourish some suspicions, particularly due to Sarrafian's allusions to the existence of a hatbox of fragments, letting deeming that the krater in his possession was imperfect.[382]

Instead, the krater object of the acquisition issued by the Metropolitan Museum of New York, for the uncommon price of one million dollars, was obviously in quite perfect conditions of conservation, and Hoving considered the hatbox size probably not enough big, considering the krater dimensions. For that reason, since 1973 Hoving started to consider the possibility that there were two different Euphronios' krater – one bought by the Museum he worked for, another one in worse conditions, owned effectively by Sarrafian – as there were too many affidavits sustaining that. Therefore, the vase acquired by the Metropolitan could had really been the result of an illicit excavation in December 1971, as contested by someone. He finally resigned from the Metropolitan in 1977, the same year in which Sarrafian remained victim of a car crash.[383]

The elements here reported let think about the following possibility:

[381] See: Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art* (New York: Simon and Schuster), 1993, 335-336; Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" V – Utterly unexpected good news', artnet.com, available at: http://www.artnet.com/magazine/features/hoving/hoving7-13-01.asp, (accessed November 23, 2013).

[382] See: Nicholas Gage, 'Farmhand tells of finding Met's vase in Italian tomb', *New York Times*, February 25, 1973; Nicholas Gage, 'Dillon stands by vase', *New York Times*, June 27, 1973, available at: http://graphics8.nytimes.com/packages/pdf/arts/Dillonstands.pdf, (accessed December 2, 2013); Lawrence Van Gelder, 'Odyssey of the vase: Contradictions and conflicts', *New York Times*, 25 February 1973; Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" V – Utterly unexpected good news', artnet.com 2001, available at: http://www.artnet.com/magazine/features/hoving/hoving7-13-01.asp, (accessed December 2, 2013); Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" VI – The old switcheroo', artnet.com, 2001, available at: http://www.artnet.com/magazine/features/hoving/hoving7-16-01.asp, (accessed December 2, 2013).

[383] See: Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art* (New York: Simon and Schuster, 1993), 338-339; Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" VI – The old switcheroo', artnet.com, 2001, available at: http://www.artnet.com/magazine/features/hoving/hoving7-16-01.asp, (accessed December 2, 2013); Thomas Hoving, 'Super art gems of New York City: The "Hot Pot" V – Utterly unexpected good news', artnet.com, 2001, available at: http://www.artnet.com/magazine/features/hoving/hoving7-13-01.asp, (accessed December 2, 2013).

Hecht collected the documents related to the provenance origin of the Sarrafian's vase and used them for the second krater (also known as Sarpedon Krater), to provide enough evidences to cover the fact that the krater has been illicitly dug in Italy in December 1971, and sell it to the Metropolitan. The other crater had been bought by the American philanthropist Shelby Write, who voluntarily decided to return it – together with other nine archaeological pieces – to Italy, when the Italian Government provided evidence about "their export from Italy was questionable." As a result, the krater was included in the exhibition that took place in March 2008 at Palazzo Poli in Rome, as a prolonged version of the most famous "Nostoi: Recovered Masterpieces," at the Quirinale, exposing 70 pieces recovered from four American museums.[384]

Some incredible *coup de théàtre* occurred between 1990s and 2000s. On September 13, 1995, the Italian and Swiss Police raided the storehouse in the Geneva Freeport.[385] The raid operation showed Giacomo Medici's connections with an organized network of dealers, tomb raiders and museums. The Freeport store contained many works of art, but also thousands of documents and photographs.[386] The Medici's Polaroid archive has become over time a well-known fact among experts and scholars in the field of the Cultural Heritage, as they provided consistent proves, or as they have been defined, "the clinching piece of evidence" of the illicit provenance of his outstanding warehousing facility.[387] Among all the photographs, with a limited attention to the current case, two have a relevant importance: one probably taken in May 1987, with Medici standing along the Sarpedon krater at the Metropolitan Museum in New York, another displaying Hecht in a similar scene even with the same vase.

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[384] See: Elisabetta Povoledo, 'Repatriated art in Rome', *New York Times*, 29 March 2008, available at: http://www.nytimes.com/2008/03/29/arts/29arts-REPATRIATEDA_BRF.html?pagewanted=print, (accessed , December 2, 2013).

[385] See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs), 2006, p. 19–23. See also, David Gill and Christopher Chippindale, "From Malibu to Rome: Further Developments on the Return of Antiquities," *International Journal of Cultural Property* 14 (2007): 206.

[386] See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), 20-22. See also: David Gill and Christopher Chippindale, "From Malibu to Rome: Further Developments on the Return of Antiquities," *International Journal of Cultural Property* 14 (2007): 206.

[387] See: David Gill and Christopher Chippindale, "From Malibu to Rome: Further Developments on the Return of Antiquities," *International Journal of Cultural Property* 14 (2007): 312.

The famous photograph showing Giacomo Medici at the Metropolitan Museum of Art of New York, along the Euphronios' krater. Source: A Trove of Stolen Treasures. http://www.npr.org/templates/story/story.php?storyId=5411644 (last access, December 10, 2013).

"The seventh example is, of course, the Euphronios vase, discussed in the Prologue. Among the photographs seized in Geneva was one that appears from a covering note to have been taken in May 1987, when Medici was in New York. This photograph shows Giacomo Medici himself, standing proudly next to a large krater, showing the death of Sarpedon. It is indeed the Euphronios krater, and Medici's proud pose, with chest out, chin thrust forward, depicts him as a victor, as having won some kind of race or contest. There is no mistaking in the message. A second photograph shows Robert Hecht on the same occasion next to the same object. Why were these photographs taken? Pellegrini, Conforti, and Ferri all realized that, by themselves, these images didn't constitute proof of anything. Taken in context, however, alongside all the other photographs – at the Met, at the Getty, and at other museums – in which Medici liked to be photographed with "his" objects, it was extremely revealing, and damning."[388]

[388] See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of*

Some photograph albums, seized from the Medici's Geneva Freeport warehouse, cataloging stolen items. Source: A Trove of Stolen Treasures http://www.npr.org/templates/story/story.php?storyId=5411644 (last access, December 10, 2013).

But the proves arrived. On February 16th, 2001, another raid was conducted by the Italian Carabinieri in Hecht's apartment in Paris, where they discovered a detailed handwritten report concerning all his activities in the art trade world[389]. Among those, two descriptions of the famous krater, reporting that he bought the vase from Medici after the illegal excavation in 1971, and the second note on the Sarrafian's original possession, as a record for Metropolitan acquisition. In June 2001, a Marion True's deposition, the J. Paul Getty curator, informed about that von Bothmer knew about an aerial shot on the tomb area where the krater had been stolen – even if Von Bothmer rejected True's accusation.[390]

Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums (New York: Public Affairs, 2006), 107-108.

[389] See: Jason Horowitz, "How Hot Vase It?" *The New York Observer*, February 20, 2006, available at: http://observer.com/2006/02/how-hot-vase-it/ , (accessed December 28, 2013).

[390] See: Jason Felch and Ralph Frammolino, 'Italy says it's proven vase at Met was looted', *Los Angeles Times*, October 28, 2005, available at: http://articles.latimes.com/2005/oct/28/local/me-

On February 3, 2006, the Metropolitan Museum of Art and the Italian signed an agreement under which the ownership of the Euphronios krater, along with other nineteen pieces of art, returned to Italy in exchange for loans of other Italian treasures. The Euphronios krater arrived back in Italy on January 2008, displayed before at the *Nostoi* exhibition, and is currently exposed at the Museum of Villa Giulia in Rome, but the municipality of Cerveteri is trying to obtain to get back in possession of the krater.[391]

Even though the proves on the illicit traffic of the krater and other antiquities had a limited and incidental nature, also Philippe de Montebello – Director of Metropolitan Museum, and signer of the bilateral agreement – affirmed that he himself was persuaded about the provenance of the pot from an Etruscan tomb as a result of a theft.[392]

At the end of the of the verifications on Medici's and Hecht's role in the international traffic of cultural objects, and the emerging of the evidence of their action on providing works of art to the Metropolitan Museum (including the Euphronios Krater), Italy had finally the possibility to launch a legal action against the two subjects. Medici was sentenced to 10 years in jail and 10 millions of Euros, for has been found guilty of dealing in stolen cultural objects in 2004.[393] Hecht's proceeding stopped because of the expiration of the statute of limitations. Robert Hecht died in January 2012. [394]

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met28, (accessed December 28, 2013). See also: Jason Felch and Ralph Frammolino, *Chasing Aphrodite, The Hunt for Looted Antiquities at the World's Richest Museum*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 209-211; Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), 206- 207.

[391] See: Elisabetta Povoledo, 'Ancient vase comes home to a hero's welcome', *New York Times*, January 19, 2008, available at: http://www.nytimes.com/2008/01/19/arts/design/19bowl.html?_r=1&ref=euphronioskrater, (accessed December 28, 2013); Comune di Cerveteri, "Eufronio racconta la Guerra di Troia", press release, available at: http://www.comune.cerveteri.rm.it/comunichiamo/comunicati-stampa/eufronio-racconta-la-guerra-di-troia (accessed November 23, 2013).

[392] See: Randy Kennedy and Eakin, Hugh, 'Met agrees tentatively to return vase in '08', *New York Times*, 4 February 2006.

[393] In 2004, Medici appealed verdict. In June 2009, the Appeal Court partly modified its decision, and reduced the previous sentence to 8 years in jail, because smuggling charges were dismissed as the statute of limitations had expired. Medici tried to appeal again, but the Court of Cassation rejected it. On this point, see: Fabio Isman and Gareth Harris, "Smuggler's Final Appeal Fails," *The Art Newspaper*, March 2012, 8.

[394] See: Jason Felch, "Robert Hecht Jr. Dies at 92," *Los Angeles Times*, February 9, 2012, available at: http://articles.latimes.com/2012/feb/09/local/la-me-robert-hecht-20120209 (accessed December 4, 2013).

5.1.3. The Bilateral Agreement

After the detailed explanation of the events connected to the krater of Euphronios, the study will take now into consideration the analysis of the text of the long-term bilateral agreement of cultural cooperation concluded by the Metropolitan Museum and Italy. The agreement has a long term comprehensive duration, as it had been stated that it will remain in force for 40 years, renewable by agreement between the parties (Article 8.1).

First of all, the preamble recalls the institutional responsibility of the Italian Ministry of Cultural in the institutional "protection, preservation and optimum utilization" of "archaeological heritage" (letter A).[395] What is to be intended as "archaeological heritage," is further explained in the letter B. Furthermore, letter C shows up the utmost meaning that this patrimony represents for the national identity and memory, being inextricably connected to the context of which it is expression, as well as its value for scientific and research purposes.[396]

Letters D and E refer to relevant legal issues. The former addresses to the applicability of the law both to permanent and temporary exit of the archaeological objects from Italy, in the case of their discovery in the Italian territory, or also in the case of their presence in the land, as in possession of a private individual. The latter addresses the question related to the formal request advanced by the Italian Ministry of Culture of transfer title related to the objects included in the agreement, as defined by Articles 3, 4, and 5. Letter E expressly recalls the Italian position on the objects: they were illegally excavated in the national territory, then sold through clandestine channels, and thus illicitly

[395] The Parties consider the recitals as an integral part of the overall agreement, as stated at article 1 of the same one.

[396] "B) The archaeological heritage includes the structures, constructions, architectural complexes, archaeological sites, movable objects and monuments of other types as well as their contexts, whether they are located underground, on the surface or under water.
C) To preserve the archaeological heritage and guarantee the scientific character of archaeological research and exploration operations, Italian law sets forth procedures for the authorization and control of excavations and archaeological activities to prevent all illegal excavations or theft of items of the archaeological heritage and to ensure that all archaeological excavations and explorations are undertaken in a scientific manner by qualified and specially trained personnel, with the provision that non-destructive exploration methods will be used whenever possible." See: Agreement between the Ministry of Culture of the Italian Republic and the Metropolitan Museum of Art (MET) of New York, February 21, 2006, as included in the Annex Section of this study.

exported. It must be underlined here as this must be considered a central point for the fulfillment of the Agreement due to a precise diplomatic choice. Essentially, Italy accepted to be involved in the mediation process, and accepted the Museum position in refusing any accusation concerning its potential awareness – and consequentially, any responsibility – of the illegal provenance of the Italian antiquities, as specified at letter I.[397]

As a consequence, the Italian statement is limited to the assumption that its archaeological objects, that are part of the Italian national heritage, have been illegally excavated, stolen and sold, but nor implication of the Museum is implied, neither the Museum states anything on its possible responsibility spontaneously. This formal diplomatic vacuum may be read as a needed step to overcome the reciprocal embarrassment and fulfill the result, that acted as a sort of neutralization of possible civil, administrative, or criminal liability of the Museum, and allowed to proceed to the mediation process, focusing on the real resolution of the case, instead of fossilizing the question on the claims of both parties. At this regard, it seems at least necessary to specify that all archaeological property excavated in Italy belongs to the Italian state, as a consequence of a 1939 Italian Law.[398]

The transfer will be integrated in the long-term agreement of cultural cooperation, and it is underlined that this action is intended by the Italian Ministry of Culture as part of the initiative aimed at recovering the national archeological items.[399]

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[397] "I) The Museum, rejecting any accusation that it had knowledge of the alleged illegal provenance in Italian territory of the assets claimed by Italy, has resolved to transfer the Requested Items in the context of this Agreement. This decision does not constitute any acknowledgment on the part of the Museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the Requested Items. The Ministry and the Commission for Cultural Assets of the Region of Sicily, in consequence of this Agreement, waives any legal action on the grounds of said categories of liability in relation to the Requested Items." See the already cited Agreement between Italy's Ministry of Culture and MET.

[398] "D) The law applies to the he permanent and temporary departure from Italian territory of archaeological objects discovered in Italian territory or present in Italian territory and in the possession of private individuals.
E) The Ministry for Cultural Assets and Activities of the Italian Republic has requested the Museum to transfer title to archaeological items that are in its collections ("**the Requested Items,**" cited in Articles 3, 4 and 5, below) that the Ministry affirms were illegally excavated in Italian territory and sold clandestinely in and outside Italian territory." See the already cited Agreement between Italy's Ministry of Culture and MET.

[399] "J) The Ministry and the Commission for Cultural Assets of the Region of Sicily and the Museum have agreed that the transfer of the Requested Items shall take place in the context of this

With regard to the analysis of the agreement under the bilateral and diplomatic relations profile, it must be underlined as the parties look at this accord as a first fundamental model to settle any potential future similar controversy, as explained at letter L.[400]

As to the Museum position, it restates the central role carried out by all museums in educating people, making works of art directly available and enjoyable, contributing to a social fundamental scope: preserving and sharing cultural heritage all around the world.[401] At the same time, the Museums also abhors the illicit practices and actions, aimed at feeding the unlawful excavations and traffic of archaeological objects, often connected to the damage of sites and monuments, as well as to illegal actions, such as thefts and unauthorized exports of cultural materials.[402] Finally, the Metropolitan Museum affirms its firm commitment in leading a responsible acquisition of antiquities and other archaeological artifacts, in accordance with uppermost requirements of reliability, and ethical standards.[403]

Article 2 of the agreement establishes the Museum will to transfer all the objects present in the following Articles 3, 4, and 5 to the Italian Ministry of Cultural and to the Commission for Cultural Assets of the Region of Sicily.[404] In

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Long-Term Cultural Cooperation Agreement (the "**Agreement**") to ensure the optimum utilization of the Italian cultural heritage, and as part of the policy of the Ministry to recover Italian archaeological assets." See the already cited Agreement between Italy's Ministry of Culture and MET.

[400] "L) The Ministry and the Museum expect that every future controversy concerning archeological assets will be resolved with the same spirit of loyal collaboration that inspired the present agreement." See the already cited Agreement between Italy's Ministry of Culture and MET.

[401] "F) The Museum believes that the artistic achievements of all civilizations should be preserved and represented in art museums, which, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve and interpret our shared cultural heritage." See the already cited Agreement between Italy's Ministry of Culture and MET.

[402] "G) The Museum deplores the illicit and unscientific excavation of archaeological materials and ancient art from archaeological sites, the destruction or defacing of ancient monuments, and the theft of works of art from individuals, museums, or other repositories." See the already cited Agreement between Italy's Ministry of Culture and MET.

[403] "H) The Museum is committed to the responsible acquisition of archaeological materials and ancient art according to the principle that all collecting be done with the highest criteria of ethical and professional practice." See the already cited Agreement between Italy's Ministry of Culture and MET.

[404] "2. The Requested Items. The Museum agrees to transfer to the Ministry for Cultural Assets and Activities of the Italian Republic and to the Commission for Cultural Assets of the Region of Sicily, on the basis of this Agreement, title to the Requested Items as listed in Articles 3, 4 and 5

exchange, the accord established that Italy engaged itself to provide "cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater" (Article 4.1), in the form of long-term loans of up to four years for each item. It is specified the temporary term of January 15, 2008, as the date when the actual transfer of title over the krater has then taken place, and until that day its exhibition had been accompanied by the exposition of the legend "Lent by the Republic of Italy:"[405]

Comprehensively, the agreement allowed restitution with the transfer of title to Italy of twenty pieces of antiquities, as provided at Articles 3, 4, and 5 (in the section called "The Requested Items") of the agreement. It comprised sixteen samples from the Hellenistic period. Here following the list of the objects:

·the Euphronios krater, ca. 515 B.C.;
·Hellenistic silver collection, 3rd century B.C. (made of fifteen pieces);
·the Laconian *kylix*, 6th century B.C.
·one Red-figured *Apulian Dinos*, 340-320 B.C.
· one Red-figured *psykter* decorated with horsemen, ca. 520 B.C.
· one Red-figured Attic amphora by the Berlin painter, ca. 490 B.C.[406]

More precisely, Article 4.1, letter b) provides for that since January 15, 2008 the Museum and the Ministry mutually agreed on the formula of a four-years loans, to substitute the Euphronios Krater in the galleries of the Museum, choosing among items of equal beauty and artistic and historical value. The items must be selected on the basis of a joint approval, from a list of twelve objects provided in the text of the agreement.[407] As underlined by Briggs, the transfer of

below of the Agreement." See the already cited Agreement between Italy's Ministry of Culture and MET.

[405] See Article 4.1. of the agreement: "The Museum shall transfer title to the Euphronios krater (Photo 5), to the Ministry of Cultural Heritage and Activities of the Italian Republic under the following procedures:
a) The Euphronios krater shall remain at the Museum on loan until January 15, 2008, and shall be exhibited with the legend: "Lent by the Republic of Italy."." See the already cited Agreement between Italy's Ministry of Culture and MET.

[406] The detailed list is available on the Annex Section of this study. See: Agreement between the Ministry of Culture of the Italian Republic and the Metropolitan Museum of Art (MET) of New York, February 21, 2006.

[407] Article 4.1. letter b): "To make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater, the Parties agree that, beginning on January 15, 2008 and for the duration of this Agreement, the Ministry of Cultural Heritage and Activities of the Italian Republic shall make

title for the items is significant "because the cultural property debate resolves around the central question of who owns the past, and in this regard the Met conceded that true ownership, if illegally exported, lies with the source nation".[408]

As a compensation for the restitution of the four last vases listed above, Article 3.2 provides for that the Italian Ministry decided to loan to the Metropolitan Museum a "first-quality Laconian artifact", for a starting period of four years, then renewable.[409] Finally, with regard to the loans, as a compensation for the restitution of the Hellenistic Silver, Article 5.3 establishes that for the entire duration of the agreement, since January 15, 2010, a four-years loan of archaeological items of equal beauty and historical-artistic value of the Hellenistic Silver collection, in addition to the four-years loan of the collection itself.[410]

As a final element concerning the cultural cooperation, that constitutes the core basis for the implementation of the restitution and the second characterizing feature of the agreement, the Museum committed itself in financing new archaeological finding missions, and Italy accepted to loan the resulting objects discovered, as well as other art objects (Article 7).

The parties committed themselves in resolving amicably any future dispute related to the interpretation of the agreement, or, in case of impossibility to reach a mutually satisfactory resolution, they will make recourse to the arbitration method, in private, with the intervention of three arbitrators, as settled

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four-year loans to the Museum on an agreed, continuing and rotating basis selected from the following archaeological artifacts, or objects of equivalent beauty and artistic/historical significance, mutually agreed upon, in the same context where possible, or of the Euphronios Krater[…]". A list of items follows. See the already cited Agreement between Italy's Ministry of Culture and MET.

[408] Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International restitution of Cultural Property", *Chicago Journal of International Law* 7 (2): 641. See also: David Bonetti, *Curators, Countries Debate Who Owns the Past*, Saint Louis Post-Dispatch B1 (February 26, 2006).

[409] "3.2. The Ministry for Cultural Assets and Activities of the Italian Republic, in the context of this Long-Term Cultural Cooperation Agreement, and to ensure the optimum utilization of the Italian cultural heritage, shall loan a first-quality Laconian artifact to the Museum for a period of four years and renewable thereafter." See the already cited Agreement between Italy's Ministry of Culture and MET.

[410] "5.3. To make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and artistic significance to that of the Hellenistic Silver, the Parties agree that, beginning on January 15, 2010 and for the duration of this Agreement, the Italian Republic shall make to the Museum on an agreed, continuing and rotating sequential basis:
a) the four-year loan of archaeological assets of equal beauty and artistic and historical significance, in the same context where possible, to that of the Hellenistic Silver;
b) the four-year loan of the Hellenistic Silver." See the already cited Agreement between Italy's Ministry of Culture and MET.

by the Rules of Arbitration and Conciliation of the International Chamber of Commerce, as under Article 9.[411]

The agreement signed between the United States Museum and the Italian Ministry of Culture in 2006 had high relief for the concrete result achieved, since it constitutes a model for future similar restitution agreements in Art and Cultural Heritage sector, avoiding to resort to trials and litigation measures. Another interesting aspect is that this agreement does not make any reference to the applicable law and does not include any conflict of law clause, letting the need to establish it by interpretation, in absence of a law clause. Probably, no agreement has been possible on this point, even though Article 9.2 provides for a dispute settlement resolution, as previously mentioned. This lack may be seen as a weak feature in the negotiation process.

As stated by Cornu and Renold, the UNESCO Secretariat refusal of registering these agreements, as asked by the parties, is "regrettable", especially considering their innovative nature. This action could have promoted a positive spreading of the basic principles, stated in the agreements, and shared by the parties.[412]

The same model has been replicated and applied by Italy to the following restitution agreements:

Agreement between Italy and the Boston Museum of Fine Arts, signed on September 28, 2006, with the transfer of 13 antiquities to Italy;[413]

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[411] "9. Arbitral panel
9.1. The Parties shall make their best efforts to resolve and settle amicably any dispute between the Ministry for Cultural Assets and Activities of the Italian Republic and the Commission for Cultural Assets of the Region of Sicily and the Museum arising from or related to the interpretation and performance of this Agreement that may arise between the Parties.
9.2. If the Parties are unable to reach a mutually satisfactory resolution to their dispute, the disputed issues shall be settled in private by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce by three arbitrators appointed in accordance with said Rules." See the already cited Agreement between Italy's Ministry of Culture and MET.

[412] See: Marie Cornu and Renold, MarcAndré. "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property* 17 (2010):15.

[413] This agreement is considered by the MFA as "the beginning of a new era of cultural exchange". In detail, it provided a partnership between the two Parties. The Italian government will loan objects of relevant cultural meaning from its territory, MFA committed in an exhibition program dedicated to Italian works of art. Moreover, the two parties established to permanently exchange information on MFA's future acquisitions of Italian antiquities. As for the Agreement between

Agreement between Italy and the Getty Institute,[414] that guaranteed the restitution of 40 masterpieces and prepared the ground for future scientific collaboration on an ethical basis between the parties;

Agreement between Italy and Princeton University Art Museum,[415] which established that Princeton committed itself to transfer title for eight of the fifteen objects claimed by Italy;

Agreement between Italy and Cleveland Museum of Art, which established the restitution of 13 ancient artifacts and an early Renaissance to Italy;[416]

Agreement between Italy and the Dallas Museum of Art, which provided for the restitution of 6 antiquities, including a pair of bronze shields and some Etruscan kraters, originally excavated from the Tomb 512 of the necropolis of Spina, near Ferrara.[417]

Every agreement reported the detailed list of objects subject to the restitution process, with inventory numbers.

5.1.4. The Solution and Lesson learnt

"This unprecedented resolution to a decades-old international property dispute has the potential to foster *a new spirit of cooperation* between *museums and source nations*, spawn stricter museum acquisition and loan policies, *reduce the demand for illicit cultural property*, and *permanently* alter the balance of

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Italy and MET, it included an extensive cultural cooperation in the areas of scholarship, conservation, archaeological investigation, and exhibition planning. See: Museum of Fine Arts, Boston, "Italian Ministry of Culture Agreement", http://www.mfa.org/collections/art-past/italian-ministry-culture-agreement (accessed November 24, 2013).

[414] See: Press Release, "Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome", September 25, 2007, http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html (accessed November 24, 2013).

[415] See:Cass Cliatt, "Princeton University Art Museum and Italy sign agreement over antiquities" October 30, 2007, http://www.princeton.edu/main/news/archive/S19/37/62Q26/index.xml (accessed November 24, 2013).

[416] See: Elisabetta Povoledo," Pact Will Relocate Artifacts to Italy From Cleveland", New York Times, November 19, 2008, http://www.nytimes.com/2008/11/20/arts/design/20arti.html?_r=0 (accessed November 24, 2013).

[417]See: CBS, "Dallas Museum Of Art Returns Antiquities To Italy", October 31, 2013, available at: http://dfw.cbslocal.com/2013/10/31/dallas-museum-of-art-returns-antiquities-to-italy/ (accessed November 24, 2013).

power in the international cultural property debate".[418] This clear comment on the Italy-MET agreement points out in few words the main innovative achievements fulfilled by the two institutions. The agreement succeeded in resolve the dispute reversing the initial opposition in the basis for a fruitful cooperation.

As previously exposed, one of the most interesting feature in this dispute is the initial opposition between a museum and the Italian State, that is one of the most important "source" countries for its richness in cultural heritage. At this regard, it must be here recalled that Italy could not take any legal action against the museum before than clear evidence of the clandestine provenance of the Krater arose, even though Italy has a very strict legal regime on its cultural heritage.[419] For this reason, the investigations on Medici signed a crucial turning point, letting understand the connection among the krater, the so-called "Medici conspiracy", and the arrival of the object to the museum in New York City. Medici and his network opened a Pandora's box in the museums field, and a huge debate arose in the cultural heritage field.

Considering the consequences of the agreement with the MET, one of the biggest effects that can be deemed is the impact played in the museum field that led to the adoption of new provenance standards in the main museums institutions of the United States, such as the MET and the Getty in 2006, as well as the American Association of Museums Directors (AAMD) made itself in January 2013.[420] The museums' effort in the observance of new more stringent standards for loans, donations and acquisitions and the willingness to cooperate with source

[418] See: Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International restitution of Cultural Property", *Chicago Journal of International Law* 7 (2) (2007): 623 (italics added in the text).

[419] Law No. 1089 of 1 June 1939 (Gazzetta Ufficiale, No 184 of 8 August 1939) provides for the national ownership of all objects of artistic, historical, archaeological or ethnological interest found in the ground during excavations or by chance, and render illegal the export of the cultural objects without an appropriate export license.

[420] AAMD adopted guidelines on the Acquisition of Archaeological Material and Ancient Art in 2004. In 2008 the association decided to revise the guidelines, considering some changes as necessary. The main one was the adoption a new requirement for provenance, asking museums to be sure about the object was out of its country of modern discovery prior to or legally exported there from after November 17, 1970. This term clearly refers to the 1970 UNESCO Convention date of entry into force in the previous version, that of 2004. The guidelines asked only to museum of acquiring art materials with at least 10 years of provenance. Even though the 2013 revision improved on new changes, as the addition of new objects exceptions to the 1970 date, as it was based on the implementation of the 2008 AAMD Guidelines version, this latter remains the most relevant modification. For further details, see: AAMD, Guidelines on the Acquisition of Archaeological Material and Ancient Art, available at: https://aamd.org/standards-and-practices (accessed November 24, 2013).

nations was at least a signal for the illicit traffic art market.

As Briggs points out in commenting the Italy-MET agreement: "Museums should refuse to purchase artifacts of unknown provenance. In its most extreme form, museums should be denied the right to exhibit illegally excavated works and forced to effectuate their restitution. The argument follows that if museums know they will have to return the pieces, they will adopt stricter acquisition policies requiring more diligent research into the provenance of the work, and refuse to trade anything that is even borderline suspicious – thus the significance of the Met's voluntary restitution of the krater".[421]

Under the Italian perspective, the achievement of the Agreement was principally a way to avoid the recourse to a litigation in the U.S. system, and posed the basis for a possible replication, whether possible.

This is the other relevant matter: the effective replicability of the MET model. It constitutes, in fact, one of the main limits of the agreement, because it could result difficult to meet again all the principle factors characterizing it. First of all, the extremely high value of the Euphronios Krater, both under the artistic and economic perspective.[422] On this crucial point, Briggs doubts that Italy would have lavished so many energies, time, and money, making it a priority also for the Carabinieri action, if the object would have been a lesser value or meaning for the national patrimony. At this purpose, he states: "the Model's effectiveness may therefore be limited by the stature of the work".[423]

Secondly, Italy was highly determinate in recovering its cultural heritage, fighting the illicit international traffic through all possible means, such as diplomatic negotiations and legal actions. Its action has been described as "aggressive".[424]

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[421] See: Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International restitution of Cultural Property", *Chicago Journal of International Law* 7 (2) (2007): 628.
[422] The krater was paid "nearly eight times the highest price ever paid for an ancient vase". See: Safercorner, "Saving Antiquities for Everyone, Italy and the Met: Three Decades of Controversy Finally Resolved?", December 9, 2006, available at: http://www.savingantiquities.org/italy-and-the-met/ (accessed November 24, 2013).
[423] See: Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International restitution of Cultural Property", *Chicago Journal of International Law* 7 (2) (2007): 644.
[424] "[…] since the late 1990s, Italy has intensified its pursuit by going after museums in foreign courts, criminally prosecuting dealers and curators in Italian courts, and negotiating bilateral agreements while strengthening the investigative capabilities of Carabinieri." See: Aaron Kyle

Thirdly, the existing framework of bilateral agreement between Italy and United States[425] helped to develop the resolution disputes accords, leading the Italian Ministry of Culture and the American Museum to the negotiating table.

Fourthly, the presence of clear evidences regarding the Medici's conspiracy, connecting the international network of illicit traffic from Italy, through Switzerland and arriving in the United States was a decisive element to prove at least the illicit provenance of the archaeological artifacts, even though the museum never admitted any responsibility.

Fifthly, the MET is one of the most famous and exclusive museums, not only in the United States, but all over the world. This element surely does not characterizes every museum in the world. Furthermore, the MET had high interest in reaching the agreement at that time, as in the same period the Leon Levy and Shelby White Court for Roman and Etruscan Art was on the way to be launched.[426] This implied also that the risk of a long legal action could affect both the economy of the museum, that invested about nine hundred million dollars for its renovation and the opening of the new area dedicated to the Greek and Roman times, and much more it would have damage its public name and imagine.[427] The terror of a trial in the public eye was due both to the exceptional privilege that the Museum has in New York City,[428] as well as because it is largely funded with

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Briggs, "Consequences of the Met-Italy Accord for the International Restitution of Cultural Property", *in Chicago Journal of International Law*, Vol. 7, N. 2, 2006-2007, p. 639. Briggs adds also the timetable implemented by Italy since 1990s: in 1999 Italy obtained the Sicilian Platter of Gold, after having petitioned the U.S Government to take a legal action against the MET, which owned the object. In 2001, Italy succeeded in negotiating a Memorandum of Understanding with the U.S. Government, strengthening its export control. In 2004, Italy influenced the U.S. in intervening against the Getty museum for the forfeiture of the Aesteas Krater, illicitly acquired by the museum in 1981. The krater had been effectively restituted in November 2005, at the time of the Italian indictment of Marion True in a criminal prosecution. On this last point, Jason Felch considers the restitution as an attempt of the Getty to re-establish good relations with Italy. See: Jason Felch, The Getty Returns 3 Ancient Artifacts to Italy, Los Angeles Times A 31, (November 10, 2005).

[425] http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/bilateral-agreements/italy (accessed November 24, 2013).

[426] See: Metropolitan Museum of Art, Metropolitan Museum Launches "21st Century Met", (February 24, 2004), available at: http://www.metmuseum.org/about-the-museum/press-room/news/2004/metropolitan-museum-launches-21stcentury-met-interior-construction-plan-to-return-roman-and-hellenistic-art-to-public-view-in-majestic-new-setting-renovate-and-reinstall-galleries-for-islamic-art-19thcentury-art-modern-art-and-modern-photography (accessed November 24, 2013).

[427] See: Hugh Eakin and Elisabetta Povoledo, Met's Fears on Looted Antiquities Are Not New, *New York Times E1*, February 20, 2006.

[428] "The Metropolitan Museum of Art is one of the world's largest and finest art museums. Its

public funds.[429]

Sixthly, the richness of Italian cultural heritage was a real resource, that MET evaluate positively, considering the possibility of including the loans of many valuable works of art in the agreement. No similar significant exchanges can be establish with other Countries. Therefore, one evident limit is the restricted applicability of the agreement to source nations that can loan cultural objects of high cultural interest.[430]

Another relevant element in the case of the Italy-Met agreement is that it overlaps the previous Memorandum of Understanding, established in 2001, and renewed during the negotiation time for the restitution of the krater. This feature is important because the renovation of the MOU had an impact also on the bilateral agreement. Before 2004, Italy was allowed to concede loans for public display only for one year, with exceptions agreed only in particular circumstances, evaluated on a case-by-case basis.[431]

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collections include more than two million works of art spanning 5,000 years of world culture, from prehistory to the present and from every part of the globe. […]Last year it was visited by 4.7 million people." See: Metropolitan Museum of Art, http://www.metmuseum.org/about-the-museum/press-room/general-information/2010/an-overview-of-the-museum (accessed , November 24, 2013).

[429] "For more than a century the City of New York and the Trustees of The Metropolitan Museum of Art have been partners in bringing the Museum's services to the public. The complex of buildings in Central Park is the property of the City, and the City provides for the Museum's heat, light, and power. The City also pays for approximately one-third the costs of maintenance and security for the facility and its collections. The collections themselves are held in trust by the Trustees. The Trustees, in turn, are responsible for meeting all expenses connected with conservation, education, special exhibitions, acquisitions, scholarly publications, and related activities, including security costs not covered by the City. In addition, the State of New York provides valuable support through the New York State Council on the Arts." See: The Metropolitan Museum of Art, An Overview of the Museum, available at: http://www.metmuseum.org/about-the-museum/press-room/general-information/2010/an-overview-of-the-museum (accessed November 24, 2013).

[430] See: Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International restitution of Cultural Property", *Chicago Journal of International Law* 7 (2) (2007): 644.

[431] The Government of the United States of America recognizes that the Government of the Republic of Italy permits the interchange of archaeological materials for cultural, exhibition, educational and scientific purposes to enable widespread public appreciation of and legal access to Italy's rich cultural heritage. The Government of the Republic of Italy agrees to use its best efforts to encourage further interchange through:

1. promoting agreements for long-term loans of objects of archaeological or artistic interest, for as long as necessary, for research and education, agreed upon, on a case by case basis, by American and Italian museums or similar institutions, to include: scientific and technological analysis of materials and their conservation; comparison for study purposes in the field of art history and other humanistic and academic disciplines with material already held in American museums or institutions; or educational presentations of special themes between various museums or academic institutions;
2. encouraging American museums and universities jointly to propose and participate in

In sum, the most distinctive value of the model established by this bilateral agreement is that it settles the dispute through an out-of-court solution, avoiding negative effects for the museum, such as the legal costs of a possible trial, while Italy officially launched its international campaign for the recovery of the most important artistic treasures, lost as a consequence of illicit excavations and traffic. The aggressive diplomatic cultural action agreed to recover a large number of works of art, especially through the collaboration among the Ministry of Culture, the direct action for the recovery implemented on field by the Italian Carabinieri and in coordination with foreign police forces, the contribution of the Italian diplomacy.[432]

5.2. Cases Concerning Resolution Through Bilateral Agreements: Italy and the Boston MFA[433]

The bilateral agreement between the Italian Ministry of Culture and the Boston Museum of Fine Arts (hereinafter, MFA) confirms that the previous agreement concluded with the Metropolitan Museum of New York constituted a model for the following accords for the restitution of cultural objects, signing the beginning of a new era of cultural cooperation between Italy and the most important museum institutions of the United States of America. Also in this case, in fact, Italy granted the loans of "significant" pieces to the American Museum, in return for the restitution of the works of art.

On September 28, 2006 the Boston Museum of Fine Arts formally returned thirteen Greeks and Roman antiquities to Italy.[434] Evidences about the

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excavation projects authorized by the Ministry of Culture, with the understanding that certain of the scientifically excavated objects from such projects could be given as a loan to the American participants through specific agreements with the Ministry of Culture;
and
3. promoting agreements for academic exchanges and specific study programs agreed upon by Italian and American institutions.

[432] See: Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International restitution of Cultural Property", *Chicago Journal of International Law* 7 (2) (2007): 636-646.

[433] The author desires to particularly thank Ms. Victoria Reed, Sadler Curator for Provenance at Museum of Fine Arts of Boston, for information and sources suggestions.

[434] Among the restituted works of art, there were also parts of candelabrum, ancient Greek water jugs, a mixing bowl, oil flask and other vessels with painting of gods, dating as far back as 530 BC. A table with photographs of the works of art restituted to Italy is available in the Annex of this study.

illegal excavation, export and purchase of all the pieces emerged during the investigations that conducted to the conviction of Giacomo Medici[435] and the allegations against Marion True and Robert Hecht. [436]

A leading role for the disclosure of case has been played by the U.S. media, who made public that some of the pieces discussed in True's and Hecht's trials were included in the MFA collection.[437] Furthermore, both the trials against Medici and against True and Hecht "allow[ed] the Italian authorities to identify antiquities that have been removed from their archaeological contexts by illicit digging".[438] As a consequence, the Boston MFA representatives contacted the

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On the agreement, see the Press Release attached in the Annex Section of this study. As explained before, among all the bilateral agreements between Italy and U.S. Museums for the restitution of Italian claimed antiquities, only the text of the MET-Italy one has been released. It must be underlined here that the Boston MFA implemented a number of restitution in last decades, facing many cases of claims for cultural objects included in its collections. Apart from the thirteen pieces objects of the 2006 restitution to Italy, other examples of deaccession, restitution or removal from its collections are: a bronze statuette restituted to the Musée de la Chartreuse of Douai of France, where it had been plundered in 1901; a marble torso of Weary Herakles, restituted to Turkey; a medieval embroidery taken from the Diocesan Museum of Trento during the World War II; a Fifteenth Century painting of a Madonna with Child, stolen in Warsaw in 1940s; a panel attributed to Raphael, restituted to Italy in 1971, which represents the most known restitution in the MFA's history. On the so-called "Boston-Raphael" some interesting details on the story and the U.S. law must be added. The Boston MFA acquired the painting in December 1969. It was declared to be purchased in Switzerland. Instead, Italian authorities' investigations discovered it had been purchased in Genoa, in the North of Italy and then smuggled. After that, the U.S. Customs Service that the object had been imported in the U.S. without being declared by a museum curator. For this reason, the painting had been seized. Even though the works of art can be legally imported in the United States duty-free, and with no obstacles, the mistake in declaring it at the customs provoked the seizure at damage of the Museum. The painting was restituted to Italy, and the Boston MFA did not get any compensation for the price paid, because the seller's estate failed. As Bator declares: "It was the failure to declare that made the Museum's possession of the painting vulnerable, since it is unlawful to import objects without declaring them, whether the item is dutiable or not. 19 U.S.C. §§ 1484-1485 (1976). Undeclared objects are subject to seizure and forfeiture; the importer of such objects is subject to fines and penalties. 18 U.S.C. §§ 542, 545 (1976); 19 U.S.C. 1592, 1595, 1602-1621." See: Paul Bator, "An Essay on the International Trade in Art", *Stanford Law Review* 34 (2) (1982): 287. For details on the MFA restitutions, see: Victoria Reed, "Due Diligence, Provenance Research, and the Acquisition Process, at the Museum of Fine Arts, Boston", *Journal of Art, Technology, and Intellectual Property Law* 23 (2) (2013): 362-363. About the "Boston Raphael", see: Karl E. Meyer, *The Plundered Past: the Story of the Illegal International Traffic in Works of Art*, (New York: Atheneum, 1973), 101-108.

[435] For details on Giacomo Medici's role in the illicit traffic of antiquities, see Paragraph 5.1. concerning the MET-Italy Agreement. Medici's involvement in both two cases constitutes a relevant elements for his implication in the international illicit traffic of antiquities.

[436] Respectively, Former curator of the J. Paul Getty Museum and an American dealer. Robert Hecht and Marion True were indicted in 2005 by the Public Prosecutor Office of the Tribunal of Rome, because of their involvement in the international illicit traffic of works of art.

[437]For further elements on art dealers involvement in the criminal procedures, see: Elisabetta Povoledo, "Boston Museum Returns 13 Ancient Works to Italy," *The New York Times*, September 29, 2006, available at: http://www.nytimes.com/2006/09/29/arts/design/29mfa.html (accessed January 20, 2014).

[438] David Gill and Christopher Chippindale, "From Boston to Rome: Reflections on Returning Antiquities", *International Journal of Cultural Property* 13 (2006): 311.

Italian Ministry of Culture. This led to a fast negotiation process, which ended five months later with the signature of the agreement.[439]

One of the possible reasons of the ready resolution of the negotiation and the achievement of the solution might has been connected with the documents found during the raid in Medici's warehouse in the Geneva Free Port, and the proves emerging in True' and Hecht's trials. Considering these elements, probably the Boston Museum deemed its position as fragile to firmly oppose to the Italian requests. Even though, on the other side, no clear evidence of the awareness of the Boston MFA about the illicit provenance of the Italian antiquities came out, impeding Italy from taking a legal action on the case.[440]

During the raid coordinated by the Swiss and Italian Police of September 13, 1995, the famous Polaroid photographs[441] and many Greek and Roman works of art proved the involvement of Medici in an international network connecting all the actors involves in the international traffic of Italian art antiquities,[442] from the Italian tomb raiders, passing through Switzerland and arriving to the U.S. art collectors and museum market.[443]

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[439]See: The Boston Museum of Fine Arts Press Release, available at: http://www.mfa.org/collections/art-past/italian-ministry-culture-agreement (accessed January 20, 2014).

[440] See: Elisabetta Povoledo, "Boston Museum Returns 13 Ancient Works to Italy," *The New York Times*, September 29, 2006, available at: http://www.nytimes.com/2006/09/29/arts/design/29mfa.html (accessed January 20, 2014).

[441] Thirty polaroid archives were discovered. See: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), 66. In particular, the polaroids have been defined as "the clinching piece of evidence" to make investigators able to recognize the works of art requested by Italy, proving also and the illicit origin of a many other antiquities included in the collections of other museums. See: David Gill and Christopher Chippindale, "From Boston to Rome: Reflections on Returning Antiquities", *International Journal of Cultural Property* 13 (2006): 312.

[442] For further details on the international network acting in the illicit traffic of cultural objects, aslo known as "the Medici Conspiracy" (which inspired also the name of the book), see: [442] Peter Watson and Cecilia Todeschini, The Medici Conspiracy: *The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), 16-18, 265, 290, 362. In particular, the polaroids have been defined as "the clinching piece of evidence" to make investigators able to recognize the works of art requested by Italy, proving also and the illicit origin of a many other antiquities included in the collections of other museums. See: David Gill and Christopher Chippindale, "From Boston to Rome: Reflections on Returning Antiquities", *International Journal of Cultural Property* 13 (2006): 312.

[443] Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (New York: Public Affairs, 2006), 20-22. See also: David Gill and Christopher Chippindale, "From Malibu to Rome: Further Developments on the Return of Antiquities", *International Journal of Cultural Property* 14 (2007): 206.

Among the photographs found in the Medici's warehouse, some portrayed the statue of Viba Sabina, Hadrian Imperator's wife, formerly conserved in Hadrian's Villa in Tivoli. The sculpture was purchased in 1979 from the Swiss dealer Fritz Bürki, and Hecht acted as an intermediary.[444] No clear information were made public about the provenance of the statue. Thus, the photographs found in Medici's warehouse helped to clarify its international transfers, before arriving to the Boston Museum, contrasting controversial reports without certain foundation.[445]

The statue has been part of the huge acquisition of art antiquities purchased by the MFA from different art galleries and dealers, during the lapse of time between 1971 and 1999. As Hecht was part of the list of art providers of the museums, Italy suspected that at least many of the antiquities acquired by the MFA in that period had been clandestinely excavated in Italy and then illegally exported.

Also in this case, the recourse to the negotiation and refraining from a trial helped to find a mutual efficient solution, opening to a strengthening cultural cooperation between the two parties. Furthermore, the MFA showed the interest in sharing information with the Italian Ministry of Culture on its future acquisitions of Italian antiquities. This point is highly relevant and made significant its inclusion in this study.[446] To guarantee the origin and provenance of the works in its possession, the Museum added a dedicated section to its own website, that also takes into account request of restitution of artworks acquired by the Museum between 1933 and 1945, by identifying and making these objects public.[447]

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[444] It is interesting to underline as the two are the same subjects involved in the Euphronios case for the transfer in Switzerland of the ancient work of art.

[445] "The portrait of Sabina was claimed to have come from 'an aristocratic family collection in Bavaria' which has the ring of the anonymous histories so often seen in sale catalogs 'Property of a Gentleman'. Given that the piece appears in the Medici Polaroid archive, this history for Sabina is demonstrably false". See: David Gill and Christopher Chippindale, "From Boston to Rome: Reflections on Returning Antiquities", *International Journal of Cultural Property* 13 (2006): 314.

[446] See: Elisabetta Povoledo, "Boston Museum Returns 13 Ancient Works to Italy," *The New York Times*, September 29, 2006, available at: http://www.nytimes.com/2006/09/29/arts/design/29mfa.html (accessed , January 20, 2014). It is interesting to underline here that this position posed the MFA on a different level also in comparison to the MET Museum. The letter, in fact, refused to include such a clause in its agreement.

[447] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento:

Italy agreed to grant loans of significant works from the country to the MFA's displays and special exhibitions program.[448] Such collaboration opened a new cultural exchanges between the two institutions, that is still ongoing, helping to concretely deter the illicit trafficking of antiquities and allowed an American institution to exhibit some of the Italian greatest treasures, thanks to long term loans.[449]

5.2.1. Provenance Research and the Panel of Saint Virgil: Boston MFA restitution practice

With regard to the issue of provenance research and possible dispute, Ms. Reed stated that each case must be analyzed separately.[450]

An exemplar decision has been taken by the MFA in 2009, with regard to an embroidered panel of the Fourteenth Century, portraying Saint Virgil life and originally owned by the Diocesan Museum of Trent.[451]

In 2007 Evelin Wetter, a Swiss scholar and curator of Late Middle Ages fabrics at the Museum of Abegg-Stiftung of Riggisberg, contacted MFA Boston curators and revealed some information on the iconography of the panel. Wetter informed that the panel in possession of the Boston MFA was part of a collection of the Diocesan Museum of Trento, from where it disappeared during the in the period during the World War I and II. The MFA started a series of inquiries on its origins and past owners.

Museo Diocesano, Temi Editrice, 2011), 28-29. This service provided by the MFA mainly concerns the research on Nazi Looted Art. For more details on the Nazi Looted Art and the American Museums coordinated effort to recover it, see the following paragraph.

[448] As a demonstration of the ongoing cooperation between Boston and Rome, see Ms. Victoria Reed's statement in her interview in the Annex Section of this study: *" [...] we were proud of the exhibition of the "Brutus" statue, from the Capitoline museum last year; and we are waiting for the "Madonna di Senigallia", a Piero della Francesca's painting, that has been recovered by the Italian Carabinieri. It should arrive within the end of September. We also had some stellar loans from Italy for the exhibitions "Titian, Tintoretto, Veronese: Rivals in Renaissance Venice" and "Aphrodite and the Gods of Love"*.

[449] For information on recent exhibitions at the MFA of loaned works of art from Italy, see the interview to Ms. Reed in the Annex of this study.

[450] See Ms. Victoria Reed's statement in her interview in the Annex Section of this study.

[451] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 25.

The panel resulted to be part of a broader fiction representing Saint Virgil's life, which belonged to the Diocesan Museum of Trent before disappeared during the XX Century. When the museum closed during World War I and II, its artworks had been relocated in the Diocesan Museum warehouse for their protection Later on, these suppositions were confirmed by the 1908 Diocesan Museum catalog, the embroidery has been classified as "missing" or "unknown location".[452]

There are no certain information about how the antique dealer, Arturo Grassi, came in touch with the MFA curator Gertrude Townsend in 1946. The panel was the only work of art acquired by the MFA from Grassi, who had galleries in Brooklyn and London. From the researches in the MFA archive, Gertrude Townsend asked information to Grassi about the provenance of the panel. He answered that the Italian owner of the panel had any kind of information about the story represented by the embroidery, no specific detail could be available to help in interpreting it. In November 1946 Townsend decided to proceed to acquire the panel for 3,000 dollars (about 23,500 Euros).[453] As Reed specifies, the MFA decision of purchasing the panel in 1946 shall not be judged as a superficial action: it was quite common at that time for curators to be confident in dealers' declarations on works of art provenance information. Furthermore, it was impossible for Townsend to have knowledge about the panel story, as Saint Virgil iconography was known in the limited area of Trento and Tirol.[454]

Even considering that the de-accession represented a weighty lost for the MFA,[455] and that it had been acquired by the museum as a *bona fide* purchaser,

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[452] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 25.

[453] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 26.

[454] George Kaftal and Fabio Bisogni, *Iconography of the Saints in the Paintings of the North East Italy*, (Florence: Sansoni, 1978), 1056-1064, as cited in Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento:Museo Diocesano, Temi Editrice, 2011), 26.

[455] The Boston MFA ha san enciclopedic collection, made of works of art from al lover the world, including paintings, photographies, sculptures, works-on-paper, textiles, musical instruments, of all ages. This explains better the meaning of the inclusion of the Saint Virgil panel in the

the MFA preferred to proceed to the restitution of the panel. There are several reasons that led the Board of Directors decide for the de-accession. First of all, even though at that time the curator's decision of acquiring the panel was acceptable, according to the standards of the time, it must also be considered that new ethical criteria are now respected. Nowadays, the MFA could not decide to acquire such a cultural object, without certain provenance information and documentation. In addition, the panel was probably illegally imported in the United States after a theft in the Diocesan Museum of Trento deposit during the war. As a proof, the MFA acquired it in 1946, but the disappearance from Trento was declared only in 1955. Also for this reason, the de-accession may be considered as a "due" action.[456]

Finally, as the Museum of Boston purchased the panel in 1946, it had been probably stolen during the 1940s. Because of the illegal origin of the panel, the Museum could not claim any property right. On December 16th, 2009 MFA Board of Directors voted for the de-accession, and in 2010 the panel came back to Trento.[457]

This example helps to illustrate the rising adoption of ethical criteria by museums, and in particular, the MFA inclusion of the clause on the sharing of information with the Italian Ministry of Cultural Heritage and Activities for its future acquisitions seems totally respondent to this vision.

Nowadays, more and detailed information concerning the provenance of the object are asked before purchasing a work of art. This procedure is considered

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collection. At the same time, this probably made the Board of Directors enough sensitive to evaluate the value of the panel in its original tryptic, deciding for its de-accession from the museum collection. This explanation is based on the information available in: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 25-32.

[456] The illegal import of the panel would also imply the violation of the current American Law, Article 18 USC §542 e §545. About the declaration on the disappearence of the panel in Trento, see: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 25.

[457] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 25.

an essential requirement before the acquisition process. American Museums, in fact, must be particularly cautious especially with those cultural objects that could have experienced transfers of property during the Nazi era and the World War II, responding to the standards established during the 1998 Washington Conference on Holocaust-Era Assets.[458] The main aim deals with the identification of works of art confiscated by the Nazi regime and their restitution to the legitimate owners or their descendants. In 1998, a coordinated action has been launched also by the American Association of Museums (AAM)[459] and the Association of Art Museum Directors (AAMD), which released their guidelines[460] regarding the museums acquisitions of cultural properties which had been transferred in Europe between 1933 and 1945. The member institutions must accomplish detailed researches on the provenance of the works of art that could be part of the Nazi confiscations. Whether the research shows an unlawful transfer of property, the museum is not allowed to conclude the acquisition procedure. In addition, guidelines impose to museums to share and make public the acquired information on the interested works of art.[461]

A first example of the MFA commitment in the recovery of Nazi Looted Art may be represented by the case of four tapestries celebrating the life of Urban VIII, whose owners were forced to sell because of the Nazi persecution in Germany in 1930s. The tapestries were realized by the Barberini Factory of Rome, and sold at the end of XIX Century. Part of the tapestries arrived in Berlin before 1928, at the antiquarian shop Margraph & co., whose owners were Jakob and Rosa Oppenheimer. They lost control over their business and properties, trying to escape from Germany and from Nazi persecution in 1933. In 1935, their

[458] See: Washington Conference on Holocaust-Era Assets, available at: http://fcit.usf.edu/holocaust/resource/assets/index.HTM (accessed February 5, 2014).
[459] The current name is American Alliance of Museums (AAM), http://www.aam-us.org/ (accessed February 5, 2014). In 2003, AAM launched also the Nazi-Era Provenance Internet Portal, available at: http://www.dfs.ny.gov/consumer/holocaust/hcpopr030908.htm (accessed February 5, 2014).
[460] See: "American Alliance of Museums (AAM), Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era", available at: http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era, and AAMD, Final Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933.1945), available at: https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.docx, (accessed February 5, 2014).
[461] This theme has indeed a relevant value, but it has to be considered here partially, as this issue shall deserve a separate examination due to its complexity. Also for this reason, it has been referred to give instead an overview of the recovery action implemented by the major American associations related to Art and Museums field.

firm was auctioned by the Nazi authorities. The Oppenheimers died before World War II was over, without receiving a reward for their lost property. Thus, the four tapestries were sold in the above mentioned auction, bought by an unknown buyer and brought to the United States few years later by a private collector. When Boston MFA verified all this information and details, the museum contacted the Oppenheimers' heirs, informing them about the museum possession of the tapestries. After few months, the two parties reached a financial agreement which lead to a legal sale, allowing the tapestries to still be legitimately part of MFA collections.[462]

A last example of the MFA action in the recovery of cultural property may be given through a brief report on the *Madonna con Bambino* (The Virgin with Child) case. It helps to explain how sharing information on the provenance of the artworks with a broader public may facilitate the resolution of cultural property disputes for museums.[463] In this case, in fact, a decisive role has been played by the website of the museum, making public the information on the painting of the Polish painter Tadeuszx Konopka. The painting resulted acquired by the MFA from a German art dealer in 1970. After few months the sharing of on line information on the MFA website, the Polish Embassy of Washington contacted the museum in Konopka's nephew's name, Anna Konopka Unrug. She was able to demonstrate that the panel had been seized to her parents during the Insurrection of Warsaw in 1944. MFA decide to de-access the panel.[464]

[462] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 30. MFA adopted a similar solution in 1999 with the heirs of Federico Gentili di Giuseppe, in the case concerning the *Adorazione dei Magi*, a painting of Corrado Giaquinto (accession n. 1992.163), as reported by Reed.

[463] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 31.

[464] See: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento: Museo Diocesano, Temi Editrice, 2011), 31.

5.2.2. The Solution and Lessons Learnt

The decision to add here also other cases to the bilateral agreement with the Italian Ministry of Culture aims to underline as MFA generally acted to solve any cultural property dispute in a fast and direct way, applying ethical standards and not claiming to be in a *bona fide* purchaser position, resulting an excellent example in the bilateral dispute of cultural objects field. Moreover, these examples show also as MFA decided to evaluate on a case by case basis each situation, not limiting to the request or claim from possible owners, but also implementing a detailed action of provenance research, promoted by the museum itself.[465]

Incidentally, in this general context, the bilateral agreement with Italy remains a unique kind of accord for MFA, especially considering the partnership program of exchanges it let establish.[466]

This agreement is similar to the one signed by Italy and the Metropolitan Museum of Art (MET). Both provided for the return of the claimed objects and the commitment of the Italian Government to lend "significant works". However, the most relevant difference regards that the MET refused to accept the clause indicating that the museum should inform Italy in the case of any future acquisitions, loans or donations of objects that could have Italian origin.[467]

Maurizio Fiorilli, the Italian government's chief negotiator, commented about the "open and honest" Boston MFA position during negotiation that: "They thought more about cultural projects than property".[468]

Even though according to some scholar this approach could be the result

[465] As stated by Ms. Reed "In 1998 MFA launched a systematic exam of its own collections, with particular attention for the Nazi period", see: Victoria Reed, "Il ricamo di San Virgilio fra Trento e Boston: ricerche sulla provenienza delle opere d'arte e restituzioni nella prassi del Museum of Fine Arts", in *Una Storia a Ricamo. La Ricomposizione di un Raro Ciclo Boemo di Fine Trecento, Domenica Primerano* (ed.), (Trento:Museo Diocesano, Temi Editrice, 2011), 28.

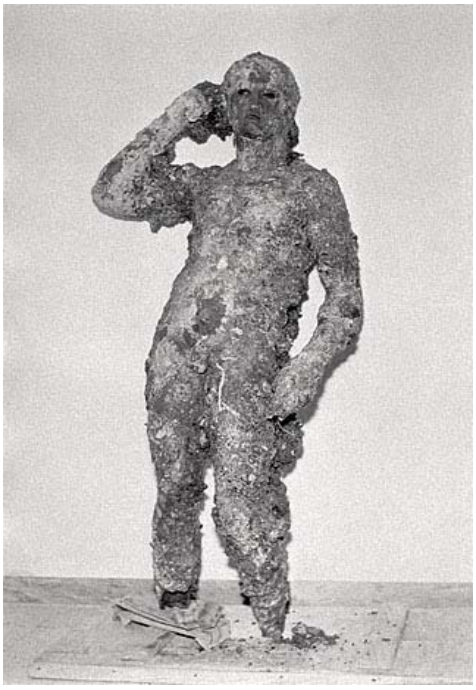
[466] "[..] the agreement with Italy is such a positive development - we are able to acquire objects with the full knowledge and assent of the source country; we still have to conduct research and do our due diligence, but there is no guesswork involved in terms of the potential for claims." Excerpt from Reed's interview, included in the Annex Section of this study.

[467] See previous paragraph on the details if the Italy-MFA agreement.

[468] See: Elisabetta Povoledo, "Boston Museum Returns 13 Ancient Works to Italy," *The New York Times*, September 29, 2006, available at: http://www.nytimes.com/2006/09/29/arts/design/29mfa.html (accessed January 20, 2014).

of Marion True's trial,[469] pushing all museums to follow a more collaborative approach, it could be evaluated as the right path for a future fruitful collaboration in the international cultural heritage framework.

5.3. Impossibility of Concluding an Agreement: The Trials on the Athlete of Fano[470]



The Victorious Youth with corrosion and incrustation layer. Source: The J. Paul Getty Museum, available at: http://www.getty.edu/art/gettyguide/artObjectDetails?handle=tech&artobj=8912&artview=55508 (accessed January 24, 2014).

[469] See: Giulia Soldan, Raphael Contel, Alessandro Chechi, Case 13 Antiquities – Italy and Boston Museum of Fine Arts, ArThemis, Art-Law Center, University of Geneva, April 2012, available at: https://plone.unige.ch/art-adr/cases-affaires/13-antiquities-2013-italy-and-boston-museum-of-fine-arts-1/case-note-13-antiquities-italy-and-boston-museum-of-fine-arts (accessed February 2, 2014).

[470] The author desires to particularly thank Mr. Stephen W. Clark, Vice President, General Counsel, and Secretary, at The J. Paul Getty Trust of Los Angeles, for the the interview and information he granted.
This case is examined here with a consideration limited to the international legal dimension, and aiming to compare it to the other cases analyzed in the present study. This premise is necessary, because of the particular complexity of the case and its interest also under Italian domestic law. Any specific analysis will be developed under maritime international law and with a limited examination of the Italian litigation law. For en extensive examination of the international maritime dimension, see: Tullio Scovazzi (ed.), *La protezione del patrimonio culturale sottomarino nel Mare Mediterraneo*, (Milan: Giuffré, 2004), VIII – 448; Tullio Scovazzi, "The Law of the Sea Convention and Underwater Cultural Heritage", *The International Journal of Marine and Coastal Law* 27 (2012): 753–761.

"In the predawn light of a summer morning in 1964, the sixty-foot fishing trawler *Ferruccio Ferri* shoved off from the Italian seaport of Fano and motored south, making a steady eight knots along Italy's coast.[471] [...] By nightfall, the Ferri had reached its destination, a spot in international waters roughly midway between Italy and Yugoslavia. [...] The crew cast its nets into the dark waters. They fished all night, sleeping in shifts.[472]

Just after dawn, the nets got caught on something. Pirani[473] gunned the engine and, with a jolt, the nets came free. As some of the men peered over the side, the crew hauled in its catch: a barnacle-encrusted object that resembled a man.

"*C'è un morto!*" cried one of the fishermen. A dead man!

As the sea gave up its secret, it quickly became apparent that the thing was too rigid and heavy to be a man. The crew dragged it to the bow of the boat. The life-size figure weighed about three hundred pounds, had black holes for eyes, and was frozen in a curious pose. Its right hand was raised to its head. Given the thickness of its encrustations, it looked as if it had been resting on the sea for centuries. [...]

He let out a yelp. "*È d'oro!*" he cried, pointing at the flash of brilliant yellow. Gold!"[474]

This is the description of the discovery of the famous statue attributed to the Greek sculptor Lysippus, who was Alexander the Great's favorite artist,[475] as rendered in the best seller "Chasing Aphrodite". It is still object of the dispute

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[471] The trawler was active in the central area of the Adriatic Sea and sailed under Italian flag. See: Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di Diritto Internazionale privato e processuale* 1(2011): 7.

[472] The statue was discovered in deep sea, 32 nautical miles south of the town of Fano, "midway between Italy and [former] Yugoslavia". See: Jason Felch and Ralph Frammolino, *Chasing Aphrodite*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 9. See also: Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (work in progress), (August 22, 2013), 6, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).

[473] Romeo Pirani was the boat's captain. See: Jason Felch and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities and the World's Richest Museum,* (Boston, New York: Houghton Mifflin Harcourt, 2011), 9.

[474] See: Jason Felch and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities and the World's Richest Museum*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 9- 10.

[475] The Greek sculptor, Lysippus, was supposed to be born around 370 B.C. The statue has been named in different ways. It is equally famous as: "the Victorious Youth", "the Getty bronze", "the Athlete of Fano". Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (August 22, 2013), p. 2, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).

between the J. Paul Getty Museum of Los Angeles and Italy. It is supposed to be dated about Fourth Century BC, representing a young runner, holding a victorious pose after his race.[476]

5.3.1. Provenance and History

The Victorious Youth currently on view at the Getty Villa Malibu. Source: The J. Paul Getty Museum, available at: http://www.getty.edu/art/gettyguide/artObjectDetails?artobj=8912 (accessed January 24, 2014).

About the ancient origins of the statue, it has probably been removed during the Roman Empire and dispersed in the sea during the transfer by ship.[477] The then-Director of the Metropolitan Museum of New York, Thomas Hoving, commented on the statue: "I went to see the sculpture in Munich in December, 1972... I looked at it for a long while I touched it all over, its face, the underside

[476] David L. Shirey, "Greek Bronze for Sale for $3.5 Million," NYT, 10 March 1973, available at: http://news.google.com/newspapers?nid=2457&dat=19730319&id=LYIzAAAAIBAJ&sjid=azgHAAAAIBAJ&pg=753,1252248 (accessed January 12, 2014).

[477] Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (work in progress), (August 22, 2013), 4, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).

of its arms and its legs. The artist of the work did not take any shortcuts in modeling his sculpture the way many Roman artists later did. It is a great visual experience."[478]

The ongoing fifty-years dispute over the ownership of the "Victorious Youth" probably represents the most intrigued, complicated and, also for this, fascinating case among the ones selected for this study.

After the discovery of the bronze, above reported in the description of the Felch and Frammolino's best seller, the fishermen hid the bronze at Dario Felici's home, a captain Ferri's friend.[479] Felici gave testimony to the Carabinieri that, using a hoe, he provoked the detachment of a fragment of marine concretion from the statue.[480] The fishermen spread the news of the statue around the town, willing to sell it. In the meanwhile, they interred the bronze in a cabbage field.[481] Later on, they contacted two brothers, Giacomo and Fabio Barbetti, known in the town for their buying and reselling activity of ancient articles found by fishermen or farmers.[482] After had buying the Victorious Youth for 3.5 million lire, the Barbettis hid it in a local church, governed by Father Giovanni Nagni. The statue remained in the church until May 1965, when probably was transferred to Gubbio. In 1989, Dario Felici made available the fragment for the Carabinieri. Another fragment would have been in possession of one of the Barbettis, but when the

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[478] David L. Shirey, "Greek Bronze for Sale for $3.5 Million," NYT, 10 March 1973. Shirey's article reported Hoving's position, according to whom, in 1973 the statue was in Munich. In the same article, Shirey also wrote: "Hoving said the Metropolitan would consider buying the bronze only if it had a clear title. Italian authorities are currently an inquiry into a 2500-years-old Greek vase by Euphronios, which the museum purchased last September for $1 Million. The authorities believe that the vase was smuggled out of an Etruscan tomb in Italy in 1971." The online version of the article is available at: http://news.google.com/newspapers?nid=2457&dat=19730319&id=LYIzAAAAIBAJ&sjid=azgHAAAAIBAJ&pg=753,1252248 (accessed January 12, 2014).

[479] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P.The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 2-3.

[480] Dario Felici recognized the same piece during the trial. See:Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 4.

[481] See: Jason Felch and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities and the World's Richest Museum*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 11.

[482] See: Jason Felch and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities and the World's Richest Museum*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 11.

"Lysippus" reappeared in Malibu, violations were prescribed and it was impossible to prosecute them.[483]

5.3.2. 1965-1989: The Transfers of the Bronze, the Getty Purchase and the First Round of Trials

With regard to the events occurred since the statue was discovered, the present examination will try to consider the fundamental events connected to the judgments concerning the bronze, considering that the case results particularly intrigued.

In 1965, the Italian authorities were informed by an anonymous letter about a recent journey of the Barbettis in Germany, in order to meet a possible purchaser for the bronze.[484] In 1966, a first trial declared Barbettis and Nagni acquitted, because of the lack of evidence on the statue precise place of finding and the doubt about it was discovered in Italian territorial waters. They were also charged with selling stolen property in violation of Article 67 of the Italian Law of 1 June 1939, n. 1089.[485]

This decision was appealed to the Court of Appeals of Perugia. On January 27, 1967 the Barbettis were found guilty of receiving stolen property, while Father Nagni of aiding and abetting in committing the crime.[486] The decisions were appealed to the Supreme Court, which reversed the previous verdict and declared that there was no sufficient evidence on the place of discovery of the statue, being impossible to identify whether it was Italian

[483]See: Giallo archeologico, *Il Tirreno*, November 20, 2007, available at: http://ricerca.gelocal.it/iltirreno/archivio/iltirreno/2007/11/20/LT4PO_LT403.html (accessed February 27, 2014).

[484] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P.The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 5.

[485] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P.The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 5.

[486] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 5.

territorial waters. Furthermore, even though the indicted admitted to have bought and re-sold the statue to an unknown subject from Milan during the proceedings, on November 8, 1970 the Court of appeal of Rome acquitted all the indicted, because of the evidential uncertainty on the alleged offenses. The Court considered that the prosecutors did not establish that the statue was found in Italian waters, because of lack of evidence, as it was not clarified in which waters the sculpture was found. Furthermore, there was insufficient evidence to prove that the statue was of "artistic and archaeological interest ".[487]

In 1972 the statue was found in Munich, in the shop of the art dealer Heinz Herzer. Thomas Hoving asserted that he saw the statue two times: the first time in 1972, and the second time in 1973, when its restoration was completed. In the same year, other proceedings started in order to achieve the restitution of the statue. The decision arrived in 1976 and was ineffective. In 1977, these proceedings were re-opened, but the judge decided that the procedure was "not to be proceeded", because it was impossible to identify the individuals that were present to the finding of the statue. In the meanwhile, at the end of these proceedings, the statue reappeared in Germany.[488]

The bronze saga entered in its core part in those years. In July 1973, Carabinieri were in Munich for investigations on another case. In that occasion they visited Herzer's art shop, and even though only the legal representative was present, they may check that he was in possession of the documents certifying the purchase of the statue. The bronze was in the shop, but the legal representative refused to provide any photograph of the statue and further information. On the basis of this inspection, the Magistrate of Gubbio opened a proceeding against unknown individuals for the crime of illegal export. On January 9, 1974 the magistrate prepared an international rogatory request, asking for: the seizure of

[487] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 6.

[488] Alessandra Lanciotti, "The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze", in *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*. Silvia Borelli and Federico Lenzerini eds., (Leiden/Boston: Martinus Nijhoff Publishers, 2012), 301-304. See also: Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (August 22, 2013), 9, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).

the sculpture, Herzer's questioning as a suspect of the crime of illegal export of archaeological finds from Italy, and the photographic documentation of the statue. The District Court of the Bavaria rejected the Italian request on the grounds that the crime alleged by the Italian authorities did not allow extradition.

By analyzing the documents produced by the legal defense of The J. Paul Getty Trust,[489] it results that, in 1974, the Prosecutor of the Court of Munich informed the Italian Magistrate that it was impossible to proceed against Mr. Heinz Herzer. Indeed, the procedure was filed by the German jurisdictional authority, and on April 8, 1974, the same prosecutor informed Herzer that the seizure of the statue was no longer necessary. The seizure would therefore have been revoked, and Herzer could freely dispose of the bronze.[490]

In the meanwhile, since 1964 the Carabinieri Art Squad never stopped its research for the Victorious Youth. As a result, on November 24, 1977 the Carabinieri finally succeeded to get a photograph of the statue, which portrayed the statue covered with concretions, as it appeared at the time of discovery, thanks to Renato Merli, a merchant from Imola, that was interested in purchasing it in 1964. Mr. Merli told that he saw the sculpture in the summer of 1964, in the home of a fisherman of Fano, and that he later knew that the find had been sold to the Barbetti brothers of Gubbio. Thanks to Mr. Merli's information, Carabinieri were able to identify all the fishermen of the two trawlers which took part to the recovery of the bronze. Moreover, it was possible to verify also the identity of the Barbettis, that bought the statue directly from Romeo Pirani and Guido Ferri. During the questioning, Mr. Merli declared to the Carabinieri that the fishermen who found the statue told him that it was discovered in the waters in front of the area of Pedaso, in the Ascoli Piceno province. It seems that they found the bronze yet lacking feet and eyes.[491] The Magistrate of Gubbio intervened again: through

[489] The information is based on the "Ordinanza 2010". See: Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 7.

[490] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 7.

[491] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07

the INTERPOL of Rome, he asked for the collaboration of the American, British and Belgian police.[492]

On November 25, 1977, the Italian Embassy in London informed the competent Italian authorities that the director of the London gallery "Artemis" asserted that his lawyers, Manca and Graziadei, had gained a regular export license for the statue of the "Victorious Youth" purchased by the Getty Museum.[493]

On December 6, 1977, INTERPOL revealed that statue had been sold in London by David Carritt, an art dealer, and the Belgian Baron Leon Lambert, to the Getty Trust for US$3.95 million. Mr. Carritt was director of the company art dealers "David Carritt Ltd." based in London, a branch of "Artemis S.A.," a European art consortium based in Luxembourg.[494] The "Artemis S.A." had bought the sculpture in 1974 by Heinz Herzer. The "Victorious Youth" had remained in London from early 1975 to early 1977, and was subsequently loaned for a short time to the Museum of Denver in Colorado, before being purchased to the J. Paul Getty Museum in Malibu.[495]

On January 2, 1978, the Carabinieri Art Squad sent the photograph of the "Victorious Youth" to the Ministry of Culture, to ascertain with the Exporting Branch Office if a regular export license was requested in the past. On May 23, 1978, the Central Office for the Environmental, Architectural, Archaeological,

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R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 7.

[492] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 7.

[493] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G..N.R. N. 3357/07 R.G..I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 8.

[494] "Founded in 1970, evidence presented by the Italian state at the Tribunal in Pesaro in February 2010 suggests that the firm was created *ad hoc* to craft false provenance for antiquities rafficking." The Artemis bought the bronze for US$ 700,000 in 1972. See: Lynda Albertson, CEO, ARCA, "OpEd: Italy's Corte Suprema di Cassazione and the Getty Bronze: What will be the fate of the Fano Athlete?", February 26, 2014, ARCA, available at: http://art-crime.blogspot.it/2014/02/italys-corte-suprema-di-cassazione-and.html (accessed February 26, 2014).

[495] See: Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (work in progress), (August 22, 2013), 14, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).

Artistic and Historical Heritage of the Ministry of Culture referred that no authorization to the export of the Lysippus' statue had ever been released by the competent Italian authorities. This element showed that the director of the gallery Artemis testified false declarations about the alleged possession of an export license.[496]

Concurrently, on March 21, 1978, INTERPOL sent to the Italian authorities the documents on the investigations conducted by the U.S. police, who had listened to Miss Sally Ela, secretary at J. Paul Getty Museum. The lady reported that the statue arrived into the U.S. from the port of Boston, through the Customs Agency "TD DWNING Company", sent by the agency Artemis, accompanied by a bill dated August 15, 1977. Then, the statue was left by the trustees of the Paul Getty Museum at the Museum of Fine Arts in Boston, to avoid paying taxes in California. After this period, the bronze was transferred for climatic reasons to the museum in Denver, Colorado, where it remained on display until March 1978, and subsequently brought to the J. Paul Getty Museum in Malibu, California. In 1974, the statue had been inspected by the Superintendent of the Paul Getty Museum, in order to verify its authenticity. The Museum was also in possession of the judgments of the Italian authorities in 1965 and 1970, which had acquitted the sellers of the statue and from which it appeared that the same was found in international waters and, therefore, it was not subject to Italian law.

Coming back to Europe, on June 21, 1978, the New Scotland Yard police answered to the Magistrate of Gubbio's request for international rogatory. The U.K. police reported that it seemed the bronze was acquired in 1971 by the "Establissement D.C.", an Artemis branch located in Vaduz Lichtenstein. Later on, the bronze was transferred in London for one year, in the warehouses of "David Carritt Ltd.", another branch of the "Artemis S.A.", based in Luxembourg. Mr. Carritt testified to the New Scotland Yard Police that he did not know anything about the transfer of the statue from Italy to London, and that he was not in possession of any relevant document of the statue.

[496]Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 8.

Afterward, the statue was sent to the Museum of Classical Antiquities of Munich, where it remained for other two years, to be restored, until 1975. In that year, J. Paul Getty started to have contacts to purchase the bronze. However, he was not willing to move to Munich to inspect the Victorious Youth, thus the latter was moved to London at the Carritt's warehouse again. Under the International Law dimension, it is interesting to remark here that no other inquiry from Italy was processed by U.K. authorities, as their country did not joined the 1970 UNESCO Convention, mentioned by the Italian Magistrate.[497]

The sculpture was purchased by the Getty Museum, and then transported to Boston on August 8, 1977. Carritt reported that the antique dealer Heinz Herzer was also a board member of the Artemis Fine Arts and that he acted as consultant during the sale of the statue at the Getty Museum.[498]

On June 21, 1978, the Embassy of Italy in Washington D.C. revealed that the Department of State declared its impossibility in giving action to the international rogatory, advanced by Italy, because of the lack of the needed legal requirements. With regard to the pending judgments in Italy, on November 25, 1978, proceedings of Gubbio came to an end, with a verdict of non-suit because the authors of the crime remained unknown.[499]

On May 15, 1989, the then Director General of the Italian Ministry of Culture sent a letter to the then Director of the Getty, asking to return the bronze to Italy. The Getty evaluated negatively this opportunity.

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[497] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 9.

[498] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G..N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 9.

[499] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G..N.R. N. 3357/07 R.G..I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 9.

5.3.2.1. The MET-Getty Negotiations on the Acquisition

Initially, Mr. Getty knew about the "Victorious Youth" through Bernard Ashmole, his antiquities advisor, an Oxford archaeologist.[500] In 1974, the two most important museums of the United States of America agreed for a joint ownership of the bronze, that would be financed by the Getty. From its side, the MET would loan 17 frescoes to its homologue. As mentioned by Fincham, the Italian intervention for the recovery of the bronze blocked the negotiations for a common acquisition by MET and Getty from Artemis. However, Herzer refused to identify the individuals who sold him the statue, and the situation did not run into any further investigation.[501]

J. Paul Getty was suspicious. For this reason, he decided to suspend the agreement, and charged his attorney to investigate the legal status of the "Victorious Youth". Doubts on the legal status were explicitly raised also by von Bothmer, who informed Hoving about his concern and told that the previous acquittal of the Barbettis and Father Nagni "does not permit the legal conclusion that the statue was [...] legally exported from Italy."[502] Furthermore, giving his advice to the MET board for the acquisition proposal, Dietrich von Bothmer added: "I recommend that legal opinions be solicited as to the possibility that a foreign government may at a later time, especially after publication of the statue, claim it as 'artistic patrimony'."[503]

As underlined by Felch, it results impossible to verify if the MET's director and curator effectively succeeded in verifying the statue's legal status, because Von Bothmer died in October 2009 and Hoving in the following

[500] Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).
[501] Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (work in progress), (August 22, 2013), 9, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).
[502] Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).
[503] Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).

December.[504] Probably due to the impossibility for the sellers of providing enough evidence on the history of the "Victorious Youth", the Getty proposal – advanced in 1973 – to purchase it for $3.8 million with the MET failed, considering the condition imposed to the sellers of assuring that no legal consequences would have followed the acquisition.[505]

Thomas Hoving, in a letter dated June 26, 1973, seemed to cooperate in the same direction: "It is clearly understood by us that no commitment is to be made by me on your behalf for the Greek Bronze until certain legal questions are clarified." The letter included the details of the loan agreement and the co-ownership of bronze. In particular, all the legal requirements and the needed documentation to conclude the purchase were attached. Hoving also wrote that the two Museums asked the lawyer Herbert Brownell to acquire the written consents for the purchase of bronze at the Italian authorities.[506] Hoving told to the Carabinieri that one or two days following the sending of his letter Mr. Carritt called him at the phone from London, who asked to raise the offer for the statue at $3.9 million. Hoving accepted. But a week before the meeting of the MET Acquisition board to vote on the bronze purchase, Carritt referred the price was

[504] Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).
[505] Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (work in progress), (August 22, 2013), 9, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014). See also: Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).
[506] Also this letter has been translated and acquired in the trial documentation. Some excerpts are particularly interesting: "It is clearly understood between us that no effort on my part is considered to be taken in respect of the Greek bronze until certain legal conditions are not clarified. These include: a) the clear title to the property Artemis-Herzer, b) if there is or not a possession by the Italian State, c) the circumstances concerning his leaving Italy, d) the possible jurisdiction by the Ministry of Culture, or other entity of the Italian Government, i) as we have yet said, the general counsel of the MMA, Herbert Brownell... will get in touch with Artemis' lawyers in Rome, Giovanni Manca and Vittorio Grimaldi "Studio Graziadei," to review all the legal issues, both past and present, ii) it is equally clear that, Herbert Brownell or his representative shall endeavor to discuss legal issues with both the Italian Superintendent, the Italian police or any other Italian authority to find out if there may or not any legal claim on the bronze Athlete. It is also pointed out that Herbert Brownell will discuss all the legal problems with your lawyers, iii) I enclosed also a copy of the letter to David Carritt regarding the offer and all the important legal issues, as we talked about it...". See: Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 10.

raised at $4.2 million, on request of Herzer, and that should be paid in Deutsche Mark because of the decrease of the dollar exchange value. Getty refused this new condition and gave instructions to wait a week and then proposing the offer to $3.7 million, and to $3.6 million after another week, and so on. According to Getty, the problem was not due to the dollar exchange value, but to the impossibility for Herzer to provide the requested documents that should have arrived from Italy. Consequently, the agreement failed. Hoving had no further contacts with Artemis and Herzer, the meeting MET Acquisition board was canceled and Brownell ended its investigation to obtain the necessary documents from Italy.[507]

As commented by Felch, Hoving reassured J. Paul Getty that also the MET's attorney would be involved, asking to the Italian officials to "clarify the circumstances under which the statue had left Italy and whether the Italians were still pursuing a legal claim."[508] In addition, Hoving wrote to Mr. Carritt: "As I previously explained during our conversation, the conclusion of the purchase by Mr. Getty is subject to the preliminary examination and approval from the Metropolitan Museum Counsel and from Getty's legal adviser with regard to certain aspects that may request further certifications or qualifications."[509]

In 1976, new negotiations started, led by Getty and the then curator of the antiquities, Jiri Frel. On June 6, 1976, Getty died.[510] At that time, the trustees of

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[507] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 11.

[508] Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).

[509] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 9. See also: Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." L.A. Times, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014): "Enamored of the bronze, Getty asked his Los Angeles attorney to obtain an opinion on its legal status. The attorney talked to the seller's Italian lawyers, who insisted that Italy had no claim to the statue."

[510] Alden Whitman, "J. . Paul Getty Dead at 83; Amassed Billions From Oil", New York Times, June 6, 1976. Available at: https://www.nytimes.com/learning/general/onthisday/bday/1215.html (accessed February 26, 2014).

the Museum voted for the acquisition of the "Victorious Youth" for $3.95 million, "the very price Getty had recently refused to pay."[511]

Patrik Whaley, member of the Getty Trust, testified that he dealt with the purchase negotiations of the statue. According to Whaley, no one among the members of the Council – that approved the purchase on July 27, 1977 – knew about the potential Italian authorities' claims over the statue. They all were aware about the trail ended at the Court of Appeal of Rome in 1970, acquitting the defendants, because the "Victorious Youth" did not come from Italian territorial water. Whaley added also that he knew about the previous negotiations with the MET for the co-ownership of the statue. According to the agreement, even though the Getty would have paid 75% of the price, and the remaining 25% from the MET, but the latter would have had the up to 75% of the ownership of the property and the Getty up to 25%. The MET would have loaned some secondary works of art. Whaley reported also that a Getty Museum advisor, Mr. Bramlett, persuaded Mr. Getty that the deal was not profitable. Lastly, Whaley also claimed that no one among the directors were aware of the documents drawn up by the MET for the co-ownership agreement.[512]

Among the documents presented by the Getty lawyers for the trial, there is a letter written by Mr. Getty on August 31, 1972, sent to Herzer, in which he expressed his doubts on the statue provenance, and Getty asked for the copy of all the documents regarding the Italian trial concluded in 1970.[513]

On October 4, 1972, Herzer and Artemis' attorneys, Gianni Manca and Vittorio Grimaldi of the studio "Ercole Graziadei", sent to their colleague representing the Getty Museum, Stuart T. Peeler, an opinion "on the issue of the

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[511] "When the statue arrived in Malibu in mid-November 1977, the Getty formally announced its acquisition, enshrining it in its own humidity-controlled room at the new museum. As a final tribute to the founder, the board of trustees dubbed it "the Getty Bronze." Jason Felch and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities and the World's Richest Museum*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 25.

[512] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 11.

[513] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 12.

Greek bronze" and giving details on it. The Italian attorneys affirmed, in fact, that the statue was purchased in Brazil from one of their clients,[514] "Establissement pour la diffusion et la Connaissence des oeuvres d'Art "DC"", by a group of Italian merchants, issuing an agreement dated June 9, 1971.[515]

In the same document, the Italian attorneys informed about the trials ended in 1970 with a final judgment of acquittal by the Court of Appeal of Rome, specifying also that the sellers were acquitted with full formula, due to the motivation that the fact "did not constitute a crime", because it was impossible to establish both the place of discovery, and to ascertain the nature of property of historical and archaeological interest attributable to the statue.[516]

Manca and Grimaldi posed anyway the doubt of a possible claim by the Italian State, in the case that the identity of the bronze and the exact place of its finding would be clearly ascertained in the future. At the same time, the two attorneys sustained that such evidence was almost impossible: consequently, the Getty Museum had no reason to worry, because Herzer and Artemis purchased the property legally and in good faith, after the acquittal of the sellers. In conclusion, they added also that the sentence had already been judged as *res judicata* and, in any case, any possible Italian claim would have been precluded by their clients' previous acquisition of the statue.[517] Despite this showing of absolute certainty of

[514] While prosecuting their investigations, also the Carabinieri followed the hypothesis that the statue had been sent to South America by sea. From Fano the bronze probably arrived to Salvador de Bahia, Brazil, where it was supposed to be received by "Father Leone", an Italian who lived in the Capuchins' convent of Alagoinbas. On June 14, 1978, however, the INTERPOL reported that said "Father Leone" was effectively identified in Brazil in the person of Sinibaldo Ricci, from Fano, which refused to provide any information on the statue. Thus, the transfer in Brazil is still debatable.

[515] This statement confirmed David Carritt's testimony given to British police, asserting that the bronze had been bought by a branch of the Artemis the "Establissement DC", located in Vaduz Liechtenstein. See: Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 12.

[516] Manca and Grimaldi underlined that the Italian state did not bring a civil action in the trial "showing in this way no interest in the recovery of bronze. Neither bronze nor any photograph of the same were never produced during the process and the prosecution was based solely on verbal tests. Therefore, it is not legally proven that this bronze is the same object of the process ... ". See: Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 13.

[517] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di

the Italian attorneys, the "Ordinanza 2010" expressly asserts that the perfect "identity between the bronze detained by the Getty and the statue object of the present investigation was instead indisputably proven in today's proceedings through the photographic documentation and analysis on the acquired fragment of marine concretion delivered by Celesti Elio to the Magistrate of Pesaro, and is not disputed by the defenders of the museum."[518]

As final point in the proceeding events, on December 21, 2009, on request of the Getty Museum's defenders, the legal representative of the Trust, Stephen W. Clark, was heard. Mr. Clark affirmed that the Getty Museum concluded the purchase fully convinced about the legality and legitimacy of the transaction, on the basis of the documents provided by the sellers. Clark particularly underlined the verdict of the trail in 1970, the dismissal of Herzer from the German judicial authority, and the legal opinions provided by Herzer and Artemis' lawyers, which stated the absence of any Italian legal claim on the statue and that the right of ownership of the sellers was lawful.[519]

As resulting from the "Ordinanza 2010", Mr. Clark answered the Getty Museum was not in possession of the contract of purchase agreement, that had presumably took place in Brazil on June 9, 1971 between the Italian sellers and the "Establissement pour la diffusion et la Connaissence des oeuvres d'Art "DC"", to which express reference is made in the opinion of the Lawyers Manca and Grimaldi on October 4, 1972. Mr. Clark also pointed out that, when the "Getty bronze" was purchased, the Museum had not yet been established the practice to prepare a dossier for the purchase, providing all the information on the provenance, the documents and artistic details on the works of art, that constitute the basis for the legal documentation of the good title for the purchase and the

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Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 13.

[518] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 13.

[519] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 13.

authenticity. In conclusion, Mr. Clark testified also that all the documents had been provided by the sellers, who guaranteed their truthfulness and fairness.

On this last point, it is interesting to underline as generally one of the main objection raised against the Getty position is that the acquisition process was concluded without a diligent inquiry into the title history of the statue. Instead, in the interview released by Mr. Clark in August 2013, he sustained an opposite position, asserting that when the statue was purchased the J.P. Getty Museum strictly verified the provenance of the bronze. As reported in question XIV of the interview to Mr. Clark, he asserted: "When Mr. Getty died in 1976, the Getty Museum made a strict review on the legal status of the statue, and bought it in good faith legally in 1977 believing all was legally correct. I spoke to the lawyer who examined the provenance. It was a very expensive object. It was bought for little less than 4 million dollars. The lawyer who was reviewing to make sure that Mr. Getty could buy it in good title, and he was completely satisfied. He had no doubt under the US law or Italian law."[520] As declared in an interview rendered to Jason Felch, Professor Patty Gerstenblith commented the Getty hard position in trying to persuade the Italian authorities about the respected due diligence as follows: "Instead of clearing it with Italian authorities, they went to the one party that was sure to give them the answer they wanted."[521]

5.3.3. From the 2007 Bilateral Agreement until the Ongoing Trail: a Missed Occasion?

On August 1, 2007, following the path opened by the bilateral agreement with the MET, the Italian Ministry of Culture, Francesco Rutelli and the Director of the J. Paul Getty Museum, Dr. Michael Brand, reached an agreement,[522] which led to the restitution of 40 cultural objects claimed by Italy, and establishing a

[520] For details, see the "Interview to Mr. Stephen W. Clark, Vice President, General Counsel and Secretary, The J. Paul Getty Museum, 1200 Getty Center Drive, Los Angeles" in the Annex Section of this study.
[521] Jason Felch, "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze." *L.A. Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14 (accessed March 6, 2014).
[522] This agreement has yet been recalled at the paragraph "5.1.3. The Bilateral Agreement**"** of this study.

cultural exchange program.[523] The decision of setting aside the dispute over the "Victorious Youth" was a needed point to reach the bilateral agreement.[524] This detail is particularly relevant for the aim of this study, underlining as in this case it was completely impossible to establish the basis of an out-of-court resolution for the "Lysippus", even though the same institutions were able to conclude an agreement for the sound restitution of 40 pieces.

Indeed, in the same year, on request of the public prosecutor of the Tribunal of Pesaro, the allegations concerning the illicit export of the statue had been rejected, because of the expiration of the statute of limitation. The public prosecutor asked for the seizure of the statue, given as ascertained that the object had been illegally exported from Italy, under the Italian law.[525]

Briefly, the criminal elements have been evaluated in four judgments, given by the Court and the Court of Appeal of Perugia, the Supreme Court and again the Court of Appeal of Perugia.[526] Eventually, the defendants were acquitted for lack of evidence that the statue was effectively found in the Italian territory. However, the Italian request for the statue seizure is still pending. This issue has been faced by the Court of Pesaro, by an order dated June 12, 2009,[527] with regard to the question of jurisdiction, and by an order of February 10, 2010,[528] for the merit of the question. Currently, the decision of the Court of Cassation is still to be announced. On February 25, 2014, Section I of the Court decided to defer the judgment to the Section III.[529]

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[523] Press Release, "Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome", September 25, 2007, http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html (accessed November 24, 2013). This document contains also the detailed list of the 40 objects restituted to Italy. The list is also available in the Annex Section of this study, including the photographs of the objects.

[524] The agreement has been officially signed on September 25, 2007, at the Collegio Romano in Rome. See: The J. Paul Getty Trust Press Release – Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome, September 25, 2007, http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html (accessed November 24, 2013).

[525] Tribunal of Pesaro, Order of 12 June 2009, No. 2042/07 RGNR, 2-3, available at: http://it.scribd.com/doc/92449731/ORDINANZA-LISIPPO-2012-05-03 (accessed November 24, 2013).

[526] See:Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di Diritto Internazionale privato e processuale* 1 (2011): 8.

[527] Tribunal of Pesaro, Order of 12 June 2009, No. 2042/07 RGNR.

[528] Tribunal of Pesaro, Order of 10 February 2010, No. 2042/07 RGNR.

[529] See: Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di Diritto Internazionale privato e processuale* 1 (2011): 5-18; Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze"*, in *Cultural*

In 2009, with regard to the jurisdiction, the Court of Pesaro stated that "the statue was likely found in non-territorial waters", on the basis of the declarations rendered at the time by the fishermen who were present at the moment of the discovery, and analyzing the encrustation of some shellfish on a piece detached from the statue during one of the transfers that followed to its discovery.[530]

Resorting to a precedent decision, related to the case of the Melqart, a bronze statue, discovered by Sicilian fishermen in January 1955,[531] the Court of

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Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law, Silvia Borelli and Federico Lenzerini eds., (Leiden/Boston: Martinus Nijhoff Publishers, 2012), 301-304. See also: Lynda Albertson, CEO, ARCA, "OpEd: Italy's Corte Suprema di Cassazione and the Getty Bronze: What will be the fate of the Fano Athlete?", February 26, 2014, ARCA, available at: http://art-crime.blogspot.it/2014/02/italys-corte-suprema-di-cassazione-and.html (accessed February 26, 2014). It is interesting to underline that the description of the case by Albertson states: "It was purchased by the J. Paul Getty Museum under less than transparent circumstances in 1977 for $3.95 million."

[530] As specified by Professor Scovazzi, given the information acquired, the statue should have been located within the continental shelf, on the seabed, without the possibility to establish if it was on the Italian or former Yugoslavian side. See: Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", in Rivista di Diritto Internazionale privato e processuale, N. 1, January-March 2011, p. 8. As specified by Professor Scovazzi, given the information acquired, the statue should have been located within the continental shelf, on the seabed, without the possibility to establish if it was on the Italian or former Yugoslavian side. See also: Jason Felch and Ralph Frammolino, *Chasing Aphrodite*, (Boston, New York: Houghton Mifflin Harcourt, 2011), 9; and Derek Fincham, "Transnational Forfeiture of the "Getty" Bronze", (work in progress), (August 22, 2013), 6, available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204 (accessed January 12, 2014).

[531] For the details of this case, see: Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di Diritto Internazionale privato e processuale* 1 (2011): 5 - 8. In particular, it is interesting to recall here the theory developed by the Court, due to the absence of legal precedents. The Court stated that, the trawler nets were the extension of the Italian territory, as the ship sailed under Italian flag. In this way, it was possible to apply Article 4 of the Italian Code of Navigation providing that "Italian ships sailing in high sea and the aircrafts in spaces not subject to the sovereignty of other countries are considered as Italian territory". With regard to the Italian judge decision, an interesting question is posed by Professor Scovazzi, wondering about the effect for the cultural heritage protection in the case that, instead of the Italian trawlers, both in the Melqart and in the Lysippus cases, the wrecks would have been found by treasures hunters sailing under flags of states applying the principles of "law of salvage" and the "law of finds" (admiralty law). For an extensive analysis of the consequences related to the hypothesis above mentioned, see: Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di Diritto Internazionale privato e processuale* 1 (2011): 13-18. Synthetically, the law of salvage consists of the right acquired by the subject who discovers a wreck in seawaters on the object against its owner, until the latter will provide a compensation for the salvage action successfully impended by the finder. A salvage definition is: "service voluntarily rendered in relieving property from an impending peril at sea or other navigable waters by those under no legal obligation to do so." See: Martin J. Norris, Benedict on Admiralty: the Law of Salvage 3A § 2, 1-4 (7th ed.1991), as cited by Mark A. Wilder, "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries", *Defense Counsel Journal* 1 (2000): 92.The law of salvage has three areas: property, life and treasure salvage. "Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in the cases of shipwreck, derelict, or recapture. *Success is essential* to the claim; as if the property is not saved, or if it perish, or in case of capture if it is not retaken,

Pesaro concluded that the Italian law shall be applied to the objects found in the high sea by a ship sailing under Italian flag, as the case of the "Victorious Youth" was. As a consequence, the Court established that Italian law and, in particular, Italian rules on Cultural heritage should have been applied "in the event of discovery of shipwrecks of historical and artistic interest in high seas, by a vessel flying the Italian flag, as occurred in this case. Given the applicability of Italian law, the existence of a right of property of the Italian State on the property in question must be acknowledged, as a direct consequence of the application of the law of the flag state...". [532]

A crucial passage in the Court's decision is represented by the following excerpt:

"In this context, the Court's jurisprudence […] has always come to the conclusion to deny that the third, who had purchased movable cultural objects in good faith in violation of the prohibitions under law no. 1089/1939, had become the owner, resulting in the inapplicability of both Article 1153 of the Italian Civil Code ("purchase *a non domino*" on the basis of a title abstractly suitable by the purchaser in good faith as a result of *traditio*), and Article 1161 of the Italian Civil Code (related to the adverse possession, abbreviated to ten-year for the owner in good faith, or twenty years in the case of bad faith, when a title even only abstractly suitable lacks)."[533]

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no compensation can be allowed", as statued by the Court in: U.S. Supreme Court - The Blackwall, 77 U.S. 10 Wall. 1 1 (1869), 12. Instead, the law of finds is based the unkown identity of wreck found in seawaters. Consequentially, the finder is entitled to acquired the right of property acquisition after he came into possession of the object. "The focus of salvage law is on the right to compensation for one's successful efforts, not title to the property. Title is presumed to still exist in the original owner. In contrast, the object of the law of finds is to vest title in the person who reduces abandoned property to his possession." See: Mark A. Wilder, "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries", *Defense Counsel Journal* 1 (2000): 93.
The text of the Italian Code of Navigation is available at: http://www.fog.it/legislaz/cn-0001-0014.htm (accessed January 12, 2014).

[532] Translation arranged by the author. Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 20.

[533] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 21.

As to the possible Getty Museum's *usucapio*, it was rejected because under Italian law (Italian Civil Code art. 826) this typology of acquisition of ownership is not allowed for the "non-available patrimony of the State", because they are objects of historical, archaeological, paleontological and artistic interest.[534]

In opposition, Professor Gaito, one of the Getty Museum's defense attorneys together with Emanuele Rimini, commented that the "Victorious Youth" cannot be included in the Italian non-disposable patrimony, because it has Greek – and not Italian – origins, it was not found in Italian waters, and nevertheless it could be part of the Greek non-disposable patrimony, as the statue was probably looted by the Romans in a Greece.[535]

The Court of Pesaro deemed that the special rules on the inalienability of cultural objects included in the state property shall prevail on the general rules regarding the *bona fide* purchaser and the expiration of the statute of limitation, respectively under Article 1153 and Article 1161 of the Italian civil code. Considering the rules applicable at the time when the facts occurred, Article 23 of the Law no. 1089/1939 is the relevant one.[536]

On February 10, 2010, the preliminary investigation judge if the Court of Pesaro, Luisa Mussoni, stated that the statue had been illicitly exported and

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[534] Guido Alpa, Vincenzo Zeno-Zencovich, *Italian Private Law*, (Abingdon, New York: Routledge, 2007), 108.

[535] The declaration is based on Professor Gaito's interview, as reported in: Simona Spagnoli, "Resolving International Disputes Over Cultural Property: The Case of Italy v. J. Paul Getty Museum", (Thesis Submitted to the Faculty of the Department of Arts Administration In Partial Fulfillment of the Requirements for the Degree of Master of Arts Savannah College of Art and Design, March 2011), 56, 102-ff..

[536] Article 23 of the Law June 1, 1939, 1089 on the "Protection of items of artistic or historic interest", published in the Official Italian Gazette n. 184 on August 8, 1939 "1. The objects mentioned in articles 1 and 2 (movable and immovable) are inalienable when they belong to the State or other entity or public institution." In particular, Article 1, on movable cultural objects regarded:
"things, real estate and furniture, which are artistic, historical, archaeological or ethnographic, including:
a) objects that may result of some interest for paleontology, prehistory and early civilizations;
b) objects of numismatic interest;
c) the manuscripts, autographs, the correspondence, relevant documents, incunabula, and all books, prints and engravings having character of rarity and value." The full text of the Law 1089/1939 is available at: http://www.liguria.beniculturali.it/PDFs/normativa/L.1089-39.pdf (accessed February 27, 2014). See also: Tullio Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di Diritto Internazionale privato e processuale*, 1 (2011): 9; and Cinzia Fenici, "La confisca della statua denominata "Atleta Vittorioso", *Il Sole 24 ore*, April 26, 2010, available at: http://fiere24.ilsole24ore.com/content/law24/penale/primiPiani/2010/04/la-confisca-della-statua-denominata--atleta-vittorioso-.html (accessed February 27, 2014).

ordered its immediate seizure, and the consequent restitution to Italy.[537] One peculiar feature of this case is that the statue falls into a particular regime, as it is not saleable. Indeed, Article 56 of the Italian Code of Cultural and Landscape Heritage provides the measures regarding the authorization for the alienation of cultural objects, excluding the ones falling under Article 54, paragraphs 1 and 2. The "Victorious Youth" falls under this latter provision (paragraph 2, letter a)).[538] For this reason, the Court considered that, even though the Museum is the currently owner of the statue, under Italian law, has not its property.[539] This assumption paved the basis for the seizure request.

Apart the subsequent Getty Museum's reaction, appealing to the Court of Cassation,[540] the biggest obstacle is posed by the fact that the statue is abroad, in a territory not subject to the Italian sovereignty. In this case, to enforce the seizure and make it effective before a U.S. Court, an administrative measure is required in order to allow the claiming State to "promote the action of the restitution before the Court of the country where the object illegally exported or stolen is located".[541] Because of this particular situation, an international cooperation is needed to enforce the original title of property on the requested object. The Order of the Court of Pesaro also refers to the provisions under Articles 75 and

[537] Tribunal of Pesaro, Order of February 10, 2010, No. 2042/07 R.G.N.R., 31.
[538] Article 54.2 of the Italian Code of the Cultural and Landscape Heritage:
"The following cannot be equally alienated:
a) immovable and movable things belonging to subjects indicated in Article 10, paragraph 1, which are the work of non-living artists and whose production goes back more than fifty years, until release from State ownership occurred, if necessary, following the verification procedures set out in Article 12". See: Italian Code of the Cultural and Landscape Heritage, as amended by the legislative decrees n. 156 and 157, on March 24, 2006, by Minister Rocco Buttiglione, which modified the previous Code "Urbani" on Cultural and Landscape Heritage (Leg. Decree 42/2004). See also: Wanda Vaccaro Giancotti, *Il Patrimonio Culturale nella Legislazione Costituzionale e Ordinaria. Analisi, proposte e prospettive di riforma*, (Turin: Giappichelli, 2008), 129-131.
[539] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 21. See also: Cinzia Fenici, "La confisca della statua denominata "Atleta Vittorioso", *Il Sole 24 ore*, April 26, 2010, available at: http://fiere24.ilsole24ore.com/content/law24/penale/primiPiani/2010/04/la-confisca-della-statua-denominata--atleta-vittorioso-.html (accessed February 27, 2014).
[540] See: The J. Paul Getty Trust Press Release, "Statement about the Ruling in Pesaro on the Getty Bronze", February 11, 2010, accessed May 25, 2012, available at: http://www.getty.edu/news/press/center/pesaro.html (accessed March 10, 2014).
[541] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, N. 2042/07 R.G.N.R. N. 3357/07 R.G.I.P. The text of the Ordinanza is available at: http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387 (accessed February 27, 2014), 24.

following of the Italian Code of Cultural Heritage and Landscape, referring to the "Restitution", when the illegally exported object is located in one of the European Union countries; otherwise for objects that are located outside the European Union territory, the Code refers to the 1995 UNIDROIT Convention, that is not applicable in the case here under analysis, as the United States did not ratified it.

The Court considered also the issue, raised by the Museum, on the impossibility to enforce the seizure in the case of an object acquired by a third party not involved in the crime. To this regard, the lack of an original title of property of Herzer and Artemis represents for the Court an evidence of the missing good faith of the purchaser. As the Museum decided to acquire a similar expensive object, importing it from abroad, looking into its provenance, and verifying the sellers' title of property would had been absolutely needed steps. The lack of due diligence[542] is a demonstration of a deep negligence.

In particular, the Court underlines that the contract attesting the purchase by the Italian sellers in Brazil on June 9, 1971 has never been transmitted. Moreover, the investigation conducted by the Carabinieri Art Squad did not succeed in finding evidence of the effective conclusion of the purchase. The negligent behavior of the Museum is evident, for the Court, in the decision of purchase the statue, on the grounds of the sellers lawyers' advice, that had a manifest economic interest in concluding the transaction.[543]

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[542] Generally speaking, "due diligence" attains the specific care that should be paid by a person before signing an agreement – or completing a transaction – with another party. More specifically, Article 4.1 of the 1995 UNIDROIT Convention states as follows: "The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object." The full text of the 1995 UNIDROIT Convention is available at: http://www.unidroit.org/instruments/cultural-property/1995-convention (accessed February 27, 2014). As affirmed by Gerstenblith, "due diligence refers to the conduct of the purchaser in investigating an object's provenance at the time of purchase.". See: Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials*, Third edn., (Durham, Carolina Academic Press, 2012), 652. See also: Sub-working group on the Prevention of thefts and Illicit trafficking of cultural goods.", Prepared by Smaragda Boutopoulou & Marlen Mouliou (Greece), February-May 2010, Available at: http://ec.europa.eu/culture/documents/due_diligence_report.pdf (accessed February 27, 2014). See also: IFAR, "Provenance Guide", available at: http://www.ifar.org/provenance_guide.php (accessed February 27, 2014). "Due diligence is establishing the full history of a cultural object from discovery or production and therefore consists one of the main means for preventing the loss of irreplaceable archaeological, historical and scientific information and thus protecting the cultural heritage of a state", as reported in:"Implementation of Due Diligence. European experts group on mobility of collections.

[543] Tribunal of Pesaro, Order of 10 February 2010, No. 2042/07 RGNR, 33.

Taking into consideration the Principles declared in the Chapter 2 on "Acquisition Policy" of the ICOM Code of Ethics for Museums, in particular 2.2 (Valid title) and 2.3 (Provenance and Due Diligence)[544], the missed request of seeing or coming into possession of the contract between the Artemis and the former owners of the statue exclude the possibility to consider it as the legal owner of the cultural object, even reckoning its declaration of *bona fide purchaser*.

On January 18, 2011, the Court of Cassation decided to transfer the case to the Court of Pesaro to re-open an examination on the merits, in consideration of the incorrect action issued against the 2010 order.[545]

On April 21, 2010, the judge Raffaele Cormio denied the Getty's appeal, because there were no reasons to support the Museum's request to suspend the forfeiture.[546]

Finally, on May 3, 2012 the order of forfeiture and the illegal export of the statue were confirmed by the pre-trial judge, Maurizio di Palma. At the moment this study is going to be completed, a final judgment of the Supreme Court is not yet available. As above mentioned, a date will be established for the verdict of the Third Chamber of the Court in next months. Many doubts still remain on the concrete enforcement of the restitution.

With regard to the Getty position, the Museum opposed the forfeiture order with three arguments. Firstly, since the criminal action was dismissed in

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[544] Article 2.2. "Valid Title":
"No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title."
Article 2. 3 "Provenance and Due Diligence":
"Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production." See: ICOM Code of Ethics for Museums 2013, available at: http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (accessed February 27, 2014).

[545] Court of Cassation, 18 January 2011, No. 6558. See: Alessandro Chechi, Raphael Contel, Marc-André Renold, "Case Victorious Youth - Italy v. J. Paul Getty Museum", Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011, available at: https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum/#footnoteF23 (accessed February 27, 2014).

[546] See: Getty Bronze Seizure Appeal Turned Down but High Court Ruling Still Pending, Agenzia Nazionale Stampa Associata, April 21, 2010, http://www.ansa.it/web/notizie/rubriche/english/2010/04/21/visualizza_new.html_1765197591.html (accessed February 24, 2014), as reported by: Leila Amineddoleh, "The Getty Museum's Non-Victorious Bid to Keep the "Victorious Youth" Bronze", *Art & Cultural Heritage Law Newsletter, American Bar Association Section of International Law* 3 (1) (2011):32.

2007 for the expiration of the statute of limitation, the forfeiture cannot be applied, as it was connected to that action. To this regard, on the basis of several precedents, the Pre-Trial Judge argued that the statue falls into the category of those objects whose confiscation is compulsory and is not inevitably connected to a verdict of guilty.[547] Secondly, the Getty stated that the Italian request of forfeiture had an illogical meaning, because the object is part of the Italian State's patrimony, even if situated abroad. Precisely because of its location, the Judge considered that resorting to the forfeiture was necessary to allow Italy to enforce its ownership right.[548] Lastly, the Museum claimed its non-involvement in the illicit export action.[549] Answering to this objection, as above mentioned, the Court opposed that the Getty Trust had a negligent behavior in concluding the purchase of the statue, without conducting a more careful enquiry on its provenance and origin. The Court's evaluation is based on the fact that the Getty officials decided to acquire the bronze, consulting only the sellers' lawyers, instead of the Italian authorities to verify the title and the export authorization, considering the information that the statue came from Italy.[550]

On this final point, the two opposed positions may be summarized by two statements.

Firstly, the position expressed by Professor Gaito: "one thing is cultural property; the dwelling place is something else. Taking note of your convictions, of the environmental habitat that has been rebuilt in Malibu, I wonder, wouldn't it be sufficient to recognize the statue of Italian/Croatian/most likely Greek paternity and leave it there where it has been for the last 40 years? […] Culture is without

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[547] Tribunal of Pesaro, Order of 10 February 2010, No. 2042/07 RGNR, 21.
[548] Tribunal of Pesaro, Order of 12 June 2009, No. 2042/07 RGNR, 9-10, available at: http://it.scribd.com/doc/92449731/ORDINANZA-LISIPPO-2012-05-03 (accessed November 24, 2013).
[549] Court of Cassation, 18 January 2011, No. 6558. See: Alessandro Chechi, Raphael Contel, Marc-André Renold, "Case Victorious Youth - Italy v. J. Paul Getty Museum", Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011, available at: https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum/#footnoteF23 (accessed February 27, 2014).
[550] Tribunal of Pesaro, Order of 10 February 2010, No. 2042/07 RGNR, p. 25. The information about Mr. Getty's denial to approve the purchase, because he demanded to get the permission from Italian authorities, constituted a clear element for the judge in considering that the Museum officials ignored the orientation and will of the Museum founder. On this, see also: Alessandra Lanciotti, "The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the 'Getty Bronze'", in *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Silvia Borelli and Federico Lenzerini eds., (Leiden/Boston: Martinus Nijhoff Publishers, 2012), 302-303.

borders. In the age of globalization it is an anachronism […] and if the statue will return to Fano then I think it would be irretrievably ruined".[551] Secondly, Professor Alberto Berardi pointed out that the restitution to the town of Fano shall find grounds on a logical basis: "For the Lysippus, not being able to replace it in water, I would think the best place would be closer to the place where it was disembarked, and that is Fano. I do not say this out of parochialism but following a precise logical thread."[552]

The choice of including the "Getty Bronze" case in this study is mainly due to the intention of underlining as the missing occasions in solving the bilateral dispute through ADR led to a long trial, that after many years has not yet provided a solution, and even in the case the Italian Supreme Court will uphold the forfeiture, its concrete enforcement is doubtable. The result seems to be an *impasse*, whatever will be the final judgment, regretting for the high costs both in terms of money and time for the parties.

Resorting to an out-of-court solution would have probably allow to find a mutual solution, providing an answer to the reciprocal positions. Perhaps, the conclusion of the bilateral agreement signed in 2007 could wait for a little longer, and not as a "partial result", letting aside the "Victorious Youth". In this way, the Museum may be allowed to consider that Italy was not so strongly persuaded to be in the right, and the Museum claims that the statue is surely more known in one of the most famous museums at the world, rather than in a little town.

After a so long time, reopening the negotiating tables seems a not admissible hypothesis, at least considering the displeasure expressed especially by the Museum for the high costs of the trials and the lengthy of the proceedings. On the contrary, Italy may resort to this possibility, once demonstrated the lack of the Museum's good faith and due diligence at the time of acquisition, and relying upon the consolidated experience in concluding profitable loans agreements with the U.S. museums. The Getty could at that point assess the possible damages due

[551] See: Simona Spagnoli, "Resolving International Disputes Over Cultural Property: The Case of Italy v. J. Paul Getty Museum", (Thesis Submitted to the Faculty of the Department of Arts Administration In Partial Fulfillment of the Requirements for the Degree of Master of Arts Savannah College of Art and Design, March 2011), 66, 102-ff..

[552] See: Simona Spagnoli, "Resolving International Disputes Over Cultural Property: The Case of Italy v. J. Paul Getty Museum", (Thesis Submitted to the Faculty of the Department of Arts Administration In Partial Fulfillment of the Requirements for the Degree of Master of Arts Savannah College of Art and Design, March 2011), 65.

to the opening of several similar claims both from Italy and Greece, considering that the Museum patrimony largely relies on these two countries' cultural objects.

Under the legal dimension, the question on the Getty possession of the object and the opposed Italian not extinguished ownership title may play a relevant role. At the same time, no clear evidence supports the Italian claim that the statue was discovered in Italian waters, and the Pre-Judge Trial of Pesaro admitted that they were international waters.[553] To this regard, doubts about the possible restitution have been expressed also by Professor Patty Gerstenblith: "If the bronze was found in international waters, rather than Italian national waters, I am doubtful that any U.S. court would recognize it as stolen. […] While the Italians claim that the bronze was illegally exported, illegal export does not, by itself, make the bronze stolen or otherwise illegal in the U.S. In future, the current application of the theory concerning the extension of the Italian territory to the nets of the ship that discover a wreck, when combined with the law of finds, may constitute a dangerous precedent, allowing to treasure hunters to vest title on the wrecks."[554]

Looking at the context issue, assumed that the statue is attributed to Lysippus, its Greek origin is enough clear. "But Maurizio Fiorilli, the attorney general of Italy, asserts that the Italian government has a strong claim for the return of the statue, and feels that Italy does not need to negotiate for what rightfully belongs to Italy. Fiorilli believes that the piece should be returned to Italy since it is Italian property. […] The Italian attorney general asserts that the statue belongs to Italy."[555]

At the same time, this case falls into the overall ethical battle played by Italy at the international level, and the Museum's position with regard to the good

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[553] Tribunal of Pesaro, Order of 12 June 2009, No. 2042/07 RGNR, 6-7. See: Alessandro Chechi, Raphael Contel, Marc-André Renold, "Case Victorious Youth - Italy v. J. Paul Getty Museum", Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011, available at: https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum/#footnoteF23 (accessed February 27, 2014).

[554] Martha Lufkin, "Greek Bronze Will Stay in the Getty Villa", Art Newspaper, April 14, 2010, http://www.theartnewspaper.com/articles/Greek-bronze-will-stay-in-the-Getty-Villa%20/20504 (accessed February 24, 2014).

[555] See: Getty Bronze Seizure Appeal Turned Down but High Court Ruling Still Pending, Agenzia Nazionale Stampa Associata, April 21, 2010, http://www.ansa.it/web/notizie/rubriche/english/2010/04/21/visualizza_new.html_1765197591.html , as reported by: Leila Amineddoleh, "The Getty Museum's Non-Victorious Bid to Keep the "Victorious Youth" Bronze", *Art & Cultural Heritage Law Newsletter, American Bar Association Section of International Law* 3 (1) (2011):32.

faith and due diligence profile provide full reason to continue the battle, in order to affirm those ethical principles with absolute certainty. On this point, some experts complain about the Italian will of using this case for its international battle. At the same time, before paying about $4 million, the trust would have paid more attention on the provenance, considering also the clear limits posed on the conclusion of the purchase by J. Paul Getty, who refused until his death to finalize it.[556]

Because of the failure of cultural cooperation, as well as political and diplomatic channels, the conclusion will be entrusted without appeal to the law certainty, possibly acting as a lesson for future similar cases, in which the alternative means of resolution might lead to mutual profitable exchanges and to the development of new formulas of cultural heritage management, given the opposite visions aiming the cultural heritage debate.[557]

5.4. Comparing Policies: from the Scandals to the Improvement of Acquisitions Standards for U.S. Museums

The scandals that affected the most important U.S. Museums had an impact of the Acquisition Policies and collections practices of Museums and Museums related associations. In particular, it was the case of the MET, Getty, and Association of Art Museum Directors (hereinafter, AAMD).

The MET Collections Management Policy is dated November 12, 2008. [558] Indubitably, also the bilateral agreement with Italy had an impact.[559]

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[556] Alessandro Chechi, Raphael Contel, Marc-André Renold, "Case Victorious Youth - Italy v. J. Paul Getty Museum", Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011, , available at: https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum/#footnoteF23 (accessed February 27, 2014).

[557] See: Quatremère de Quincy, *Lettres au général Miranda sur le préjudice qu'occasionneraient aux arts et à la science le déplacement de monuments de l'art de l'Italie, le démembrement de ses Ecoles et la spoliation de ses galléries, musées*, Edouard Pommier ed., (Paris: Macula, 1989), 88-89. John Henry Merryman, "The Free International Movement of Cultural Property", *New York University Journal of International Law and Politics*, 31(1) (1998): 4-14. Paul M. Bator, "An Essay on the International Trade ion Art", *Stanford Law Review* 34 (1982): 275-287. See also: Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials*, Third edn., (Durham, Carolina Academic Press,2012), 623-647.

[558] Philippe de Montebello represented a point of direct contact between the MET and the AAMD, contributing to determine new standards for both Museum and Association guidelines. See Sharon Cott's answer to question V in the interview she released, reported in the Annex section of this study. "The Association of Art Museum Directors (AAMD) guidelines are a fundamental reference for this step. The MET participated on the Task Force to create the AAMD their

As said, the Museum refused to make any reference or admission to the "incautious" acquisitions concluded in the past in the 2006 agreement. At the same time, Italy accepted to conclude the agreement with the MET. This diplomatic choice allowed the Museum to not offer any justification about the acquisition of the works of art that "voluntarily" decided to restitute to Italy.[560] For this reason, the conclusion of the agreement determined a sort of Italian implicit acceptance of the Museum conduct.

As a matter of fact, also the adoption of the J. Paul Getty Museum Policy for Acquisitions, approved by the Board of Trustees on October 23, 2006, arrived after the scandal that engulfed the Getty's former curator Marion True, who resigned in October 2005.[561]

Comparing the policies of the two Museums, some differences arise. First of all, the Met still leaves more of a loophole in the *caveat* about works of singular importance, instead the J. Paul Getty Policy Statement is less detailed, but it has written stricter provenance guidelines.[562]

Looking in detail to the text of the two documents a difference can be seen for the terms adopted by these two museums. The MET's "Provenance Guidelines" lists all the elements that must be verified to assure that the "Museum can obtain clear title" on the object that will be acquired.[563] The lexicon adopted

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guidelines, originally issued in 2004. Philippe de Montebello, the former MET Director, took part into the original Committee that developed the guidelines for archeological and antiquities objects. There was a revision in 2008, and a second one occurred in January 2013. These guidelines added several new procedures, only for Antiquities, as well as for Archeological Materials."

[559] See *infra* paragraph 5.1. of this research.

[560] "However, since these items have been "voluntarily" returned to Italy by the Getty and the Met, the analysis below assumes that the Italian government's view of provenance is the "Accepted Provenance" of the Euphronios Krater and the Syriskos Krater." See: Robin Short Myren, "Provenance Factors for Antiquities Acquisitions", *Society for California Archeology Proceedings* 24, (2010): 2, available at: http://scahome.org/publications/proceedings/Proceedings.24Myren.pdf (accessed October 21, 2013).

[561] On Marion True's accusation, and the consequent trial, that began in Rome on November 16, 2005, see: Peter Watson and Cecilia Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums,* (New York: Public Affairs, 2006), 94, 115-118, 123, 284, 289, 303-305. See also: Randy Kennedy, "Collecting Antiquities, Cautiously, at the Getty", *The New York Times*, June 26, 2007.

[562] This statement is based on lectures held by Professor Holly Flora on June 10, 2013, in the Course "Beyond the Law: the Ethics of Collectors and Collections", in the Program "Tulane-Siena Institute for International Law, Cultural Heritage and the Arts", Tulane Law School, Summer 2013.

[563] See Point D. "Provenance Guidelines", Article 1. "Guidelines for all Acquisitions" letter "a. Inquiry and Research", in "Collections Management Policy", of the Metropolitan Museum of Art, New York, Last Revised March 13, 2012, available at: http://www.metmuseum.org/about-the-museum/collections-management-policy#acquisitions (accessed October 21, 2013):
"The Museum shall rigorously research the provenance of a work of art prior to acquisition to

by the MET opens up to lighter degree of stringency if compared to the J. Paul Getty Museum's "Conditions of Acquisition", which expressly states: "no object will be acquired without assurance that valid and legal title can be transferred".[564]

Surely, the negative impact of Marion True's experience played a decisive role in the following Getty effort to offer a new imagine to the Museum after the scandal. The promotion of rigorous standards may be seen as a reaction, opting for a harsh style, that is the result of a precise legislative technique: expressing tight rules, letting less space to possible wide interpretation. Considering the pending dispute over the Athlete of Fano, the Acquisition Policy takes on a great importance. The dispute is fundamentally related to the Acquisition issue, in particular with regard to the due diligence and valid title principles. The action promoted by the Museum for the implementation of higher standards of provenance may be read as a consequence also with regard to the trial with Italy on the "Bronze", because probably such a long legal dispute would

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determine that the Museum can obtain clear title. Such research should include, but is not necessarily limited to, determining:
the ownership history of the work of art;
the countries in which the work of art has been located and when;
the exhibition history of the work of art, if any;
the publication history of the work of art, if any;
whether any claims to ownership of the work of art have been made;
whether the work of art appears in relevant databases of stolen works; and
the circumstances under which the work of art is being offered to the Museum."

[564] See Article 1 and following of the J. Paul Getty Museum's "Conditions of Acquisition", in "The J. Paul Getty Museum Policy for Acquisitions, approved by the Board of Trustees on October 23, 2006", available at: http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf (accessed October 21, 2013):
"2. The Museum will undertake due diligence to establish the legal status of an object under consideration for acquisition, making every reasonable effort to investigate, substantiate, or clarify the provenance of the object.
3. No object will be acquired that, to the knowledge of the Museum, has been stolen, removed in contravention of treaties and international conventions of which the United States is a signatory, illegally exported from its country of origin or the country where it was last legally owned, or illegally imported into the United States.
4. In addition, for the acquisition of any ancient work of art or archaeological material, the Museum will require:
a.) Documentation or substantial evidence that the item was in the United States by November 17, 1970 (the date of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property) and that there is no reason to suspect it was illegally exported from its country of origin, OR
b.) Documentation or substantial evidence that the item was out of its country of origin before November 17, 1970 and that it has been or will be legally imported into the United States, OR
c.) Documentation or substantial evidence that the item was legally exported from its country of origin after
November 17, 1970 and that it has been or will be legally imported into the United States."

have not occurred if the Museum would have followed stringent acquisition criteria.

With regard to the second case included in the examination,[565] the MFA's "Acquisition and Provenance Policy" clarifies since its title the particular attention paid to the provenance research.

The institutional responsibility of curators and directors represents a pivotal issue,[566] and the "Provenance" rules[567] include specific "Procedures" provisions.[568] As explained in the MFA case analysis, the Museum developed a specialized care for the management of Nazi looted Art, on the basis of the Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era and the American Alliance of Museums (AAM) Guidelines Concerning the

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[565] See paragraph 5.1.4. of this study.

[566] See: Museum of Fine Arts, Boston, "Acquisition and Provenance Policy", available at: https://www.mfa.org/collections/art-past/acquisitions-and-provenance-policy (accessed October 21, 2013):
"The Museum seeks to enhance the distinction of the collection through the acquisition of works of art by purchase, gift, and bequest. The Museum values quality over quantity. Acquisition activity is a major responsibility of the Curatorial staff, Deputy Director, and Director."

[567] See: Museum of Fine Arts, Boston, "Acquisition and Provenance Policy", available at: https://www.mfa.org/collections/art-past/acquisitions-and-provenance-policy (accessed October 21, 2013):
"The provenance of the object will be taken into account in every acquisition decision.
The Museum believes that the interests of the public are served by collecting the artistic achievements of all civilizations according to the highest standards of ethical and professional practice, in accordance with applicable law, and in such a way that it does not provide a direct and material incentive to looting or theft.
The Museum will not acquire any work of art known to have been stolen, exported from its country of origin (or any other country in which it was subsequently owned) in violation of such country's laws at the time of its export, or imported into the United States in violation of U.S. law at the time of its importation."

[568] See: Museum of Fine Arts, Boston, "Acquisition and Provenance Policy", "Provenance - Procedures" available at: https://www.mfa.org/collections/art-past/acquisitions-and-provenance-policy (accessed October 21, 2013):
"As part of its standard procedure for all proposed acquisitions, the Museum will:
substantiate the account of ownership history provided by the donor or vendor by obtaining documentary evidence of an object's provenance (including, but not limited to: a dated bill of sale or sales receipt, will, inventory, auction catalogue, published reference, exhibition record, correspondence, photograph). or, in exceptional cases, if documentary evidence cannot be obtained, a signed statement from the donor or vendor that confirms the accuracy of the account.
contact possible sources of information such as foreign institutions and governmental agencies, the Art Loss Register, other independent registries, and/or colleagues to uncover any potential ownership claims on the object,
undertake other appropriate research to ensure that the proposed acquisition has not been illegally appropriated (without subsequent restitution),
make every reasonable effort to ensure that the object has been exported from its country of origin (or any other country) in compliance with the laws of such country at the time of export, and imported into the United States in compliance with U.S. law at the time of import by requesting relevant export and import paperwork (such as export licenses and customs documentation) and document the above efforts by completing a detailed provenance questionnaire (unless such a questionnaire is waived by the Deputy Director)."

Unlawful Appropriation of Objects During the Nazi Era. Furthermore, the last section is dedicated to the "Archeological Materials and Ancient Art", which expressly recalls the 1970 UNESCO Convention and 2008 AAMD Report on the Acquisition of Archaeological Materials and Ancient Art.[569]

The great attention paid by U.S. Museums' curators to - and the influence exercised by - the AAM and AAMD Guidelines is underlined also by Victoria Reed, current curator at the MFA: "Today, ignorance is no excuse, particularly with acquisition guidelines in place from the American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD"). This reflection allows to mark here an ideal link between these guidelines and the concrete effort displayed by MFA. Reed continues: "With each new acquisition, the MFA requests, assesses, and shares provenance information; but is this enough to ensure we are not acquiring stolen works of art? The answer depends, I would argue, on how well the provenance is documented, which, in turn, hinges on the research process. Nearly every object that the MFA has de-accessioned or come to a settlement over – nearly every object we acquired to which we did not have the title – had only the word of the dealer or donor as it source of provenance information at the time of acquisition. In other words, there was no paper trail, no proof of legal export or import, and little or no publication or exhibition history."[570]

The MFA developed a questionnaire on provenance, export and import history of the works of art for potential acquisitions. This operational tool can be considered a best practice, that could be adopted by other Museums.[571]

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[569] See: Museum of Fine Arts, Boston, "Acquisition and Provenance Policy" "Provenance - For Archaeological Materials and Ancient Art", available at: https://www.mfa.org/collections/art-past/acquisitions-and-provenance-policy (accessed October 21, 2013):
"Following the AAMD Report on the Acquisition of Archaeological Materials and Ancient Art (dated June 4, 2008), the Museum recognizes the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (dated Nov. 17, 1970) as providing the most pertinent threshold for the application of more rigorous standards to the acquisition of archaeological materials and ancient art. The Museum will therefore not normally acquire archaeological materials and ancient art unless research substantiates that the work was outside its country of probable modern discovery before Nov. 17, 1970, or was legally exported from its country of probable modern discovery on or after Nov. 17, 1970."

[570] See: Victoria Reed, "Due Diligence, Provenance Research, and the Acquisition Process at the Museum of Fine Arts, Boston", *De Paul Journal of Art, Technology and Intellectual Property Law* 23 (2013): 366-367.

[571] See: Victoria Reed, "Due Diligence, Provenance Research, and the Acquisition Process at the Museum of Fine Arts, Boston", *De Paul Journal of Art, Technology and Intellectual Property Law*

Bearing in mind the general recall of ethical values for provenance research and due diligence in U.S. Museums' Policies of Acquisition, and their link with the AAMD Guidelines[572], a criticism has been moved to them with regard to the adoption of the 1970 as time limit criterion to impede the acquisition of stolen cultural objects.[573] The choice refers to the 1970 UNESCO Convention, but it is actually regrettable: the Convention entered into force only in 1972, after the deposit of the third instrument, as provided for by Article 21 of the Convention.[574] This choice results unfortunate, because it prevents possible recovery for all cases prior to the 1970, included those of objects removed from their place of origin during the colonization or II World War time.[575]

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23 (2013): 368. Reed gives also (p. 369) an example of failed acquisition, that MFA refused to complete, because the piece of art resulted stolen.

[572] The AAMD were firstly developed in 2004, and revised in 2008 and 2013. See: "AAMD Guidelines. Introduction to the Revision to the 2008 Guidelines on the Acquisition of Archeological Material and Ancient Art", January 29, 2013 Revision, available at: https://aamd.org/sites/default/files/document/Guidelines%20on%20the%20Acquisition%20of%20Archaeological%20Material%20and%20Ancient%20Art%20revised%202013_0.pdf (accessed October 21, 2013):
"The 2008 guidelines represented a significant change in the AAMD's recommendation for acquisitions of archaeological material and ancient art. Those guidelines used the date of adoption of the UNESCO Convention, November 17, 1970, as a threshold for a more rigorous analysis of provenance information – an analysis not necessarily required by applicable law. The 2013 revisions, while they address a very limited universe of objects as exceptions to the 1970 date, maintain that threshold for analysis of acquisitions of archaeological material and ancient art. The AAMD was encouraged in 2008 to see that the date of adoption of the UNESCO Convention was recognized not only by museums as a threshold for more rigorous analysis of acquisitions, but also by some countries as a voluntary limitation for enforcement of their cultural patrimony laws that predate the UNESCO Convention. The AAMD hopes that other countries will follow this precedent of voluntary restraint as the AAMD continues to encourage its members to pursue voluntary standards for acquisitions that are stricter than the requirements of applicable law." See also "AAMD. Guidelines on the Acquisition of Archaeological Material and Ancient Art (revised 2013)", "Guideline III. E.": "Member museums normally should not acquire a Work unless provenance research substantiates that the Work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970".

[573] See: Tullio Scovazzi, Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter V, paragraphs 29 and 34, in course of publication.

[574] See: Article 21 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, available at: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed October 21, 2013):
"Article 21
This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession."

[575] "La scelta fatta dalle Linee-guida, che propongono la data del 1970 come soglia temporale per valutare la legittimità di un'acquisizione presenta il grave inconveniente di troncare ogni discussione sulle rimozioni di beni culturali avvenute in precedenza, ivi comprese quelle

In any case, a - partial - result has been achieved through the promotion of wider and safer ethical standards in the U.S. Museums field. Also in this a positive change may be recognized in the overturning occurred in last decades, starting from the initial negative stream of scandals that overwhelmed the international art market, and made of prestigious Museums doubtable institutions.

In conclusion, even though the U.S. Museums Policies on Acquisitions of works of art have limited legal impact, they have a great value, because they represent the result of volunteer process of responsibility, and their ethical standards – in line with the action promoted by the Codes of Conduct – concretely contribute to the strengthening of legal principles implementation.

5.5. The Bilateral Dispute Between Italy and Australia

The interest for including this dispute into the case studies section was essentially due to two principal reasons. First, the nature of the requested cultural objects: they are not artistic creations, as in the cases previously examined, but Indigenous' heritage objects. This determines also that this case may be considered as an example of "repatriation" request, accepting the partition among the three categories of "recovery", as considered in the present research. Second, the different role of Italy: in comparison to the disputes with U.S. museums discussed in the previous three cases, here the objects are stored into two Italian museums. This feature overturns the pattern followed until here, which saw Italy as a claimant state, while now it is the one that receives a claim. Because of the peculiarity of the subjects involved in the case, this paragraph will provide a different pattern of analysis in comparison to that adopted in the first three cases.

The analysis will move from the examination of the historical provenance of the objects, to proceed with the institutional steps taken by the Australian and Italian governments and the Museums' opposition to grant the repatriation of the human remains. In addition, in order to give a complete overview of the relevant elements, both the ethical and legal dimensions will be considered, including: the specific ICOM Code of Ethics standards for human

intervenute durante dominazioni coloniali o durante la Seconda Guerra Mondiale." See: Tullio Scovazzi, Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*, Chapter V, paragraphs 29 and 34, in course of publication.

remains repatriations, the international solutions adopted by museums in similar cases, and the comparison with Italian domestic practice with specific attention to the issue of the inalinability of cultural objects question. Finally, the international legal foundation of the human rights dimension of the Indigenous minorities issue.

The examination of the international legal framework and the comparative analysis of similar cases in the international practice results here necessary, because the case results uncovered by academic sources in international law.

The dispute originated in September 2007, when the Australian Embassy in Rome, on behalf of the Australian Government, has advanced a claim for restitution against the Italian Ministry of Culture related to some human skeletal remains originally belonging to the indigenous communities of the South Western Australian territory.[576] Contextually, the Australian Embassy asked the "Luigi Pigorini National Museum of Prehistory and Ethnography" (hereinafter, "Pigorini" Museum) of Rome to organize and possibly host a seminar on the matter.

The total amount should be around forty items:[577] of these, ten pieces[578] are stored at the Oceania Section of the "Pigorini" Museum, and the remaining ones at the Section of Anthropology and Ethnology of the "Museum of Natural History" at the University of Florence.

[576] It seems a curious coincidence the fact that in the same September 2007 the Declaration on the Rights of Indigenous Peoples' has been adopted. For further details on its connection with the case under International Law, see Paragraph 5.5.4.

[577] It is not possible to establish with definitive certainty the correct number of the pieces requested by the Australian Government, as no definitive answer has been provided by the museums curators. In particular, the Superintendent for the Ministry of Cultural Heritage and Activities at the "Pigorini" Museum has preferred to not provide any further detail on the requested objects, as the situation is still waiting for a political and diplomatic resolution, that will be reached directly between the two Governments. In his answer, the Superintendent clearly states that the final solution will be of a political and diplomatic nature, going beyond the divergent orientations related to the central matter "according to which the ancient remains belong to all humanity and to the world cultural or – *on the contrary* - those who occupy the same areas regardless of the context of effective continuity and ethnicity" (italics added). See the original answer in the Annex Section of the present study.

[578] On this point, more precisely, the pieces were at beginning ten pieces. The final requested advanced by Ambassador Vanstone were five (the so-called "list Vanstone" for the "Pigorini" Museum): three skulls ("Pyrrha-koole"), all three from the Narrinyeri people (Renkinyeri) of the Lower Murray, and two bones of death (Mookoo), one from Marutania people, situated on the right shore of the Fortescue River and another from the Dieryeries people, located at Lake Pirigundi.This information has been disclosed by Carlo Nobili.

5.5.1. History and Provenance[579]

The Indigenous repatriation request addressed to the "Pigorini" Museum of Rome and to the Museum of Natural History of the University of Florence is linked to the desire of the original peoples of the Aboriginal Australian territories to bury all bodies and objects that had a particular link with the dead person, according to their traditional beliefs based on to the conviction that they have a sacred value.[580] According to the culture of Indigenous peoples, not only in Australia, the lack of a decent burial of a dead body represents a source of torment for his soul, as it prevents any possible contact with the homeland.[581]

To better understand the case, it is necessary to provide here historical details of the provenance of the human remains under request,[582] and on the main events by which the pieces arrived in Italy. According to the information traced so

[579] Information provided for this case, when not expressly cited, are based on relevant documents that are on file with the author. The author desires to thank for their precious collaboration and useful suggestions the Superintendent Francesco di Gennaro, the MET and the Italian Minister of Cultural Heritage and Activities Adviser Daniel Berger, the curators Carlo Nobili (Head Curator, Oceania Section, "Luigi Pigorini National Museum of Prehistory and Ethnography") and Monica Zavattaro (Head Curator, Section of Anthropology and Ethnology, "Natural History Museum University of Florence"), and Vito Lattanzi (Director of the Ethnographic Section "Mediterranean Cultures", "Luigi Pigorini National Museum of Prehistory and Ethnography").

[580] On the Australian Indigenous' traditional belief of ancestors burying in the native land, see: "The indigenous population of Australia has a belief that the spirits of the dead cannot rest until returned to their country and also want to reassert control over their cultural heritage.", as reported in the Executive Summary of the Law Library of Congress of Australia on the" Repatriation of Historic Human Remains"(July 2009), available at: http://www.loc.gov/law/help/repatriation_%20final_%20rpt.pdf (accessed January 6, 2014). On the issue of the Indigenous claims of return of Cultural Objects, and the role of Museums, a indispensable basis for a comprehensive in-depth analysis is: Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006), 342.

[581] One fundamental belief for Australian Indigenous people is that: "Burials are highly significant to Aboriginal and Torres Strait Islander people and it is important not to interfere with human remains." Furthermore, "[...]it is an offence for anyone, other than Traditional Owners, to possess Aboriginal and Torres Strait Islander human remains, regardless of when they came into their possession. If an individual possesses or has knowledge of the existence of Aboriginal or Torres Strait Islander human remains, they are required to report them to Department of Aboriginal and Torre Strait Islander and Multicultural Affairs (DATSIMA) as soon as possible. Any human remains that are found must not be disturbed. All human remains must be reported to the police in the first instance". See: Queensland Government, DATSIMA, "Human remains", available at: http://www.datsima.qld.gov.au/atsis/aboriginal-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-cultural-heritage/human-remains (accessed, February 20, 2014).

[582] As pointed out by the curator of the Oceania Section of the National Museum of Prehistory and Ethnography "Pigorini" of Rome, Carlo Nobili, the request promoted in 2007 from the Australian Embassy of Rome covers only a limited amount of the human remains material stored in the museum collection. This information is based on a phone call interview with Mr. Carlo Nobili. In particular, Carlo Nobili has been the main interlocutor consulted in the research, which helped in the limits of his mandate and authority in confirming the information autonomously gathered by the author.

far uncovered in the secondary sources[583] and confirmed by experts in the field,[584] the presence in our country of most of the claimed objects is due to a Florentine man, Enrico Hillyer Giglioli.[585] Born in England in 1845, fifth-son of the anthropologist Joseph, a follower of Mazzini, who was exiled in London for political reasons, Enrico became a zoologist. He was able to gather a collection of particular ethnological significance, thanks to the governmental and academic positions held over time. In fact, he was selected by Professor Filippo De Filippi to take part in the voyage of exploration of the Magenta. Professor De Filippi unfortunately died in the first part of the voyage, in 1867 in Hong Kong. The young Giglioli became the head of the mission. During that experience 5986 samples from over 2000 different animal species have been gathered.[586]

By bequest, he donated his collection – completely created by donations and exchanges - to the National Museum of Prehistory and Ethnology in Rome, personally directed at the time by Pigorini, from whom the Museum took its current name. More precisely, ministerial sources reveal that part of the collection is the result of purchases in Paris and Berlin, while some pieces have been object of a personal exchange between Giglioli and the Museum of Perth back in 1870.[587]

The thirty pieces stored and safeguarded in Florence have been collected by the Museum between 1870 and 1905, as a purchase or donation by travelers (as Giglioli, D'Albertis, Podenzana, Scheidel), donation by government agencies (Ministry of Public Education) or foreign scholars (James Grose, Teodore Caruel),

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[583] Apart the personal information gathered by the author, the unique source of a scientific rank, available in literature and published at the time of writing is: Various Authors, Section "Forum – Recovery of Human Remains," *Museologia Scientifica* 5 (1-2) 2011: 8-52.

[584] During the researches on the case, the author contacted the curators of the two museums involved and experts of the Ministry of Cultural Heritage and Activities. In particular, Carlo Nobili, curator of the Oceania Section of the National Museum of Prehistory and Ethnography "Pigorini" of Rome has been the main interlocutor consulted in the research, which helped in the limits of his mandate and authority in confirming the information autonomously gathered by the author.

[585] The Florentine origins of Giglioli explain also his special ties with the city of Florence, where part of his personal collection was destinated, and are nowadays still stored, at the Natural History Museum of the University of Florence.

[586] On the mission and Giglioli's role, see: Enrico Hillyer Giglioli and Paolo Mantegazza, *Viaggio intorno al globo della Regia pirocorvetta italiana Magenta negli anni 1865-66-67-68 sotto il comando del capitano di fregata V. F. Arminjon*, (Milan: V. Maisner e compagnia, U. Hoepli, 1876), xxxviii – 1031.

[587] This information aims to emphasize that the pieces requested by the Australian Embassy had already been included in museum collections in Australia in the past.

or as an exchange with the Museum of Sydney.[588] The founder of the Museum of Florence, Paolo Mantegazza, decided to gather all these collections, belonging to European and non-European Countries, in order to illustrate the variability among the human world population, as well as within each *ethnos*. On the basis of all the stored material, Mantegazza, with the support of Giulio Barsanti, demonstrated that it is impossible to establish racial classifications and hierarchies based on the analysis of skulls. It represented an absolute innovative scientific result, and the Australian collection was part of that research. Also for this reason, the Museum of Florence claims now that maintaining unaltered its collection has a scientific ground.[589]

5.5.2. Institutional Grounds of the Bilateral Dispute

As a first element in the reconstruction of the events characterizing the claim, it must be here underlined that the Australian Ambassador at the time was Amanda Vanstone, sent to Rome in 2007, after being Minister for Indigenous Affairs in Australia.[590]

In response to the Australian claim and request, the ”Pigorini” Museum and the Italian Ministry of Culture have opposed to the repatriation claim, while they agreed to host the seminar.

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[588] See: Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, “Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence”, *Museologia Scientifica* 5 (1-2) 2011: 18. According to the information provided by the museums experts, the choice of the ten pieces selected among all the Australian objects stored at the Oceania section of the museum lacked of any scientific foundation. This would suggest a political intent aiming the request in 2007, probably due to domestic policy reasons, more than to the real interest for the repatriation of the human remains. This reconstruction is based on the personal statements gathered by the author during her researches on the case, and the advices rendered by the museums' curators.

[589] Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, “Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence”, *Museologia Scientifica* 5 (1-2) 2011: 18.

[590] Paolo Fantauzzi,“Ridateci l'aborigeno”, *L'Espresso*, September 9, 2010. About Mrs. Vanstone appointment in Italy, the Italian museums experts have read it as a clear intention of the Australian Government to send Mrs. Vanstone in Italy for her past experience in the domestic Indigenous Affairs to stress the issue against the Italian Ministry of Culture, meanwhile sponsoring the Australian Government desire to publicly support the Indigenous communities at an international level.

In the middle of October 2007, Mrs. Vanstone met Gianfranco Varvesi, the then Ministry Diplomatic Adviser for the Ministry of Cultural Heritage. In that occasion, Varvesi confirmed the Museum's unwillingness and the formal impossibility to agree to the human remains repatriation, assuring the perfect state of respect, care, and conservation of the pieces.[591]

On October 31, 2007, the seminar has taken effectively place at the Museum in Rome, with the participation of the Australian Embassy representatives, but also of some Aboriginal delegates.[592] On that occasion, Indigenous requests were clearly presented and were recognized by the museum, but the proper investigation was necessarily delegated to the competent ministerial experts.[593]

On November 5 of that year Professor Apolito presented his position on the case to the then Minister of Culture, Francesco Rutelli, recapping the positions that emerged during the seminar, and illustrating that only a political solution was possible with respect to the repatriation request. On this point, in his report, Professor Apolito underlined also that the Italian Senator in Australia, Antonino Randazzo, expressed his position in favor for the repatriation, and strongly pushed for an exchange of cultural objects between the Italian Museums and the Australian Embassy.[594]

On November 21, Ambassador Vanstone wrote directly to the Italian Minister Rutelli asking for a meeting to discuss the issue, and continued to pushing for the repatriation. In the course of the subsequent meetings and informal conversations between Ambassador Vanstone, her Diplomatic Counselor

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[591] The relevant documents are on file with the author.

[592] The seminar has been held on behalf of the Australian Delegation of the Department of Families, Community Services and Indigenous Affairs (also known as FaCSIA, active between January 2006 and December 2007). Here following the list of the participants: the Australian Ambassador, Amanda Vanstone; the Superintendent of the Pigorini Museum, Maria Antonietta Fugazzola; Mr. Omaji, Assistant Secretary, Reconciliation and Repatriation Branch of the FaCSIA; the Indigenous delegates: Ismahl Croft, Delegate for the Kimberley Region, West Australia, and Lori Richardson, Assistant Director International Repatriation Program & Indigenous Delegate; Prof. Steve Webb, Australian Studies, Bond University; Marco Biscione and Giuseppina Prayer, as representatives of the Pigorini Museum; Prof. Paolo Apolito, University of Roma Tre, as Ministry of Culture representative. Also the list of participants may be taken into account as an evidence of the original provenance of the pieces from the Western area of Australia. This confirms also that part of the original collection was a donation from the Museum of Perth. See *infra*.

[593] On the "Pigorini" museum's position, see: Giuseppina Prayer, "La questione della "repatriation": motivazioni culturali, vincoli giuridici, implicazioni museo logiche", *Antropologia Museale* 18 (2008):54.

[594] This information is based on the phone interview with the "Pigorini" Museum curator Carlo Nobili.

Paul Garwood, the Italian Superintendent, and the curator Marco Biscione the hypothesis of an exchange started to take a shape. Especially the Cabinet of the Minister would be favorable to this kind of solution.[595]

On November 27, the Minister Rutelli wrote to the Australian Ambassador confirming that he had asked the General Director to examine in depth the question and showing willingness for cultural cooperation, loans and exchanges, even though the Director General for Archaeological Goods expressed a contrary opinion.

Later on, the Australian Embassy has been informed on a confidential basis that some contemporary Indigenous works of art would be well received in the context of a cultural exchange for the repatriation of the human remains.[596]

On February 1, 2008 the Minister Plenipotentiary Varvesi informed the management of the "Pigorini" Museum of the Government's willingness to favorably consider the Australian requests. He wrote: "In principle, the human remains have to be returned, while cultural objects could be subject to an exchange with artifacts from Australia of equal scientific, artistic and economic value".[597] However, before any decision on the case, Varvesi called on the museum to cooperate with the Embassy of Australia in relation to the

[595] This claim is the result of private meetings with sources, who expressly asked not to be identified.
[596] The relevant documents are on file with the author.
[597] See: Letter from the Minister Plenipotentiary. Gianfranco Varvesi to the Superintendent at the Museum Pigorini Mr. Fugazzola, and for information to the Director General for Cultural Heritage, Mr. De Caro, dated February 1, 2008; as reported in Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali", *Antropologia Museale* 32-33 (2012): 59. This statement is highly relevant, considering the political value of the decision taken by the Italian Government at that time, that seemed to go beyond the evaluation of the formal problem posed by this request coming from the Australian Government, and not advanced by the original Indigenous communities. Furthermore, this decision could be seen as more focused on recognizing the significance of the real value of the request, without stopping the process at a formal stage. On the other side, as also after-written, the biggest legal obstacle for Italy in giving concrete action to the repatriation of the Indigenous remains is represented by the impossibility to alienate any cultural item included in the Italian museums collections, as provided by the Article 54 of the Italian Code of the Cultural Goods and Landscape. Ferracuti and Lattanzi also precise that the Ministry of Culture political orientation did not substantially changed in the following years, at least until when its intervention had been limited to provide the required list of the Museums collections. The Legislative Office of the Ministry of Cultural Heritage had been appointed of finding possible solutions and treated the issue in direct collaboration with the Director General of Antiquities, from which the Superintendent at the Museum Pigorini depends; as reported in Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali *Antropologia Museale* 32-33 (2012): 59. Carlo Nobili confirmed during the phone interview that the Ministry explicitly relieved the museums from taking any decision.

identification of remains and artifacts. Indeed, he specified also that the Australian Ambassador would have to contact the Museum to make a list of the items.

The visit eventually took place before the end of February. With the authorization of the Superintendent, Ambassador Vanstone visited the Oceania Section of the "Pigorini" Museum, made a list of the objects and made some photocopies of the labels from the Archive "Giglioli" in relation to the five objects she finally decided to request. Not all the ten pieces are made of human remains: they were eight items of human remains in total, of which three were skulls.

Ambassador Vanstone's visit have noted that the remains at the "Pigorini" were kept in an inappropriate manner, compromising their sacred character for the Indigenous populations. Attempting to show its willingness to cooperate both with the Australian Government and the Indigenous community, the Museum "Pigorini" promoted two actions: first, separating the objects, and isolating them in a special structure of the storage; secondly, they started to consider a possible solution of the dispute through cultural cooperation means, such as an exchange of cultural objects.[598]

Between February and March, the Embassy sends Varvesi the pictures of two paintings that Australia would be willing to exchange for the human remains. The Italian Superintendents considers the information relating to the works of art and find that both their artistic and economic value is quite inadequate (they are estimated to have a value of about 500 Australian dollars, less than 300 Euros).

According to the Italian museums experts this can be considered as a lost opportunity for the Australian Embassy. The exchange could have take place only under conditions of equality of the objects exchanged. The counterproposal offered by Australia for the requested human remains was considered not adequate, and in the meantime Ambassador Vanstone had left Rome. This latter element is significant for the Pigorini curator, as the Australian Ambassador

[598] See paragraph 5.1 of this study. It must be recalled also that, the ICOM Code of Ethics, at Article 2.5 states as follows: "Culturally Sensitive Material. Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known". See: ICOM, Code of Ethics, available at: http://icom.museum/the-vision/code-of-ethics/2-museums-that-maintain-collections-hold-them-in-trust-for-the-benefit-of-society-and-its-developme/#sommairecontent (accessed January 25, 2014).

played a central role in the management of the request, but after her departure no other request has been advanced by the Australian Embassy in Rome on the issue.[599]

Nevertheless, the position of both Italian museums involved was a firm denial, interpreting the actions of the Australian Government as motivated by domestic political interest, and reinforced by the fact that the objects are considered *inalienable assets* according the relevant Italian regulations. As a matter of law, the objects are currently part of the Italian national heritage[600], as originally purchased or donated to the museum by the owner, who directly bought them legally on international markets, or received them in turn as a gift from foreign museums, as the information relating to the Museum of Perth seems to clearly confirm.[601]

As remarked by the museum curator, the cultural exchange soon took shape as the only possible alternative to a change of the Italian law. Moreover, it could represent an advantage for the Italian museum, given the high number of human remains belonging to the same epoch stored in the museum. In Nobili's opinion, it was better to enrich the collection with objects from different epochs, rather than preserve only objects from a particular time.[602] From a museological perspective, the ethnological dignity of each object is the same. This means that the possible exchange with contemporary pieces of equal value, but substituting the old ones with contemporary ones would imply an improvement of the global collection of that section of the museum. This evaluation is also the result of new developments and considerations in Museology. Over time, the ethnological criteria experienced a general change. In fact, nowadays the objects are considered also for their contribution to museums collection.[603]

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[599] This information is found on a phone interview with the curator Carlo Nobili.
[600] In particular, the Giglioli's collection has become part of the Italian cultural patrimony, since 1913 when it has been purchased by the Museum from Giglioli's heirs. The Purchase document refers to Costanza Casella, that was Giglioli's wife. It is the Folder n. 209 of the Historical Archive of the National Museum of Prehistory and Ethnography "Luigi Pigorini".
[601] The curator of the Oceania Section at the "Pigorini" Museum informed that the perfect accuracy dedicated by Giglioli in compiling the detailed description of each piece of his large collection may easily considered as a proof about the provenance of the pieces, as each one was subdued to the rigorous analysis and transcription of the owner.
[602] The position is based on a phone call interview to the curator of the Oceania Section of the "Pigorini" Museum of Rome, Carlo Nobili.
[603]The exposed evaluations are founded on personal statements and consideration of Mr. Nobili's perspective about his idea of museological management.

Looking at the institutional efforts activated to solve the dispute, the last available information dates back to 2009. In fact, during the G8 Summit held in L'Aquila, on July 10, the two Prime Ministers, Silvio Berlusconi and Kevin Rudd, signed a Joint Declaration for the establishment of a Joint Working Group to settle the dispute. This step was followed on July 29, by the Italian Minister of Culture, Sandro Bondi, signing the decree for the domestic implementation of the Joint Working Group institution.[604]

It must be underlined that, in the Joint statement, the Italian Government fully recognized the "particular ties that exist between the Australian Indigenous population and their ancestral remains". The Italian position seems to be affected by diplomatic prudence. In fact, in the same line it is stated that the same objects are today integrated as part of the Italian national cultural heritage, "or which, in any case, are present in Italy".[605] This statement may be read as a cautious position, waiting for any possible resolution. This is the very crucial point, from the legislative point of view: as the objects – of whatever provenance, but surely not obtained as consequence of illicit traffic of illegal export – had been donated by the original owner to the museums, they are now *inalienable* under the Italian Law on cultural assets. Under Article 54, letter c), part II, of the Italian Code of the Cultural and Landscape Heritage, the "collections of museums, art galleries, galleries, and libraries" are classified as inalienable cultural goods.[606] Under the Code, a condition for the alienability can be envisaged only if "absence of any

[604] See the documents: "Joint Declaration by the Prime Minister of the Republic of Italy and the Prime Minister of the Commonwealth of Australia on Indigenous ancestral remains", and the Ministerial Decree July 29, 2009 of the Ministry for Cultural Heritage and Activities setting up Joint Working Group on Indigenous Remains in the Annex Section of this study. Article 1 of the Document decrees as follows: "a Working Group is set up with the task of identifying possible solutions, including legislative solutions, for the return of the ancestral remains of the Indigenous populations of Australia and which are held in Italy". Article 1.2 and 1.3 provided for the list of the components of the two National groups. For Italy: Mario Luigi Torsello, Head of the Office of Legislative Ministry of Heritage and Cultural Activities; Patrizio Fondi, Diplomatic Advisor to the Minister for Heritage and Cultural Activities; Stefano De Caro, Director General for Cultural Heritage of the Ministry for Cultural Heritage and Activities, Daniel Berger, Adviser to the Minister for Cultural Heritage and Activities; for Australia: Amanda Vanstone, Australian Ambassador to Italy; Toshi Kawaguchi, Third Secretary of the Embassy of Australia in Italy, Clelia March- Doeve, Cultural Advisor of the Embassy of Australia in Italy, Paul Garwood, Head of Research, Australian Embassy in Italy.

[605] The full text of the Joint Statement is attached in the Annex Sextion of this study.

[606] See: Article 54 of the Italian Code of the Cultural and Landscape Heritage, as amended by the legislative decrees n. 156 and 157, on March 24, 2006, by Minister Rocco Buttiglione, which modified the previous Code "Urbani" on Cultural and Landscape Heritage (Leg. Decree 42/2004). See also: Wanda Vaccaro Giancotti, *Il Patrimonio Culturale nella Legislazione Costituzionale e Ordinaria. Analisi, proposte e prospettive di riforma*, (Turin: Giappichelli ed., 2008), 129-131.

cultural interest " is recognized. This condition is obviously difficult to fulfill, for such remains, have an indisputable documentary value, because they belong to historical collections. This is a thorny problem, also considering that even the most recent laws on cultural heritage do not take into account the possible differences existing among the several kinds of cultural items, since they are first and foremost outlined with reference to the historical, artistic and archaeological heritage. As an effect, the human remains category ends up not being included with enough sensitiveness in terms of protection and care.[607]

The decision was reached on the basis of the mutual commitment to make "every effort" to achieve the restitution of the remains to "Australia and to the Indigenous community", by taking into due consideration the respective legislation in force. Furthermore, both parties recognized the presence of "complex issues" that needed to be addressed in order to find a possible solution to this claim.[608]

The Joint Declaration stated that the Working Group had to conclude its work by the end of 2009, with submission of its proposals to find suitable solutions to the case, "including those of legislative nature".[609] However, it was not possible to verify whether any solution has been proposed. The unique information available about the attempts until up to this point refer to the proposal advanced by Italy, based on the exchanging of the human remains items requested by Australia with other kind of contemporary Indigenous cultural objects. It was on this basis that Australia has proposed its list of "cultural objects", deemed as inadequate by the Italian party.[610]

A change in the relevant Italian law has been identified as very necessary for a resolution of the case, as the requested pieces are part of two Italian

[607] Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali", *Antropologia Museale* 32-33 (2012): 59.
[608] The full text of the Joint Statement is attached in the Annex Sextion of this study.
[609] See the document: "Joint Declaration by the Prime Minister of the Republic of Italy and the Prime Minister of the Commonwealth of Australia on Indigenous ancestral remains", signed in L'Aquila, on July 10, 2009, in the Annex section.
[610] One of the expert involved in the question expressed some doubts about the list presented by the Australian representatives. In his opinion, the list has been probably compiled only with the purpose of continuing the negotiation process, given that the Australian Party considers the entire restitution issue as "not negotiable", looking at the achievement of the repatriation the unique purpose of the request. This information is based on direct exchanges with an Italian Ministry for Cultural Heritage and Activities attaché.

museums collections, and for this reason they have conceived as an inalienable part of the national patrimony.[611]

Daniel Berger notes also that there were also problems impeding a positive resolution and the achievement of a mutually satisfactory agreement between the two parties: the Australian Embassy did not clearly answered about the final destination of the remains in Australia. This probably means that the Australian representatives did not express any guarantee about the effective final restitution of the human remains to the original Indigenous communities. According to the Italian experts, as Berger reports, "if the alternative was that the human remains would have been stored in a warehouse in Australia, it would have been much better to keep them in Italy".[612] The second feature underlined by Berger is that the restitution would have caused damage to Italy, because of the loss, in terms of commercial value, of the inalienable cultural items included in the museums collections, considering that the exchange proposal did not equal the value of the human remains that Italy was ready to send to Australia. At this regard, Berger emphasizes that if such an uneven exchange between the Italian Museum and the Australian Embassy were to take place, the administrative official that had signed the authorization would have been required to refund the value of the damage suffered by the Italian state.[613]

At this point, no final resolution has been reached. As emphasized in the statement of the Superintendent at the Pigorini Museum, Francesco di Gennaro, the situation must be managed at a political and diplomatic level. The pending

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[611] On the issue regarding the profile of "inalienability" of the Italian Museums collections, see for further details the following paragraph, and also: Article 54 of the Italian Code of the Cultural and Landscape Heritage, as amended by the legislative decrees n. 156 and 157, on March 24, 2006, by Minister Rocco Buttiglione, which modified the previous Code "Urbani" on Cultural and Landscape Heritage (Leg. Decree 42/2004).

[612] This citation is based on a phone call interview to Mr. Daniel Berger.

[613] Under the Royal Decree July12, 1934, N. 1214 Article 13, Title II, Powers of the Italian Corte dei Conti (Court of Auditors) - Section I – General Duties: "The Court in accordance with the laws and regulations: [...] passes judgment on liability for damage caused to public exchequer by administrative officials, paid by the State, in the exercise of their functions." The Court may, on complaint or on its own initiative, to enable proceedings against the public officers whose actions caused a loss of revenue. The full text of the Royal Decree July12, 1934, N. 1214 is available at: http://www.corteconti.it/export/sites/portalecdc/_documenti/normativa/corte_dei_conti/r.d._12_luglio_1934x_1214.pdf (accessed, February 10, 2014). Such cases occur when a specific conduct of an administrative official results in a reduction of resources, or in the failure to achieve some precise objectives. It can occur as a loss or deterioration of tangible or intangible goods.
This typology of damage has a public dimension, because it produces effects that fall on the society and has a dimension of revenue, because of the economic injury that fall on the budget of the State or of a public body.

dispute must be resolved by taking into account two different visions about the ownership of the remains at the international level: under one vision they belong to the entire humanity, under the other they are part of a specific culture and must be repatriated, even though no clear continuous lineage with any existing ethnic group was established.[614]

5.5.3. The Museums' position

The repatriation of human remains represents one of the highest challenges for museums, that naturally involves also ethical and anthropological considerations.[615] In order to draw a complete representation of the positions of the players involved in the museum sector and at the institutional level, the National Association of Scientific Museums of Italy decided to hold a meeting on November 3, 2011 in Florence, establishing a Joint Commission to adopt a document on the issue. The major concern expressed by the Joint Commission is the possible loss of precious artistic items, by anthropological and ethnological museums, not only for what concerns Italy, but more in general, "hinder[ing] the museums in their principal function, the dissemination of knowledge about the diversity of the world's culture".[616]

According to the museums experts, in the near future, it would represent a loss in terms of scientific studies on the evolution of the human species, collected with effort by the museums over time. The document reiterates that the claimed pieces are: of great scientific significance, they have been used for

[614] See the Superintendent's answer to the formal request of the list of the human remains in the Annex Section of this study.
In other words, in this case, the damage would have derived from the alienation of objects, that are part of the integral heritage, and which contribute to the global value of the museum inventory, where the objects are stored. Without any exchange of equivalent objects, things or money, the official signing the document that authorizes the cultural exchange could be personally liable to make restitution of the value of the damage.

[615] In their article, Ferracuti and Lattanzi refer to the human remains repatriation as "sensitive objects", a definition that clearly underlines the tactful nature of this issue. They also point out that this represents the most complex theme for museums curators, as these remains "*absorb* the passionate contemporary frictions that characterize the cultural heritage paradigm" (translation edited by the author). See: Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali", *Antropologia Museale* 32-33 (2012): 56.

[616] Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011):13.

scientific studies on the evolution of the human species, on diseases and so on, and they could be useful for future studies. Furthermore, it is noted that the significance of the collection is bound to its integrity; and that the pieces – "regularly inventoried and catalogued" – are part of the Italian patrimony and therefore inalienable. [617] They are the result of exchanges or purchases, and "[...] did not come to Italy as a result of plundering or genocide", and for this reason no need of reconciliation with original Indigenous communities exists. [618]

It must be stressed that the Document presented by the experts identifies the items stored in the museums as of "universal significance; [...] they have become part of the cultural heritage of humanity."[619] Probably unintentionally, such a statement is a legally relevant element. As it generally occurs in these cases, the rising central issue becomes the opposition between the interest of the scientific community and the educational purpose promoted and sought by museums, and the rights of the ethnic group who claims the pieces on the basis of their origins and roots.

Furthermore, the scientific interest of museums for human remains can be here recalled. Human skeletons, mummified tissues and tissues in fluids represent one of the most important objects for ethno-anthropological museums. Until recent times, they did not raise any ethical questions, because the "legitimacy of scientific research and ownership did prevail". [620]

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[617] Even the human remains of archaeological and ethno-anthropological interest fall under the categories set out in Articles 2 and 10 of the Lgs. D. n.42 of January 22th, 2001 (Cultural Heritage Code), relating to the "cultural heritage".

[618] See in detail: Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011):12-13.

[619] This statement may appear controversial, because it seems to contradict the Italian museums experts' position. The Joint Committee, in its Document, aims to use this recognition in order to oppose the repatriation request of the Australian government, also because of the provision of Article 54 of the Italian Code of the Cultural and Landscape Heritage that establishes the inalienability of all the items included in the Italian museums collections. On this issue, Giovanni Pinna – Director of the Museum of Natural History of Milan – explains that the intention was to underline that, given their universal value, the remains can be stored in every state, museum or place. On the other side, the recognition of the fact that the human remains are part of "the cultural heritage of humanity," as well as of their "universal significance" seems to recognize them also a value that goes beyond the national perspective. For this reason, the statement could be interpreted in two opposite ways.

[620] See: Alain Froment, "Collecting human remains: what for?", in *Museologia Scientifica* 5 (1-2) (2011):22.

Incidentally, the Joint Committee of the National Association of the Scientific Museums in the last part of its Document adopts more cautious positions. First of all, the Document demonstrates to take in due account the significance of the human remains for the Indigenous peoples, considering the role played by the identity value of the cultural heritage within every community or nation. Bearing in mind this fundamental consideration, the Joint Committee affirms the necessity to inaugurate a new form of direct collaboration between the museums and the Indigenous communities, looking at the safeguarding of the integrity of the Italian national patrimony, as well as to the protection of the Indigenous aspirations, specifying "all this, without any obligation of reconciliation by Italy". The collaboration can be fulfilled only between the museums and the communities of origin of the remains, without any kind of role of the Australian national political bodies. It is stated on this point: "In particular, regarding the human remains requested by Australia, we believe that the Australian Government does not have the authority to mediate between the Italian museums and Aboriginal communities, given that it has recognized the cultural autonomy of such communities."[621]

On this point, the Joint Committee identifies the direct collaboration with the communities of origin of the human remains requested as the most fruitful way of cooperation, yet applied by other museums involved in similar bilateral disputes. The main benefit of this particular path is the mutual preservation of cultural heritage: on one side, the museums are able to continue to preserve the integrity of their collections and patrimony; on the other side, the Indigenous communities have their representatives who play a direct role in the museum's activities, with the possibility to preserve "the moral right of the communities on the human remains of their ancestors." [622]

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[621] See: Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011):20.

[622] See: Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011):20.

It is not clear whether or not this kind of cooperation would imply the repatriation.[623]

Other requests are also posed with regard to the addressees: the restitution can be implemented only if the communities are really the true descendants people whose human remains are held by the Italian museums, and the restitution must be directed strictly to the descendants' communities, "excluding governments or their state institutions from the restitution negotiation".[624] Recent generations are probably the result of a natural social development of integration among all the peoples living in the areas, thus it is not possible to fully identify the actual descendants of those remains. By the way, this position seems too partial and generic, and this study simply records it as part of the overall framework of the issue. Generally, the presence of documentary evidence is required, bearing objective and factual proves emerging from archives, such as DNA testing. In this regard, Alain Froment believes that national and international legislations should adopt a best-practice guide and formulate specific recommendations for the museum experts and operators.[625]

In addition, a vast amount of human remains finished in the West at the beginning of the XIX Century, with a possible spread of fake pieces. According to the tests requested by the "Pigorini" museums, objective scientific elements leave a room for well-grounded doubts about the provenance of all the pieces from the Australian territory, and instead some of them could belong to non-Indigenous people.[626] Being subject to its duty of operational confidentiality, the museum

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[623] On the possible ways of cultural cooperation models, some examples regarding the Italian Museums involved in the case under examination are reported in this chapter hereinafter.

[624] Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011):12-13.

[625] On the assessment of repatriation requests, see: Alain Froment is the scientific responsible of the Musée de l'Homme of Paris, Department "Man, Nature, Society". On this point, see: "Argumentaire sur la conservation et l'étude des collections de restes humains", *Museologia Scientifica* 5 (1-2) (2011): 22-27.

[626] After the presentation of the Australian request, the Italian Ministry of Culture asked to the curators their advice. In a meeting, the physician anthropologists decided to submit the pieces to the scientific tests of the University La Sapienza. The test were partial, thus there is no definitive result on the objects. Nevertheless, after a first analysis some doubts have been raised about the actual Australian origin of all the pieces requested. The common practice of creating fake pieces during Giglioli's epoch let open this hypothesis. In particular, one ritual object that should be used for evil magic spell practices could be in reality a woman bone. First of all, it should be a male bone, according to the traditional Indigenous believes – as explained by Nobili. Secondly, this

responsible is not allowed to share full information on the case. Incidentally, one of the most relevant cases refers to a human head that had been depicted and used as a drinking cup. According to the museum, this additional feature should imply a change in the usage of the item, that may make it comparable to an artistic object; and it considers the same object, in any case to be different from an artifact used in ritual or sacred practices.[627]

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opens to a new question: if the bone was used for this ritual practice, in Nobili's view, it shall not be doomed to be buried, but simply hold by the magician. This should imply that those objects part of the museum collection had been created not to be buried. In any case, Nobili pointed out that even though these considerations have been made, the museum decided to cooperate to recover the objects, and collaborate with the Australian Embassy to reach an exchange agreement.

[627] With regard to the different evaluation between museums and Indigenous peoples about the modified human remains, it is interesting to include here Lori Richardson's statement: "There is some division amongst museums and Indigenous peoples regarding the difference between human remains and modified remains, modified remains being parts of a human being that have been adapted so as to become an object. For example, in south-east Australia, Aboriginal people used the skulls of the deceased as water vessels. The skulls would be sealed with clay or beeswax and sometimes had a fiber handle attached. Clearly, the skulls were modified for a purpose and were no longer seen as human remains to be treated with reverence by their maker. Yet, today, the descendents of the tribes who made these objects see them as human remains to be reburied with other remains." Lori Richardson was Assistant Director International Repatriation Program & Indigenous Delegate, and took part to the Conference organized at the "Pigorini" Museum in 2007. This statement is part of an e-mail exchange between the author and Ms. Richardson, dated January 28, 2014. Interestingly, requested more details on this issue, on January 29, Ms. Richardson added: " I think it's important for people to realize that repatriation is a very complex issue. I think it is a fair question for museums to ask whether modified remains should be treated as other remains just as much as whether they should return remains that were purchased.
A Native American friend of mine told me that some tribes made flutes from human bones. Clearly, a flute is a musical instrument and would have been used for that purpose. As a curator I would think that there are ethical questions to be considered such as whether to store such an object with the remains or the instruments or whether it would be appropriate to put in on exhibition. In some Aboriginal tribes once the deceased has gone through a burial ceremony, they no longer see the remains as being connect to that person, that is, the spirit has moved on to the next world and what is left is just bones and yes, some of these might have been sold.
The pointing bone – held at the Pigorini, is another case of a modified object of great cultural and spiritual significance to men. It is believed that by pointing the bone at an individual, that would die. So this is a very important object that I could not discuss with the community as a woman, I actually had to get one of my male team members to discuss. The view of the Elders was that they needed to think about it and discuss what should be done, but there was no follow up on this matter. All I can remember is that we consulted a group at Port Hedland, WA on this matter. I can't remember who or which tribal group it was – it would have been at least 6 or 7 years ago. To some extent, I think my own museum background gives me a different perspective on things. I understand how museums work and do see a difference between remains and modified remains. However, I still think that even modified remains should be returned to Traditional Owners and country. [...] There are calls here from Indigenous people who want all their material culture back including paintings, spears, boomerangs etc. When I was at the Museum of Victoria, we purchased a number of contemporary items created by an Aboriginal man in Gippsland. Several months later, the Gippsland Aboriginal community opened a new cultural centre and requested all the Gippsland Aboriginal material to be returned to them for exhibition in the new centre including the newly acquired contemporary objects. This lead to the museum saying that it wouldn't purchase any new material if communities were going to demand them back, which in turn would lead to a loss of business for the makers."

From the museological perspective, the data regarding the fake market for human remains during the XIX Century is valuable and interesting, because it confirms the growing importance of that phenomenon at the time. On the other side, the issue today has acquired new meaning. Indigenous peoples request the repatriation of those pieces on the basis of their traditional and religious beliefs: they also have the right to know exactly whether or not the remains are their ancestors. Furthermore, the request finds its foundation on a separate level than the possible usage that art merchants made of those bones. The essentiality of that sacred value cannot be ignored. Their sacredness gives them a superior value. Conversely, once verified that those corpses have been used for practices considered as not respectful of the value recognized by the originating culture, for example when decorated as works of art, *a fortiori*, a rehabilitation of their original value should be realized.[628]

All this considered, the Joint Commission openly asks the Italian Government to analyze the scientific and historical value of the pieces before considering the actual restitution. Secondly, the Commission asks that the restitution may be considered only after a vote of the Parliament, in relation to the need of ensuring a decision taken at political level through the citizens' representatives, as it would affect the "unity of the country's cultural heritage and would contrast with a criterion of inalienability established by national laws".

With regard to the future conclusion of the bilateral pending dispute between Italy and Australia, Mr. Carlo Nobili, curator of the Oceania Section at the Museum "Pigorini" affirmed: "An increasing hardening of the [Australian] position led to a stalemate".[629] The position of the museum was initially of a substantial willingness to find a solution and evaluate all the criteria and elements implying the potential restitution, even though immediate reasons to oppose such a request in terms of museological and ethnographic instances are easily deducible. "The Museum cannot take responsibility, despite all the possible reasons", added Nobili, implying that the museum may execute decisions taken at a political level

[628] To understand how big was the interest of foreigners in the market of Indigenous remains, see in detail Ms. Lori Richardson's speech at the Conference held at the "Pigorini" Museum in 2007. This paper reports, among other examples, the case of an Indigenous' murder on order, with the aim of selling his skeleton on the International market. See: Position Paper presented by Lori Richarson at the Seminar on "The Repatriation of Australian Indigenous Ancestral Remains". October 31, 2007, Museum "Pigorini" of Rome in the Annex Section of this study.
[629] Source based on a phone interview.

by the central Government, through the Ministry of Culture, but has no direct decision making power.

5.5.4. Possible Ethical Guidelines Application for a Resolution

After having considered the positions of the two Italian museums involved in the dispute, the research moves here to examine the guidelines exposed by the ICOM Code of Ethics on the repatrition of human remains issue, as it can be considered as the most relevant document among all the codes of conduct for museums professionals, for its general acceptance and validity in the museum sector.

It seems interesting to include here also some ethical and anthropological considerations advanced by museums' experts, with regard to the issue under analysis. The current prevailing trend consists of the effort to ensure respect for the Indigenous communities that can be rightly considered as the original owners of the remains, but maintaining a similar respect for the museums visitors. In order to guarantee these two aims, museums are trying to respect the moral sensitivity of the Indigenous peoples and inform the museums' visitors, in accordance with the standards stated by the Code of Ethics of ICOM, paying attention before to the meaning of the cultural objects and then to the displaying choices.[630]

[630] Section 4 of the ICOM Code of Ethics regards the opportunities for the appreciation, understanding and promotion of the natural and cultural heritage implemented by all the museums. The section is based on the principle regarding the meaningful duty of museums in developing their "educational role and attract wider audiences from the community, locality, or group they serve. Interaction with the constituent community and promotion of their heritage is an integral part of the educational role of the museum.". The framework of the Section 4 places before Article 4.2, on the "Interpretation of Exhibits" and then Article 4.3, regarding "Exhibition of Sensitive Materials". In order, Article 4.2 provides that: "Museums should ensure that the information they present in displays and exhibitions is well-founded, accurate and gives appropriate consideration to represented groups or beliefs"; Article 4.3: "Human remains and materials of sacred significance must be displayed in a manner consistent with professional standards and, where known, taking into account the interests and beliefs of members of the community, ethnic or religious groups from whom the objects originated. They must be presented with great tact and respect for the feelings of human dignity held by all peoples." See: ICOM, Code of Ethics, available at: http://icom.museum/the-vision/code-of-ethics/4-museums-provide-opportunities-for-the-appreciation-understanding-and-promotion-of-the-natural-an/#sommairecontent (accessed February 10, 2014).

The ICOM Code recognizes also the right of Indigenous communities to ask for the removal of human remains, asking for the adoption of definite policies by museums at this regard[631], and recalls the museums' responsibility in building their collections and disseminate accurate information, bearing in mind the meaning of sacred or human remains.[632] One of the weak points that could be raised is the impossibility of finding a solution able to resolve the existing fracture between the universal notion of cultural heritage and the instances advanced by the Indigenous communities, asking for their own right to manage their cultural heritage and resources in accordance with their local standards and ethics.[633]

From an anthropological perspective, some authors underline the peculiar dimension of the North America and Oceania reconciliation between Indigenous and colonizers' descendants. The Italian anthropologist Adriano Favole classified the methods adopted by Western peoples for the appropriation of Indigenous remains, as a means to analyze the domain and pillaging relationships dynamics during the era of colonization.[634] Favole identifies three different typologies of appropriation in Oceania: the direct colonizers' purchasing of the remains from the Indigenous peoples; the looting activities in the Indigenous cemeteries; and finally, the destruction of the remains.

These three modalities show a generally predatory attitude, that exemplifies the relationship between Europeans and Indigenous populations established in the colonial time. At the basis of this pillaging there was a logic of incorporation, which characterized the colonization process.[635] This has been

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[631] See: Code of Ethics, "Article 4.4 Removal from Public Display.
Requests for removal from public display of human remains or material of sacred significance from the originating communities must be addressed expeditiously with respect and sensitivity. Requests for the return of such material should be addressed similarly. Museum policies should clearly define the process for responding to such requests." Available at: http://icom.museum/the-vision/code-of-ethics/3-museums-hold-primary-evidence-for-establishing-and-furthering-knowledge/#sommairecontent (accessed February 10, 2014).

[632] See: ICOM Code of Ethics, "Article 3.7 "Human Remains and Material of Sacred Significance. Research on human remains and materials of sacred significance must be accomplished in a manner consistent with professional standards and take into account the interests and beliefs of the community, ethnic or religious groups from whom the objects originated, where these are known." available at:http://icom.museum/the-vision/code-of-ethics/3-museums-hold-primary-evidence-for-establishing-and-furthering-knowledge/#sommairecontent (accessed February 10, 2014).

[633] See: Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali", *Antropologia Museale* 32-33(2012):58.

[634] See: Adriano Favole, "Appropriazione, incorporazione, restituzione di resti umani: casi dall'Oceania", *Antropologia* 3 (2003):125.

[635] See: Adriano Favole, "Appropriazione, incorporazione, restituzione di resti umani: casi dall'Oceania", *Antropologia* 3 (2003):126.

transmitted also in the development of the Western museums concept, and for this reason the current museums' opposition to the repatriation of remains to the original Indigenous descendants may be considered a consequence of this original attitude, raising relevant ethical questions. Nowadays, four main features are evaluated in this regard: the antiquity of the remains, the time of their discovery, the type of death of the subject (natural or violent), and the possibility of establishing a direct link between the dead peoples' descendants and the members of the community who claim what remains of his body.[636]

The interesting point underlined by Ferracuti and Lattanzi with regard to this latter issue is that nobody among the anthropology community took part to the drafting in the Document produced by the Joint Committee in Florence. Ferracuti and Lattanzi, instead, point out that the dialogue on the repatriation of human remains should be based on the fundamental recognition of the "ambivalent nature" of the human remains themselves: even though they are cultural objects and samples from a scientific perspective, for their ancestors they still represent "remains of humanity", thus having a double nature of ancestors (subjects) and materials (objects).[637]

This evaluation opens-up the next step of reflection: considering this double identity is possible, it can be noted that the remains are, at the same time, a material object that is the concrete remain of a soul, linking together the tangible and intangible dimensions of cultural objects.[638] This is probably one of the most complex concepts, but also the most complete evidence of the indissoluble linkage between the material representation of culture and its internal essence, and that exemplifies why human remains deserve a particular and different attention in the cultural heritage debate, and they should not be treated like others cultural objects. Even considering the outstanding value of artistic creations and their meaning for education, their importance for future generations and as inheritance from the past and fundamental roots for peoples' identity is such that human remains cannot be assimilated to mere "objects". This does not imply a lesser grade of dignity for the

[636] See: Gareth Jones and Robyn Harris, "Archeological human remains: scientific, cultural, and ethical considerations", *Current Anthropology* 2 (39) (1998) :254-255.
[637] See: Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali", *Antropologia Museale* 32-33(2012):60.
[638] On the protection of the intangible heritage, see references to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage in the Part One of this study.

artistic creations or belittling them, but rather it would identify the human remains under a distinct category of cultural objects, because they represent what remain of living bodies, and have for this a different essence.

In conclusion, with regard to the Italian museums' orientation on the care and museological decisions, it must be noted the general attention paid to the issue. For example, the "Pigorini" Museum decided to not display the objects in the Oceania section and launched a direct collaboration with the Indigenous communities. Similarly, on May 25, 2009 the Museum of Florence inaugurated its new set-up of the North America collection, inviting three Lakota Sioux representatives from the native communities to officiate the pipes ritual, and the Museum decided to not exhibit the pipes, as they are the most important spiritual objects in the Sioux culture.[639] This approach illustrates the attention paid by museums' curators to the Indigenous communities, showing also their interest in having direct exchanges with the native groups and not with the National Governments or bodies, as stated also in the position paper above mentioned.

5.5.5. Subjects Qualified to Request Indigenous Objects Repatriation

In order to implement a request of recovery of cultural objects is necessary to accurately assess the origins and status of individuals who have advanced it. No objection can be raised in the case of direct descendants.[640] On

[639] See:Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011): 21.

[640] On this point, the Italian legislation lacks adequate legal definition over the issue of the Indigenous claims against museums and other institutions. The reason is clearly founded on the lack of a domestic Indigenous issue, in opposition to other countries that had direct role in the colonization, such as the United Kingdom. Looking at the Australian case, the government has enacted some Acts also to encompass the Indigenous requests concerning the "Native Title" right over the land. The latter issue regards their request of their formal recognition as traditional land and waters owners of some territories of the country. The 1994 Aboriginal and Torre Strait Islander Heritage Protection Act and the 2006 Aboriginal Heritage Act are two examples of the Australian government attention to the Indigenous claims. Giuseppina Prayer labels these two acts as "incomplete and insufficient attempts". It is interesting that later on, Giuseppina Prayer also considers that: "the scientific value of the studies over the human remains based on the antiquity of the relics is a western concept alien from the Indigenous mentality. [...] It is generally recognized that each community must be free to decide on the basis of their traditional beliefs whether or not realize scientific researches on the remains, because their beliefs should be respected by

the contrary, the repatriation may be denied if, over time, the original group has been dispersed and no descendant can be identified, or any link with another group that had a connection with the ethnic group to whom the required remains belong. [641] Looking at the national Australian legislations, it is of extreme

everyone." Prayer also takes into consideration the "Standing Resolution of Council" of the University of Melbourne. It is highly relevant to note that, the Human Remains Policy (MPF1226) of the University of Melbourne, at point 4, regarding the "Storage of human remains and burial artefacts" directly recalls the 2004 ICOM Code of Ethics:
"4.1 The storage of human remains must be based on a high level of care and respect. In developing this policy the International Council of Museums Code of Ethics (2004) statement on storage has been drawn on. This Code states: 'Collections of human remains and material of sacred significance should be housed securely and respectfully and carefully maintained as archival collections in scholarly institutions. It should be available for legitimate study on request. Research on such material, its housing, care and use (exhibition, replication and publication) must be accomplished in a manner consistent with professional standards and the interests and beliefs of the members of the community, ethnic or religious groups from which the object originated. Requests for removal from public display of human remains or material of sacred significance must be addressed in a timely manner and with respect and sensitivity. Any new displays should be set up in ways that are sensitive to religious and cultural beliefs. Advice should be sought from appropriate communities or museum curators when creating such displays."
Point 6 of the University of Melbourne Policy, on "Sacred or secret objects" states:
6.1 In accordance with the Victorian Act, the University may hold an Aboriginal object provided it has the consent of its owner, it is in accordance with a cultural heritage agreement or plan or in certain other limited circumstances.
6.2 Under the Victorian Act an Aboriginal person with traditional or familial links to a secret or sacred Aboriginal object held or controlled by a university, museum or other institution may- on his or her own initiative, or in conjunction with one or more other Aboriginal persons, negotiate directly with the university, museum or other institution; or ask the Minister to negotiate with the university, museum or other institution on behalf of the person for the return of the secret or sacred Aboriginal object.
6.3 Aboriginal artefacts that are not sacred or secret objects and are able to be held by the University, and indigenous and non-indigenous burial artefacts, must be catalogued so that they can be identified for return or repatriation should a request be made."
See: Giuseppina Prayer, "La questione della "repatriation": motivazioni culturali, vincoli giuridici, implicazioni museo logiche", *Antropologia Museale* 18 (2008): 53. See also: Melbourne Policy Library, University of Melbourne, available at: http://policy.unimelb.edu.au/MPF1226 (accessed February 20, 2014).

[641] The Joint Committee of the National Association of the Scientific Museums, in its Document, in addressing to the Italian Government in order to point out its precise criteria to achieve a solution on the repatriation request, expressly states: "The Committee asks the Italian Government: that any eventual restitution takes place only after assuring, by means of incontrovertible scientific techniques, that the requesting communities are truly the direct and unique descendants of those whose remains are being requested, and after verifying that these communities will guarantee the correct conservation of the remains, albeit in respect of their specific cultural traditions". See: Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence, "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence", *Museologia Scientifica* 5 (1-2) (2011):13. As no source is provided in the text with regard to the need of demonstrable link between the objects and the descendants, it seems here useful also to look at the domestic Australian provisions, related to the repatriation issues. In absence of proper Italian legislation on the matter, it must be underlined that, the remains are in Italy and are part of the Italian cultural patrimony, as above mentioned. For this reason the recourse to the examination of the Australian provisions is not intended here as the applicable source of law, but it aims to find a source of applicable criteria, even considering that Italy has any domestic "Indigenous issue". In

importance to recall here the most important provisions on the human remains legal regime. Under Part 2 of the two principal Acts adopted by Australia, *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003,* Aboriginal and Torres Strait Islander people having traditional or familial links to the requested human remains become automatically the owners. This general principle applies irrespective of who had previously owned the remains.[642]

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fact, as to the link between human remains and Indigenous descendants, the statements are included in the Executive Summary of the Law Library of Congress of Australia on the" Repatriation of Historic Human Remains"(July 2009). The document refers to the cooperation between the British and Australian governments to implement an increasing human remains repatriation stream to the native Australian land, and recalls also the enactment of appropriate legislation of this issue in several Australian states. In particular, it is worth of citation the following excerpt: "The Australian and British governments agree to increase efforts to repatriate human remains to Australian indigenous communities. In doing this, the governments recognize the special connection that indigenous people have with ancestral remains, particularly where there are living descendants", as it explains the meaning of a direct linkage between descendants and their ancestors in the requesting process of human remains. The complete document is available at: http://www.loc.gov/law/help/repatriation_%20final_%20rpt.pdf (accessed January 6, 2014). The document also makes reference to some precise goals implemented by the Australian Government in its repatriation program of human and sacred remains (the first program has been launched in 1993):
"identify the origins of all ancestral remains and secret/sacred objects held in the museums where possible; notify all communities who have ancestral remains and secret/sacred objects held in the museums ; appropriately store ancestral remains and secret/sacred objects held in the museums at the request of the relevant community; arrange for repatriation where and when it is requested".
See also: Marilyn Truscott, Repatriation of Indigenous cultural property (2006) (paper prepared for the 2006
Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra), available at: http://www.environment.gov.au/system/files/pages/e535aa20-601d-4e5f-9279-5fe172d2b708/files/repatriation.pdf (accessed January 6, 2014). It is also necessary to recall here as large part of this program has been devoted to a domestic dimension of repatriation of human remains and sacred objects, with a large involvement of the National Museum of Australia and as a consequence of the Aboriginal and Torres Strait Islander Heritage Protection Act 1987. See: Ana Filipa Vrdoljak, International Law, Museums and the Return of Cultural Objects, (Cambridge, New York: Cambridge University Press), 2006, p. 222. A specific part of the program is dedicated to the "Repatriation from Overseas", esteeming that about 900 Indigenous Australian remains were originally stored in foreign museums. See: Executive Summary of the Law Library of Congress of Australia on the" Repatriation of Historic Human Remains"(July 2009), http://www.loc.gov/law/help/repatriation_%20final_%20rpt.pdf (accessed January 6, 2014).

[642] Due to brevity reasons, it is reported here only the first Act text, as apart the precise territorial reference, the text of the provisions is the same. The text of the *Torres Strait Islander Cultural Heritage Act 2003* is available at:
https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TorresStIsCuA03.pdf (accessed February 5, 2014).
Part 2 "Ownership, custodianship and possession of Aboriginal cultural heritage", Division 2 "Aboriginal human remains",
Article 15 "Ownership of Aboriginal human remains",
(1) On the commencement of this section, Aboriginal people who have a traditional or familial link with Aboriginal human remains in existence immediately before the commencement become the owners of the human remains if they are not already the owners.
(2) Subsection (1) applies regardless of who may have owned the Aboriginal human remains before the commencement of this section.

Looking at the International legal tools,[643] Article 12, Part III, of the 1994 United Nations Declaration on the Rights of Indigenous People provides: "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs."[644]

Article 16 "Aboriginal human remains in custody of State"
(1) This section applies to Aboriginal human remains if the human remains are in the custody of an entity that represents or is the State.
(2) The persons who own the human remains may at any time ask the entity—
(a) to continue to be the custodian of the human remains; or
(b) to return the human remains to them.
(3) If the entity is satisfied the persons making the request under subsection (2) are the owners of the human remains, the entity must comply with the request to the greatest practicable extent.
(4) The persons who own the human remains are not limited to making only 1 request under subsection (2).
Example— The owners could ask for the Queensland Museum to continue its custody of the human remains while they make suitable arrangements for dealing with the human remains, at which time they could ask for the human remains to be returned to them. The complete text of the Aboriginal Cultural Heritage
Act (March 31, 2003) is available at:
https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TorresStIsCuA03.pdf (accessed February 5, 2014).

[643] It is of some interest the analysis conducted by Ana Filipa Vrdoljak on the historical background of the restitution legal ground development, and its links with Decolonization. In particular, Vrdoljak moves from the analysis of the Mohammed Bedjaoui's draft articles, that led to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, as Special Rapporteur, appointed by the International Law Commission. As suggested by Bedjaoui, the 1983 Vienna Convention did not include any reference to "works of art", despite as Vrdoljak states, "after the Second World War did the international community recognize categorically the primacy of the right of colonized peoples to the preservation and development of their cultural identity over the right of the international community to unfettered access to these cultural 'resources'." Bedjoui remarked also in his report that the transfer of cultural objects from colonial lands to metropolitan powers posed on an uneven relation, and was not generally based on "canons of justice, morality and law", contributing to the disruption of indigenous communities. " More precisely, Vrdoljak points out as the Bedjoui's exclusion of the cultural objects from his report influenced also the 1970 UNESCO Convention, and further states that such exclusion "despite his acknowledgment of the cultural losses fuelled by colonial occupation is inexplicable. The 1970 UNESCO Convention offers little recourse for peoples who have suffered cultural losses prior to its operation". The non-retroactivity of the 1970 UNESCO Convention opened to a legal *vulnus* for all transfers of cultural objects occurred before the entry into force of the Convention itself. See: Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006), 200-210. See also: Doc. A/CN.4/292, paragraph 136; and Mohammed Bedjaoui, Fourth Report on the Succession of States in Respect of Matters Other Than Treaties, International Law Commission, UN Doc.A/CN.4/247 and Add. 1.

[644] The full text of the 1994 United Nations Declaration on the Rights of Indigenous People is available at:
http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDoc

The 2001 UNESCO Universal Declaration of Cultural Diversity states similar principles. In particular, Article 4 and 5, included in the Part concerning "Cultural Diversity and Human Rights", precisely express that the respect for Indigenous peoples' and minority groups' cultural identity must be intended as an ethical imperative.[645]

As previously stated, the 1995 UNIDROIT Convention provisions cannot be applied for several reasons. First of all, it refers to stolen or illegally exported cultural objects – and this case does not fall into the Convention categories. Secondly, Australia is not party to the UNIDROIT Convention, while Italy signed it on June 24, 1995, and ratified it on October 11, 1999.[646] Thirdly, even if the objects would have been stolen or illegally exported, and Australia would had ratified the Convention, the restitution claim "is subject to a limitation time of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation."[647]

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ument (accessed February 24, 2014).

[645] See: "Article 4 – Human rights as guarantees of cultural diversity.
The defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.
Article 5 – Cultural rights as an enabling environment for cultural diversity.
Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms."
The full text of the 2001 UNESCO Universal Declaration on Cultural Diversity is available at: http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed February 10, 2014).

[646] See:"Status", UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, available at: http://www.unidroit.org/status-cp (accessed February 10, 2014). As to February 28, 2014,35 countries are Parties to the UNIDROIT Convention, after the last two ratifications of Honduras and the Former Republic of Macedonia, occurred on February 1, 2014.

[647] See Article 3.5 of the 1995 UNIDROIT Convention. In addition, it must be here recalled that Article 3, paragraphs 3 and 4 provide as follow: "(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

In addition, to some extent, under a comparative dimension, the 2006 Policy on Human Remains held by the University of Oxford's Museums can be here taken into consideration.[648] In particular, the provisions on De-accessioning and Claims for the Return of human remains result of some interest. The Policy states the general interest of the University of Oxford to preserve its human remains collection "intact", but also takes into consideration the need of evaluating "on a case-by-case basis" the claims of repatriation of human remains "that were buried or are intended for burial".[649] The Policy also points out a clear distinction among the different kind of human remains, considering whether the objects have been modified or are "separable". If they are no longer considered as "human remains intended for burial [then the university is …] unlikely to agree to

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor." The full text of the 1995 UNIDROIT Convention is available at: http://www.unidroit.org/instruments/cultural-property/1995-convention (last access February 14, 2014).

[648] Oxford University Gazette, Policy on Human Remains held by the University of Oxford's Museums , Supplement (2) to N. 4787, Wednesday, 15 November 2006, http://www.ox.ac.uk/gazette/2006-7/supps/2_4787.pdf (accessed July 16, 2013). A new Policy had been published in 2011. By the way, the 2006 is taken here into account for its provisions on Human remains Policy.

[649] It seems important to completely include here the text of the provisions regarding the De-accession (5.3) and Claims for return (6).

"5.3 *De-accessioning.*

Notwithstanding the University's general presumption that its collections should remain intact for the benefit of present and future generations, human remains may on occasion be de-accessioned, for instance (*a*) in response to approved claims for repatriation submitted in accordance with the University's procedure for the consideration of claims, or (*b*) in accordance with agreed inter-institutional policies for the location of certain types of material. On such occasions the de-accessioning museum will need to be satisfied that the remains will be appropriately dealt with within the accepted framework of legal, ethical and practical considerations and in conformity with the procedures required by the museum's status as a collection Accredited and Designated by the Museums, Libraries and Archives Council."

"6.2 While the University of Oxford generally presumes that its collections should remain intact for the benefit of present and future generations throughout the world, it will on a case-by-case basis give serious consideration to repatriating human remains that were buried or were intended for burial, if (*a*) they are less than 100 years old and a claim for their return is being made by a genealogical descendant; or (*b*) they are less than 300 years old, and the claim is normally made by a source community which displays a cultural continuity with the remains in question, and the claim is made through a national government, national agency, or equivalent, and where, after taking any relevant independent advice on questions which the University formulates as needing an answer to help it make a decision, it is in its view likely that the cultural and religious importance of the human remains to the community making the claim outweighs any other public benefit." The text specifies in a note that, "The phrase 'human remains that were buried or were intended for burial' includes (1) human remains that were modified for this purpose (e.g. cremated) and (2) human remains that were used or intended for any other form of mortuary disposal, as appropriate to different societies."

any claim for their repatriation".[650] Furthermore, the Policy also includes interesting considerations on the temporary antiquity of the objects claimed (6.4) and states that only the community can claim the objects, clearly excluding the hypothesis of a successful repatriation claim presented by a national government (6.5).[651] These points seem of undeniable interest for the analysis of the Australian case here under examination.

Looking at the Italy-Australia dispute, it shall be settled through the bilateral negotiation between the two national governments, having the Australian government as representative of the Indigenous people, always considering that the direct linkage and lineage remains an undeniable element for the recognition of the request. Bearing this in mind, a possible suggestion for the Italian Museums could be the adoption of a Policy similar to that adopted by the Oxford University, in order to develop some specific standards on the issue.

5.5.6. Comparative Analysis with Other Cases of Indigenous Objects Repatriation

In terms of comparison[652], it seems useful to recall here the case of restitution of sixteen Maori heads by France, which were given back to the New

[650] See: point 6.3 of the "Policy on Human Remains held by the University of Oxford's Museums", Oxford University Gazette, Supplement (2) to N. 4787, Wednesday, 15 November 2006, http://www.ox.ac.uk/gazette/2006-7/supps/2_4787.pdf (accessed July 16, 2013).

[651] See: Oxford University Gazette, Policy on Human Remains held by the University of Oxford's Museums, Supplement (2) to N. 4787, Wednesday, 15 November 2006, http://www.ox.ac.uk/gazette/2006-7/supps/2_4787.pdf (accessed July 16, 2013).
" 6.4 The University of Oxford considers that claims are unlikely to be successful for any remains over 300 years old,
and are highly unlikely to be considered for remains over 500 years old, except where a very close geographical, religious and cultural link can be demonstrated.
6.5 The University of Oxford will normally only consider a claim for repatriation from a community if it has been made officially through a body generally recognized as responsible for the governance of the claimant community. The University will not normally consider a claim from a national government unless it is made on behalf of an identified source community."

[652] In order to completely represent here the Italian situation on a comparative basis, it is curious that another case has occurred, resulting in a domestic repatriation. It deals with the restitution of Giuseppe Vilella's head, a brigand, at the Lombroso Museum of Turin. As known, Lombroso was an anthropologist lived at the end of the XIX Century, who used the heads of bandits and robbers to support his theories. According to Lombroso, through the analysis of robbers' morphology is possible to identify the common elements that always recur in criminals. The mayor of Motta Santa Lucia, in the city of Cosenza, birthplace of the robber formally asked for the recovery of Vilella's skull, to give it a decent burial at the place of birth. He filed also a petition with the Court of Lamezia Terme against the Turin museum. On October 5, 2012, the judgment of first instance concluded with the condemnation of the City and the University of Turin to return the head. This

Zealand original Indigenous communities to which they belong. This happened only after June 29, 2009, when the French Senate overturned the previous Tribunal of Rouen judgment, and finally voted on May 4, 2010 for the bill that approved the repatriation of the Maori heads.[653] The first head was returned on May 9, 2010 to the National Museum of New Zealand Te Papa Tongarewa,[654] after enacting a specific domestic law that allowed changing the internal measures for the protection of French cultural heritage. The tattooed and mummified heads were donated by a private collector in 1875 to the Museum of Natural History in Rouen. The first requests for the recovery of the cultural objects date back to the 1880s. In 2007, the same town of Rouen has voluntarily voted in favor of accepting the restitution request.

With respect to the French case Giocomo Giacobini stated as follows: "Paris, reu Cuvier, the storerooms of the biological anthropology collections of the Musée de l'Homme, March 2011. Alain Froment [...] is accompanying me on a visit to the "reserves", temporarily transferred to this building, and is telling me about the events leading to the restitution of some human remains held in France to indigenous communities. We are discussing the *peril*[655] of these actions for museums, impoverishing historically and scientifically important collections which are both a research tool and a patrimony of cultural goods rightfully

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case led to a list of restitution requests from the South of Italy to the Lombroso Museum. Another interesting point is that one of the last requests arrived from a village near Latina, in the Lazio Region. In the municipal request for the restitution of the bandit's remains, a motivation is specified: "*in accordance with the principle of respect for those who did not receive any adequate burial after their death*." See: Sandra Ferracuti e Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali" *Antropologia Museale* 32-33(2012): 59.

[653] This case is also known as "Toi moko", that means *relic*. The main references on this case and its International Legal foundations, see: Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests : the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden : Martinus Nijhoff Publishers, 2012), 157-177. For the text of the Senate Bill, see: LOI n° 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections (1), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022227321&dateTexte= (accessed December 30, 2013).

[654] The Newzealander Museum claims back about 500 Maori heads, tattooed and mummified, which became collectors' items in the Eighteenth and Nineteenth Centuries, and for this reason widely exported, mainly in European countries. On this point, see: Liberation, D.P.O. ,"Rouen restitue une tête maorie", May 9, 2010, http://www.liberation.fr/culture/01012336306-rouen-restitue-une-tete-maorie (accessed February 1, 2014). See also: Le Figaro, AFP, "La France va restituer des têtes maories", http://www.lefigaro.fr/flash-actu/2010/04/29/97001-20100429FILWWW00470-la-france-va-restituer-des-tetes-maories.ph (accessed February 1, 2014).

[655] Italics added.

considered a heritage of humanity. What happened in a secular nation like France, the country of reason and method, amazes me and I ask him what Descartes would think today".[656]

Eventually, the national Government decided to block the request, because the objects were recognized as inalienable, and considered as works of art or of particular archaeological value. The French path for the solution of the issue was marked by distinction that is fundamental for International Law: the request was blocked also because it must be received by the same Indigenous community, to whom the disputed objects belong. It is not possible to accept such a request of recovery submitted by a State, especially in cases such as New Zealand – and this profile can be totally assimilated to the Australian case – in which the present Government is an evolution of the colonial power, which firstly inflicted serious damage and committed crimes that contravene the respect of fundamental human rights against those Indigenous populations that nowadays claim back their ancestors' remains.[657]

The treatment of local Indigenous minorities has undergone a positive change only in last decades, decreeing a radical switch in the realm of the solutions adopted for the recovery of cultural objects, with a strong impact on case law and national legislations.

In the French case, the restitution has been operated through the approval of a new domestic law, changing the national legislation to settle the dispute. The most relevant consequence was the wider effect on the entire national legislation and the creation of a precedent: the solution has not been pursued through a bilateral agreement, with a delimitated influence and scope on the specific case, but through a tool having a wider legal effect. It must be underlined that – as it is in the Italian case – no other legal solution of limited impact may have succeeded in concluding the dispute, as a modification of the French domestic law itself was

[656] Giacomo Giacobini, "A Threat to Biological Anthropology Collections (and not to Them Alone) *Museologia Scientifica* 5 (1-2) (2011):8.

[657] With regard to the issue of the repatriation of the Maori tattooed deads to the community as a key element for the rights of peoples and their traditions, see Judgment of the Inter-American Court on the case *Moiwana Community v. Suriname* (June 5, 2005). See on this: Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests : the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden : Martinus Nijhoff Publishers, 2012), 166-173.

needed. As pointed out by Daniel Berger,[658] a similar situation occurs in the Italian case, as one of the best solutions would imply changing the law of national heritage and – at least – stating that the remains donated from Giglioli to the "Pigorini" Museum would not be considered anymore as part of it. Understandably, no one would take on a similar political responsibility.

In addition to France, Norway has also already returned some Maori heads, while Switzerland, Denmark, the Netherlands and Germany have indicated their willingness. Similarly, a change in the law on the recovery of human remains was implemented also in Great Britain in 2004, with the approval of the Human Tissue Act (Section 47).[659] Since then, nine national museums have "power to de-accession" human remains from their collections, when dated as being less than a thousand years from the date of the entry into force of the rule. This is totally discretionary measure that must be adopted by the museum authorities, and not by the national Government, implying the decision of a possible repatriation of requested cultural objects, pursuant to the provisions of the General Law on Museums 1964.[660]

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[658] This information has been provided by Mr. Daniel Berger during a phone call interview.

[659] See: Human Tissue Act 2004, Part 3, Section 47. "Power to de-accession human remains", available at: http://www.legislation.gov.uk/ukpga/2004/30/section/47 (accessed December 15, 2013):
(1)This section applies to the following bodies:
The Board of Trustees of the Armouries;
The Trustees of the British Museum;
The Trustees of the Imperial War Museum;
The Board of Governors of the Museum of London;
The Trustees of the National Maritime Museum;
The Board of Trustees of the National Museums and Galleries on Merseyside;
The Trustees of the Natural History Museum;
The Board of Trustees of the Science Museum;
The Board of Trustees of the Victoria and Albert Museum.
(2)Any body to which this section applies may transfer from their collection any human remains which they reasonably believe to be remains of a person who died less than one thousand years before the day on which this section comes into force if it appears to them to be appropriate to do so for any reason, whether or not relating to their other functions.
(3)If, in relation to any human remains in their collection, it appears to a body to which this section applies—
(a)that the human remains are mixed or bound up with something other than human remains, and
(b)that it is undesirable, or impracticable, to separate them,
the power conferred by subsection (2) includes power to transfer the thing with which the human remains are mixed or bound up.
(4)The power conferred by subsection (2) does not affect any trust or condition subject to which a body to which this section applies holds anything in relation to which the power is exercisable.
(5)The power conferred by subsection (2) is an additional power.

[660] Massimo Corio, "L'affaire dei resti umani nelle collezioni etnografiche", *Italia Arte*, December 1, 2010, available at: http://www.legaleuro.eu/it/blog/index.php?id=nd0abcde (accessed December 23, 2013).

With regard to Australian claims, Sweden has been the most active country in implementing the repatriation of human remains.[661] This choice could lead to the development of possible *best practices*[662] among the Countries involved in bilateral disputes concerning the repatriation of human remains.[663]

5.5.7. Possible Comparative Profiles with Italian Precedents: The Venus of Cyrene

The issue of the inalienability under the Italian law of the objects requested by Australia may be assumed as not-negotiable. From the methodological perspective, it could be useful to look at possible comparisons into the Italian *praxis* in the restitution of cultural objects sector. Only one case arises with regard to the Italian involvement in bilateral disputes over the recovery of cultural objects: the restitution of the Venus of Cyrene,[664] restituted from Italy to Libya on August 31, 2008.[665] In 1913, a headless statue of Venus – a copy of the original Greek one – had been discovered by Italian troops on the Libyan coasts, in the ancient Greek-Roman site of Cyrene. At that time, Cyrenaica and Tripolitania were officially annexed to Italy, after the Italian-Turkish war (1911-1912), although the Italian control over the entire Libyan territory occurred only

[661] Karl Ritter, "Swedish museum to send a stolen generation home", theage.com.au, available at: November 28, 2003, http://www.theage.com.au/articles/2003/11/27/1069825923163.html?from=storyrhs (accessed January 25, 2014).

[662] The best practices, or also "best in class", or "leading practice", refer to specific techniques or methodology applied to the resolution of a problem, generally regarding a public policy matter, which have demonstrated their superiority in comparison to other means. For this reason they start to be used as a benchmark. For further detail, see: Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving*, (Washington: CQ Press, SAGE Publications, 2011), 132.

[663] The promotion of *best practices* was one of the themes also of the work of the First Session of the Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (UNESCO, Paris, 1970) held in Paris, on July 2 and 3, 2013. See *supra* , Paragraph 1.3.

[664] Also Known as the Venus "Anadyomene", that means "rising from the waves". See: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 360.

[665] This case regards several legal questions, that will not here completely included for brevity reasons. The citation of the case is here due to the strict reference to the connection with the inalienability issue of the cultural objects, that are part of the Italian state property. For an extensive examination of the case, see: Alessandro Chechi, "The return of cultural objects removed in times of colonial domination and international law: the case of the Venus of Cyrene", *Italian Yearbook of International Law* 13 (2008): 159-181.

in 1932.[666] In 1915, the Venus had been carried in Italy and exposed at the National Roman Museum. After the Libyan independence in 1951, in 1989 for the first time the Venus was claimed by Libyan authorities. On July 4, 1998, Italy signed a Joint Declaration with Libya, committing itself to return "all manuscripts, artifacts, documents, monuments and archaeological objects brought to Italy during and after the Italian colonization of Libya, pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property".[667]

Therefore, in 2000 the two countries concluded an agreement for the restitution of the statue. On August 1, 2002, a Ministerial Decree of the Italian Ministry of Culture recognized that Italy had no intention of owning the statue any more, and decided to dismiss it from the list of the state property, in order to give action the restitution. Nonetheless, the Italian non-governmental organization "Italia Nostra"[668] opposed the restitution because of the inalienability of the cultural object. On November 14, 2002, Italia Nostra settled a lawsuit before the Tribunale Amministrativo Regionale (the Regional Administrative Tribunal) of Lazio against the Ministry of Culture, and asked for the invalidation of the Ministerial Decree of 1 August 2002. The Tribunal rejected Italia Nostra's recourse, considering that Italy had to restitute the statue, because of the obligations deriving from the Joint Declaration (1998) and the Agreement (2000). The Tribunal established that it was impossible to apply in this case the prohibition of alienation, under the Italian law, because Italy accepted to return the statue in a bilateral international accord. This evaluation was based both on the 1998 bilateral declaration, and on "two customary rules of international law".[669] The first rule concerns the principle stated under Article 15, paragraph 1, sub-paragraph (e) and (f) of the 1983 Vienna Convention on Succession of States in

[666] See: Nancy C. Wilkie, "Colonization and Its Effect on the Cultural Property of Libya," in *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, James A.R. Nafziger and Ann M. Nicgorski eds., (Leiden: Martinus Nijhoff Publishers, 2009), 170-171, 176.
[667] See: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 360.
[668] "Italia Nostra", Italian branch of "Europa Nostra", established in 1958. It is the "National association for the protection of the National historical, artisitc, and natural heritage". See: Italia Nostra, http://www.italianostra.org/?page_id=4 (accessed Febraury 20, 2014).
[669] For an extensive description of the case and a detailed analysis, see: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 360-363.

respect of State Property, Archives and Debts.[670] The second rule regards the principle, established in the 1899 and 1907 Hague Conventions, in many peace treaties and in the 1954 Hague Convention for the Protection of Cultural Property in the Event of the Armed Conflict and its Protocol, providing that the cultural property carried out of its original context during time of war shall be recovered. As a consequence, there was no need of any enacting law for the 1998 Italian-Libyan Joint Declaration, because under Article 10 of the Italian Constitution all rules of customary international law are self-executing.[671]

The NGO decided to appeal to the Regional Administrative Tribunal verdict before the Consiglio di Stato ("Council of State"). On June 23, 2008, the Council confirmed such verdict, pointing out, as to the inalienability issue, that the Ministerial Decree of August 2002 reproduced binding international obligations assumed by Italy. For this reason, this provision prevailed over other domestic rules, regardless they might have a formal hierarchic superiority, such as norms banning the deaccession of cultural objects part of the state property. The Council, therefore, also rejected the Italian NGO's appeal for the enactment of a specific law for the exclusion of the statue from the list of the Italian inalienable state patrimony. On August 30, 2008, the Venus copy was eventually restituted.[672]

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[670] See: "Article 15 – Newly independent State
1.When the successor State is a newly independent State: [...]
(*e*) movable property, having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;
(*f*) movable State property of the predecessor State, other than the property mentioned in subparagraphs (*d*) and (*e*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory."
The full text of the 1983 Vienna Convention is available at: http://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (accessed February 20, 2014). It must added that the Tribunal considered that the 1983 Vienna Convention, although not yet entered into force, at Article 15 indicated "the principle in force in the field of international succession between the States which have gained full independence following the process of decolonization". The Tribunal also reported an excerpt of the Report of the International Law Committee on Article 15, para. 1, letter (f) of the future Convention, asserting: "this provision represents a concrete application of the concept of equity forming part of the material content of a rule of positive international law, which is designed to preserve, *inter alia*, the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned". United Nations, *Yearbook of the International Law Commission* 2 (1981): 38, as cited in Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 362.

[671] Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2 (2011): 363.

[672] See: Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Venus of Cyrene – Italy and Libya," Platform ArThemis, Art-Law Centre, University of Geneva, available at: https://plone.unige.ch/art-adr/cases-affaires/venus-of-cyrene-2013-italy-and-libya (accessed,

It is just the case to report that the Council of State found that a new rule of customary international law arose, with regard to the cultural properties removed during time of war or also colonial domination, which originated from the principles of the prohibition of the recourse to the use of force and of the self-determination of peoples. In any case, the case here taken into consideration cannot be included or assimilated to the situation of colonial domination or war time, and the interest for the comparison with the Venus of Cyrene is strictly limited to the issue of the inalienability of the state property classification of the requested cultural objects. In contrast with the Venus of Cyrene, in the Indigenous case the inalienability question has relevance and a specific domestic law would be necessary to recover the objects and repatriate them to the Indigenous communities of Australia.

5.5.8. The Human Rights Dimension in the Recovery of Cultural Objects: the Legal Foundation in International Law

After having analyzed the dispute, its possible comparisons in the international and Italian praxis aiming to find possible solutions, the research will now consider the main legal instruments that must be recalled to give foundation to the Indigenous issue in international law. Firstly, the analysis will draw its attention to the identification and definition of the Indigenous peoples, for their peculiar nature and representing the most relevant subjects involved in the case. Secondly, the analysis of the human rights dimension in international law will be developed following a chronological criteria, needing to include several legal instruments, both regional and international, proceeding to a systematic examination. Nonetheless, when necessary, some references will be addressed to the bilateral dispute analyzed in this paragraph.

Even if separated from the bilateral dispute analysis, this overview of the international law sources on the Indigenous issues seems here necessary, because it offers useful elements that constitute the ground to determine the conclusive evaluations of the case. As the final sub-paragraph will show, the research

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eventually adopts a progressive position, that is the result of the international law evolution illustrated below.

To better define the term, a fundamental source is the Final Report of the Sofia Conference on the "Rights of Indigenous Peoples" of the International Law Association, held in Sofia in 2012. It states as follows:

"the *indicia* that should be used in order to ascertain whether or not a given community may be considered as an indigenous people are the following:

- *self-identification*: self-identification as both indigenous and as a people;

- *historical continuity*: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;

- *special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will *usually* form the basis of the cultural distinctiveness of indigenous peoples;

- *distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;

- *non-dominance*: forming non-dominant groups within the society;

- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities."[673]

The Report also specifies as, among all the *indicia* above reported, only two may be assessed as indispensable to identify an Indigenous people community: self-identification and its special relationship with its ancestral lands.[674]

Even though, in the past no ethical reason was raised against the preservation of human remains in museums, because of its recognized and

[673]See: International Law Association, Sofia Conference (2012), Rights of Indigenous Peoples. The document of the Final Report is available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1024 (accessed February 4, 2014).

[674] Taking into consideration other International Organizations, it must be recalled here as the World Bank's International Finance Corporation "Performance Standard 7, Indigenous Peoples", (1 January 2012) adopts as well two of the four elements above mentioned to identify the "indigenous peoples": the"[s]elf-identification as members of a distinct Indigenous cultural group and recognition of this identity by others" and "[c]ollective attachment to geographically distinct habitats or ancestral territories [...] and to the natural resources in these habitats and territories" (see paragraph 5). available at: http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES (accessed January 31, 2014).

accepted scientific legitimacy, a considerable change occurred on November 16, 1990 with the entering into force of the NAGPRA (Native American Grave Protection and Repatriation Act), which had a great international impact on the issue.[675]

This epochal switch has been the result of important changes that have occurred in the museum field. The progressive recognition of collective human rights is undoubtedly connected with a rising innovative consideration of culture itself. A relentless evolution in international law is going to acknowledge a link between the indigenous cultures and the importance of the possession of cultural objects, which enshrine the roots of their traditions and believes, considered essential to the transmission of the cultural values. The connection is highly relevant to move towards a wider and holistic notion of the indigenous culture as a whole.[676]

Looking at preceding cases, one of the most recent and relevant in relation to the repatriation of human remains regards that of Saartjie Baartman. She was a woman from South Africa, also famous as "the Hottentot Venus", who died in 1815 and the remains of whomwhere repatriated in 2002 from France, where the corpse was exported at the beginning of the XIX Century. Precisely, in 1810, the woman was obliged to leave her land, and follow the Boer Caezar to be exhibited in the human zoos of London and the exclusive high class cultural gathering in Paris, on the leash of the bear tamer Réaux. After her death, the anatomist George Cuvie exhibited the plaster cast of her entire body and her vagina in formaldehyde.[677]

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[675]See: "U.S. Department of Interior, Native American Graves Protection and Repatriation Act", available at: http://www.nps.gov/nagpra/mandates/25usc3001etseq.htm (accessed February 1, 2014). As a consequence, for example, in 1999 the Canadian Museums Association has published its *Ethics Guidelines*. In UK, in 2005 the British Government has produced a *Guidance for the Care of Human Remains in Museums*, and in 2006 the British Museum Policy on Human Remains, in coordination with the UK museums. Also in France the scientific community cared about the issue, and the Association Générale des collections des conservateurs publiques de France devoted a special edition of its magazine to the topic, entitled *Les cadavres de nos musées sont-ils exquis?* (no. 259/2010), as reported in Sandra Ferracuti and Vito Lattanzi, "Corpi e musei: dilemmi etici e politiche relazionali", *Antropologia Museale* 32-33 (2012): 57.

[676]On the return of human remains from museums more generally, see: Steven Gallagher, "Museums and the Return of Human Remains: An Equitable Solution?", *International Journal of Cultural Property* 17 (2010): 65. (Note 4)

[677] See: Clifton Crais and Pamela Scully, *Sara Baartman and the Hottentot Venus: A Ghost Story and a Biography*. (Princeton: Princeton University Press, 2008), ix-248.

Beside it, in 2005 a group of indigenous repatriations occurred from a list of museums and other institutions disseminated all along North America to the Indigenous community of origin, the Haida Nation, settled in the Northwest Coast of North America. Instead, the remains in possession of private people as well as of European institutions have not yet been recovered.[678] The declaration of the curator of the Museum of the University of Aberdeen on the occasion of a repatriation to New Zealand in 2006 is worthy of note: "the heads will be repatriated as ancestors back to New Zealand, [as they] are no longer objects, they are people".[679] This was a repatriation of nine heads, following a first repatriation to New Zealand occurred in 2004, from the Kelvingrove Art Gallery in Glasgow, of three heads. [680]

The last decades led to a growing interconnection between human rights and cultural identity. A first relevant legal source is Article 27 of the Universal Declaration of Human Rights, establishing in the right to participate in cultural life the basic international standard of the cultural rights, which opened to the following development of the associated rights, as well as of relevant international mechanisms and bodies.

Article 27 of the Universal Declaration of Human Rights states as follows:

"*(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[681]

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[678] See: Skidegate Repatriation & Cultural Committee, "End of Mourning Ceremony", available at: http://www.repatriation.ca/Pages/End%20of%20Mourning.html (accessed January 23, 2014). See also M. Simpson, "The Repatriation of Haida Ancestors", in Lyndel V. Prott (ed.), *Witnesses to History – Documents and Writings on the Return of Cultural Objects* (UNESCO, 2009), 260.
[679] See "Maori artefacts will be returned", *BBC News*, 18 July 2006, available at: http://news.bbc.co.uk/2/hi/uk_news/scotland/5189490.stm (accessed January 24, 2013).
[680] See "Maori heads will return to NZ", *BBC News*, 24 June 2004, available at: http://news.bbc.co.uk/2/hi/uk_news/scotland/3834501.stm (accessed January 24, 2013).
[681] Universal Declaration of Human Rights, text available at: http://www.un.org/en/documents/udhr/ , (last visited on 4 January 2013). For an extensive and detailed examination of Article 27 of the Human Rights Committe, see: Elsa Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond*, (Leiden, Boston: Martinus Nijhoff Publishers, 2007), xi-333.

The only international human rights treaty that included the term "cultural rights" in its title has been the International Covenant on Economic, Social and Cultural Rights. Article 15 of the Covenant recalls the principle of participation to cultural life, and the right to enjoy and benefit from culture and its applications.[682] In particular, paragraph 2 of the Article 15 pays precise attention to the preservation of the system of values and cultural identity of minorities and indigenous groups, which is expressly considered as a necessary step to guarantee to every individual the right to be involved in the social and cultural life.[683] According to the Committee on Economic, Social and Cultural Rights' (ESCR Committee) interpretation, this right cannot be fully achieved without implementing a conduct "pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples".[684]

The 1966 International Covenant on Civil and Political Rights (ICCPR), adopted on December 16 as the previous Covenant, does not explicitly display the term "cultural rights", but it states, under Article 27: "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such*

[682] It must be underlined that it cannot be here included an extensive analysis also on the economic and social meaning of the debate. The Covenant is here included for its reference to the cultural rights, even though its principal value attains the distinctive economic and social dimension, separated from the human rights protection significance. See: United Nations Human Rights, Office of the High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx ((accessed January 24, 2013). See in particular, Article 15:
1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[683] International Covenant on Economic, Social and Cultural Rights (ICESCR) (New York, 16 December 1966); 993 UNTS 3.

[684] See: General Comment No. 21, Right of everyone to take part in cultural life (Article 15, paragraph 1 (a), International Covenant on Civil and Political Rights), UN doc. E/C.12/GC/21, 21 December 2009, paragraph 16 (e).

minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[685]

Article 27 is the cornerstone to group and minority rights, granting recognition beyond individual rights. It must be underlined here that the debate on the inclusion of the references to cultural rights, in the drafting of Article 27, occurred in conjunction with the controversy as to whether the Convention on the Prevention and Punishment of the Crime of Genocide should address or not to the "cultural genocide", in addition to the physical and biological genocide cases.[686]

As reported by Lenzerini,[687] referring to the interpretation of Article 27 of the 1966 ICCPR, the Human Rights Committee has stated as follows: "[...] *culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the*

[685] For an extensive examination of Article 27 of the 1996 ICCPR, see: Elsa Stamatopoulou, Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond, (Leiden, Boston: Martinus Nijhoff Publishers), 2007, Chapter Four A, pp. 162- 229. See: "The Tensions Between Communities' Cultural Rights and Global Interests: the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden: Martinus Nijhoff Publishers, 2012), 166-173.

[686] On the debate over the inclusion of the "cultural genocide" in the Convention on the Prevention and Punishment of the Crime of Genocide, the "Drafting of the Convention" reports as follows: "Certain aspects of the drafting history of the Convention have figured in subsequent interpretation of some of its provisions. For example, the definition of genocide set out in article II is a much-reduced version of the text prepared by the Secretariat experts, who had divided genocide into three categories, physical, biological and cultural genocide. The Sixth Committee voted to exclude cultural genocide from the scope of the Convention, although it subsequently agreed to an exception to this general rule, allowing "forcible transfer of children from one group to another" as a punishable act. See: United Nations Audiovisual Library of International Law, Convention on the Prevention and Punishment of the Crime of Genocide, available at: http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf (accessed, February 5, 2014).
On the connection between the two relevant international legal tools on Human Rights protection, see: Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, (Philadelphia: University of Pennsylvania Press, 1999), 217-222, and 269-280. See also: United Nations Human Rights, Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed, January 3rd, 2014).

[687] See: "The Tensions Between Communities' Cultural Rights and Global Interests: the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden: Martinus Nijhoff Publishers, 2012), 166-173.

effective participation of members of minority communities in decisions which affect them."[688]

Furthermore, some monitoring bodies have affirmed the right of Indigenous peoples to safeguard and protect their specific identity and culture.[689] First of all, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination[690] deserves to be recalled here. According to the Committee on the Elimination of Racial Discrimination, in fact, the 1966 Convention aims to "[e]*nsure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages*".[691] In 2009, also the Committee of the Rights of the Child[692] expressly requested to the Member States of the Convention on the Rights of the Child "*to recognize and respect indigenous distinct cultures, history, language*

[688] See: General Comment No. 23: The rights of minorities (Article 27 ICCPR), 8 April 1994, UN doc. CCPR/C/21/Rev.1/Add.5. This approach has been confirmed by the Human Rights Committee in several individual communications; see, *inter alia*, *Ivan Kitok v. Sweden* (Comm. No. 197/1985), Views of 27 July 1988; *Bernard Ominayak and the Lubicon Lake Band v. Canada* (Comm. No. 167/1984), Views of 26 March 1990; *Ilmari Länsam et al. v. Finland (No. 1)* (Comm. No. 511/1992), Views of 14 October 1993; *Hopu and Bessert v. France* (Comm. No. 549/1993), Views of 29 July 1997; *Apirana Mahuika et al. v. New Zealand* (Comm. No. 547/1993), Views of 27 October 2000; as reported by Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests: the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden: Martinus Nijhoff Publishers, 2012), 166-173.

[689] Other relevant tools in the development of the concept of "cultural rights", which are not reported in their full definition in the present study due to brevity reasons, are: Articles 1, 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, containing the definition of "racial discrimination"; Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women; Articles 8, 17 and 20 of the Convention on the Rights of the Child; Articles 1, 2 and 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and Article 31 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. On these International tools and their meaningful contribution to the elaboration of the concept of "cultural rights", see: Elsa Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond*, (Leiden, Boston: Martinus Nijhoff Publishers, 2007), 38-56.

[690] International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), 660 UNTS 195.

[691] See: General Recommendation XXIII on the rights of indigenous peoples paragraph 4(e), 18 August 1997, available at: http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Open (accessed February 10, 2014).

[692] The Committee has been established by Article 43 of the 1989 Convention on the Rights of the Child, Convention on the Rights of the Child (GA Res. 44/25, 20 November 1989), 1577 UNTS 3. As of January 23, 2014, the Convention has been ratified by all UN member States except Somalia and the United States of America (see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en), (accessed February 10, 2014).. This Convention remains the most ratified international treaty in the history of the United Nations.

and way of life as an enrichment of the State's cultural identity and to promote its preservation".[693]

In addition, among the other international legal instruments, Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities specifically recalls – in particular, at paragraph 2 – the right of expression and development of peculiar traditions and beliefs, but within the limits of national law and international rules.[694] States have increasingly been paying more attention to the specific needs of the Indigenous peoples, called themselves to adapt to the development and urbanization changes. In this situation, Indigenous peoples have expressed the will to maintain their traditions, use their languages, follow the practices connected to their cultures and spirituality, strenuously opposing any assimilation, including those depending on or triggered by the globalization process. As a consequence, States had to receive the requests connected to the respect of the diversity within the national borders of the States in which they are encompassed.[695] To better face these new challenges, States have been called to confer with minorities on all the issues that could have influence on their global identity, both under the physical and the spiritual or cultural dimensions.[696]

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[693] See: General Comment No. 11, Indigenous children and their rights under the Convention, UN doc. CRC/C/GC/11, 12 February 2009, paragraph 18 (emphasis in original).

[694] United Nations, General Assembly, RES. 47/135. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Declaration has been adopted on December 18, 1992.
"Article 4:
1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country."

[695] On this point, see also the following references to the Mexico City Declaration, especially with regard to the point 25.

[696] See: Elsa Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond*, (Leiden, Boston: Martinus Nijhoff Publishers, 2007),

The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance represented another important step in the realm of the soft law instruments, also in relation to the protection of the Indigenous rights.[697] During the Conference some international normative features have been elaborated, helping to define the concepts of cultural rights. Among them, some are particularly connected with the case here under examination:[698]

"a) The freedom of individuals and groups to practice their way of life, including the use of their language;

b) The obligation of the state to guarantee that persons belonging to minorities, individually or in community with other members of their group, enjoy their own culture, profess and practice their own religion, use their own language, in private and in public, and participate effectively in the cultural life of the country;

[...]

f) The need for states to commit financial resources to the promotion of acceptance, tolerance, diversity and respect for indigenous peoples' culture within their borders."[699]

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[697] One of the main results of the Durban Conference (August 31 – September 7, 2001) has been the "Doctrines of Dispossessions", based on the "laws" of "discovery", "conquest", and "terra nullius", as stated also by Erica Irene Daes, Chairperson and Rapporteur of the United Nations Working Group on Indigenous Populations, in a study on indigenous peoples and their relationship to land. See: World Conference against Racism, "Doctrines of Dispossession" – Racism against Indigenous peoples, available at: http://www.un.org/WCAR/e-kit/indigenous.htm (accessed February 4, 2014).

[698] These points have been elaborated by Elsa Stamatopoulous in her review, summing up the main results of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. See: Elsa Stamatopoulou, *Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond*, (Leiden, Boston: Martinus Nijhoff Publishers, 2007), 33.

[699] Consistently with the mentioned change in States' attitude towards minorities, the initiative promoted by the Australian Government asking for the repatriation of human remains held in Italy, as a part of a minority's heritage, can be seen as consistent with the above mentioned point b) reported by Stamatopoulou. But at the same time, a request of repatriation coming from a central Government of a Nation that is the contemporary historical successor of those Governments that have denied for a long time the recognition and respect of basic fundamental rights of Indigenous peoples within their own borders seem here to be a very controversial issue. On the actions perpetrated by the National Government of Australia toward the Indigenous peoples in the past, it seems sufficient to recall here the genocide and mass deportations occurred, such as the last one between 1930 and 1970, which concerned over 100,000 Aboriginal children from their families. On this point, see: Australian Human Rights Committee, International Review of Indigenous issues in 2000: Australia -- 6. Indigenous children as victims of racism, Indigenous children as victims of racism, available at: https://www.humanrights.gov.au/publications/international-review-indigenous-issues-2000-australia-6-indigenous-children-victims (accessed February 5, 2014). Furthermore, some doubts arise on the legitimacy of the current Government to represent the

At the same time, in the last decades, a new stream within the international law arena has raised with regard to the consideration of the concept of "cultural heritage", starting with the Mexico City Declaration on Cultural Policies of 1982. It especially dealt with the inclusion and consideration of the spirituality, values, traditions and beliefs, with a clear and full reference also to rites and beliefs. The references to the difference between the artistic production and the spiritual dimension of culture has a central value here, because through this Declaration it is possible to find a first step in the affirmation of the passage from the tangible to intangible dimension of the cultural heritage (see point 23 of the Declaration); it also recalls the right to the preservation of rites and traditions from destruction, industrial and technological progress, but also colonialism and imposition of values that are distant from the original culture of the peoples.

Furthermore, point 26 of the Declaration expressly recalls the issue of the restitution of works illicitly removed from the countries of origin, as a "basic principle of cultural relations between peoples", looking at international legal tools and agreements as possible ways to improve the enhancement of this principle.[700]

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genuine link between the requested objects and the claimants. This element represents a fundamental aspect for the recognition and grant of the repatriation. The need for a direct and genuine link between the objects and the people is fundamental, and any request from a new subject cannot be taken fully in consideration under a formal perspective, also in consideration of all the past limitations to the full implementation and enjoyment of their rights for the Indigenous communities within the Australian borders, in terms of respect of their cultural expression, religion, and traditions.

[700] On this point, see: U N E S C O, Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies, Mexico City, 26 July – 6 August 1982. In particular, see the Section of the Mexico City Declaration dedicated to the Cultural Heritage issue, available at: http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf (last accessed January 23, 2014)

"CULTURAL HERITAGE

23. The cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both *tangible and intangible* works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries. (italics added).

24. Every people therefore has a right and a duty to defend and preserve its cultural heritage, since societies recognize themselves through the values in which they find a source of creative inspiration.

25. The cultural heritage has frequently suffered damage or destruction as a result of thoughtlessness as well as of the processes of urbanization, industrialization and technological penetration. But even more intolerable is the damage caused to the cultural heritage by colonialism, armed conflict, foreign occupation and the imposition of alien values. All these have the effect of severing a people's links with and obliterating the memory of its past. Preservation and appreciation of its cultural heritage therefore enable a people to defend its sovereignty and independence, and hence affirm and promote its cultural identity.

Incidentally, as stated also by the Joint Committee of the National Association of Scientific Museums, the objects requested by the Australian Government have not been illicitly exported or stolen. For this reason, no provision of the 1970 UNESCO Convention can be applied to the case. The issue can be conceived only on the basis of those principles generally accepted and shared by the international community, and for this more founded on the recognition of the Indigenous cultural rights than on a strict application of the 1970 UNESCO Convention.[701]

Furthermore, even though the 1995 UNIDROIT Convention at Article 5.3 states: "The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: [...] (d) the traditional or ritual use of the object by a tribal or indigenous community", that refers to the specific situation under Chapter III of the Convention, dedicated to "Return of Illegally Exported Cultural Objects".[702] For the same reason above considered, with regard to the possible application of the 1970 UNESCO Convention, also in this case it seems not appropriate to take this second Convention into consideration, as no factual element considerable under the "illicit export or stolen object" can be established.

Bearing in mind the particular attention paid by the 1995 to the Indigenous peoples, reversing the issue, the previous passage opens-up a different consideration: the emerging need to improve the normative instruments currently in force to strengthen the attention on the wide-ranging matters concerning Indigenous peoples' restitution and repatriation claims. Indeed, the framework set-up by the 1970 UNESCO and 1995 UNIDROIT Conventions appears too weak to be applied, as they are focused on particular issues limited to the stealing and illicit export cases. This could lead to consider the option to adoptmore specific provisions in the future, addressed not only to the matters related to the

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26. The restitution to their countries of origin of works illicitly removed from them is a basic principle of cultural relations between peoples. Existing international instruments, agreements and resolutions could be strengthened to increase their effectiveness in this respect."

[701] As Australia has not ratified the 1995 UNIDROIT Convention, the latter cannot be taken into account in relation to bilateral disputes with Italy, concerning the restitution and repatriation issues for cultural objects.

[702] This provision cannot be taken into account in relation to bilateral disputes with Italy, also because Australia has not ratified the 1995 UNIDROIT Convention.

"illegal export and stolen cultural heritage" cases, but even considering different issues; such as the repatriation of Indigenous cultural objects not stolen or illegally exported.[703] As Vrdoljiak points out, "*Indigenous peoples were not involved directly in the treaty negotiations*" for the 1995 UNIDROIT Convention.[704] Instead, UNESCO and some settler States tried to include in the final text some guarantees for Indigenous' rights, laws and customs.[705]

Vrdoljak considers some specific features present in the 1995 UNIDROIT Convention with regard to the Indigenous heritage issue:

"*(1) the inclusion of 'national, tribal, indigenous or other countries';*

(2) States and non-individuals as claimants;

(3) Non-retroactivity;

(4) The inclusion of the 'due diligence' requirement".[706]

With regard to point (1), the Preamble of the Convention expresses its deep concern for "the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of *national, tribal, indigenous or other communities*, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and

[703] This author's evaluation has been inspired by the consideration expressed in the Final Report on the "Rights of Indigenous Peoples", with regard to the Mokomokai case, also included in the present study: "This practice shows a growing recognition by the international community of the right of indigenous peoples to obtain the return of objects of special spiritual significance for their cultural identity, especially when these objects are human remains, although the present normative apparatus". One of the solutions prospected in the Final Report, also considering the specific matter of the protection of Indigenous traditional knowledge, on which a rising attention has become to paid by international bodies, such WIPO, WTO, and the Convention on Biological Diversity, is the settlement of a sui generis regime, founded an international framework and developed mainly at a local level, to overcome the current impasse. This sort of "global-based" regime would face the international need of specific rules, and the possibility to design the proper solution in accordance with the particular needs of each area and community. See: International Law Association, Sofia Conference (2012), Rights of Indigenous Peoples. Final Report, 21, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1024 (accessed February 4, 2014). On the latter point, see: Federico Lenzerini, "Traditional Knowledge, Biogenetic Resources, Genetic Engineering and Intellectual Property Rights", in Daniel Wuger and Thomas Cottier (eds.), *Genetic Engineering and the World Trade System*, Cambridge, 2008, p. 118 ff. See also: Federico Lenzerini, "Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge", in *Cultural Human Rights*, Francesco Francioni and Martin Scheinin eds., (Leiden: Martinus Nijhoff Publishers, 2008), 119- ff.

[704] See: Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006), 273.

[705] See: Lyndel Vivien Prott, Commentary on the Unidroit Convention, (Leicester: Institute of Art and Law, 1997), 17, as cited in Ana Filipa Vrdoljak, International Law, Museums and the Return of Cultural Objects, (Cambridge, New York: Cambridge University Press, 2006), 273.

[706] See: Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006), 273.

the resulting loss of irreplaceable archaeological, historical and scientific information".[707]

Another relevant point is the Anglo-American States' disagreement to enforce the export-control provisions enacted by other States as they are based on a free trade regime in the international cultural objects trade market. These positions influenced the provisions on stolen cultural objects and illicitly exported cultural objects, respectively at Chapter II and III of the UNIDROIT Convention. [708] However, the indigenous positions were considered in the Convention, insomuch as some provisions have been redrafted. Article 3.8 applies the same time limitation provided to public collections also to "[...] *a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use*".

Article 5.3, letter d) expressly impose to the court of a State to return objects illegally exported, whether another State claims the removal of the object damages "*the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State*".

Under Article 7.2, provisions regarding the return of cultural object considers an exception, applying the return provisions, in the case the claimed object "*was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community*".

With regard to point (2), Vrdoljak recalls the fundamental difference between 1970 UNESCO and 1995 UNIDROIT Conventions: in the latter, as it concerns private international law, objects are not "specifically designated by each State". With regard to the distinction between claims from a State and from an individual, Vrdoljak rightly points out that, while a request regarding a stolen cultural object can be raised by both subjects, a similar one for an illicitly

[707] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, June 24, 1995, available at: http://www.unidroit.org/status-cp (accessed February 10, 2014).
[708] See: Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, New York: Cambridge University Press, 2006), 273.

exported cultural object can be raised only by a State that is Party to the UNIDROIT Convention.

Because of the non-retroactivity principle, stated under Article 10 of the UNIDROIT Convention (above mentioned point 3), those States that experienced in the past relevant damages due to illicit traffic of cultural objects express their concern about the potential negative consequences of the provision. The non-retroactivity could imply a legalization of those illicit exports of cultural objects occurred before the entry into force of the Convention. As Vrdoljak remarks, in order to reassure them, the Convention provides at Article 10.3: "This Convention does not in any way legitimize any illegal transaction of whatever nature which has taken place before the entry into force of this Convention [...]". In addition, Article 9.1 allows to the application of "rules more favorable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention."

Finally, as to point (4), the *bona fide* purchaser principle has a fundamental importance, also with regard to the indigenous peoples concern for their cultural objects. According to Civil law countries, this principle promoted the illicit traffic of art and antiquities. Instead, the UNIDROIT Convention aims to a solution, recognizing a compensation for the purchaser who concretely can demonstrate the acquisition of the object has been concluded with due diligence, under Article 4.1 and 4.4.[709] As noted by Vrdoljak, the Indigenous organizations development of guidelines regarding their specific cultural heritage represents a tool to make the potential purchaser aware on the issue.[710]

As to the ritual burial practices relevant for the Indigenous Australian peoples involved in the request under examination, point 19 of the 1995 Draft

[709] Article 4 "(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."
Article 4.4 "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the Parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."
See: UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, June 24, 1995, available at: http://www.unidroit.org/status-cp (accessed February 10, 2014).
[710] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects,* (Cambridge, New York: Cambridge University Press, 2006), 274.

Principles and Guidelines for the Protection of the Heritage of Indigenous People comes here to attention: "*Human remains and associated funerary objects and documentation must be returned to their descendants in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, or otherwise used only in such form and manner as may be agreed upon with the peoples concerned.*"[711]

UNESCO followed this path with the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[712] The definitions given in the two Conventions of the concept of "cultural heritage" is here extremely worthy. As underlined by Lenzerini, these two Conventions opened the full recognition of the "*subjective* aspect of culture", including the material and intangible feature that concretely characterizes the *identity* of a people, community or ethnic or group.[713] The 2003 UNESCO Convention partially refers to the definitions previously adopted also by the Mexico City Declaration, including the intangible cultural heritage expressions, and practices.[714] The 2005 UNESCO Convention considers all the various forms of

[711] See: Principles & Guidelines for the Protection of the Heritage of Indigenous People Elaborated by the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995). The text of the document is available at: http://cwis.org/GML/UnitedNationsDocuments/ (accessed February 5, 2014).

[712] The 2003 UNESCO Convention specifically states: [...] the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage"; the heritage is able to confer to the people "a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity (Art. 1).

[713] Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests: the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden: Martinus Nijhoff Publishers, 2012), 165.

[714] See Article 1, Convention for the Safeguarding of the Intangible Cultural Heritage 2003. Paris, 17 October 2003, 2368 UNTS 3: The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development".

expressions of groups and societies, with a wide formula that can find application to every social belonging.[715]

Later on, considering the repatriation, as the central issue of the case under examination and its application to the Indigenous context, another international tool must be here take into consideration: the 2007 Declaration on the Rights of Indigenous Peoples (UNDRIP). In particular, Article 12 states as follows:

"*1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."[716]

This provision explicitly refers to the right of repatriation concerning human remains and identifies a precise responsibility of States in supporting the implementation and fulfillment of the ritual ceremonies and practices.

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[715] See: Article 4.1 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005, 2440 UNTS 311:
"1. Cultural diversity.
"Cultural diversity" refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used."

[716] General Assembly, 61/295. United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed February 4, 2014). As strictly related to the cited Article 12, they must be recalled here also Article 11:
"1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature"; and Article 31:
"1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."

Considering the significance of the burial ceremony among the Indigenous peoples involved, this provision seems to increase relevance for the issue and to lay foundation for their request.

Finally, to complete the international overview, a precedent may be here recalled looking at the judicial practice, making a comparison with the case under analysis of the Australian request of repatriation. It is the *Case of the Moiwana Community v. Suriname,* a judgment of the Inter-American Court of Human Rights on the situation experienced by an Indigenous community, that was prevented to get possession of their ancestors' remains and celebrate them in an appropriate way in accordance with their traditions.[717]

The Court ordered to Suriname to implement all the possible efforts to recover the remains of Moiwana ancestors' killed during an Army attack in 1986 in the N'djuka village, noting that the Indigenous communities "[...] *do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture, which causes them deep anguish and despair* [...]. *Since the various death rituals have not been performed according to N'djuka tradition, the community members fear "spiritually-caused illnesses". Indigenous peoples are persuaded that this situation will continue to affect them and their descendants, on the basis of their social and traditional believes.*"[718]

One of the most interesting elements of the judgment regards the evaluation of the Inter-American Court, with regard to the sufferance experienced by the Indigenous community, that can be considered a violation of the right to human treatment, as provided for by Article 5 of the 1969 American Convention on Human Rights.[719]

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[717] Inter-American Court of Human Rights, Case of the Moiwana Community v. Suriname, Judgment of February 8, 2006, (Interpretation of the Judgment of Merits, Reparations, and Costs) http://www.corteidh.or.cr/docs/casos/articulos/seriec_145_ing.pdf (accessed, January 20, 2014). For a more extensive analysis on this Case, see: Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests : the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* (Silvia Borelli and Federico Lenzerini, ed.), (Leiden : Martinus Nijhoff Publishers, 2012), 168-178.

[718] See: *Case of the Moiwana Community v. Suriname (Preliminary Objections, Merits, Reparations and Costs)*, IACtHR, Judgment of 15 June 2005, *Series C No. 124*, paragraph 195.

[719] American Convention on Human Rights (San Jose, 21 November 1969); OAS TS No. 36, 1144 UNTS 123. See in detail the text of the recalled Article 5:." Right to Humane Treatment
1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the

It is worth reporting here passage of judgment stating that: "[i]*f the various death rituals are not performed according to N'djuka tradition, it is considered a moral transgression, which will not only anger the spirit of the individual who died, but may also offend other ancestors of the community. This leads to a number of "spiritually-caused illnesses" that become manifest as actual physical maladies and can potentially affect the entire natural lineage. The N'djuka understand that such illnesses are not cured on their own, but rather must be resolved through cultural and ceremonial means; if not, the conditions will persist through generations.*"[720]

Considering the case at issue, Article 17 (2) of the 1981 African Charter on Human and Peoples' Rights shall be here take into consideration and applied. With regard to the principle of free participation of every individual to the cultural life, the African Commission stressed that:

"[...] *protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity* [... The State is obliged] *to promote and protect traditional values recognized by a community.* [... C]*ulture* [is to be understood] *to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other*

human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvinced persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners."

[720] See: *Moiwana Community v. Suriname, (Preliminary Objections, Merits, Reparations and Costs)*, IACtHR, Judgment of 15 June 2005, *Series C No. 124*, paragraph 86(9), as reported in Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests : the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden : Martinus Nijhoff Publishers, 2012), 169.

similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics."[721]

The elements that characterize the case seem highly relevant and the precedent constitutes an interesting comparative source for the evaluation of the Indigenous Australian request of repatriation of their ancestors' remains.

5.5.9. Waiting for a solution

A series of final considerations can be advanced on the case.

First of all, even considering the current *impasse* with regard to the achievement of a solution for the repatriation request of the Indigenous Australian remains, a concrete situation is in any case already defined, since in the future a new request could be advanced by the original communities. The request from the Australian Government had the result of posing the question, and letting the case be considered. Even though the fact can be evaluated in its formal details and limits under a legal point of view, an issue that is probably even more relevant – the respect of the cultural and human rights of these peoples – must be taken into account. Indeed, the peculiar feature characterizing the case concerns also the separation between the mere repatriation request and its implications related to the deeper significance related to the human rights and cultural rights profile. The specific issue related to the repatriation requested in 2007 can be set aside, and relegated to the simple political and diplomatic evaluation at this time. By the way, the respect of that culture and the belief of the communities, based on the tradition of burying the corpses of the ancestors in their native land, cannot be put aside so simply. If it is a fundamental traditional and religious belief for the people concerned, that should find an answer and a solution within a brief time. Their claims are based also on legal rules, recognized and implemented by the international community.

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[721] See: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (Comm. No. 276/2003), 4 February 2010, available at: http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/SMAR82H3UE-full_report.pdf/$File/full_report.pdf (accessed July 5, 2010), paragraph 241, as reported in Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests : the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden : Martinus Nijhoff Publishers, 2012), 169.

Secondly, considering the information available until the present time, the Italian attempt to solve the question through the establishment of talks with the Australian Embassy must also be considered. As appears from the reconstruction of facts, the possible cultural exchange of the human remains with Australian Indigenous' contemporary artistic works broke down when Italy deemed the proposed paintings as having too little value. This implies that, in other circumstances, an exchange could have been fully concluded, overcoming all the troubles due to the provenance of the formal request, and giving consideration to the more sensitive issue of the respect of the Indigenous rights. Conversely, under the domestic perspective, the fundamental legal question still attains the formal obstacle posed by the inalienability of the objects under the Italian law.[722] This issue is unlikely to be solved until the Italian legislator will find a legal solution to the alienation procedure for cultural objects included in the state property that fall into situations similar to the requested Indigenous objects. In this regard, a crucial question opens-up: which effect would have had the achievement of the cultural exchange that was on the way to be concluded between the Australian Embassy and the "Pigorini" museum? Would it constituted a precedent for a solution and a change in the Italian law, or more simply, a big mish-mash lacking a lawful foundation?

Thirdly, the distinct significance of the death-related practices – and their human rights dimension – takes on pivotal centrality. In cases such as the one here considered, any supreme value can be linked to the general interest of humanity in relation to the protection, preservation, and enjoyment of cultural heritage, considering the higher significance of the accomplishment of those rituals for the Indigenous community. This means that in the situation here represented, two opposing interests arise: on one side, the general interest of humanity, generally pursued by museums, as in this case as well, in relation to their fundamental scope in contributing to the education and development of humanity; and on the other side, the particular interest of that precise community in giving accomplishment to the transmission and preservation of their sacred values, giving a honorable

[722] Similarly to the situation posed by the case concerning the Venus of Cyrene, "the removal of cultural property from the State demesne could be effected only through a law, as such property is inalienable under the provisions of the Italian civil code which itself have the status of law." See: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", *Rivista di diritto internazionale* 2(2011):361.

ceremony of burial practices to their ancestors, believing that its denial would represent a prejudice for dead and living people' souls, particularly because the ceremony itself is a means to perpetuate the cultural identity of the community concerned.

Keeping in mind the examples previously cited in the reconstruction of the facts, the special interests of Indigenous communities seem to be evaluated of a prevalent importance under international law. In the present situation, this feature shall be considered in the adoption of a final solution of the dispute, and the human rights dimension should prevail,[723] even considering the equal dignity of all cultural objects.[724]

Moreover, it must be considered that, in the present case, political choices will have a decisive impact on the final decision to design a resolution. Normally, a general interest for the educational goal of museums should be considered, but under the international law dimension the attention for the respect of the identity of Indigenous peoples ought to prevail. In fact, in this case the latter should prevail on the basis of the recognition of Indigenous peoples' rights, that are duly considered and protected by international law, as previously explained. Probably, the adoption of a solution on the case should deem this issue, and design an option able to respect Indigenous peoples' specific rights, allowing them to perpetuate their own cultural traditions.

Fourthly, considering the museological perspective, it is interesting to recall the position expressed by the "Pigorini" curator. Mr. Nobili affirms: "As a curator, I disagree about the position of some colleagues that prefer not to divulge the content of the museum collections, because of the risk of facing possible recovery requests. I find this an insensitive position, bearing in mind the

[723]On this point, Mr. Garlandini's (President of ICOM Italia) position is clear: "Absolutely, it is not possible to consider human remains as other kind of cultural objects. They must be treated with particular attention, as they are the remains of a person, and for this reason a special regard must be guaranteed to them". See the full text of the interviews in the Annex Section of this study.
[724]United Nations General Assembly Resolution A/RES/62/155, adopted on December 18, 2007, "Human rights and cultural diversity" states: "Recognizing in each culture a dignity and value that deserve recognition, respect and preservation, and convinced that, in their rich variety and diversity, and in the reciprocal influences that they exert on one another, all cultures form part of the common heritage belonging to all humankind". The full text of the resolution is available at: United Nations, General Assembly, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/155&Lang=E (accessed February 14, 2014).

colonization issue, and what peoples experienced. I have a feeling of embarrassment when pieces of the collection cannot be showed."

Fifthly, considering the general issue of the repatriation of human remains to the original Indigenous lands, whether the objects have not been stolen or illegally exported, it is not possible to apply the relevant international treaty law, regardless of whether or not the States involved in the request are parties to the relevant conventions. However, recalling the results expressed by the Final Report of the International Law Association on the "Rights of Indigenous Peoples", it is possible to look at the customary international law, on the basis of the principles expressed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples, consistent with States' obligation under customary international law. [725]

[725] In particular, the main reference attains points 2, 3, 6 and 8 of the Final Report of the International Law Association on the "Rights of Indigenous Peoples", available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed February 14, 2014):
"2. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary International law. It, however, includes key provisions which correspond to existing State obligations under customary international law.
3. The provisions included in the UNDRIP which do not yet correspond to customary international law nevertheless express the aspirations of the world's indigenous peoples as well as of States in their move to improve existing standards for the safeguarding of indigenous peoples' human rights. Their recognition by States in a Declaration subsumed "within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a nondiscriminatory basis" and passed with overwhelming support by the UN General Assembly leads to an expectation of maximum compliance by States and the other relevant actors. The provisions included in the UNDRIP represent the parameters of reference for States to define the scope and content of their existing obligations – pursuant to customary and conventional international law – towards indigenous peoples.
6. States must also comply – according to customary and, where applicable, conventional international law – with the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government, which translates into a number of prerogatives necessary in order to secure the preservation and transmission to future generations of their cultural identity and distinctiveness; these prerogatives include, *inter alia*, the right to participate in national decision-making with respect to decisions that may affect them, the right to be consulted with respect to any project that may affect them and the related right that projects suitable to significantly impact their rights and ways of life are not carried out without their prior, free and informed consent, as well as the right to regulate autonomously their internal affairs according to their customary law and to establish, maintain and develop their own legal and political institutions.
8. States must comply – pursuant to customary and, where applicable, conventional international law – with the obligation to recognize, respect, safeguard, promote and fulfill the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples' land rights must be secured to the extent that is necessary to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions."

Sixthly, considering the general framework of this study and the intention of examining the different options for the resolution of bilateral disputes over the recovery of cultural objects, in this case, even though any concrete solution has been achieved, the parties had adopted a negotiating approach that may consent to classify the case an effort for an ADR resolution. Considering the current stalemate, in the event that the request would be raised again, the previous steps of bilateral exchanges established since 2007 may be considered as a preparatory negotiating basis. The recourse to diplomatic means of resolution lets us to presume that Italy does not intend to change the inalienability status of its patrimony to open to a repatriation process. Considering the information on the achievement of an agreement to exchange the requested pieces with contemporary works of art from the Indigenous community of Australia, thus a progressive orientation was on the way to be implemented. The effective exchange was blocked because of the exiguous economic value of the paintings proposed for the exchange, but this feature cannot change the importance of the prospected solution: the bilateral dispute would had been solved overcoming the Italian provision on the inalienability of the human remains requested by Australia. Considering the importance of the human remains for the identity of the Indigenous communities – directly or indirectly protected by international law rules – the obligation to repatriate the remains to community of origins may be read as directly deriving from international law. As a result, apart from its domestic provisions in force, Italy should simply adapt its legislation to the requirements of international law. In this regard, it seems useful to recall the position reaffirmed in many occasions – articles, publications, and conferences – by Professor Scovazzi,[726] and accepted by several Italian scholars of international law, such as Professor Lenzerini, asserting a progressive interpretation of the international standards, founded on the need to apply ethical, cultural and social principles, being able to go beyond to the legalistic applications of domestic laws. In particular, bearing in mind the higher meaning of death-related rituals for Indigenous peoples, such as in the present case, superior value can be accorded to

[726] Tullio Scovazzi, "La Restituzione dell'Obelisco di Axum e della Venere di Cirene", *Rivista di diritto internazionale privato e processuale* 45 (3) (2009): 565-566. See also Professor Scovazzi's lecture in the Meeting "Beni culturali:memoria della comunità, radici del futuro", Trani, Auditorium Chiesa San Luigi – (February 1, 2013, at 4.00 p.m.).

the principle of general interest of humanity in relation to the protection, preservation and enjoyment of cultural heritage.[727]

In the case here under examination, the social and cultural requirements are bound to the original context of the cultural objects, implying that it seems morally unacceptable to continue to hold such remains acquired in the past in "situations of manifest injustice". Even though Italy was not a colonial power in Australia, the Indigenous question is indissolubly bound to the colonization experience. Furthermore, the subsequent trade in human remains – recognized as a trend in the Nineteenth Century in the Western society[728] – can be assessed as a cultural product of the colonization and the imposition of the Western culture on the Indigenous one. This feature recalls two principles recognized by Scovazzi: the principle of non-impoverishment of the cultural heritage of the State of origin, and the principle of avoidance of advantage through exploiting other countries' weakness. The first principle also finds a basis in Article 2 of the 1970 UNESCO Convention.[729] In addition, the removal of human remains from the place of origin could be interpreted in the light of the principle of the need to preserve the integrity of cultural sites. Bearing in mind the traditional and religious importance

[727] "In recent decades International community has become conscious of this reality, as is testified by the human rights monitoring bodies, which consider the rupture of the practices in point as amounting to an intolerable breach of the fundamental rights of the members of the community concerned. The equation existing between death-related practices and human rights is even stronger in cases where it involves the dead person in a physical sense […]. In such cases, no consideration for the general interest of humanity to have access and to preserve cultural heritage may in principle be considered as interfering with the right of the persons and/or communities specifically concerned to have the relevant human remains returned". See: Federico Lenzerini, "The Tensions Between Communities' Cultural Rights and Global Interests : the Case of the Māori "Mokomokai", in *Cultural heritage, cultural rights, cultural diversity,* Silvia Borelli and Federico Lenzerini, eds., (Leiden : Martinus Nijhoff Publishers, 2012), 177.

[728] This information has been confirmed also by Mr. Carlo Nobili, in a phone interview.

[729] Article 2 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, 14 November 1970. "1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations." The full text of the Convention is available at: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed March 19, 2014). See also: Tullio Scovazzi, "La Restituzione dell'Obelisco di Axum e della Venere di Cirene", *Rivista di diritto internazionale privato e processuale* 45(3) (2009): 565. On the evolutionary principles of International Law applied to the recovery of cultural objects see also: Tullio Scovazzi, *La Restituzione di Beni Culturali Rimossi nella Pratica Italiana*, in course of publication.

for the Indigenous people of being buried in their mother land, the failure to give respect to this belief appears as a corruption of their traditional "integrity", eroding their identity. The principle of preservation of the integrity of cultural sites may probably be read taking into account the special significance of the intangible aspect of the matter. Article 5, paragraph 3 of the UNIDROIT Convention may here be mentioned, not with regard to the "integrity of a complex object"[730], but for its inclusion of "traditional or ritual use".[731]

A last reflection is here proposed, which goes beyond the legal interest of the issue here examined. The facts here verified and exposed suggest that probably a deeper and more accurate scientific examination is necessary, as previously mentioned, to define with certainty whether the remains are Indigenous' remains or not. In fact, as mentioned, DNA partial results suggest that some cultural objects, previously considered as Indigenous remains only because they are part of the collection are in reality fake. This was an incidental outcome resulting from the case opened by the Australian Embassy request, but the issue here seems to be of unavoidable scientific importance.

[730] See also: Tullio Tullio Scovazzi, "La Restituzione dell'Obelisco di Axum e della Venere di Cirene", *Rivista di diritto internazionale privato e processuale* 45(3) (2009): 566. Professor Scovazzi refers in his article to letter (b) of the UNIDROIT Convention Article 5.3, as he analysed in particular the removal of cultural objects.

[731] Article 5 (3) of the 1995 UNIDROIT Convention.
"The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:
(a) the physical preservation of the object or of its context;
(b) the integrity of a complex object;
(c) the preservation of information of, for example, a scientific or historical character;
(d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State".(italics added). The full text of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995) is available at: http://www.unidroit.org/instruments/cultural-property/1995-convention (accessed March 19, 2014).

Part Three. Conclusive Evaluations and Possible Developments

Chapter Six. Conclusion and Perspectives

6.1. Conclusion

This study took into consideration different issues relating to the restitution of the so-called cultural objects.

Some conclusion may be drawn about: the taxonomy consideration regarding the concepts "cultural object" and "recovery"; the need of a case-by-case resolution and the extreme fragmentation of the relations between the involved stakeholders; the different nature of the typology of requests in the cases under examination; the possible evolution of the International Law.

First of all, considering the historical "battle of concepts" that has been yet taken into account, but conscious of the limits of this modest study, it may be a solution to propose the use of the term "cultural object" as a neutral form, used to identify the centre of the discussion, deprived of any related contexts, such as the reference to property issue, or cultural context, or the precise meaning of "heritage", but only considering the pure object in its mere essence. Still, the choice to keep into account the related issues is still valid in accordance with the specific situation in which the object is embedded, and actually this is the approach that can be observed also in the UNESCO Conventions. Indeed, each Convention has a specific purpose and, as a consequence, the concept of "cultural object" is adapted to the specific context.

The main problem still is the definition of the complex concept of "culture", as explained in the First Part. Though, this is outside the scope of the study, as the debate amongst sociology scholars is still lively, and no clear and shared definition has been found until now. The taxonomic perspective led us to further considerations. The basis of this reasoning is the position expressed against the distinction between the terms "restitution" and "return" as adopted by the 1995 UNIDROIT Convention, and, accepting the reason of the criticism, regarding the essential identity of the phenomena: in both cases the aim is the restoration of the initial situation. As a result, the restoration itself is needed only because an illicit action has been carried out. In other words, the action of "recovery and restitution" is needed to restore the *status quo ante* that preceded

the illicit export or illegal traffic of cultural objects. Nevertheless, as showed during the examination of the concepts of "restitution", "return", "repatriation", each of these categories refers to a precise historical and cultural context. For this reason, all positions seem valid: under a substantial point of view, "restitution" and "return" identifies the same process, but a deeper distinction may be probably adopted to better specify in which situation the specific recovery claim occurs. Due to this latter consideration this research preferred to refer to the distinction of the terms.

To this regard, it is deemed necessary to explain the choice to use the term "recovery" in the title of this study: the purpose was to exploit a general category, able to encompass all the categories used to describe the complex phenomenon. The three different terms "restitution", "return", "repatriation" may be used to identify a specific situation under analysis, on a case-by-case basis, considering them as sub-categories of the comprehensive action, but bearing in mind that each of these sub-categories identifies a time frame that follows the actual recovery of the object. In sum, the title of this study refers to the "recovery" category, not expecting or presuming that it should be the most correct concept, but looking at it as a due answer to a request from the original or descendants' legal owners.

Secondly, the cases taken into consideration in the present study – even in their limited number – succeeded in giving an idea of the complexity of the recovery issue.

The four cases here proposed aim to show also the difficulty of giving an answer to the several stakeholders involved, as well as the high level of fragmentation of their relations, which may derive from a single request of recovery. Furthermore, a related topic is the limited applicability of both the International Conventions, 1970 UNESCO and 1995 UNIDROIT. The major limits are of the non-retroactivity of the provision and – because of the conventional nature of the tool – that the Conventions are binding only for states parties. The latter can also become parties to the treaties posing some *caveats*, limiting the overall scope of action of the Convention provisions.

The fragmentation of the international scenario is loyally reflected by the same degree of fragmentation in the international legal regime, which constitutes

one of the main reasons of the difficulty in managing cultural property at the globalized arena. The same evolution of the regime is a result of the fragmentation of the several stakeholders' instances and the substantial inefficacy of the international legal tools. In brief, the need to work out an international response was initially originated by the rising phenomenon of the illicit trade of cultural objects. The general purpose aimed to restrain the cultural property "leakage", which caused the violation of property rights, involving both individual and collective interests. However, the fragmented legal context impedes a coordinated answer, able to counterbalance possible conflicts arising due to contrasting interests.[732]

This situation opens-up to many criticisms to the practical effectiveness of the Conventions, and to the need of tailored solutions. The cases here examined and the need to resort to private solutions are the result of the weakness of public international law answers. Given this framework, and in need to provide answers to the several cases of recovery of cultural objects, especially when the application of the two international Conventions is not possible, the situation may be overturned, changing the limits into an opportunity. The need of a case-by-case solution and the potentiality of the out-of-court settlements, that in many cases are preferable to long and expensive trials, shall be conceived as a valid mean to defeat the bounds imposed at the national level, as well. The Alternative Dispute Resolution constitutes a fundamental resource to promote new practices, which may contribute in balancing civil law and common law systems. Given this global scenario, and considering the general international dimension of the cultural property circulation at the present time, one of the main result of the current challenge may lie in the potentiality of the best practices arising from the settlement of the different disputes, able to counterbalance the weakness of the conventional legal tools.

Thirdly, comparing the examined cases, the Australian request over the Indigenous human remains seems the most relevant case. The need to consider the two national situations implies a heterogeneous multi-level relations framework:

[732] See: International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, April 13, 2006 , UN Doc. A/CN.4/L.682, 1-256 and July 18, 2006, UN Doc. A/CN.4/L.702, 1-25.

the domestic Australian relations between the national government and the Indigenous minorities, and the international level with Italy. Instead, it would be advisable to develop a method of resolution able to satisfy the Indigenous peoples' request, without resorting to a complex procedure and to the involvement of the national government. Moreover, this case outlines the attention paid to the ethical question and on this point the international community seems to show its high interest and respect, underlining at the same time that the conventional principles are valid and relevant, but in many occasions not applicable. At this point, a fundamental question turns up: does the Indigenous-related Australian request represent a missed occasion of successfully finding a mutual profitable solution? Or Italy could still manage it proposing an answer in line with the existing legal principles? As outlined in the case analysis, a solution respectful of the standards in force under international law would aim at repatriating the human remains, despite the limits due to the domestic provisions. A degree of courageous respect of this vision would lead to the implementation of the measures needed in order to enable the repatriation.

Making a comparison with the other three cases, the specific nature of the objects requested in each case makes the difference. The three cases described in relation to the Italian requests of restitution of cultural objects to U.S. Museums concern works of art. They are creations of artists, who - thanks to the expression of particular values in their works - are considered able to represent a cultural reference, *rectius* to represent the identity of the people and the land they are from. On the contrary, the Indigenous remains claimed by Australia have clearly a totally different nature. The choice of referring in all cases to them as "cultural objects" underlined the idea of considering all the requested objects as having equal dignity, conferring them the same title. At the same time, the analysis of each case makes it clear that a peculiar distinction shall be underlined for the fourth case, because of the human origin of those remains, which were living bodies in the past, and thus deserve a high degree of respect. For this reason, in this study we take into careful consideration the inherent specific features of the cases examined, but in all cases we still maintain the fundamental equal value of the objects themselves. The distinction that can be ideally drawn refers to the value of the remains for their previous belonging to human beings, even though

the value of the works of art in the other cases – due to their meaning for the people of origin and the expression of their cultural identity – is absolutely undisputed.

The difference here proposed aims at identifying the nature of the cultural object itself as a further criterion that should be taken into account during the decision on the request of recovery. Applying this generic statement to the actual practice, a comparison may be easy applied looking at the cases regarding the opposition between the Italian Ministry of Culture and the U.S. Museums as separated from the Indigenous human remains case. For the cases concerning the U.S. Museums the request of restitution is based on the claim over the statues, because they are considered as belonging to the national patrimony, and Italy founds its requests on legal and ethical standards of cultural property. It is just the case to underline that for the "Getty Bronze" many doubts have been arisen against the Italian position about the Greek origins of the statue, the uncertainty over its discovery in international waters, its display for a long time in one of the most famous museums that contributed to increase its fame. Instead, in the last case, the human rights dimension takes on a pivotal role, depending essentially on the original nature of the objects, which cannot be simply assimilated to the ones claimed in the previous cases, because they are the testimony of lives of human beings, with a sacred value and deserving special respect.

The first two cases analyzed are clear examples of the possibility of a positive settlement of bilateral disputes, concerning cultural objects property. In particular, the cases were meaningful in highlighting at that time the discovery of an international network of illicit art trade, involving some of the most important and rich museums at the world. The agreements concluded by the Italian Ministry of Culture represented an asset also in influencing the general public attention for ethical standards in the Museums' policies of acquisition.

As to the third case, given that international legal standards shall be always strictly applied, and asserting also that Italy has more than some grounds to found its request on, in the Getty case the situation is complex because of limited solutions offered by conventional rules. Furthermore, it represents the failure in reconciling the parties involved in the bilateral disputes, implying the resort to a trial to settle the case. Resorting to alternative methods and making

reciprocal concessions in order to get a mutual beneficial deal would have constituted the basis for a stronger cultural cooperation. This would have resulted, as occurred with the MET and the Boston Fine Arts Museums, in transforming the original dispute in an additional occasion to promote profitable relations between the Italian Ministry of Culture and the Getty Museum.

On the contrary, the human rights issue that characterizes the fourth case poses some doubts about the possibility of negotiating the human remains recovery. Because of their specific nature of human remains, their recovery seems to answer to principles generally recognized under international law – and for this reason, not negotiable.[733] Taking into consideration the significance of human rights in the Indigenous case, to some extent their involvement shall be here recalled also in relation to the cultural property issue, directly concerning the restitution of works of art. If we look at the request not only under the right to dignity or self-determination profiles, the right to cultural property is invoked to support trade interests.[734] Given the limits observed, resorting to the human rights dimension may lead towards a solution based on a universal legal framework, which can contribute to the definition of ethical standards for alternative dispute settlements. The topic here discussed involves both the property and the identity issues. These two features can be analyzed on a separate basis, but cannot be separated one from another, because they are both inherent to the problem. As a consequence, the dispute settlement needs to look both at legal principles able to

[733] This reflection has been shared and discussed also with Mr. Howard Spiegler (co-chair of Herrick, Feinstein's International Art Law Group) in an informal meeting in New York City on August 28, 2013, and with Mr. Stephen Clark, during the interview he agreed to release. Substantially, Mr. Clark convened on the point of acknowledging a separate evaluation of the possible solution for cultural heritage disputes on the basis of the analysis of the requested object.

[734] See on this: Article 1 of the First Protocol to the 1950 European Convention on Human Rights: "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by general principles of international law". See: Council of Europe, "Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11", available at: http://conventions.coe.int/treaty/en/treaties/html/009.htm (accessed March 28, 2014). A curious example about how this principle may be applied both to guarantee a concrete respect of fundamental human rights and enable the repatriation of cultural objects, but also be used to ask for a compensation to states for the expropriation of cultural property. It is the decision of the Supreme Court of Costa Rica, declaring that the National Archeological Patrimony Law dated December 28, 1981 was unconstitutional. The argument was found on the violation of the prerequisite of the Constitution of Costa Rica, which provided for a compensation for the expropriation of private property. See: Costa Rica, Boletin Judicial N. 90, 12. 5. 1983, as reported by Francesca Fiorentini, "The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions", in *Resolving Disputes in Cultural Property*, Marc-André Renold, Alessandro Chechi, Anne Laure Bandle eds., (Genève, Zurich: Schulthess Médias Juridiques, 2012), 128.

regulate property issues, and to human rights principles, based on a more ethical dimension. The examination of this double dimension – property and identity – allows to counterbalance the conflicting interests that particularly characterize the field of cultural heritage.

Fourthly, a consideration must be specifically paid to the soft-law role. As seen, codes of conduct represent fundamental complementary legal tools, providing for professional ethical rules shared in the museums and art dealers' fields. Perhaps, despite their soft nature, the consequences deriving from the violation of the ethical standards, compulsory for each member, may be evaluated as more effective in their actual application, entailing the exclusion from the association for those members who do not respect the standards included in the Code and the resulting loss of reputation at the international level.[735]

Furthermore, ethical codes generally allow the coexistence of the interests of both public transparency and of professional art market groups and lobbies. The outcome mainly consists of standards based on due diligence, illicit traffic of cultural property prevention, and transparency in the management of cultural objects, contributing to achieve a rising level of professionalism at all layers of art market and museum world.[736]

As an additional feature, the professional codes of ethics have a certain degree of connection with hard-law, as they refer to the international conventional provisions core principles, especially for all the issues related to the respect of national and international rules on cultural property, art trade and cooperation with the state of origin of cultural objects. Thanks to this framework, when multilateral conventions and other regional treaties or rules cannot be applied – such as EU directives – codes of conduct find application and can play as supplement legal tools on negotiating tables for the settlement of disputes over the recovery of cultural objects. Even though ethical codes have a limited legal force, the exclusion of those members who do not respect the standards subscribed and their loss of international respectability may play as deterrents. They are not

[735] See: Francesca Fiorentini, "The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions", in *Resolving Disputes in Cultural Property*, Marc-André Renold, Alessandro Chechi, Anne Laure Bandle eds., (Genève, Zurich: Schulthess Médias Juridiques, 2012), 118-119.
[736] Irini A. Stamatoudi, *Cultural Property Law and Restitution. A Commentary to International Conventions and European Union Law*, (Cheltenham – Northampton: Edward Elgar Publishing, 2011), 161, 166, 168.

coactive measures, but they act as effective disincentives from assuming unethical behaviors.[737] This way, the inclusion of soft-law tools highly contributes in filling hard-law gaps.

Fifthly, looking at the solution adopted for the bilateral disputes between Italy and the U.S. Museums, the loan of art crafts is one of the key provisions that allowed to conclude the agreements. Scholars share a common interest in this choice and deemed it as a strategic measure to so56tlve such kind of bilateral disputes. The art loans do not find any basis in the 1970 UNESCO Convention, but on "*ad hoc* practices of the institutions involved."[738]

This typology of solution does not imply the transfer of title, with some advantages. It entails a double benefit for all the parties involved in the dispute: a common profitable solution, without dealing with troubles resulting from the management of the ownership of the cultural objects. Art loan is considered as one of the more effective solutions, insofar that some scholars look at the rental market for ancient artifacts as an alternative method to increase the legal circulation of ancient works of art, aiming to fighting the illicit export and traffic.[739]

Sixthly, as generally only the criticisms about the UNESCO and UNIDROIT Conventions are underlined, it must be recalled that the cooperation between the two international institutions has played a fundamental role in hard-law achievements, leading to a higher degree of exchange between public and private international law.

Another positive consequence deriving from this mixed public-private law cooperation is the development of case law applying the Conventions principles to restitution requests. An example is given by the famous

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[737] See interview to Mr. Garlandini, President of ICOM Italia, in the Annex Section.

[738] See: Francesca Fiorentini, "The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions", in *Resolving Disputes in Cultural Property*, Marc-André Renold, Alessandro Chechi, Anne Laure Bandle eds., (Genève, Zurich: Schulthess Médias Juridiques, 2012), 122.

[739] For instance, Silvia Beltrametti proposes the leasing of ancient artifacts as a measure able to entail a double advantage: the possibility of separating the two layers of the ownership issue from the cultural exchange, as the property will be assured to the state of origin (or to the original owner) through its own jurisdiction during the loan period. This proposal is founded on the firm belief that a high degree of international cooperation is required to ensure an adequate protection for cultural heritage worldwide. In Beltrametti's opinion, leasing represents also a conciliation between the two opposite visions that divide the cultural debate: nationalism and internationalism, and the related different thinking over cultural objects, intended as property or culture itself. Silvia Beltrametti, "Museum Strategies: Leasing Antiquities", *Columbia Journal of Law and the Arts* 36 (2013):203-260.

case *Government of Islamic Republic of Iran v. Barakat Gallery Ltd.*[740] The England and Wales Court of Appeal decided to apply Iranian law for the protection of cultural property, both private and public. Furthermore, the Court recalled also the 1970, the 1995 UNIDROIT Conventions and the EU Directive 93/7/ EEC, even recognizing that these international legal tools did not found direct application in national law, but they shall be considered as an expression of the general intention of the United Kingdom in fighting the illicit export of cultural objects.[741] Moreover, in cases that cannot be solved through the Conventions' application, both the call for resorting to agreements to solve restitution or return disputes -when good provenance cannot be provided for cultural objects - and the principle of compensation for acquirers represent a valid encouragement to the implementation of alternative resolutions.[742]

Taking into consideration the conflict between nationalism and internationalism, many years of study shall now drive towards a new vision: internationalism may not be intended as pass for an uncontrolled international movement of cultural objects. Assuming that the already developed rules did not succeed in erasing the illegal trade of cultural objects, a different effort should be implemented to win the challenge on a global ground. At this stage, the global dimension of the circulation of cultural objects, the existence of art market and its high economic interests could be accepted as a matter of fact, considering also the significant role played by internet.[743] The next step forward would be focusing on establishing definite mechanisms able to ensure the preservation of cultural

[740] Islamic Republic of Iran v. Barakat Galleries Ltd. [2007] EWCA Civ. 1374.

[741] See: Lyndel V. Prott, "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On", *Uniform Law Review,* Rome, UNIDROIT, 14 (1-2) (1996): 223. See also: Francesca Fiorentini, "The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions", in *Resolving Disputes in Cultural Property*, Marc-André Renold, Alessandro Chechi, Anne Laure Bandle eds., (Genève, Zurich: Schulthess Médias Juridiques, 2012), 110.

[742] In particular, as underlined by Prott with regard to the survey on the EU Directive 93/7 application – developed on the basis of the 1995 UNIDROIT draft – "dealers and purchasers who are presented with evidence that a cultural object does not have a good provenance do not now wait for litigation to commence, but come to an agreement to return, or to compensate a purchaser who returns. This is an entirely beneficial effect, since it avoids costs for all Parties and ensures that cultural objects which have been illicitly traded go back to the proper holder – a real deterrent to individuals used to dubious transactions. And even these cases seem to be few in number." This statement shows the positive outcomes of the direct settlement of bilateral disputes over the recovery of cultural objects and its potential value in fighting the illicit trade. See: Lyndel V. Prott, "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On", *Uniform Law Review,* Rome, UNIDROIT, 14 (1-2) (1996): 223.

[743] Internet may be perceived both as a thread, because it is used to facilitate illicit traffic, and as a resource thanks to its investigation use by national forces, such as the Carabinieri Art Squad and through the digitalization of stolen objects databases.

objects in the contexts that better represent their identity, and to which they authentically belong to. Three main principles may be here recalled, because they are able to balance the international legal development of cultural heritage protection with ethical, social and cultural instances. All three principles are fundamentally based on the notion "*diviser c'est détruire*", having a clear moral foundation.[744]

"The principles here under consideration can be useful in addressing some limits of the treaties in force as regards the return of cultural property (in particular, their non-retroactive character and the fact that they can create rights and obligations only for the parties). The first two principles are the principle of non exploitation of the weakness of another subject for cultural gain – which applies to situations of war, colonial domination, foreign occupation or involving indigenous peoples – and the principle of co-operation against illegal movements of cultural property, which has a general scope of application. They are linked to the principle of the preservation of the integrity of cultural contexts, which is deeply rooted in the nature of cultural heritage. A fourth principle, of a procedural nature, is the principle of international co-operation in settling disputes on the return of cultural property,[745] taking into account all the relevant circumstances. It should govern the relationship between the States of origin and the States of destination of cultural property and may involve, if it is the case, also non-State actors and non-adversarial procedures, as mediation and conciliation."[746]

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[744] This principle was initially exposed by the French scholar Antoine-Chrysostome Quatremère de Quincy. Quatremère reflected about the consequences due to the removal of cultural objects from their places of origin, corresponding in his vision to destroy them. As understandable, this idea is strictly connected also to the value recognized to the provenance issue and constitutes the foundation of the principle of the integrity of contexts. See: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties", in *Rivista di diritto internazionale* 2(2011): 344-345. See also: Quatremère de Quincy, *Lettres au général Miranda sur le préjudice qu'occasionneraient aux arts et à la science le déplacement de monuments de l'art de l'Italie, le démembrement de ses Ecoles et la spoliation de ses galléries, musées*, (Rome, 1825), 25, as reported in Scovazzi.

[745] See the judgment delivered by the International Court of Justice, February 20,1969 on the North Sea Continental Shelf cases stressing on the importance of concretely aiming to cooperate for a solution for the Parties involved in a dispute settlement procedure: "the Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation (...); they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (par. 85). See: The International Court of Justice, "North Sea Continental Shelf Cases. Judgment of 20 February 1969", available at: http://www.icj-cij.org/docket/index.php?sum=295&p1=3&p2=3&k=cc&case=51&p3=0 (accessed March 28, 2014).

[746] See: Tullio Scovazzi, "*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of

For these reasons, new solutions may be prospected going beyond the treaties with a triple orientation: finding answers to cases falling outside the Conventions' range of applicability, providing full satisfaction to the rising international demanding of respect of cultural rights and cultural heritage protection, aiming to develop new standards and preferring out-of-court solutions.

6.2. Perspectives

Bearing in mind the considerations above mentioned, some *desiderata* may be proposed.

Future developments should be able to remove the current limits to rightful application of the recovery principles, if needed overcoming the conventional tools.

A first recommendation is overturning the application of those criteria that foster the proliferation of illegal trade of cultural objects, such as resorting to the imposition of the burden of proof for the possessor of cultural objects of questionable provenance in opposition to the good faith in acquisition. The presumption of good faith in acquisition acts concretely in promoting the illegal flux of art trade, because of the lack of an adequate control over the provenance of the pieces of art.

Looking at the actual implementation of law instruments, a recent interesting evolution may be found in the amendments to the EU Directive 93/7/EEC of March 15, 1993, that provided for the imposition of the burden of proof on the possessor.[747] This EU Directive represents one of the legal tools, resulting from the interplay of law-makers at the international ground.

Return of Cultural Properties", in *Rivista di diritto internazionale* 2(2011): 384-395.

[747] "Possessors will be required to show that they exercised due care and attention when purchasing the object, i.e. that they took all necessary steps to satisfy themselves that the object was of legal origin. Since in most cases possessors are art market participants, it is only normal that they should be required to show that a cultural object has been lawfully acquired, in order to be eligible for compensation." See: European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (recast) (COM(2013)0311 – C7-0147/2013 – 2013/0162(COD)), January 28, 2014, available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0058&language=EN (accessed March 28, 2014).

The EU Directive 93/7/EEC seeks to allow Member States to protect their national treasures which have been illegally removed from their territory. Despite it has this specific purpose, it must be taken into consideration the general international legal framework regarding free trade of goods. In fact, this action has been implemented by both EU[748] and GATT[749] in the field of cultural objects, proving for special restrictions on free movements of cultural goods.

The EU Directive 97/3/EEC was substantially drafted on the basis of the preparatory works of the 1995 UNIDROIT Convention, aiming principally at deterring the illegal export of cultural objects rather than implementing their restitution. The most recent inclusion among the amendments to the Directive of the "burden of proof" principle and its invitation to the EU member states to sign and ratify both UNESCO and UNIDROIT Conventions appear an important message,[750] which desirably should spread beyond the EU boundaries. Even though this research did not aim to analyze the EU legal system, the relation of the EU Directive 93/7/EEC with the UNIDROIT Convention imposes at least some considerations on the recast process of the Directive.[751]

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[748] See: Article 36 Consolidated Version of the Treaty on the Functioning of the European Union (ex Article 30 TEC): "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Available at:http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.doc (accessed March 28, 2014).

[749] See: The General Agreements on Tariffs and Trades (GATT), Article XX "General Exceptions", paragraph (f): "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (…) imposed for the protection of national treasures of artistic, historic or archaeological value", available at: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm (accessed March 28, 2014).

[750] See: European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (recast) (COM(2013)0311 – C7-0147/2013 – 2013/0162(COD)), "Amendment 6, Proposal for a directive, Recital 10": "In the same spirit of cooperation and mutual understanding, and in order to promote the return of cultural objects from one Member State to another, including outside the scope of this Directive, Member States should be encouraged to sign and ratify the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on stolen or unlawfully exported cultural objects." Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0058&language=EN (accessed March 28, 2014).

[751] On the choice of the recast procedure, see: European Commission, "Proposal for a Directive of the European Parliament and the Council on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2013) 311 final)", "Legislative technique", available

The issue will remain a domain of the DG Enterprise and Industry – and not of the DG Culture - , stressing the economic and commercial value of the legal tool. It must be also considered that, if all the EU member states had signed and ratified the UNIDROIT Convention, the EU Directive would have resulted outdated.[752] As stated by the European Commission, in its Impact analysis on the Directive Recast, "a possible abrogation could be analyzed only in a context where all Members States would become parties to the UNIDROIT Convention. In such a context, benefits of the Directive 93/7/EEC for the return would be less than those offered by the Convention."[753]

Secondly, willing to look at forthcoming steps in a positive way, this research desires to read these amendments in line with the calls for changes claimed by many states for the improvement of the 1970 UNESCO Convention.

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at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0311:FIN:EN:PDF (accessed April 8, 2014). "On 1 April 1987, the Commission decided to instruct its staff that all acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavor to codify the texts for which they are responsible at even shorter intervals in order to ensure that their provisions are clear and readily understandable. Codification of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State was initiated by the Commission, and a relevant proposal was submitted to the legislative authority. The new Directive was to have superseded the various acts incorporated in it.
In the course of the legislative procedure, it was acknowledged that Article 16(4) of Directive 93/7/EEC, which corresponded to Article 16(3) of the proposed codified text, established a secondary legal basis. In the light of the judgment of the Court of Justice of 6 May 2008 in Case C-133/06, it was considered necessary to delete Article 16(3) of the proposed codified text. Since such a deletion would have involved a substantive change going beyond straightforward codification, it was considered necessary that point 8 of the Interinstitutional Agreement of 20 December 1994 – Accelerated working method for official codification of legislative texts – be applied, in the light of the joint declaration on that point.
The Commission therefore considered it appropriate to withdraw the proposal for a Directive of the European Parliament and of the Council codifying Directive 93/7/EECand to transform the codification of the Directive into a recast in order to incorporate the necessary amendment. (italics added).
As explained above, the objective of enabling Member States to secure the return of cultural objects which are classified as national treasures requires a certain number of substantial changes to be made to Directive 93/7/EEC. It has therefore been decided to apply the recasting technique in accordance with the Interinstitutional Agreement of 28 November 2001
on a more structured use of the recasting technique for legal acts. This proposal is for a recast of Directive 93/7/EEC, as amended by Directives 96/100/EC and 2001/38/EC. It provides for simplification of the legislation in force and will lead to the repeal of Directives 93/7/EEC, 96/100/EC and 2001/38/EC."

[752] With regard to the procedures and times for the approval, the co-legislators have agreed on a compromise text which endorses the main changes of the Commission's proposal. The European Parliament voted on the agreed text during the session held on April 15-18, 2014; the Council will vote on the compromise text probably in May. Then, the new Directive will be published in the JOUE. After 20 days, the Directive will enter into force. Member States have 18 months to transpose the Directive into their national laws. For all the details on the recast scopes and procedure see: http://ec.europa.eu/enterprise/policies/single-market-goods/internal- market-for-products/cultural-goods/ (accessed April 19, 2014).

[753] See: European Commission, Impact analysis, 128 – SWD (2013) 189 final.

Aware of the criticisms moved against the guidelines definition process promoted by UNESCO and for the need of future steps to really produce a change in the wording of the Convention, at least the processes currently in action are nurturing the debate. The real problem remains the irreconcilability between the concurring interests between the industrialized and the developing countries, due mainly to colonization and plunder of cultural objects. It is fair to assume that is quite impossible to conciliate them. The affirmation and rising of the principles of moral inspiration shall contribute in balancing the instances of former colonizing powers, but this process still appears as a walk with many steep paths to go through. For this reason as well, and considering it as a second recommendation, the balance with soft law tools appears of uprising importance.

A certain degree of optimism may be apply also to the philosophical analysis developed by Prott on the evolution of the fight against the illegal trade of cultural objects. Prott expressly wonders "why is it that attitudes are changing so slowly? What we can do to persuade collectors, private and public, individuals and museums, to stop "this awful business[…]"? An evolution can be registered, in any case. Will be the current process of improvement of the 1970 Convention able to produce bigger results? And bearing in mind Prott's analysis, how long will it take?[754]

As third point, the width of the field of cultural objects and the return issues implies the need of a case-by-case analysis, aware of the impossibility of imposing a common shared vision on cultural property law, because common law and civil law have different paradigms for the same issue. A possible recommendation for the future on this topic is to examine each case and apply the law system able to provide the best solution to settle the dispute.

From an evolutionary perspective, resorting to solutions based on customary international rules for judgments on disputes of cultural objects recovery could help to encourage a new development at the international ground. The Italian practice has yet produced two similar judgments,[755] which had the

[754] See : Lyndel V. Prott, "Philosophies, politics, Law and the 1970 UNESCO Convention", in *La Convencion de la UNESCO 1970 Sus Nuevos Desafios*, Jorge Sanchez Cordero ed., (Ciudad Universitaria, Instituto de Investigaciones Juridicas, Mexico, 2013), 272.

[755] The cases of the *Venus of Cyrene*, discussed in this research in the examination of the "Getty case", Chapter 5.4., and the judgment on *Saint Catherine of Alexandria.* See: Tullio Scovazzi, La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana, Chapter V, paragraph 32, in course of

peculiarity of constituting a precedent themselves, because they did not rely on a consolidated practices. This element is important as it contributed to the birth of a potential new customary rule, able to overcome the limits of the conventional tools in force, especially the time limit and the related non-retroactivity issue. Furthermore, considering the Italian examples, it is encouraging to point out that the resort to the international best practicescan be used for the promotion of more integrated international practice. Because of the discussed high fragmentation of the relations involved, legal paradigms and cultural divide, the effort for a shared solution can be achieved only applying, on a case-by-case analysis, the most suitable best practices.

Finally, given the complexity of the issue and the multilayer legal instruments in a decentralized system of regulation, an effort to balance soft law and hard law tools is required. Possibly, these achievement would be reached balancing the principles expressed by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention with the international co-operation in promoting a *moral suasion* in the international art trade market. This recommendation reiterate the centrality of the respect for ethical and cultural principles which inspired the Cultural Heritage Law development, aiming to the general safeguard of cultural heritage. In this regard, cultural objects may be considered as the material proof of cultural development, and their integral conservation and respect may be looked as the most concrete way to ensure a wider cultural heritage protection.

As stated by Maurizio Fiorilli, State Legal Advisor of the Italian Republic, "recovering one's own memory and helping others to recover theirs is an act of civilization".[756]

publication.

[756] Maurizio Fiorilli, "Cultural properties and International agreements", in *International Meeting on Illicit Traffic of Cultural Property*, Rome 16/17 December 2009, (Rome, Gangemi, 2010), 165.

ANNEX SECTION

I. LEGAL TOOLS

1. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970

Paris, 14 November 1970

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 12 October to 14 November 1970, at its sixteenth session,

RECALLING the importance of the provisions contained in the Declaration of the Principles of International Cultural Co-operation, adopted by the General Conference at its fourteenth session,

CONSIDERING that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations,

CONSIDERING that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding is origin, history and traditional setting,

CONSIDERING that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,

CONSIDERING that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations,

CONSIDERING that, as cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles,

CONSIDERING that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO's mission to promote by recommending to interested States, international conventions to this end,

CONSIDERING that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation,

CONSIDERING that the UNESCO General Conference adopted a Recommendation to this effect in 1964,

HAVING before it further proposals on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, a question which is on the agenda for the session as item 19,

HAVING decided, at its fifteenth session, that this question should be made the subject of an international convention,

Adopts this Convention on the fourteenth day of November 1970.

Article 1
For the purposes of this Convention, the term `cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manu-factured articles decorated by hand);
(ii) original works of statuary art and sculpture in any material;
(iii) original engravings, prints and lithographs ;
(iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

Article 2
1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

Article 3
The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

Article 4
The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:
(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

Article 5
To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist,

for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:
(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;
(b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;
(c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops...) required to ensure the preservation and presentation of cultural property;
(d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research;
(e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;
(f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;
(g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

Article 6
The States Parties to this Convention undertake:
(a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
(b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;
(c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

Article 7
The States Parties to this Convention undertake:
(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;
(b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;
(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

Article 8
The States Parties to this Convention undertake to impose penalties or admin-istrative sanctions on any person responsible for infringing the prohibitions referred to under Articles 6(b) and 7(b) above.

Article 9
Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Article 10
The States Parties to this Convention undertake:
(a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject;
(b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.

Article 11
The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.

Article 12
The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible, and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories.

Article 13
The States Parties to this Convention also undertake, consistent with the laws of each State:
(a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
(b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

Article 14
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.

Article 15
Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.

Article 16
The States Parties to this Convention shall in their periodic reports submitted to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative

provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.

Article 17
1. The States Parties to this Convention may call on the technical assistance of the United Nations Educational, Scientific and Cultural Organization, particularly as regards:
(a) Information and education;
(b) consultation and expert advice;
(c) co-ordination and good offices.
2. The United Nations Educational, Scientific and Cultural Organization may, on its own initiative conduct research and publish studies on matters relevant to the illicit movement of cultural property.
3. To this end, the United Nations Educational, Scientific and Cultural Organization may also call on the co-operation of any competent non-governmental organization.
4. The United Nations Educational, Scientific and Cultural Organization may, on its own initiative, make proposals to States Parties to this Convention for its implementation.
5. At the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them.

Article 18
This Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.

Article 19
1. This Convention shall be subject to ratification or acceptance by States members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.
2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 20
1. This Convention shall be open to accession by all States not members of the United Nations Educational, Scientific and Cultural Organization which are invited to accede to it by the Executive Board of the Organization.
2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 21
This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

Article 22
The States Parties to this Convention recognize that the Convention is applicable not only to their metropolitan territories but also to all territories for the international relations of which they are responsible; they undertake to consult, if necessary, the governments or other competent authorities of these territories on or before ratification, acceptance or accession with a view to securing the application of the Convention to those territories, and to notify the Director-General of the United Nations Educational, Scientific and cultural Organization of the territories to which it is applied, the notification to take effect three months after the date of its receipt.

Article 23
1. Each State Party to this Convention may denounce the Convention on its own behalf or on behalf of any territory for whose international relations it is responsible.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation.

Article 24
The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States members of the Organization, the States not members of the Organization which are referred to in Article 20, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance and accession provided for in Articles 19 and 20, and of the notifications and denunciations provided for in Articles 22 and 23 respectively.

Article 25
1. This Convention may be revised by the General Conference of the United Nations Educational, Scientific and Cultural Organization. Any such revision shall, however, bind only the States which shall become Parties to the revising convention.
2. If the General Conference should adopt a new convention revising this Convention in whole or in part, then, unless the new convention otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession, as from the date on which the new revising convention enters into force.

Article 26
In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Done in Paris this seventeenth day of November 1970, in two authentic copies bearing the signature of the President of the sixteenth session of the General Conference and of the Director-General of the United Nations Educational, Scientific and Cultural Organization, which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 19 and 20 as well as to the United Nations.

Declarations and Reservations

Australia [at time of acceptance]
"The Government of Australia declares that Australia is not at present in a position to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject. Australia therefore accepts the Convention subject to a reservation as to Article 10, to the extent that it is unable to comply with the obligations imposed by that Article." (see letter LA/Depositary/1989/20 of 10 January 1990).

Belgium
"Belgium interprets the term "cultural property" as confined to those objects listed in the Annex to Council Regulation (EEC) No 3911/92 of 9 December 1992, as amended, on the export of cultural goods and in the Annex to Council Directive 93/7/EEC of 15 March 1993, as amended, on the return of cultural objects unlawfully removed from the territory of a Member State." [Original: French, English, Flemish and German]

Byelorussian Soviet Socialist Republic [at time of ratification]
"The Byelorussian Soviet Socialist Republic declares that the provisions of Articles 12, 22 and 23 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, providing for the possibility for the contracting parties to extend its application to the territories for the international relations of which they are responsible, are outdated and contrary to the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514/XV of 14 December 1960)." (see letter LA/Depositary/1988/11 of 15 September 1988)

Cuba
(Translation) "The Government of the Republic of Cuba considers that the implementation of the provisions contained in Articles 22 and 23 of the Convention is contrary to the Declaration on

Granting Independence to Colonial Countries and Peoples (Resolution 1514) adopted by the United Nations General Assembly on 14 December 1960, which proclaims the necessity of bringing to a speedy and unconditional end colonialization in all its forms and manifestations." (See letter LA/Depositary/1980/7 of 11 March 1980.)

Czechoslovakia
"Accepting the Convention, the Government of the Czechoslovak Socialist Republic wishes to declare that preservation of the state of dependence of certain countries from which the provisions of Articles 12, 22, and 23 proceed is in contradiction with the contents and objective of the Declaration of the United Nations General Assembly No. 1514 on the granting of independence to colonial countries and nations of 14 December 1960. The Government of the Czechoslovak Socialist Republic further declares in connection with Article 20 that the Convention, according to the problems it regulates, should be open also to non-Member States of the United Nations Educational, Scientific and Cultural Organization without the need of invitation by the Executive Council of the United Nations Educational, Scientific and Cultural Organization." (See letter LA/Depositary/1977/6 of 8 April 1977)

Denmark [at the time of ratification]
The instrument contained the following temporary reservation:
"...until further decision, the Convention will apply neither to the Faroe Islands nor to Groenland"
[Original: French]

and was accompanied by the following declaration:

"The property designated as "of importance for archaeology, prehistory, history, literature, art or science", in accordance with Article 1 of the Convention, are the properties covered by the Danish legislation concerning protection of cultural assets and the Danish Museum Act.

Act on Protection of Cultural Assets in Denmark
The Act on Protection of Cultural Assets in Denmark came into force on 1 January 1987.
According to section 2(1) in the Act on Protection of Cultural Assets in Denmark the Act applies to the following cultural assets which are not publicly owned:
• cultural objects of the period before 1660;
• cultural objects older than 100 years and valued at DKK 100,000 or more;
• photographs (regardless of age) if they have a value of DKK 30,000 or more.
In exceptional cases the Minister of Culture can decide that the Act is also applicable to other objects of cultural interest.
Coins and medals are the only cultural objects explicitly exempted from the regulations of the Act.
The above-mentioned assets must not be exported from Denmark without permission from the Commission on Export of Cultural Assets.

Museum Act
According to section 28 of the Museum Act, any person who finds an ancient relic or monument, including shipwrecks, cargo or parts of such wrecks, which at any time must be assumed lost more than 100 years ago, in watercourses, in lakes, in territorial waters or on the continental shelf, but not beyond 24 nautical miles from the base lines from which the width of outer territorial waters is measured, shall immediately notify the Minister of Culture. Such objects shall belong to the State, unless any person proves that he or she is the rightful owner. Any person who gathers up an object belonging to the State, and any person who gains possession of such an object, shall immediately deliver it to the Minister of Culture.
According to section 30 of the Museum Act objects of the past, including coins found in Denmark, of which no one can prove to be the rightful owner, shall be treasure trove (danefæ) if made of valuable material or being of a special cultural heritage value. Treasure trove shall belong to the State. Any person who finds treasure trove, and any person who gains possession of treasure trove, shall immediately deliver it to the National Museum of Denmark.
According to section 31 of the Museum Act, a geological object or a botanical or zoological object of a fossil or sub-fossil nature or a meteorite found in Denmark is fossil trove (danekræ) if the object is of unique scientific or exhibitional value. Fossil trove shall belong to the State. Any person who finds fossil trove, and any person, who gains possession of fossil trove, shall

immediately deliver it to the Danish Museum of Natural History." (see letter LA/Depositary/2003/12)

Finland [at the time of ratification]
"The Government of Finland declares that it will implement the provisions of Article 7 (b) (ii) of this Convention in accordance with its obligations under Unidroit Convention on Stolen or Illegally Exported Cultural Objects done at Rome on 24 June 1995."

France [at the time of ratification]
"The property designated as "of importance for archaeology, prehistory, history, literature, art, or science", in accordance with Article 1 of the Convention, are the following properties whose value exceeds the thresholds indicated opposite:
- Thresholds (in ECUs) (see note 3)
1. Archaeological objets more than 100 years old originating from :
- terrestrial and submarine excavations and discoveries,
- archaeological sites, archaeological collections 0
2. Elements more than 100 years old that form an integral part of artistic, historic ou religious monuments which have been dismembered 0
3. Pictures and paintings produced entirely by hand on any support and in any material (see note 1) 150.000
4. Mosaics, other than those included in categories 1 ou 2, and drawings produced entirely by hand on any support and in any material (see note 1) 15.000
5. Original engravings, prints, serigraphs et lithographs and their respective matrices, and original posters (see note 1) 15.000
6. Original works of statutary art or sculpture and copies obtained by the same means as the original (see note 1), other than items included in category 1 50.000
7. Photographs, films and their negatives (see note 1) 15.000
8. Incunabula and manuscripts, including geographical maps and musical scores, singly or in collections (see note 1) 0
9. Books more than 100 years old, singly or in collections 50.000
10. Printed geographical maps more than 200 years old 15.000
11. Archives of any sort comprising elements more than 50 years old, whatever their medium 0
12. (a) Collections (see note 2) and specimens from collections of fauna, flora, minerals, and anatomy 50.000
(b) Collections (see note 2) of a historical, palaeontological, ethnographic or numismatic interest 50.000
13. Means of transport over 75 years old 50.000
14. Any other ancient object not included in categories 1 to 13 between 50 et 100 years old
(a)
- toys or games,
- glassware,
- objects made of precious metals,
- furniture and furnishings,
- optical, photographic or de cinematographic instruments,
- musical instruments,
- timepieces,
- objects made of wood,
- pottery,
- tapestries,
- carpets,
- wallpapers,
- weapons 50.000
(b) More than 100 years old 50.000

This list is in conformity with rules in force in France and subject to modification. The government of the French Republic will make known any modifications to it that may be made at a future date." (See LA/DEP/1997/1).

Guatemala
"The Republic of Guatemala, mindful that, in conformity with the Fundamental Statute of Government, monuments and archaeological vestiges are the property of the nation and that, furthermore, national law prohibits the unauthorized export of property constituting its cultural wealth, makes an express reservation concerning paragraph (b) (ii) of Article 7 of the Convention to the effect that it does not consider itself obliged to pay any compensation to any person or persons holding cultural property that has been looted or stolen in Guatemala or exported illicitly to another State Party and that, at the request of the Government of Guatemala, has been the subject of appropriate steps for its confiscation and/or restitution by that other State Party.
In any case, the Republic of Guatemala does not consider that the purchase of property forming part of its cultural wealth is in good faith solely through having been made in ignorance of the law.
Concerning Article 3 of the Convention, the Republic of Guatemala shall also consider to be illicit the import and transfer of ownership of cultural property effected contrary to the national provisions in force that are not in conflict with the provisions of the Convention" (See letter LA/Depositary/1985/1).

Hungary
"Articles 12, 22 and 23 of the Convention contradict United Nations General Assembly Resolution 1514(XV) of 14 December 1960, which proclaimed the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations. Article 20 of the Convention is not in conformity with the principle of the sovereign equality of States; in view of the matters it regulates, the Convention should be open to all States without restriction." (See letter LA/Depositary/1978/17 of 12 December 1978.)

Mexico
"The Government of the United Mexican States has studied the text of the comments and reservations on the convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property made by the United States of America on 20 June 1983. It has reached the conclusion that these comments and reservations are not compatible with the purposes and aims of the Convention, and that their application would have the regrettable result of permitting the import into the United States of America of cultural property and its re-export to other countries, with the possibility that the cultural heritage of Mexico might be affected." (See letter LA/Depositary/1985/40 of 3 March 1986).

New Zealand
"AND DECLARES that, consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this acceptance shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory;"

Republique of Moldova
"Until the full re-establishment of the territorial integrity of the Republic of Moldova, the provisions of the convention shall be applied only on the territory controlled effectively by the authorities of the Republic of Moldova."

Sweden
"The property designated as "of importance for archaeology, prehistory, history, literature, art or science", in accordance with Article 1 of the Convention, are the following properties:
1. Archaeological objects – Swedish archaeological objects, regardless of material or value, dating from 1650 or before and not belonging to the State.
2. Pictures and paintings
(a) Swedish paintings more than 100 years old and worth more than SEK 50,000,
(b) portraits picturing a Swede or other persons who were active in Sweden, which are more than 100 years old and worth more than SEK 20,000,
(c) foreign paintings worth more than SEK 50,000.
3. Drawings
(a) Swedish drawings, water-colours, gouaches and pastels more than 100 years old and worth more than SEK 50,000,

(b) portraits picturing a Swede or other persons who were active in Sweden, in the form of water-colours, gouaches and pastels more than 100 years old and worth more than SEK 20,000,
(c) foreign drawings, water-colours, gouaches and pastels worth more than SEK 50,000.
4. Original engravings – Swedish woodcut and copperplate engraving, made before 1650, regardless of value.
5. Original sculptures
(a) Swedish original sculptures and copies produced by the same process as the original, regardless of material, which are more than 100 years old and worth more than SEK 50,000,
(b) foreign original sculptures and copies produced by the same process as the original, regardless of material, which are worth more than SEK 50,000.
6. Incunabula and manuscripts
(a) Swedish incunabula, regardless of value,
(b) Swedish manuscripts on parchment or paper produced before 1650, regardless of value,
(c) Swedish unprinted minutes, letters, diaries, manuscripts, music, accounts, hand-drawn maps and drawings, which are more than 50 years old and worth more than SEK 2,000,
(d) collections of foreign incunabula and Swedish unprinted material in category (b) and (c), which are older than 50 years and are worth more than SEK 50,000.
7. Books
(a) Swedish books printed before 1600, regardless of value,
(b) other Swedish books, which are older than 100 years and are worth more than SEK 10,000, (c) foreign books worth more than SEK 10,000.
8. Printed maps
(a) Swedish printed maps, which are older than 100 years and worth more than SEK 10,000,
(b) foreign printed maps, worth more than SEK 10,000.
9. Archives – Swedish unprinted minutes, letters, diaries, manuscripts, music, accounts, hand-drawn maps and drawings, which are more than 50 years and are worth more than SEK 2,000.
10. Means of transport
(a) Swedish means of transport which are older than 100 years and are worth more than SEK 50,000,
(b) foreign means of transport worth more than SEK 50,000.
11. Any other antique item not included in categories 1-10:
(a) Swedish items of wood, bone, pottery, metal or textile which are produced before 1650, regardless of value,
(b) Swedish furniture, mirrors and boxes which are made before 1860, regardless of value,
(c) Swedish drinking-vessels, harness and textile implements if they are made of wood and have painted or carved decorations, folk costumes and embroidered or pattern-woven traditional textiles, tapestry paintings, long-case clocks, wall clocks and brackets clocks, signed faience, firearms, edged weapons and defensive weapons and musical instruments, which are more than 100 years old, regardless of value,
(d) Swedish items of pottery, glass, porphyry, gold, silver or bronze, with exception of coins and medals, chandeliers, woven tapestries and tiled stoves, which are older than 100 years and worth more than SEK 50,000,
(e) Swedish technical models and prototypes and scientific instruments, which are older than 50 years and worth more than SEK 2,000,
(f) foreign furniture, mirrors, boxes, long-case clocks, wall clocks and brackets clocks, musical instruments, firearms, edged weapons and defensive weapons, items of pottery, glass, ivory, gold, silver or bronze, with exception of coins and medals, chandeliers and woven tapestries, which are worth more than SEK 50,000.
12. Lapp (Sami) items which are more than 50 years and worth more than SEK 2,000. The term Swedish items of historic interest refers to items which were actually or presumably made in Sweden or in some other country by a Swede. The term foreign items of historic interest refers to items made in another country by a non-Swede. This list is in conformity with rules in force in Sweden at present."

Ukrainian Soviet Socialist Republic [at time of ratification]
"The Ukrainian Soviet Socialist Republic declares that the provisions of Articles 12, 22 and 23 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, providing for the possibility for the contracting parties to extend its application to the territories for the international relations of which they are responsible, are outdated and contrary to the Declaration of the United Nations General Assembly on the

Granting of Independence to Colonial Countries and Peoples (Resolution 1514/XV of 14 December 1960)." (see letter LA/Depositary/1988/12 of 15 September 1988).

Union of Soviet Socialist Republics [at time of ratification]
"The Union of Soviet Socialist Republics declares that the provisions of Articles 12, 22 and 23 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, providing for the possibility for the contracting parties to extend its application to the territories for the international relations of which they are responsible, are outdated and contrary to the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples (resolution 1514/XV of 14 December 1960)." (see letter LA/Depositary/1988/13 of 15 September 1988).

United Kingdom of Great Britain and Northern Ireland
"(a) the United Kingdom interprets the term "cultural property" as confined to those objects listed in the Annex to Council Regulation (EEC) N° 3911/1992 of 9 December 1992, as amended, on the export of cultural goods and in the Annex to Council Directive 1993 / EEC of 15 March 1993, as amended, on the return of cultural objects unlawfully removed from the territory of a Member State;
(b) As between EC member states, the United Kingdom shall apply the relevant EC legislation to the extent that that legislation covers matters to which the Convention applies; and
(c) The United Kingdom interprets Article 7(b)(ii) to the effect that it may continue to apply its existing rules on limitation to claims made under this Article for the recovery and return of cultural objects." [Original : English] (see letter LA/Depositary/2002/31)

United States of America [at the time of ratification]
"United States reserves the right to determine whether or not to impose export controls over cultural property.
The United States understands the provisions of the Convention to be neither self-executing nor retroactive.
The United States understands Article 3 not to modify property interests in cultural property under the laws of the States Parties.
The United States understands Article 7 (a) to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions.
The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the States Parties for the recovery of stolen cultural property to the rightful owner without payment of compensation.
The United States is further prepared to take the additional steps contemplated by Article 7(b) (ii) for the return of covered stolen cultural property without payment of compensation, except to the extent required by the Constitution of the United States, for those States Parties that agree to do the same for the United States institutions.
The United States understands the words "as appropriate for each country" in Article 10 (a) as permitting each state party to determine the extent of regulation, if any, of antique dealers and declares that in the United States that determination would be made by the appropriate authorities of state and municipal governments.
The United States understands Article 13(d) as applying to objects removed from the country of origin after the entry into force of this Convention for the states concerned, and, as stated by the Chairman of the Special Committee of Governmental Experts that prepared the text, and reported in paragraph 28 of the Report of that Committee, the means of recovery of cultural property under subparagraph (d) are the judicial actions referred to in subparagraph (c) of Article 13, and that such actions are controlled by the law of the requested State, the requesting State having to submit necessary proofs."

Territorial Application

Notification by	**Date of receipt of notification**	**Extension to**
Denmark	27 May 2004	Greenland (see letter LA/DEP/2004/014)
Denmark	17 April 2008	Faroes
Norway	16 February 2007	Territory of the Kingdom of Norway and the Norwegian dependencies Bouvet Island, Peter I's Island and Queen Maud Land

Notes
(1) More than 50 years old and not belonging to their creators.
(2) Objects for collections are objects that posses the necessary qualities for admission to a collection, that is to say, objects that are relatively rare, not normally used for their original purpose, are the subject of special transactions distinct from the normal trade in usable objects of a similar nature, and have a high value.
(3) The conversion value in national currencies of the amounts in ECUs is that in force on 1 January 1993.

2. Unidroit Convention on Stolen or Illegally Exported Cultural Objects

(Rome, 24 June 1995)

THE STATES PARTIES TO THIS CONVENTION,

ASSEMBLED in Rome at the invitation of the Government of the Italian Republic from 7 to 24 June 1995 for a Diplomatic Conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects,

CONVINCED of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation,

DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information,

DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all,

EMPHASISING that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States,

AFFIRMING that the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention,

CONSCIOUS that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges,

ACKNOWLEDGING that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation,

RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector,

HAVE AGREED as follows:

CHAPTER I – SCOPE OF APPLICATION AND DEFINITION

Article 1

This Convention applies to claims of an international character for:

(a) the restitution of stolen cultural objects;

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects").

Article 2

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

CHAPTER II – RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

(1) The possessor of a cultural object which has been stolen shall return it.

(2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.
(6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.
(7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by:
(a) a Contracting State
(b) a regional or local authority of a Contracting State;
(c) a religious institution in a Contracting State; or
(d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.
(8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

Article 4

(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.
(2) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.
(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.
(4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.
(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

CHAPTER III – RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.

(2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or of its context;

(b) the integrity of a complex object;

(c) the preservation of information of, for example, a scientific or historical character;

(d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.

(4) Any request made under paragraph 1 of this article shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 to 3 have been met.

(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

Article 6

(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.

(4) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.
(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

Article 7

(1) The provisions of this Chapter shall not apply where:
(a) the export of a cultural object is no longer illegal at the time at which the return is requested; or
(b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.
(2) Notwithstanding the provisions of sub-paragraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

CHAPTER IV – GENERAL PROVISIONS

Article 8

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

Article 9

(1) Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.
(2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

Article 10

(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

(2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

(3) This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.

CHAPTER V – FINAL PROVISIONS

Article 11

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until 30 June 1996.

(2) This Convention is subject to ratification, acceptance or approval by States which have signed it.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Ratification, acceptance, approval or accession is subject to the deposit of a formal instrument to that effect with the depositary.

Article 12

(1) This Convention shall enter into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State that ratifies, accepts, approves or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State on the first day of the sixth month following the date of deposit of its instrument of ratification, acceptance, approval or accession.

Article 13

(1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument.

(2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary.
(3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.

Article 14

(1) If a Contracting State has two or more territorial units, whether or not possessing different systems of law applicable in relation to the matters dealt with in this Convention, it may, at the time of signature or of the deposit of its instrument of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute for its declaration another declaration at any time.
(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:
(a) the territory of a Contracting State in Article 1 shall be construed as referring to the territory of a territorial unit of that State;
(b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;
(c) the Contracting State where the cultural object is located in Article 8 (1) shall be construed as referring to the territorial unit of that State where the object is located;
(d) the law of the Contracting State where the object is located in Article 8 (3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and
(e) a Contracting State in Article 9 shall be construed as referring to a territorial unit of that State.
(4) If a Contracting State makes no declaration under paragraph 1 of this article, this Convention is to extend to all territorial units of that State.

Article 15

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
(3) A declaration shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force shall take effect on the first day of the sixth month following the date of its deposit with the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal shall take effect on the first day of the sixth month following the date of the deposit of the notification.

Article 16

(1) Each Contracting State shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests for the return, of cultural objects brought by a State under Article 8 may be submitted to it under one or more of the following procedures:

(a) directly to the courts or other competent authorities of the declaring State;

(b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;

(c) through diplomatic or consular channels.

(2) Each Contracting State may also designate the courts or other authorities competent to order the restitution or return of cultural objects under the provisions of Chapters II and III.

(3) Declarations made under paragraphs 1 and 2 of this article may be modified at any time by a new declaration.

(4) The provisions of paragraphs 1 to 3 of this article do not affect bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.

Article 17

Each Contracting State shall, no later than six months following the date of deposit of its instrument of ratification, acceptance, approval or accession, provide the depositary with written information in one of the official languages of the Convention concerning the legislation regulating the export of its cultural objects. This information shall be updated from time to time as appropriate.

Article 18

No reservations are permitted except those expressly authorised in this Convention.

Article 19

(1) This Convention may be denounced by any State Party, at any time after the date on which it enters into force for that State, by the deposit of an instrument to that effect with the depositary.

(2) A denunciation shall take effect on the first day of the sixth month following the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it shall take effect upon the expiration of such longer period after its deposit with the depositary.

(3) Notwithstanding such a denunciation, this Convention shall nevertheless apply to a claim for restitution or a request for return of a cultural object submitted prior to the date on which the denunciation takes effect.

Article 20

The President of the International Institute for the Unification of Private Law (UNIDROIT) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention.

Article 21

(1) This Convention shall be deposited with the Government of the Italian Republic.

(2) The Government of the Italian Republic shall:

(a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (UNIDROIT) of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made in accordance with this Convention;

(iii) the withdrawal of any declaration;

(iv) the date of entry into force of this Convention;

(v) the agreements referred to in Article 13;

(vi) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (UNIDROIT);

(c) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Convention.

DONE at Rome, this twenty-fourth day of June, one thousand nine hundred and ninety-five,in a single original, in the English and French languages, both texts being equally authentic.

Annex

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

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

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

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

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

(iii) original engravings, prints and lithographs;(iv) original artistic assemblages and montages in any material;

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

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

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

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

3. Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People

EXTRACTS

Full text available at **http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf**

Elaborated by the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations (E/CN.4/Sub.2/1995/26, GE. 95-12808 (E), 21 June 1995) and revised 2000

PRINCIPLES

1 The effective protection of the heritage of the indigenous peoples of the world benefits all humanity. Its diversity is essential to the adaptability, sustainability and creativity of the human species as a whole.

…

5. Indigenous peoples' ownership and custody of their heritage should be collective, permanent and inalienable, or as prescribed by the customs, rules and practices of each people.

GUIDELINES

Definitions

…

13. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immoveable cultural property such as sacred sites of cultural, natural and historical significance and burials.

14. Every element of an indigenous peoples' heritage has owners, which may be the whole people, a particular family or clan, an association or community, or individuals, who have been specially taught or initiated to be such custodians. The owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

Recovery and restitution of heritage

…

17. Governments, international organizations and private institutions should assist indigenous peoples and communities in recovering control and possession of their moveable cultural property and other heritage, including from across international borders, through adequate

agreements and/or appropriate domestic governmental action including if necessary the creation of adequate institutions and mechanisms.

18. In cooperation with indigenous peoples, UNESCO should facilitate the mediation of the recovery of moveable cultural property from across international borders, at the request of the traditional owners of the property concerned.

19. Human remains and associated funerary objects and documentation must be returned to their descendants in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, or otherwise used only in such form and manner as may be agreed upon with the peoples concerned.

20. Moveable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.

21. Under no circumstances should human remains or any other sacred elements of an indigenous peoples' heritage be publicly displayed, except in a manner deemed appropriate by the peoples concerned.

22. In the case of objects or other elements of heritage which were removed or recorded in the past, the traditional owners of which can no longer be identified precisely, the traditional owners are presumed to be the indigenous people associated with the territory from which these objects were removed or recordings were made.

27. All researchers and scholarly institutions within their competences should take steps to provide indigenous peoples and communities with comprehensive inventories of the cultural property, and documentation of indigenous peoples' heritage, which they may have in their custody.

28. Researchers and scholarly institutions should return all elements of indigenous peoples' heritage to the traditional owners upon demand, or obtain formal agreements with the traditional owners for the shared custody, use and interpretation of their heritage.

29. Researchers and scholarly institutions should decline any offers for the donation or sale of elements of indigenous peoples' heritage, without first contacting the peoples or communities directly concerned and ascertaining the wishes of the traditional owners.

International organizations

…

48. The Secretary-General and the governing bodies of the competent specialized agencies should ensure that the task of coordinating international cooperation in this field is entrusted to appropriate organs and specialized agencies of the United Nations, with adequate means of implementation.

49. In cooperation with indigenous peoples, the United Nations should bring these principles and guidelines to the attention of all Member States through, inter alia, international, regional and national seminars and publications, with a view to promoting the strengthening of national legislation and international conventions in this field.

52. In collaboration with indigenous peoples and Governments concerned, the United Nations should develop a confidential list of sacred and ceremonial sites that require special measures for their protection and conservation, and provide financial and technical assistance to indigenous peoples for these purposes.

53. In collaboration with indigenous peoples and Governments concerned, the United Nations should establish a trust fund with a mandate to act as a global agent for the recovery of compensation for the unconsented or inappropriate use of indigenous peoples' heritage, and to assist indigenous peoples in developing the institutional capacity to defend their own heritage.

54. United Nations operational agencies, as well as the international financial institutions and regional and bilateral development assistance programmes, should give priority to providing financial and technical support to indigenous communities for capacity-building and exchanges of experience focused on local control of research and education.

4. United Nations Declaration on the Rights of Indigenous Peoples 2007

EXTRACTS

…

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

…

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

…

II. BILATERAL RELATIONS DOCUMENTS

1. Bilateral Agreement - Metropolitan Museum of Art of New York

The bilateral agreement

The main legal issue concerns the transfer of Title of the disputed archaeological items.

E) The Ministry of Culture of the Italian Republic has requested the Museum to *transfer title*[757] to archaeological items that are in its collections ("the Requested Items," cited in Articles 3, 4 and 5, below) that the Ministry affirms were illegally excavated in Italian territory and sold clandestinely in and outside Italian territory.

Furthermore, the transfer itself will take place in the general context of the Long Term Agreement (Letter J), included on a continuing program of cooperation, in conformity with the Italian Code of Cultural and Landscape Heritage:

"J) The Ministry and the Commission for Cultural Assets of the Region of Sicily and the Museum have agreed that the transfer of the Requested Items shall take place in the context of this Long-Term Cultural Cooperation Agreement (the "Agreement") to ensure the optimum utilization of the Italian cultural heritage, and as part of the policy of the Ministry to recover Italian archaeological assets (letter K).

K) This Agreement is part of a continuing program of cultural cooperation between Italy and the Museum involving reciprocal loans of archaeological artifacts and other works of art consistent with Article 67, Paragraph 1, letter (d) of the Code of Cultural and Landscape Heritage."

The museum restates the importance of the role of the museum institution for the spreading of the general knowledge, education and amusement of people.

"F) The Museum believes that the artistic achievements of all civilizations should be preserved and represented in art museums, which, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve and interpret our shared cultural heritage."

The Museum refuses any involvement concerning the illicit provenance of the art objects:

"I) The Museum, rejecting any accusation that it had knowledge of the alleged illegal provenance in Italian territory of the assets claimed by Italy, has resolved to transfer the Requested Items in the context of this Agreement. This decision does not constitute any acknowledgment on the part of the Museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the Requested Items. The Ministry and the Commission for Cultural

[757] Italics added.

Assets of the Region of Sicily, in consequence of this Agreement, waives any legal action on the grounds of said categories of liability in relation to the Requested Items."

As the basic starting point for the reaching of the agreement has been the neutral consideration of the Museum position and its not awareness on the illicit provenance of the items, the agreement itself is founded on the reciprocal exchange of conditions. As a consequence, the transfer of title of the famous Krater of Euphronios implied the substitution in the Museum with other archaeological items of equivalent beauty and artistic value, as established by article 4, letter b) of the Agreement, which provides also the list of selected assets that will substitute the Krater on a rotating basis for the entire duration og the long term agreement:

"b) To make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater, the Parties agree that, beginning on January 15, 2008 and for the duration of this Agreement, the Ministry of Cultural Heritage and Activities of the Italian Republic shall make four-year loans to the Museum on an agreed, continuing and rotating basis selected from the following archaeological artifacts, or objects of equivalent beauty and artistic/historical significance, mutually agreed upon, in the same context where possible, or of the Euphronios Krater:

1. Attic vase, red figures on white background, signed by Charinos, Tarquinia, Museo Archeologico Nazionale, Inv. No. RC 6845.
2. Red-figured Attic kylix signed by Oltos as painter and Euxitheos as potter, with scenes of the Gods of Olympus, ca. 515-510 B.C., Tarquinia, Museo Archeologico Nazionale, Inv. No. RC 6848.
3. Red-figure Attic hydra from Nola, known as the "Vivenzio Hydra," attributed to the Painter Kleophrades, with a scene of the fall of Troy, ca. 480 B.C. Naples, Museo Archeologico Nazionale, Inv. No. 81669.
4. Bell-shaped Attic krater attributed to the Altamura Painter, with a scene of Dionysus and Oenopion, ca. 465 B.C., Ferrara, Museo Nazionale.
5. Large red-figured Attic kylix attributed to the painter Penthesileia, with the exploits of Theseus. ca. 480 - 460 B.C. Ferrara, Museo Archeologico Nazionale, Inv. No. T. 18 CUP.
6. Red-figured Attic stamnos from Nocera, attributed to the Dinos Painter, with scene of the cult of Dionysus, ca. 420 B.C., Naples, Museo Archeologico Nazionale, Inv. No. 81674.
7. Red-figured Attic hydria from Populonia, attributed to the Meidias Painter, with a scene of Phaon in a bower with Demonassa. ca. 410 B.C. Florence, Museo Archeologico Nazionale, Inv. No. 81947.
8. Red-figured spiral Attic krater from Spina, attributed to a follower (Bologna Painter 279) of the Niobid Painter, with scenes of the heroes of Marathon and the Seven Against Thebes. ca. 440 B.C. Ferrara, Museo Nazionale Inv. No. T. 579.
9. Red-figured Attic krater from Ruvo, atributed to the Pronomos Painter, with scene of the flute-player Pronomos. ca. late 5th Century BC, Naples, Museo Archeologico Nazionale, Inv. No. 3240 = No. 81673.
10. Red-figured spiral Attic krater, attributed to the Talos Painter, with scene of the death of Talos. ca. late 5th Century BC, Ruvo, Museo Nazionale, Inv. No. Jatta 1501.

11. Red-figured spiral Apulian krater, showing Orestes at Delphi and a chariot race, ca. mid-4th Century B.C., Ruvo, Museo Nazionale, Inv. No. J1492.
12. Red-figured krater from Southern Italy, from Paestum, of Python, with theatrical scene of Oedipus and the Sphinx. ca. 4th Century BC, Naples, Museo Archeologico Nazionale, Inv. No. 81417."

2. Bilateral Agreement - MFA Boston and Italy Joint Release Declaration

Ministero per i Beni e le Attività Culturali

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Joint Statement from the Museum of Fine Arts, Boston and the Italian Ministry of Culture

MUSEUM OF FINE ARTS, BOSTON AND ITALIAN MINISTRY OF CULTURE SIGN AGREEMENT MARKING NEW ERA OF CULTURAL EXCHANGE

MFA Transfers 13 Antiquities to Italy

ROME, Italy (September 28, 2006)—Today, the Museum of Fine Arts, Boston (MFA) transferred 13 antiquities to Italy and signed an agreement with the Italian Ministry of Culture marking the beginning of a new era of cultural exchange. The objects arrived in Rome a few days ago and were unveiled for the first time at today's press conference.

Francesco Rutelli, Minister of Culture, stated, "I am proud to announce this historic moment in international cooperation against illegal trafficking of antiquities. The great artistic importance of the works of art transferred, and above all, the quality and intensity of the rapport which we established with the Museum of Fine Arts, Boston are a testament to a fundamental moment in reciprocal cooperation and enhancement of the cultural patrimony of humanity. It is with great satisfaction that the merits go today to the Museum of Fine Arts, Boston, a museum of enormous prestige, with whom we are signing an agreement that will be a model for the future and we hope for similarly innovative agreements with other institutions around the world."
"Both the Museum of Fine Arts, Boston and the Italian Ministry of Culture wish to see the end of the illicit excavation and trade of antiquities," said Malcolm Rogers, Ann and Graham Gund Director of the Museum of Fine Arts. "Our partnership with the Italian government heralds an exciting new era of collaboration by making the world's great artistic treasures available to the broadest possible audience."

The agreement includes the creation of a partnership in which the Italian government will loan significant works from Italy to the MFA's displays and special exhibitions program, and establishes a process by which the MFA and Italy will exchange information with respect to the Museum's future acquisitions of Italian antiquities. The partnership also envisages collaboration in the areas of scholarship, conservation, archaeological investigation and exhibition planning.

The agreement between the MFA and the Italian Ministry of Culture follows several months of discussions, including two meetings in Rome which took place in May and July 2006. Today, the agreement was signed by MFA Director Malcolm Rogers and Giuseppe Proietti of the Italian Ministry of Culture, in the presence of Minister of Culture Francesco Rutelli.

The MFA has been a leader within the museum community in sharing the objects in its collection, and their provenance history, worldwide on its Web site. Currently, information about more than 330,000 objects is available at: www.mfa.org/collections.

Minister Francesco Rutelli will visit Boston's Museum of Fine Arts in late November to underscore the significance of the collaboration established between Italy and the MFA.

To celebrate the extraordinary event of the transfer of these thirteen antiquities from the Museum of Fine Arts, Boston to Italy, they will be on view to the public at the Museo Nazionale Romano di Palazzo Massimo alle Terme in Rome for a week starting October 10, before being installed at museums in their historical territories.

Information regarding the 13 antiquities transferred to Italy, including their provenance and downloadable, high-resolution images, is available at www.mfa.org. Additional information can be found at www.beniculturali.it.

The objects transferred to Italy from the MFA are:

Two-handled vessel (nestoris) about 420-410 B.C. (MFA accession number 1971.49)

Lekythos about 500-490 B.C. (1977.713)

Water jar (kalpis-hydria) depicting Apollo making a libation before gods and godesse about 485 B.C. (1978.45)

Two-handled jar (pelike) depicting Phineus with the sons of Boreas about 450 B.C. (1979.40)

Statue of Sabina about A.D. 136 (1979.556)

Water jar (hydria) about 530-520 B.C. (1979.614)

Vase for bath water (loutrophoros) depicting Pelops and Hippodameia in chariot 320-310 B.C. (1988.431)

Mixing bowl (bell-krater) about 380-370 B.C. (1988.532)

Oil flask (lekythos) about 490 B.C. (1989.317)

Two-handled jar (amphora) depicting the murder of Atreus about 340–330 B.C. (1991.437)

Triangular support for a candelabrum shaft, decorative colonette, or small basin A.D. 20-60 (1992.310)

Two-handled vessel (nestoris) depicting athletes in conversation with girls late fifth century B.C. (1998.588)

Mixing bowl (bell-krater) with Thracian hunters about 440-430 B.C. (1999.735)
###

3. Italian-Australian Joint Prime Ministerial Declaration on Indigenous Human Remains

Dichiarazione Congiunta del Presidente del Consiglio dei Ministri della Repubblica Italiana e del Primo Ministro del Commonwealth dell'Australia sui resti ancestrali della popolazione indigena australiana

Il Governo italiano e il Governo australiano riconoscono il particolare legame che intercorre tra la popolazione indigena Australiana e i loro resti ancestrali, attualmente rientranti nel patrimonio culturale italiano o comunque presenti in territorio italiano.

Pertanto concordano di fare ogni sforzo diretto alla restituzione di tali resti al Paese australiano e alle comunità indigene, nel rispetto dei relativi ordinamenti.

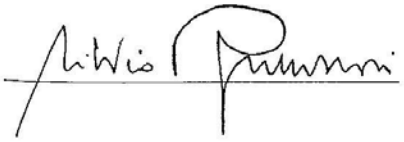
Inoltre i due Governi prendono atto dell'esistenza di complesse questioni da affrontare e risolvere per giungere a tale restituzione.

A tal fine stabiliscono di costituire, nel mese di settembre 2009, un gruppo di lavoro congiunto per individuare possibili soluzioni, anche di carattere normativo.

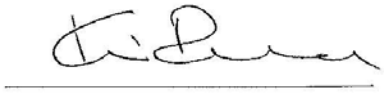
Tale gruppo terminerà i propri lavori entro la fine dell'anno con la formulazione delle relative proposte.

L'Aquila, 10 luglio 2009

Il Presidente del Consiglio dei Ministri della Repubblica Italiana



Il Primo Ministro del Commonwealth dell'Australia



Joint declaration by the Prime Minister of the Republic of Italy and the Prime Minister of the Commonwealth of Australia on Indigenous ancestral remains

The Italian Government and the Australian Government recognise the particular ties that exist between the Australian Indigenous population and their ancestral remains, which currently form part of Italy's cultural heritage or which, in any case, are present in Italy.

Therefore, they agree to make every effort for the restitution of such remains to Australia and to the Indigenous communities, in accordance with any respective legislations.

In addition, the two Governments take note of the existence of complex issues to address and resolve in order to achieve such restitution.

To this end, they agree to establish in September 2009 a joint working group to identify possible solutions, including those of a legislative nature.

This group will complete its work by the end of the year with the formulation of its proposals.

L'Aquila, July 10th, 2009

The Prime Minister of the Republic of Italy

The Prime Minister of the Commonwealth of Australia

4. Italian-Australian Ministerial Decree Setting Up Joint Working Group on Indigenous Remains

MODULARIO B.A.C. - 66

Mod. 6 (Servis. Generale)

Il Ministro per i Beni e le Attività Culturali

VISTO il decreto legislativo 20 ottobre 1998, n. 368 e successive modificazioni recante "Istituzione del Ministero per i beni e le attività culturali, a norma dell'articolo 11 della legge 15 marzo 1997, n. 59.";

VISTO il decreto legislativo 22 gennaio 2004 n. 42 recante il "Codice dei Beni culturali e del paesaggio", e successive modificazioni;

VISTA la dichiarazione congiunta del Presidente del Consiglio dei Ministri italiano e del Primo Ministro australiano sui resti ancestrali della popolazione indigena Australiana presenti nel territorio italiano, sottoscritta nell'ambito degli incontri tenutisi durante il G8, con la quale si è concordato di fare ogni sforzo diretto alla restituzione dei suddetti resti al Paese australiano e alle comunità indigene, nel rispetto dei relativi ordinamenti;

CONSIDERATO che la suddetta dichiarazione congiunta prevede la costituzione di un apposito gruppo di lavoro congiunto, con il compito di individuare possibili soluzioni, anche di carattere normativo, finalizzate ad affrontare e risolvere le complesse questioni relative alla restituzione dei resti sopra menzionati;

VISTA la lettera del 22 luglio 2009 con la quale l'Ambasciatore australiano ha comunicato i nominativi dei componenti di parte australiana del Gruppo di lavoro;

D E C R E T A

Art.1

1. E' istituito un gruppo di lavoro con il compito di individuare possibili soluzioni, anche di carattere normativo, per la restituzione, al Paese Australiano, dei resti ancestrali della popolazione indigena australiana presenti sul territorio italiano.

2. Il Gruppo di lavoro, per la parte italiana, è così composto:

- Mario Luigi Torsello, Capo dell'Ufficio legislativo del Ministero per i beni e le attività culturali;
- Patrizio Fondi, Consigliere diplomatico del Ministro per i beni e le attività culturali;
- Stefano De Caro, Direttore generale per i beni archeologici del Ministero per i beni e le attività culturali;
- Daniel Berger, Consigliere del Ministro per i beni e le attività culturali.

Il Ministro
per i Beni e le Attività Culturali

3. Il Gruppo di lavoro, per la parte australiana, è così composto:

- Amanda Vanstone, Ambasciatore d'Australia in Italia;
- Toshi Kawaguchi, Terzo Segretario, Ambasciata d'Australia in Italia;
- Clelia March – Doeve, Consulente Culturale, Ambasciata d'Australia in Italia;
- Paul Garwood, Responsabile per la Ricerca, Ambasciata d'Australia in Italia.

Art. 2

1. Il gruppo di lavoro dovrà terminare i propri lavori entro la fine del corrente anno con la formulazione di proposte.

Art. 3

1. Ai componenti del gruppo di lavoro non sono dovuti gettoni di partecipazione, compensi, indennità o rimborsi di alcun tipo.

Roma, 29 LUG. 2009

IL MINISTRO

THE MINISTRY OF CULTURE

IN LIGHT OF Legislative Decree no. 368 of 20 October 1998 and subsequent changes regarding the "Establishment of the Ministry of Culture pursuant to article 11 of the Law no. 59 of 15 March 1997";

IN LIGHT OF Legislative Decree no. 42 of 22 January 2004 regarding "the Code of Cultural Heritage" and subsequent changes;

IN LIGHT OF the joint statement by the Italian and Australian Prime Ministers on the ancestral remains of the indigenous population of Australia and which are held in Italy, which was signed as part of the meetings held during the G8, and in which it was agreed to make all efforts to return these remains to Australia and to the indigenous communities, in compliance with the relative laws;

IN CONSIDERATION OF THE FACT that the above joint statement envisages the establishment of a specific joint working group, with the task of identifying possible solutions, including legislative solutions, aimed at addressing and resolving the complex issues relating to the return of the above remains;

IN LIGHT OF the letter of 22 July 2009 in which the Australian Ambassador communicated the names of the members of the working group for Australia;

DECREES

Art. 1

1. A working group is set up with the task of identifying possible solutions, including legislative solutions, for the return to Australia of the ancestral remains of the indigenous population of Australia and which are held in Italy.

2. For Italy the working group will be composed as follows:

- Mario Luigi Torsello, Head of Legislative Office of Ministry of Culture;
- Patrizio Fondi, Diplomatic Counsellor to Minister of Culture;
- Stefano De Caro, Director General for archaeological assets of the Ministry of Culture;
- Daniel Berger, Counsellor to Minister of Culture.

3. For Australia the working group will be composed as follows:

- Amanda Vanstone, Australian Ambassador to Italy;
- Toshi Kawaguchi, Third Secretary, Australian Embassy to Italy
- Clelia March-Doeve, Cultural Consultant, Australian Embassy to Italy;
- Paul Garwood, Research Officer, Australian Embassy to Italy.

Art. 2

1. The working group must end its work by the end of this year with the formulation of proposals.

Art. 3

1. The members of the working group are not due participation fees, pay, compensation or repayments of any kind.

Rome, 29 July 2009

THE MINISTER

III. INTERVIEW[758]

Interview I. Sharon Cott[759] – Metropolitan Museum of Fine Arts

New York, August 20, 2013.

I. Q: "With regard to the issue of authenticity, what is the procedure followed for the verification of the objects when they are received?"

A: "In art museums, the curators (who normally have an expertise in History of Art) are the initial experts, responsible for reviewing and determining the authenticity of the works of art. It is always the result of a combination of factors: they rely on their eye, their training and their research. They form a judgment, which at the beginning is really an art historian judgment, when they see a work of art. When art historians have to prepare a purchase of a work of art or accept a gift, they make the initial research based on art historical information. They prepare a written report for the director of the museum, in which they explain their judgment. They also consult conservators (chemists, biologists, etc.), who examine a work of art scientifically (i.e. the material, stone, wood, etc). The conservators consult with the curator, whether the work of art can be consistent with the prospected historical period, if there are other pieces of the same period that are compatible, and so on. They give each others information, but many time a scientific test may help absolutely in understanding the real origin of a work of art."[760]

"These two steps, the art historician and the conservator, are reflected in the papers they are sending to the director. The curator also has to consider the

[758] In the following interviews, "Q" is used for the questions of the author of this research, "A" for the answers of the people who released the interviews.

[759] Mrs. Sharon H. Cott, Senior Vice President, Secretary & General Counsel, The Metropolitan Museum of Art, New York.

[760] The Getty bought the fake, took the *Kouros* out of display, did more tests, and then transferred both statues to Greece in 1992, for an international colloquium to try and settle the issue. Despite this, scholars remained divided, though they were split along disciplinary lines. The art historians and archeologists were convinced that *kouros* was a fake, whereas the scientists thought that the science proved it was a genuine." Peter Watson and Cecilia Todeschini, *The Medici Conspiracy*, (New York: Public Affairs), 2007, p. 82.

provenance of the work of art. This step regards for example who owns the work of art now, who owned in the past, tracing it back as far as they can; all the elements that is possible to collect in relation to the history of that work of art."

"In case of a purchase, the Acquisition Committee must review every work of art, if the value is more than 100.000 $. The curator brings the work of art to the museum on display and every curator is invited to give advice. There are 18 different curatorial departments in the museum (i.e., Egyptian, American, Medieval, etc.). The heads of every department, all together look at it, and they write, making a balance about the opportunity of the acquisition of that object, and form an advice for the director, that means if it should be bought by the museum or should not. And then after that, the Board of Trustees Acquisition Committee makes the final acquisition decision. The curator speaks to the Acquisition Committee in presence of the object, explaining the reason for purchasing of the work of art."

II. Q: "Is there any relevant legal step prior to the assessment of the authenticity?"

A: "The legal department reviews all the import and export documents, to make sure they are in order. This step regards all the conditions that will be agreed, to conclude the acquisition of the work of art."[761]

III. Q: "I would like to better understand which are all of the steps that precede the acquisition of a work of art, until its arrival at the museum. In particular, looking at the legal obligations, which are the most relevant fulfillments to guarantee the control of the origin, as well as the protection of the Museum, considering possible cases of imitations or works that could be the result of a theft?"

A: "We search in an the international database, called Art Loss Register. It is based in London. A fee is required to access the Register. We have to rely on third parties to report the theft in the Register."

IV. Q: "How many experts (specifically which ones, and from how many different sectors) are involved in the process of buying and receiving a work of art? Are there differences depending on the nature and date of the work?"

[761] On this point, see "Collections Management Policy, The Metropolitan Museum of Art, Last Revised November 12, 2008". In detail, see Point IV, regarding the Acquisition.

A: "The process involves: curator, conservator, director, legal department, Board of Trustees. It does not depend on the date. We do the same for all the works of art. It may depend on the value, the price. Every museum may have a different procedure. As for the MET, the purchased must be approved by the Board of Trustees when the value of the work of art is more than 100,000 $. If below, the director may proceed to purchase the work of art."

V. Q: "In which ways the acquisition policy of the Museum has substantially changed since 2008?"

A: "The Association of Art Museum Directors (AAMD) guidelines are a fundamental reference for this step[762]. The MET participated on the Task Force to create the AAMD their guidelines, originally issued in 2004. Philippe de Montebello, the former MET Director, took part into the original Committee that developed the guidelines for archeological and antiquities objects. There was a revision in 2008, and a second one occurred in January 2013. These guidelines added several new procedures, only for Antiquities, as well as for Archeological Materials."

"All major art museums members agreed on several principles.[763] The first one was that every museum must be responsible for its own acquisitions, "whether by purchases, gift, bequest or exchange."

"Thus, the first principle is: "We (the Directors of the American Museums) deplore, we condemn illicit excavations. We believe we should continue to buy antiquities, but we condemn illicit excavations, and ask for higher standards." At that time, in fact, someone supported the position to stop collecting entirely, but the position adopted in the document states that the American Museums do not want to limit their educational scopes. Their commitment in developing civilization, the opportunity of studying of works of art, to educate and inspire people through enjoying Art, and better know other cultures. This purpose can still be implement through the adoption of responsibility and high standards in acquisition practice."[764]

[762] See Guidelines on the Acquisition of Archeological Material and Ancient Art (revised 2013), Adopted by AAMD Membership January 29, 2013.
[763] See "Statement of Principles", I. letter A, AAMD Guidelines.
[764] See point C, AAMD Guidelines.

VI. Q. “Is this a crossing also with standards adopted in the ICOM Code of Ethics?”

A: “Yes, it is. They came close, as the two documents arrived after the 1970 UNESCO Convention.”

“But the focus here is the due diligence, before acquiring a work of art, and be transparent in providing information on the provenience of the work of art.”[765]

“About the 1970 UNESCO Convention, everyone agrees that it was the begin of a new dialogue, an important moment of transition.”[766]

“I think some people misunderstand the legal action of that Convention, because by itself it generally cannot change the law of a country. There was a symbolic value in the Convention, but its primary purpose comes to involve each country to develop certain rules. It provided a limited legal impact at the international level, but it depends on how every single country implements it. It is not a self-executing legal tool. The US adopted it in 1983.”

“This document (AAMD) agrees on the fact that the date of 1970 was an important threshold to apply new legal standards for the acquisitions. The US Museum Directors agreed on the idea that they should apply more rigorous standards.”

“It is very difficult to get the entire history ownership of works of art, and especially for antiquities. We cannot have one rule that works for everyone. Everyone has to be diligent and transparent, make its own judgement about the provenience in an appropriate way.[767] And the AAMD document also recommends that the countries form legitimate markets. Examples of this may be intended Japan and United Kingdom. Instead of saying nothing can be sold, they protect their own national treasures, but other works of art can be sold.”[768]

“Other Countries, as Italy, Turkey, Egypt approved national laws providing for the impossibility to sell anything.”

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[765] See point D, AAMD Guidelines.
[766] See point E, AAMD Guidelines.
[767] See point F, AAMD Guidelines.
[768] On this issue, see point G, AAMD Guidelines: “AAMD reaffirms the value of licit markets for the legal sale and export of works of art as an effective means of deterring the illicit excavation and trafficking of archeological materials and ancient art”.

"So, the AAMD guidelines encourage all nations to do so, creating licit markets and "provide legal method for the sale and export of art."[769]

"With specific regard to the Guidelines, they provide for rigorous research concerning the acquisition process of archeological materials and ancient art. The commitment implies the effort to get "accurate written documentation with respect to its history, including import and export documents. Museums can require the sellers to provide all the information they have."

"Member museums commit themselves to "normally" not acquire works of art unless getting the certainty that it was out of its country of probable discovery before 1970,[770] but some works can present exceptions, when for example a complete documentation would not be available. The AAMD guidelines differ from the ICOM guidelines, as the latter are restricted to the hypothesis of clear certainty about the history of the works of art, with reference to the discovery outside the modern country of discovery before 1970, or its legal export after 1970".

"If we think the work should worth purchased or accepted as a gift, we can make an informed judgment. Where we have cumulative facts and circumstances, clues, but not a piece of paper; we think the sellers bought from someone else, or probably there were auctions for the work of art, that was part of larger collection. In this case, it is supposed to be part of that collection, but there may lack clear, firm proof. We believe in our judgment. Thus, the first exception is, we really believe that the provenance is clear, but we cannot find a proof".

"With regard to the second exception, since 2008, MET made an informed judgment for 15 works of art. For AAMD if you make an exception, you must provide a description, and the work of art must be consistent with the Statement of Principles. If we make an exception, we look at the cumulative facts and circumstances. Most of our exception are in the category two. In these cases, we will look at the cumulative facts and circumstances. If a curator wants to buy a work of art that falls in this kind of exception, we look to see at if it has been exhibited; has it been published? If the art works were published and exhibited, those with a claim could raise it."

VII. Q: "So, is this also a point related to the transparency policy. Isn't it?"

[769] See point H, AAMD Guidelines.
[770] See point "III. Guidelines", AAMD Guidelines.

A: “Exactly. Very recently, in 2013, AAMD clarified the exception. For donors that promised an acquisition. In this case, the museum is required to promptly publish the acquisition images in electronic form, and its provenance. If the acquisition is the result of an exception, the work of art must be posted on the AAMD object registry, also in this case, including an image and its provenance. Moreover, the museum always continue to research it. If in our research we find someone else owned it, this third party must be promptly informed, considering if the third party has a right to ownership. In such a case, the museum should initiate the return.”

VIII. Q: “Is this hypothesis ever occurred in the past?”

A: “No, the hypothesis has not occurred yet. But third parties have raised a claim to the museum. If someone approaches us, we have to respond promptly. This is the case of the claim presented by the Italian Ministry of Culture, that lead to the 2006 Settlement Agreement, (as for the provision includes also the event that “a third party brings to the attention of a member museum information supporting the party’s claim to Work”, the museum is required to promptly respond to this claim, taking “whatever steps are necessary to address this claim, including, if warranted, returning the Work”. It was exactly the case of the Italian Ministry of Cultural Heritage and Activities’s claim for the Euphronios vase, in which the Ministry was a third party claimant.) This event also influenced both the adoption of the new acquisition policies by the MET in 2008, and the contribution for the AAMD guidelines. It is possible to underline a parallelism between the two tools development”.

IX. Q: “Which are the legal tools that MET uses to protect itself from the risk of fraud, in order not to be called upon to legally respond of it?”

A: “If a work of art is not authentic, we rely on the warranty from the seller. Auction Houses provide limited warranties compared to other sellers.”

X. Q: “What led to the bilateral agreement with Italy in 2006, which has also opened the way to the next ones? Is the MET satisfied about the conclusion of the Agreement? In which areas the agreement has been considered advantageous? Which do you think had been the greatest benefit?”

A: “The main element at the beginning was Italy’s persistence in pressing the claim. Italy wanted more information. We provided the information we had at

that time. After the Medici investigation, additional information became available. We appreciated the loans, exchanges, our collaboration with the Italian Colleagues. At the same time of the claim, that the Euphronios case arrived, many different collaborations were going on between our Museum and Italy. There were exhibitions of the MET in Italy, exchanges, international teams made by curators from Italy and curators of the MET working together. Both sides were interested in continuing our collaborations for new good common benefits and settled the dispute in the best way."

XI. Q: "Which had been the further effects of the concluded agreements? How much that historical moment has influenced the following guidelines and policies of the Museum? Has the Museum intended its opening to the restitution of cultural objects as a signal also for other museums in the area?"

A: "No doubts that it influenced the guidelines. Did we intend it to be a signal for others? I think we were trying to make the best decision for MET, and it is also important for other museums to make their own decisions."

XII. Q: "Do you believe that museums can and will play a greater role in defining the future directions in the field of restitution of works of art? At the same time, do you believe that a major involvement of all the stakeholders in the international community for the field of Art market could result in better outcomes at the end of the codification processes of those international standards established through the 1970 UNESCO and 1995UNIDROIT Conventions?"

A: "I think there is a good existing framework".

XIII. Q: "Do you think that a major participation, a more involved role, of representatives from main Museums and galleries in the UNESCO meetings (I make reference in particular to the Subsidiary Committee of the States Parties to the 1970 UNESCO Convention) could consistently contribute to the development of new legal solutions, more effective to tackle with the current troubles?"

A: "I respect your judgement."

XIV. Q: "Do you consider that a major level of free trade in all countries would allow to a better self-regulation in the art market?"

A: "Yes, Absolutely."

XV. Q: "Could the market be lead to have a positive impact with respect to the problem of black market of counterfeit and illicit trafficking as well?"

A: “Yes.”

XVI. Q: “In case, which legislative measures would still be necessary to facilitate a proper liberal policy of the art market? At the moment, which would be the legislative measures actually effective and necessary to protect the cultural heritage, to contrast black market and smuggling, as well as to protect the museums themselves, considering the consequent negative effects and damages to their image in case of involvement in illegal actions in this area?”

A: “In my opinion, legislation in the United Kingdom and Japan can be considered as good examples. They adopted a liberal policy, but still protect their national treasures.”

Interview II. Victoria Reed[771] – Boston Museum of Fine Arts

Boston, September 11, 2013.

I. Q: Which is the nature of the bilateral agreement signed between the Museum of Fine Arts and the Italian Ministry of Culture?

A: The bilateral agreement between the Boston Museum of Modern Art and the Italian Ministry of Culture is confidential.

II. Q: Which is the current acquisition policy approach for the Boston Museum of Fine Arts?

A: With regard to the acquisition policy, there is the commitment, for AAMD policy, to not purchase or accept as gift antiquities which do not have a documented provenance back to at least 1970. (This is a sort of minimum threshold for us).

In the United States art museums that are members of the AAM and AAMD are bound to follow the Guidelines on the Acquisition of Archeological Material and Ancient Art, as revised in 2008 (both AAM and AAMD policy). They are effectively ethical guidelines and do not have legal weight in the U.S. In the practical curatorial activity at the MFA we also look at the national legislation of the source countries (Syria, Egypt, Turkey, Italy, Greece), particularly if they have patrimony laws (i.e., vest ownership of undiscovered antiquities with the government). In the specific case of Italy, we look at the 1909 and 1939 national laws. If the antiquities has not any export permit, or cannot be traced before 1909, then we ask the Italian Ministry of Culture if they raise any objections to our acquisition.

III. Q: Is it more useful to work on bilateral bases with countries, than trying to apply the 1970 UNESCO Convention?

A: Each country has its own legislation. It is fundamental to know case by case the national legislation. As for Italy, the developed agreement represents a special case.

[771] Ms. Victoria Reed, Monica S. Sadler Curator for Provenance, Boston Museum of Fine Arts.

IV. Q: Which is the specific procedure that you adopt and implement to control the new acquisitions of works of art?

A: We principally work on the Provenance Research and on the Due Diligence prior to acquisition; curators are required to fill out a provenance questionnaire. Since 2010, there has been a centralized role for provenance research (the curator for provenance, i.e., me). I work with the curators to complete the questionnaires and review them; before this, our Deputy Director had overseen acquisitions.

Every purchase, gift, or bequest that will be loan, as well as the permanent collection is subjected to the control.

V. Q: Do you believe that the UNESCO Convention could be improved? Is it possible to drawn a model to which look to and solve the similar cases?

A: There is not a strict international standard. Each country has its own legislation. Every situation must analyzed separately.

I would say that in an ideal world, there would be an internationally agreed upon standard that we would all follow. However, there is not, and the challenge that I face at the MFA is trying to interpret foreign laws and case law precedent while also trying to conduct research on the object provenance. This is one reason why the agreement with Italy is such a positive development—we are able to acquire objects with the full knowledge and assent of the source country; we still have to conduct research and do our due diligence, but there is no guesswork involved in terms of the potential for claims.

VI. Q: Did you open the bilateral agreement model to other countries?

A:. I would simply say that the bilateral agreement we have with Italy is unique to the MFA at this time, and not comment on other countries.

VII. Q: Have you any loan at the moment due to the bilateral agreement with Italy?

A: Not in this right moment. However, we were proud of the exhibition of the “Brutus” statue, from the Capitoline museum last year; and we are waiting for the “Madonna di Senigallia”, a Piero della Francesca’s painting, that has been recovered by the Italian Carabinieri. It should arrive within the end of September.

We also had some stellar loans from Italy for the exhibitions “Titian, Tintoretto, Veronese: Rivals in Renaissance Venice” and “Aphrodite and the Gods of Love”.

Interview III. Stephen Clark[772] – The Getty Museum of Los Angeles

Los Angeles, September 17, 2013.

I. Q: "With regard to the issue of authenticity, what is the procedure followed for the verification of the objects when they are received? Is there any relevant legal step prior to the assessment of the authenticity?"

A: "For "authenticity" we rely on art curators and art conservators. This is true for every kind of work of art. We rely on the opinion of the professionals. Art curators care for art historical aspects. Art conservators deal more with art objects testing."

II. Q: "I would like to better understand which are all of the steps that precede the acquisition of a work of art until its arrival at the museum. In particular, looking at the legal obligations, which are the most relevant fulfillments to guarantee the control of the origin, as well as the protection of the Museum, considering possible cases of imitations or works that could be the result of a theft?"

A: "The museum director and curators try always to improve the quality of the museum collections. In some cases, they actively seek out objects to fill gaps in the collection, or to obtain better examples of objects we already own. At other times, unexpected opportunities arise, and we try to remain flexible enough to take advantage of such opportunities. With respect to process, a curator recommending an object for acquisition typically presents a report on the object and its relation to the collection, including information about quality, condition, provenance and price. Some acquisitions must be approved by the Board of Trustees; other acquisitions may be approved by the museum director or Trust CEO."

III. Q: "How many experts (specifically which ones, and from how many different sectors) are involved in the process of buying and receiving a single

[772] Interview to Mr. Stephen W. Clark, Vice President, General Counsel and Secretary, The J. Paul Getty Museum, 1200 Getty Center Drive, Los Angeles.

cultural objects? Are there differences depending on the nature and date of the work?"

A: "It depends. For really important objects more people may be involved. Excepting photos, Getty does not acquire many objects later than XIX century. You can have both art historical analysis and a scientific analysis, to make sure that something has not been stolen or looted, and to analyze the historical provenance. This is a legal issue."

IV. Q: "In which ways the acquisition policy of the Museum has substantially changed since 2006?"

A: "I started to work here in 2008. We have not changed the Acquisition policy since I joined the Getty. Getty has a really strong policy now and we expect to continue to build our collections consistent with this policy."

V. Q: "Which are the legal tools adopted by the Getty to protect itself from the risk of fraud, in order not to be called upon to legally respond of it?"

A: "In some cases, it is very clear if an object is known, and has been previously exhibited. It is less risky to acquire objects that have a clear pedigree, objects that had been exhibited and published in the previous 200 years, for example.

With regard to legal tools, a reasonable enquiry is essential. Satisfactory provenance is for us a required feature."

VI. Q: "What led to the bilateral agreement with Italy in 2006? Is the Getty satisfied about the conclusion of the Agreement? In which areas the agreement has been considered advantageous? Which do you think had been the greatest benefit?"

A: "I was not here at that time and therefore I have no personal experience. In general the Getty understood in 2006 that there were some legitimate problems. And even though, at least in some cases it was possible to defend the Getty's continuing possession of these objects, institutionally the Getty wanted to resolve those problems. Institutions have limited resources and if you spend energy and time trying to fight over these things, it is not productive. It was reasonable to return certain objects back to Italy. Once that was finished, instead of spending time fighting, now we have a very productive collaboration with Italy. The "Chimaera of Arezzo" was here two years ago. Last year The Capitoline

Museum offered us“ The Lion attracting a horse” for 6 months. The major exhibition about Sicily hosted a lot of Magna Grecia objects. The Getty worked with colleagues in Italy to spend less time arguing and more time working collaboratively on artistic and scholarly projects of mutual interest.”

VII. Q: “Do you consider 6 months loans as enough time?”

A: “In many cases, it would be helpful to have the flexibility to have loans available for a longer term. This is especially true when the borrowing institution uses its own resources to conserve or restore a loaned object. For example, when the Getty borrowed objects from Sicily, Getty conservators spent many months and a great deal of money to conserve an important statue. In particular, the Getty created a “seismic isolator” for the statue, sophisticated technology that absorbs the motion of an earthquake and prevents the object from being damaged or destroyed during a period of seismic activity. We understand that the object was an important aspect of what its museum home in Sicily could offer its audience, but we were also interested in showing it to a larger public. It seemed fair to make it available at the Getty and elsewhere in the United States, both to educate as many people as possible about the triumphs of Sicilian culture, but also to recognize the Getty’s contribution to conserving and protecting the statue, and introducing it to a wider audience.”

VIII. Q: “Has the Museum intended its opening to the restitution of cultural objects as a signal also for other museums in the area?”

A: “The Getty was not trying to suggest anything to other museums. Each institution must decide on a case by case basis what is right for itself, based on the unique facts of every situation.”

IX. Q: “Do you believe that museums can and will play a greater role in defining the future directions in the field of restitution of works of art? At the same time, do you believe that a major involvement of all the stakeholders in the international community for the field of Art market could result in better outcomes at the end of the codification processes of those international standards established through the 1970 UNESCO and 1995 UNIDROIT Conventions?”

A: “Museums have an important role, because museums must be responsible members of the community and do show they are responsible, handling specific claims for objects. It is important for museums individually to

take individual decision on specific requests, look at ethical guidelines, and to behave responsibly and to reply to every kind of request. Sovereign nations must also think carefully about claiming objects. Some claims have merit and are worth discussing, but no one, personally, institutionally, or especially at the level of a nation state, should present non-credible claims, or argue endlessly over old issues. There is too much useful, productive work to do to spend time and energy bickering. Far better to study these objects and use them to educate the public about the ancient world."

X. Q: "As one of the greatest museums in the world, which would be the biggest problems still to be addressed for the establishment of international standards that can be seen as the most shared, and with which instruments do you believe the expected changes should be implemented?"

A: "It is hard to speak globally about this. There are two leading American organizations, the American Association of Museum Directors (AAMD) and the American Alliance of Museums (AAM). Both of those organizations address, among other things, legal and ethical issues on behalf of museums. Art museums directors' guidelines for American museums have a great value in addressing our individual action as a museum. Everybody approaches these problems with this framework of laws and traditions. It is impossible to settle one common ethical or legal tool. Generally speaking, institutions have an obligation, in being responsible for their work. For example, Italy will care for the heritage it has, that could be caring about Pompei disintegration, rather to spend money to preserve objects all over the world. It is hard to apply a common standard to each country all over the world. But there is a good basis for being collaborative and productive, together.

The Getty has 1.6 million visitors per year. It has a precise aim in educating people and bring the physical culture to humanity through these exclusive and extraordinary objects. And Met has also more visitors per year. I think it is a waste of time if we make a comparison with Fano and what its role could be in comparison with Met or the Getty."

XI. Q: "In such a context, may have a real impact the action of a private institution which bears non-state interests, as the Getty could be? (The museum

approach is probably more independent from the mere national vision, which is stronger in "source" countries, instead).”

A: “This is an important point. Almost all museums in the United States are private institutions. This is hard for European colleagues to understand, because in Europe this is not the case. And it is also harder to negotiate with a sovereign nation, there is a so huge difference of power between the Republic of Italy and an American museum.”

XII. Q: “Do you consider that a major level of free trade in all countries would allow to a better self-regulation in the art market?

A: “I believe that there should be trade in cultural objects. And they have to follow the law. I am not sure that the self-regulation exists and is a solid scheme in this field. I think that there is a room for trade, but with a level of regulation also to avoid black market and trafficking. The solution, in my opinion, should be reasonably regulated trade.”

XIII. Q: Could the market be led to have a positive impact with respect to the problem of black market of counterfeit and illicit trafficking as well?

In case, which legislative measures would still be necessary to facilitate a proper liberal policy of the art market? At the moment, which would be the legislative measures actually effective and necessary to protect the cultural heritage, to contrast black market and smuggling, as well as to protect the museums themselves, considering the consequent negative effects and damages to their image in case of involvement in illegal actions in this area?”

A: “No more legislation is required. American law is quite reasonable. The American implementation of the UNESCO Treaty is an effective, balanced piece of law. In implementing UNESCO through the Cultural Property Implementation Act in 1983, the United States created a workable balance of interests of source countries and the market. But we need to follow existing law better than we do. And I do not have any opinion on International Law.”

XIV. Q: “Could you briefly retrace here the elements that provides evidence of the Getty position about the Victorious Youth case? In particular, the features that strengthen you believe to have good title over the statue? What is the latest evolution of the trial?”

A: “The Getty has a very strong position on the Victorious Youth. The Getty bought it in good faith, in reliance on the opinion of the Court of Cassation, the Supreme Court of Italy which in 1968 declared that Italy had no ownership interest in the statue. The Getty bought the object in Germany and it was imported legally into the United States, in reliance on the opinion of the Court of Cassation, the Supreme Court of Italy in 1968 declared that Italy had no ownership interest in the statue. Thus, Mr. Getty originally tried to personally buy the statue, but he was never able to get an acceptable price. When Mr. Getty died in 1976, the Getty Museum made a strict review on the legal status of the statue, and bought it in good faith legally in 1977 believing all was legally correct. I spoke to the lawyer who examined the provenance. It was a very expensive object. It was bought for little less than 4 million dollars. The lawyer who was reviewing to make sure that Mr. Getty could buy it in good title, and he was completely satisfied. He had no doubt under the US law or Italian law. The object was in Italy only incidentally, and the Italian government never formally asserted any ownership interest in it. For these objects, sometimes you have some archeological context, but in this case there is no archeological context because it was found in the ocean. It is a Greek object. It has no direct link to Italy. There is no credible patrimony issue, about why it should be in Italy rather than in the United States. It is a very weak claim, ethically and legally. Italy had a strong claim on certain things, but not on this statue.”

Interview IV. Alberto Garlandini, President of ICOM Italia

Phone interview, October 20, 2013.

1. Q. Which is the value of the ICOM Code of Ethics and what the possible effects under the legal profile?

A. The ICOM Code of Ethics has values among ICOM members. All members are required to respect the code. If a member breaks the Code, he will lose his membership status.

More precisely, there are three conditions that determine the loss of membership: making trade of cultural objects, the conflict of interest and the failure in complying with the standards imposed by the Code.

There are only indirect possible legal consequences, but the ICOM Code of Ethics is taken in due consideration also by official deliberations in Italy. This confers a value to its validity as a reference point.

Some other considerations must be included on the benefits resulting from the application of the ICOM Code of Ethics. Its basic deficiency may be overturned into an advantage: even though the Code is not an international legal tool, it has the role of connecting the museums on the international ground, overcoming national positions, and the differences among national legislations. This peculiarity allows the existence of an international community of museums, making effective a real cultural cooperation that takes origin from the true basis of the museums system. Furthermore, the duty to respect the standards of the Code for all ICOM members implies that every member (person or institution) is obliged to respect it. ICOM Code of Ethics has its force in proposing ethical and cultural values for museums and museums professionals that can be surely deemed as a supplement for international rules.

2 . Q. Is it possible to consider it as an instrument of soft law?

A. There are judgments which refer to the ICOM Code of Ethics.

3 . Q. What are the major benefits resulting from the application of the COM Code of Ethics?

A. ICOM Code of Ethics has value as a reference standard both nationally and internationally to define the criteria for museum management.

In Italy, the ICOM Code influenced the museum management both for its impact on individual members' behavior, and also considering museums' administrators and owners. In particular, the failure in complying with the Code provisions requires the exclusion of members. The Code is also a tool for those working in museums. The sharpness is increased if in the statutes of the museum there is a direct reference to the ICOM Code.

4 . Q. What is the relationship between ICOM and museums? What kind of cooperation is carried out with regard to the problem of the return of cultural objects?

A. ICOM is mainly based on professional relations in the museum field and among associations connected to museums. At the national level, the relation mainly depends on the direct exchanges between ICOM and its members.

With regard to the return of cultural objects, it is a difficult issue, generally not so simple to be solved. At international level, mediators take part to the dispute settlement procedure and ICOM head office is called upon to express its opinion.

5 . Q. What are the tools that contain specific rules regarding the steps that must be crossed in order to exercise "due diligence " and "due care"?

A. There are no official detailed documents on due diligence and due care. Generally, a commitment is required the objective verification of the origin, checking the due care of the seller and the provenance of the object. These features contribute to the ethical examination of the object. In addition, the international committees of ICOM deal with specific issues, such as the due preservation of the cultural objects.

6 . Q. Do you think that a distinction may be outlined between works of art and human remains?

A. Yes, definitely it can be. Human remains need a special consideration. As remains of human beings, they deserve a particular respect. Also for this reason, the ICOM Code of Ethics grants a dedicate part to this issue. Three fundamental aspects must be consider in caring and preserving objects in

museums: the context, its use, and cultural continuity, respecting for example the interpretation of the object in its community of origin.

8 . Q. Do you believe that in future an improvement of current disputes settlement on cultural objects will be possible? If so, in which way?

A. To some extent, the procedures could be improved through as higher degree of participation of museum professionals, and looking at professional documents that constitute the foundation of their professionalism.

IV. DOCUMENTS

1. Lori Richarson's [773] Position Paper: Repatriation of Australian Indigenous Ancestral Remains.

Speech presented at Seminar held at the "Pigorini" Museum of Rome, October 31, 2007.

"I'd like to thank everyone for attending this presentation and for the warm welcome we have received.

For those of you who are unaware, there are two Indigenous peoples in Australia – Aboriginal Australians who inhabited and continue to inhabit all parts of the Australian continent including the island state of Tasmania and Torres Strait Islanders who inhabited and continue to inhabit the islands of the Torres Strait, the passage of water between mainland Australia and Papua and New Guinea.

I am fortunate to come from both cultures. Through my father, I am Aboriginal, Kuku Yalangi and Djabugay and through my mother, I am a Torres Strait Islander, Meriam from Erub and Mer Islands in the eastern Torres Strait.

Throughout this presentation I will use the terms Aboriginal, Torres Strait Islander, or Indigenous when referring to both groups.

The aim of this presentation is to present my views concerning the continued retention of Australian Indigenous ancestral remains in collecting institutions throughout the world. My views are moulded firstly by my Indigenous heritage, culture and beliefs and secondly as someone who has worked in this area for 25 years, including 15 years as a museum professional.

I use the term 'ancestral remains' respectfully, as I don't see these remains as bones, relics, specimens or artefacts, terms used by museums and collecting instutitons to dehumanise the ancestors. For me, these are the earthly remains of people, human beings, ancestors who lived, and loved and were laid to rest in their country for eternity.

I will also use the term 'museum' to describe all categories of collecting intitutions holding Indigenous ancestral remains.

[773] Lori Richardson, Assistant Director, International Repatriation Program FAHCSIA.

My early museum days gave me an insight as to how museums treated Indigenous ancestral remains and the role museums played in creating and reinforcing the stereotypes that still affect my people today.

The acquisition of Indigenous ancestral remains and their exhibition with the skeletons of apes and monkeys led people to believe that not only were we the missing link and belonged in this category but also reinforced the stereotype that we possessed the intelligence of those primates. This is of course, exactly what such exhibitions were meant to do.

It has been well documented that some museums have remains in their collections that were acquired through acts of grave-robbing, body-snatching and in some cases, murder. Let me give you some examples:

In 1833 Yagan, an Aboriginal warrior from Western Australia was shot by a settler. His head was removed and his tribal markings skinned from his back before being sent to England. His remains were eventually returned to his country of origin in 1997, 164 years after his death.

In the late 1800's a collector from a museum in Hamburg (c 1863-73) tried to induce a squatter to shoot an Aboriginal, so that the skeleton could be sent back to Germany (Roth 1908 p81)

In 1869 the body of William Lanney, the last Tasmanian Aboriginal man of unmixed genetic descent, was decapitated and mutilated less than 24 hours after his death. His head was cut off and stolen by a member of the Royal College of Surgeons. His hands, fee, nose and ears were also stolen and a tobacco pouch was made from a portion of his skin (Ryan 1982, pp216-217). His remains were not returned until 2000, 131 years after his death.

A Swedish anthropologist who travelled to the Kimberley region of Australia in 1913 wrote that the collecting of remains was not approved by the Aboriginal people and that they believed that there was potential for them to retaliate. He goes onto to admit illegally taking ancestral remains out of the country by claiming that they were animal bones.

A significant collection of ancestral remains removed from Arnhem Land in Northern Australian in the late 1940's was sent to the Smithsonian National Museum of Natural History, USA. I met with the children of the children of those remains, two very senior Traditional Owners who knew that their grandmother's

remains were both missing but did not know that they were in America. We are currently in discussions with the NNMNH, but their attitude can best be described as 'uncooperative'.[774]

One of the justifications for taking the remains was that:

"we collected some remains of the remains, since there is no doubt that most of them would be soon destroyed in their original burial places".

In accordance with Indigenous beliefs and indeed, with Christian beliefs our remains are meant to turn to dust. We believe that our final resting place must be in our place of birth, our country, so that our spirits become part of the landscape. Remains placed in trees, caves and crevices were not tossed away or disposed of. These were places of significance to the tribe and the deceased which family members continue to visit them, generations later.

It is indisputable that the way that we, Indigenous peoples were treated in the past was in humane and the way our ancestral remains were collected was barbaric and contrary to Indigenous cultural beliefs and values. It is only just, therefore, that members of communities whose ancestors' remains are hoarded and held across the world are now requesting for them to be returned. Failure of institutions holding Indigenous ancestral remains to return them to their traditional custodians only condones the actions of the past.

One of the arguments I have heard against returning ancestral remains is the age old question of who owns the past. Do contemporary Indigenous peoples have any rights over remains hundreds or thousands of years old? Do Indigenous remains belong to a single group or to the world?

Let me answer these questions from my own experience. I am KukuYalangi, Djabugay and Meriam. These are my traditional lands, the lands of my ancestors and the lands of our child and their children. Any remains from my traditional lands are my family either through blood or kinship.

Let me just take a minute to discuss the concept of kinship. Using Mer, my Torres Strait Island home as an example, I am related to every person on the island through a complex kinship structure that sees me connected to my countrymen through blood and direct ancestry, through tribal affiliations and through respect. I call every person of my grandparents generation, grandmother

[774] The Smithsonian agreed to return two thirds of the collection in 2008 and the final one third in 2010.

or grandfather, every person of my mother's generations, aunty or uncle – except in the case of my mother's blood brothers, sisters and cousins who I also address as mother or father. My cousins or people of my generation are brothers and sisters, while children of the following generations are nieces, nephews or grandchildren.

These relationships are particularly important because they give us our place within our family, community and culture. It is why I see the remains as ancestors and as family and why I have a responsibility to ensure that they are treated with the dignity and respect that I would give to any of my Elders living or deceased. I have a responsibility to ensure that my ancestor's remains are returned to our traditional lands, where they belong. This is a responsibility that I have inherited from my Elders and one that I don't question.

However, there are a number of things that I do question. I question why WE have to prove custodianship or direct relationships to our ancestral remains. I question by what right do collecting institutions or individuals judge whether we are the appropriate people to take custody of our ancestral remains. And I question, that in this time and place in our history, who are these people, these institutions to deny us and our ancestors our cultural heritage and our customary, moral and human rights?

The onus must not be on us to prove custodianship but on museums and individuals to acknowledge and understand that the Australian Indigenous remains held in their collections are held against the wishes and the culture of Australian Indigenous peoples. The value of science does not override the value of Indigenous culture. I reiterate, that failure to return our ancestors to their traditional lands only condones the actions of the past.

For far too long, academics have been accumulating and circulating research data amongst themselves, while the 'subjects' of their research have been kept ignorant. Indeed many academics have made careers out of studying our ancestral remains yet none on their research has benefited my people to any degree. Our ancestors remains are not items of curiosity or scientific specimens and it is intolerable that they continue to be seen as such.

The question of whether to repatriation ancestral remains or not has not been raised in Australia for over 20 years. Museums in Australia accept that they

must return ancestral remains to traditional owners upon request. In fact, all of the major State and Federal museums holding ancestral remains have been participating in a national program to return them to traditional custodians. There is no legislative requirement for them to repatriate, it is simply accepted practice.

The fear that museums originally felt that returning ancestral remains would put their entire collections at risk was quickly alleviated. There has not been an avalanche of requests for the return of other material culture – the collections are still there and the museums are still open for business. But what has transpired is the increased number of partnerships between museums and Indigenous communities, when they have worked together to repatriate ancestral remains.

Repatriation is not a recent phenomenon. Indigenous Australians have been fighting for the return of our ancestral remains for over forty years. During those years we have had repatriations from key institutions such as the British Museum and the Natural History Museum in London, UK, amongst many others. Thinking back to my early museums days, I never through I would witness the British Museum or the Natural History Museum repatriating any cultural property to anyone, anywhere, so I was overwhelmed when they agreed to return remains to Australia.

To me, these repatriations are extremely significant. They reassured me that our fight is not futile and that institutions that refused to talk to us 40 years ago, can reconsider their policies and can act humanely, honourably and courageously in righting the wrongs of the past.

In closing, I say this – this issue will not go away, we will not go away. There will always be an Indigenous voice that will fight for the rights of our ancestors. We can either be adversaries for years to come or we can take this opportunity to work together to go forward and resolve this in a respectful and cooperative way that satisfies us all. I hope we choose the latter."

2. Superintender di Gennaro's Position on the Pending Dispute Between Italy and Australia on the Repatriation Request of Ancestral Remains

E-mail communication, February 4, 2014.

"Dear Ms. Serino, [775]
as to your request in order to produce a list of human remains claimed by Australian Aboriginals and stored at the "Pigorini" Museum, I inform you that these are matters that - beyond the opposites tendencies, according to which the ancient remains belong either to all humanity and the world of culture, or to the people who now occupy the same areas, regardless of an effective continuity and ethnicity relationship - must be managed and resolved at a political and diplomatic level.
Therefore, we are waiting for a settlement of disputes, which have an International Law nature.

Sincerely,

The Superintendent
Francesco di Gennaro"

[775] Translation arranged by the author of the present study. Here following the original communication text:
"Gentile dott.ssa Serino,
in merito alla sua richiesta finalizzata ad ottenere una lista dei resti umani reclamati dagli aborigeni australiani e conservati nel Museo "Pigorini", le comunico che trattasi di materia che – al di là degli opposti orientamenti secondo cui i resti antichi appartengono all'intera umanità e al mondo culturale oppure a chi occupa le stesse aree a prescindere da un contesto di effettiva continuità ed appartenenza etnica – deve essere gestita e risolta a livello politico e diplomatico.
Pertanto, si resta in attesa di una definizione delle vertenze, che hanno carattere di diritto internazionale.

Con cordialità,

Il Soprintendente
Francesco di Gennaro"

V. PHOTOGRAPHS OF THE RETURNED CULTURAL OBJECTS[776]

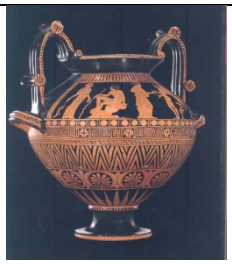
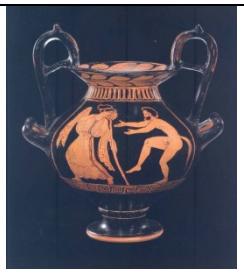
1. Bilateral agreement with the Metropolitan Museum of Art, New York, signed on February 21, 2006, for the repatriation of 5 archaeological findings, the Euphronios' krater between them, and the "Ellenistic Silverware Treasure" from Morgantina (Sicily).

1	IMMAGINE	OGGETTO	DIMENSIONI	NOTE
1		**Cratere a calice con la morte di Sarpedonte**	h. cm 45,7; diam. cm 55,1	Firmato da Euxitheos come vasaio e da Euphronios come ceramografo, ca. 515 a.C. Da scavi clandestini in Etruria Meridionale
22		**Kylix laconica con guerrieri**	h. cm 12,9; diam. cm 25,4	Attribuita al Pittore della Caccia, 550-525 a.C.
33		**Deinos apulo a figure rosse**	h. cm 24,8	Attribuito al Pittore di Dario, 340-320 a.C.

[776] Source: Directorate General for Antiquities, Italian Ministry for Cultural Heritage and Activities, "Agreements with USA Museums", http://www.archeologia.beniculturali.it/index.php?en/226/accordi-con-musei-statunitensi (accessed, June 2, 2013).

44		**Psykter a figure rosse con teoria di cavalieri**	h. max cm 20,6	Attribuito a Smikros, 510 a.C.
55		**Anfora attica a figure rosse con citarista**	h. cm 57,8	Attribuita al Pittore di Berlino, 490 a.C.
66		**Tesoro di argenteria composto da 16 oggetti in argento dorato**		Seconda metà del III sec. a.C. Da scavi clandestini effettuati nella città antica di Morgantina

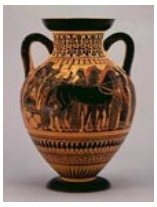
2. Bilateral agreement with the Museum of Fine Arts, Boston, signed on September 28, 2006, for the repatriation of 13 archaeological findings coming from Italy.

	IMMAGINE	OGGETTO	DIMENSIONI	NOTE
1		**Nestoris lucana a figure rosse con atleti e donne**	h. 49,6	Attribuita al Pittore di Amykos, ca. 420-410 a.C.
2		**Nestoris lucana a figure rosse con guerrieri**	h. 28,5; diam. corpo 19,4	Attribuita al Pittore di Amykos, ca. 420-410 a.C.
3		**Lekythos attica a figure nere su fondo bianco con Eracle e gli uccelli Stinfalidi**	h. cm 20,8	Attribuito al Pittore di Diosphos. 490 a. C.
4		**Lekythos attica a figure rosse con l'uccisione di Egisto**	h. cm 37	Attribuito al Pittore di Terpaulos. 500-490 a.C.
5		**Cratere a campana a figure rosse con Achille e Troilo**	h. 36,2	Attribuito al Pittore di Hoppin, ca. 389-370 a.C.

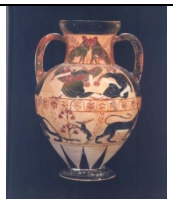
6		**Anfora apula a figure rosse raffigurante l'assassinio di Atreo**	H: 88.3 cm	Attribuita al Pittore di Dario, 340-330 a. C.
7		**Loutrophoros apula a figure rosse raffigurante Pelope ed Ippodamia sul carro**	H: 80 cm D. corpo 33.2 cm	Attribuita al Pittore del Sakkos Bianco, 320-310 a. C. Da scavi clandestini in Puglia
8		**Hydria attica a figure nere con cavalieri sciti**	h. cm 46.2	Cerchia del Pittore di Antimenes. 530-520 a. C. Da scavi clandestini nell'area di Vulci
9		**Pelike attica a figure rosse raffigurante Fineo e i Boreadi**	H: 21.3 cm D: 16.3 cm	Attribuito al Pittore di Nausicaa, ca. 450 a. C. Da scavi clandestini in Etruria
10		**Kalpis attica a figure rosse raffigurante Apollo**	h. cm 40.2	Attribuito al Pittore di Berlino. ca. 485 a. C. Da scavi clandestini in Etruria.
11		**Cratere attico a figure rosse con cacciatori traci**	h. cm 35.3	Attribuito al Pittore della Centauromachia del Louvre. 440-430 a. C. Da scavi clandestini in Etruria.

12		**Statua in marmo di Vibia Sabina**	h. cm 204	Post 136 d.C.
13		**Supporto triangolare in marmo**		

3. Bilateral agreement with the John Paul Getty Museum, Los Angeles, signed on September 25, 2007, for the repatriation of 40 archaeological findings coming from Italy.[777]

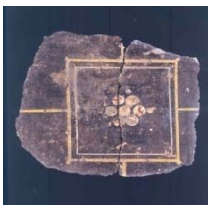
	IMMAGINE	OGGETTO	DIMENSIONI	NOTE
1		**Askòs bronzeo a forma di sirena**	h. 15,9; lungh. 19,4	ca . 470-460 a.C., da una tomba in località Murgie di Strongoli, nel territorio di Crotone
2		**Kilix attica a figure nere con scena di simposio**	h. cm 13,6 Ø cm 36,4	Circa 520 a. C.
3		**Kantharos attico gianiformе**	H: 19.1 cm D: 13.9 cm	Attribuito alla Classe del Vaticano, ca. 470 a. C. Da scavi clandestini
4		**Anfora attica a figure rosse con scena di lotta per il tripode**	H: 56 cm D: 26 cm	480-470 a. C. Da scavi clandestini
5		**Anfora attica a figure nere**	H: 29 cm D: 17.3 cm	Attribuito al Gruppo delle Tre Linee. 530 a. C. Da scavi clandestini operati in Etruria.

[777] As specified by the Directorate-General for Antiquities, more archeological findings have been put in the list of this agreement. They have been repatriated in addition to the cited agreement.

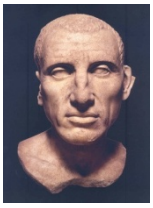
6		**Antefissa con Menade e Sileno**	H: 54.6 cm L: 32.5 cm	inizi del V sec. a. C. Da scavi clandestini
7		**Specchio in bronzo con coperchio decorato a rilievo**	H. 3 cm D. 15,1 cm	Fine del III sec. a. C. Da scavi clandestini
8		**Askos plastico a forma di paperella**	lungh. 13,5; diam. Piede 5	Officina chiusina, Gruppo Clusium, 350-300 a.C. Da scavi clandestini in Italia centro-meridionale
9		**Cratere a calice attico a figure rosse raffigurante scene della guerra di Troia**		Attribuito al Pittore di Berlino. 490 a.C. Da scavi clandestini in Italia centro-meridionale
10		**Kylix attica a figure rosse raffigurante scene di palestra**	h. 13; diam. Orlo 34	Attribuita al vasaio Pamphaios e al pittore di Nikosthenes. Ca. 510-500 a.C. Da scavi clandestini in Italia centro-meridionale
11		**Anfora pontica con uccisione di Medusa**	h. 35; diam. 22	Attribuito al Pittore di Tityos, ca. 530-510 a.C.
12		**Olpe protocorinzia con decorazione a squame**	h.20-22; diam. pancia 14,5; diam. bocca11,2	Officina corinzia, ca. 650-625 a.C.

13		**Phiale mesonfalica attica a figure rosse con scene mitologiche (in frammenti)**	h. 13,3; diam. 32,4	Firmato da Douris come ceramografo e attribuito a Smikros come vasaio, ca. 490-480 a.C. Da scavi clandestini in Italia centro-meridionale
14		**Cratere attico a figure rosse con uccisione di Egisto**	h. cm 58,2 Ø cm 61,6	Circa 470 a. C. Da scavi clandestini in Italia centro-meridionale
15		**Anfora attica a figure rosse con atleti**	H: 43.5 cm D: 25.7 cm	Attribuita ad Euthymides, ca. 515-510 a.c. Da scavi clandestini
16		**Kylix attica a figure rosse con Zeus e Ganimede**	H: 13.3 cm D: 32.4 cm	Firmata da Douris, 480 a.C. Da scavi clandestini
17		**Kylix attica a figure rosse con etera**	H: 14.5 cm D: 34 cm	Attribuita a Epiktetos, 520-510 a.C. Da scavi clandestini
18		**Cratere attico a calice a figure rosse con divinità**	H: 43 cm D: 55 cm	Firmato da Syriskos, 470-460 a. C. Da scavi clandestini
19		**Kantharos attico a figure rosse configurato a maschera dionisiaca**	H: 14,7cm D: 17,4 cm	Attribuito ad Euphronios e al Pittore della Fonderia, 480 a.C. Da scavi clandestini

20		**Anfora attica a figure nere con lotta tra Eracle e Gerione**	H: 42 cm D: 27 cm	Atribuito al Pittore di Berlino 1686, 540 a.C. Da scavi clandestini
21		**Lekythos pestana a figure rosse con il giardino delle Esperidi**	H: 45.5 cm Diam. base:18.3 cm	Attribuito ad Assteas, ca. 350-340 a.C. Da scavi clandestini nell'area di Paestum (Salerno).
22		**Cratere apulo a campana a figure rosse con scena fliacica**	H. 37 cm; D. bocca 45 cm	Attribuito al Pittore di Choregos, ca. 380 a.C.
23		**Kalpis attica a figure rosse con Fineo e le Arpie**	H. cm 39; D. corpo cm 32,5	Attribuita al Pittore di Kleophrades, ca. 480 a.C.
24		**Pelike apula a figure rosse con il compianto di Achille perPatroclo**	H. 50,9 cm;diam. corpo36,2 cm;diam bocca 28 cm	Attribuita ad un artigianovicino al Gruppo di Ruvo 423,375-350 a.C.Da scavi clandestini in ItaliaMeridionale
25		**Frammento di decorazione parietale ad affresco: lunetta con maschera e attributi di Ercole**	h. 61; largh. 81	II stile pompeiano, ca. 50-30 a.C. Da scavi clandestini in una villa dell'area vesuviana
26		**Frammento di decorazione parietale**	h. 59,5; largh. 83	Dal suburbio di Pompei; III stile pompeiano, 35-45 d.C. (Bastet-de Vos) 42-62 d. C.

				(Ehrardt)
27		**Frammento di decorazione parietale**	h. 55; largh. 81	Dal suburbio di Pompei; III stile pompeiano, 35-45 d.C. (Bastet-de Vos) 42-62 d. C. (Ehrardt)
28		**Frammento di decorazione parietale**	h. 28; largh. 23	Dal suburbio di Pompei; III stile pompeiano, 35-45 d.C. (Bastet-de Vos) 42-62 d. C. (Ehrardt)
29		**Frammento di decorazione parietale**	h. 10,5; largh. 12	Dal suburbio di Pompei; III stile pompeiano, 35-45 d.C. (Bastet-de Vos) 42-62 d. C. (Ehrardt)
30		**Frammento di decorazione parietale**	h. 19; largh. 17	Dal suburbio di Pompei; III stile pompeiano, 35-45 d.C. (Bastet-de Vos) 42-62 d. C. (Ehrardt)
31		**Frammento di decorazione parietale**	H. 38; largh. 42,5	Dal suburbio di Pompei; III stile pompeiano, 35-45 d.C. (Bastet-de Vos) 42-62 d. C. (Ehrardt)
32		**Cratere a campana attico a figure rosse con scena dionisiaca**	h. 25,4; diam. Corpo 33	ca. 420 a.C. Da scavi clandestini in Italia centro-meridionale

33		**Cratere attico a figure rosse raffigurante scena teatrale da "Gli Uccelli" di Aristofane**	h. 18,7, diam. orlo 23	ca. 415-410 a.C. Da scavi clandestini in Italia centro-meridionale
		**Frammento di decorazione parietale**		
		**Cratere apulo a volute a figure rosse con Fenice e Achille**	h. 103; diam. Corpo 56	Attribuito al Pittore del Sakkos Bianco, ca. 320 a.C. Da scavi clandestini in Italia Meridionale
35		**Cratere a calice apulo con scena di oltretomba**	h. cm 89; D. corpo cm 56;	Attribuito al Pittore del Sakkos Bianco Da scavi clandestini in Italia Meridionale
36		**Cratere apulo a volute a figure rosse con liberazione di Andromeda**	H: 63.3 cm D: 38 cm	Attribuito al Pittore di Sisifo, 410-400 a. C.
37		**Lekanis in marmo dipinto, con Nereidi che sorreggono le armi di Achille**	H: 30.8 cm D.orlo: 57.2 cm D.piede: 30 cm	325-300 a.C. Da scavi clandestini in località Ascoli Satriano
38		**Sostegno di tavolo in marmo, con due grifoni che attaccano una cerva**	H: 95 cm L: 148 cm	325-300 a.C. Da scavi clandestini in località Ascoli Satriano

39		**Pelike apula a figure rosse con Perseo e Andromeda**	h. cm 61; D. corpo cm 38,1; D. bocca cm 24,8	Scavo clandestino prima del 1985 attribuita al Pittore di Dario, 340-330 a.C.
40		**Loutrophoros apula a figure rosse con Perseo e Andromeda**	87 h ; 26,9 Ø	340-330 a.C. Da scavi clandestini
41		**Statuetta in marmo di Tyche**	h. cm. 84,5 Ø base cm. 19,4	Metà I sec. d.C. Da scavi clandestini in Italia centro-meridionale.
42		**Statua in marmo di Apollo**	h. cm. 146	Prima metà II sec. d. C. Da scavi clandestini nel territorio di Ascoli Satriano.
43		**Testa maschile in marmo**	h. 32,7; largh. 15	Ultimo quarto del I secolo a.C. Da scavi clandestini in Italia centro-meridionale
44		**Statuetta in marmo di Dioniso con capro**	h: 62,3; base: 17,3 x 17,5	ca. 50 d.C. Da scavi clandestini
45		**Statua acrolito di Afrodite**	h. cm 224	ca. 425 a.C. Da scavi clandestini nel territorio di Morgantina

46		**Kylix attica a figure rosse con Ilioupersis**	h cm 20,5, diam. cm 46,5	Firmata da Euphronios come vasaio e attribuita ad Onesimos come ceramografo. 500-490 a.C. Da scavi clandestini in loc. S. Antonio, Cerveteri
47		**Cratere pestano a figure rosse con il ratto di Europa**	h. cm 71,4; diam. orlo cm 60	Firmato da Assteas, 350-340 a.C. Da scavi clandestini nel territorio di S. Agata dei Goti, provincia di Benevento. Restituito nel 2005
48		**Lex sacra di Selinunte**	h. cm 23, lungh. cm 60	475-450 a.C. Da scavi clandestini nel territorio di Selinunte. Restituita nel 1992
49		**Cippo arcaico in calcare**		VI sec. a.C. Da scavi clandestini nel territorio di Selinunte. Restituita nel 2005

Bibliography

Books

One author

Beazley, John D. *Attic red-figure vase-painters*. Vol. 1. Second Edition. Clarendon Press: Oxford, 1963.

Boardman, John. *The History of Greek Vases*. London: Thames & Hudson, 2006.

Cassese, Antonio. *International Law.* Second Edition. Oxford University Press, New York, 2005.

Ciciriello, Maria Clelia. *La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla Convenzione UNESCO del 1972*. Naples: Editoriale Scientifica, 1997.

Forrest, Craig. *International Law and the Protection of Cultural Heritage*. Abingdon, New York: Routledge, 2010.

Giglioli, Enrico Hillyer and Paolo Mantegazza. *Viaggio intorno al globo della Regia pirocorvetta italiana Magenta negli anni 1865-66-67-68 sotto il comando del capitano di fregata V. F. Arminjon*. Milan: V. Maisner e compagnia, U. Hoepli, 1876.

Eliot, Thomas. S. *Notes towards the definition of Culture*. London: Faber and Faber Ltd, 2010.

Forrest, Craig. *International Law and the Protection of Cultural Heritage*. Abingdon, New York: Routledge, 2010.

Frigo, Manlio. *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*. Milan: Giuffré, 2007.

Gerstenblith, Patty. *Art, Cultural Heritage and the Law*. Second Edition. Durham, North Carolina: Carolina Academic Press, 2008.

Gerstenblith, Patty. *Art, Cultural Heritage, and the Law: Cases and Materials*. Third edition. Durham: Carolina Academic Press, 2012.

Greenfield, Jeanette. *The Return of Cultural Treasures*. Second Edition. Cambridge: Cambridge University Press, 1996.

Hook, Philip. *Breakfast at Sotheby's: An A-Z of the Art World*. London: Particular Books, 2013.

Hoving, Thomas. *Making the Mummies Dance: Inside the Metropolitan Museum of Art.* New York: Simon and Schuster, 1993.

Kowalski, Wojciech W. *Art Treasures and War*. Leicester: Institute of Art and Law, 1998.

Lowenthal, David. *The Heritage Crusade and the Spoils of History*. Cambridge: Cambridge University Press, 1998.

Mackenzie, Simon. *Going, Going Gone: Regulating the Market in Illicit Antiquities*. Leicester: Institute of Art and Law, 2005.

Meek, Susan B. *Alternative Dispute Resolution.* Tucson: Lawyers and Judges, 1996.

Merryman, John Henry. *Imperialism, Art and Restitution*. New York: Cambridge University Press, 2006.

Meyer, Karl E. *The Plundered Past: the Story of the Illegal International Traffic in Works of Art*. New York: Atheneum, 1973.

Morsink, Johannes. *The Universal Declaration of Human Rights: Origins, Drafting and Intent*. Philadelphia: University of Pennsylvania Press, 1999.

Nafziger, James A.R. *Cultural Heritage Law*. Cheltenham: Edward Elgar Publishing Limited, 2012.

Noble, Joseph Veach. *Techniques of painted Attic pottery.* New York: Watson-Guptill Publications, 1965.

O'Keefe, Patrick J. *Commentary on the 1970 UNESCO Convention*. Second Edition. Builth Wells: Institute of Art and Law, 2007.

Prott, Lyndel V. *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995, First edn*. Builth Wells: Institute of Art and Law, 1997.

Renfrew, Colin. *Loot, Legitimacy and Ownership*. London: Duckworth, 2000.

Quincy, Quatremère de. *Lettres au général Miranda sur le préjudice qu'occasionneraient aux arts et à la science le déplacement de monuments de l'art de l'Italie, le démembrement de ses Ecoles et la spoliation de ses galléries, musées*. Rome, 1825.

Sax, Joseph L. *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*. Ann Arbor: The University of Michigan Press, 1999.

Shaw, Malcolm N. *International Law*, Sixth edn. Cambridge: Cambridge University Press, 2008.

Tullio Scovazzi. *La protezione del patrimonio culturale sottomarino nel Mare Mediterraneo*. Milan: Giuffré, 2004.

Scovazzi, Tullio. *La Restituzione di Beni Culturali Rimossi Nella Pratica Italiana*. In course of publication.

Silver, Vernon. *The Lost Chalice*. New York: Harper Collins, 2009.

Stamatopoulou, *Elsa. Cultural Rights in International Law. Article 27 of the Universal Declaration on Human Rights and Beyond*. Leiden, Boston: Martinus Nijhoff Publishers, 2007.

Stamatoudi, Irini A. *Cultural Property Law and Restitution. A Commentary to International Conventions and European Union Law*. Cheltenham, Northampton: Edward Elgar Publishing, 2011.

Stocking, George. *History of Anthropology, Vol. 3 Objects and Others Essays on Museums and Material Culture*. University of Wisconsin Press, 1985.

Vaccaro Giancotti, Wanda. *Il Patrimonio Culturale nella Legislazione Costituzionale e Ordinaria. Analisi, proposte e prospettive di riforma*. Turin: Giappichelli, 2008.

Vrdoljak, Ana Filipa. *International Law, Museums and the Return of Cultural Objects.* Cambridge, New York: Cambridge University Press, 2006.

Ware, Stephen J. *Alternative Dispute Resolution.* St. Paul: West Group, 2001.

Williams, Sharon. *The International and National Protection of Movable Cultural Property. A Comparative Study*. Dobbs Ferry, NY: Oceania Publications, 1978.

Two or more authors

Alpa, Guido; and Vincenzo Zeno-Zencovich. *Italian Private Law*. Abingdon, New York: Routledge, 2007.

Catelani, Alessandro; and Salvatore Cattaneo, Paolo Stella Richter. *I beni e le attività culturali*. Padova: CEDAM, 2000.

Crais, Clifton and Pamela Scully. *Sara Baartman and the Hottentot Venus: A Ghost Story and a Biography*. Princeton: Princeton University Press, 2008.

Garabello, Roberta and Tullio Scovazzi. *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention.* Leiden: Martinus Nijhoff Publishers, 2003.

Felch, Jason and Ralph Frammolino. *Chasing Aphrodite*. Boston, New York: Houghton Mifflin Harcourt, 2011.

Francioni, Francesco and Federico Lenzerini. *The 1972 World Heritage Convention: A Commentary.* New York: Oxford University Press, 2008.

Malaro, Marie C. and Ildiko P. De Angelis. *A legal primer on managing museum collections*. Washington: Smithsonian Books, 2012.

Nafziger, James A. R., and Robert Kirkwood Paterson, Alison Dundes Renteln. *Cultural Law. International, Comparative, and Indigenous*. New York: Cambridge University Press, 2010.

Prott, Lyndel V. and Patrick J. O'Keefe. *Law and the Cultural Heritage: Vol. I Discovery and Excavation*. Abingdon: Professional Books Ltd, 1984.

Scovazzi, Tullio and Bendetta Ubertazzi,Lauso Zagato. *Il patrimonio culturale intangibile nelle sue diverse dimensioni.* Milan: Giuffrè, 2012.

Watson, Peter and Cecilia Todeschini. *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums*. New York: Public Affairs, 2006.

Chapter or part of a book

Brinkman, Manus. “Reflections on the causes of Illicit Traffic in Cultural Property and Some Potential Cures”. In *Art and Cultural Heritage: Law, Policy, and Practice,* edited by Barbara T., 64-89. Hoffman. Cambridge : Cambridge University Press, 2006.

Cadin, Raffaele “Il concetto integrato di sviluppo umano”in *Sviluppo e diritti umani nella cooperazione internazionale. Lezioni sulla cooperazione internazionale per lo sviluppo umano,* 2nd edn, edited by Raffaele Cadin, Cristiana Carletti and Erisliagrazia Spatafora, 1-140. Turin: Giappichelli, 2007.

Cowan, Jane K. “Ambiguities of an Emancipatory Discourse: The Making of a Macedonian Minority in Greece”. In *Culture and Rights: Anthropological Perspectives* edited by Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, 152-176. Cambridge: Cambridge University Press, 2001.

Fiorentini, Francesca. “The Trade of Cultural Property: Legal Pluralism in an Age of Global Institutions”, in *Resolving Disputes in Cultural Property*, edited by Marc-André Renold, Alessandro Chechi, Anne Laure Bandle, 103-133. Genève, Zurich: Schulthess Médias Juridiques, 2012.

Fiorilli, Maurizio. “Cultural properties and International agreements”. In *International Meeting on Illicit Traffic of Cultural Property*, Rome 16/17 December 2009: Rome, Gangemi, 2010.

Francioni, Francesco. “Controlling Illicit Trade in Art Objects: the 1995 UNIDROIT Convention”. In *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, *Atti del Convegno – Roma, 8-9 maggio 1998,* edited by Francesco Francioni, Angela Del Vecchio, Paolo De Caterini. Quaderni 3, 11-19. Milan: Giuffré Editore, 2000.

Guerrero, Blanca Alva. “El Comité Subsidiario: Propuesta de Futuras Tareas”. In *La Convencion de la UNESCO 1970 Sus Nuevos Desafios,*edited by Jorge Sanchez Cordero, 45-56. Ciudad Universitaria, Instituto de Investigaciones Juridicas, Mexico, 2013.

Kamenka, Eugene. "Human Rights and Peoples' Rights". In *The Rights of Peoples,* edited by James Crawford, 80-107. Oxford: Clarendon Press, 1992.

Kersel, Morag M. “From the Ground to the Buyer: A Market Analysis of the Trade in Illegal Antiquities”. In *Cultural Heritage and the Antiquities Trade*, edited by Neil Brodie, Morag M. Kersel, Christina Luke and Kathryn Walker Tubb, 188-205. Gainesville: University Press of Florida, 2006.

Kowalski, Wojciech W. “Claims for Works of Art and Their Legal Nature”. In *Resolution of Cultural Property Disputes*, edited by International Bureau of the Permanent Court of Arbitration, 31-51. The Hague: Kluwer International, 2004.

Lanciotti, Alessandra. “The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the ‘Getty Bronze’”, in *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, edited by Silvia Borelli and Federico Lenzerini, 301-326. Leiden, Boston: Martinus Nijhoff Publishers, 2012.

Lenzerini, Federico. “Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge”, in *Cultural Human Rights*, edited by Francesco Francioni and Martin Scheinin, 119-149. Leiden: Martinus Nijhoff Publishers, 2008.

Lenzerini, Federico. “The Tensions Between Communities’ Cultural Rights and Global Interests : the Case of the Māori "Mokomokai"”, in *Cultural heritage, cultural rights, cultural diversity*, edited

by Silvia Borelli and Federico Lenzerini, 169-191. Leiden: Martinus Nijhoff Publishers, 2012.

Lenzerini, Federico. “Traditional Knowledge, Biogenetic Resources, Genetic Engineering and Intellectual Property Rights”, in *Genetic Engineering and the World Trade System*, edited by Daniel Wuger and Thomas Cottier, 118-148. Cambridge: Cambridge University Press, 2008.

Pavoni, Riccardo, “Sovereign Immunity and the Enforcement of International Cultural Property Law”. In *Enforcing International Cultural Heritage Law*, edited by Francesco Francioni and James Gordley, 79-109. Oxford: Oxford University Press, 2013.

Planche, Edouard “L’UNESCO et la Protection du Patimoine Culturel: Defis et Perspectives de la Convention de 1970. Mexican Seminar: The Globalization of the Protection of Cultural Heritage : the 1970 Convention : New Challenges”. In *La Convencion de la UNESCO 1970 Sus Nuevos Desafios*, edited by Jorge Sanchez Cordero, 247-268. Ciudad Universitaria, Instituto de Investigaciones Juridicas, Mexico, 2013.

Prott, Lyndel V. “International Standards for Cultural Heritage”. In *UNESCO World Culture Report*, 222-236.UNESCO Publishing, Paris 1998.

Prott, Lyndel V. “Philosophies, politics, Law and the 1970 UNESCO Convention”, in *La Convencion de la UNESCO 1970 Sus Nuevos Desafios*, edited by Jorge Sanchez Cordero, 269-296. Ciudad Universitaria, Instituto de Investigaciones Juridicas, Mexico, 2013.

Rodinò, Walter . “La Convenzione UNIDROIT sui beni culturali rubati illecitamente esportati”. In *La Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura, Atti del Convegno – Roma, 8-9 maggio 1998,* edited by Francesco Francioni, Angela Del Vecchio, Paolo De Caterini. Quaderni 3, 103-108. Milan: Giuffré Editore, 2000.

Schorlemer (von), Sabine. “UNESCO Dispute Settlement”. In *Standard-setting in UNESCO: Normative Action in Education, Science and Culture*, edited by A.A. Yusuf, 73-103. Leiden: Martinus Nijhoff and UNESCO Publishing, 2007.

Simpson, M. “The Repatriation of Haida Ancestors”, in *Witnesses to History – Documents and Writings on the Return of Cultural Objects*, edited by Lyndel V. Prott, 260-262. UNESCO, 2009.

Vrdoljak, Ana Filipa. "Intentional Destruction of Cultural Heritage and International Law". In *Multiculturalism and International Law,* edited by Kalliopi Koufa. Thesaurus Acroasium XXXV, 377-396 . Thessaloniki, Sakkoulas Publications, 2007.

Journal Articles

Adler, Christine and Ken Polk, “Stopping This Awful Business: The Illicit Traffic in Antiquities Examined as a Criminal Market”. *Art and Antiquity Law*, 7 (1) (2002): 35-53.

Amineddoleh, Leila. “The Getty Museum’s Non-Victorious Bid to Keep the “Victorious Youth” Bronze”. *Art & Cultural Heritage Law Newsletter, American Bar Association Section of International Law* 3 (1) (2011): 30-32.

Bator, Paul M. “An Essay on the International Trade on Art”. *Stanford Law Review* 34 (1982):

275-384.

Blake, Janet. “On defining the cultural heritage”. *International and Comparative Law Quarterly* 49 (1) (2000): 61-85.

Beltrametti, Silvia. “Museum Strategies: Leasing Antiquities”. *Columbia Journal of Law and the Arts* 36 (2013): 203-260.

Briggs, Aaron Kyle. “Consequences of the Met-Italy Accord for the International restitution of Cultural Property”. *Chicago Journal of International Law* 7 (2) (2007): 623-653.

Chechi, Alessandro. “The return of cultural objects removed in times of colonial domination and international law: the case of the Venus of Cyrene”. *Italian Yearbook of International Law* 13 (2008): 159-181.

Coggins, Clemency. “Illicit Traffic of Pre-Columbian Antiquities”. *Art Journal* 29 (1) (1969): 94, 96, 98, 114.

Cornu, Marie and Marc-André Renold. “New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution”. *International Journal of Cultural Property* 17 (2010): 1-31.

Elia, Ricardo J. “Looting, Collecting, and the Destruction of Archeological Resources”. *Nonrenewable Resources* 6 (2) (1997): 85 -98.

Favole, Adriano. “Appropriazione, incorporazione, restituzione di resti umani: casi dall’Oceania”. *Antropologia* 3 (2003):121-139.

Ferracuti, Sandra; and Vito Lattanzi. “Corpi e musei: dilemmi etici e politiche relazionali”. *Antropologia Museale* 32-33 (2012): 56-62.

Francioni, Francesco. "Thirty Years On: Is the World Heritage Convention Ready For the 21st Century?" *The Italian Yearbook of International Law* 12 (2002): 13-38.

Frigo, Manlio. “Cultural Property v. Cultural Heritage: A “battle of Concepts” in International Law?” *International Review of the Red Cross* 86 (584) (2004): 367-378.

Froment, Alain. “Argumentaire sur la conservation et l’étude des collections de restes humains”. *Museologia Scientifica* 5 (1-2) (2011): 22-27.

Gallagher, Steven. “Museums and the Return of Human Remains: An Equitable Solution?”. *International Journal of Cultural Property* 17 (2010): 65-86.

Gerstenblith, Patty. “Identity and Cultural Property: The Protection of Cultural Property in the United States”. *Boston University Law Review* 75 (1995): 559-668.
Gerstenblith, Patty. “International Art and Cultural Heritage”. *International Law* 44 (2010): 487-501.

Gerstenblith, Patty and David Bright, Michael McCullough, and Kathleen Nandan. “International Art and Cultural Heritage”. *The Year in Review* 47 (2013): 423-434.

Giacomo. Giacobini, “A Threat to Biological Anthropology Collections (and not to Them Alone)”.

Museologia Scientifica 5 (1-2) (2011):8-10.

Gill, David and Christopher Chippindale. "From Boston to Rome: Reflections on Returning Antiquities". *International Journal of Cultural Property* 13 (2006): 311-331.

Gill, David and Christopher Chippindale. "From Malibu to Rome: Further Developments on the Return of Antiquities". *International Journal of Cultural Property* 14 (2007): 205-240.

Goyder, Joanna. "Treaties and EC Matters". *International Journal Cultural Property* 3 (1994):125-130.

Jenkins, Paul "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects". *Art Antiquity and Law* 1 (1996): 163-169.

Joint Committee, National Association of the Scientific Museums, Museum of Natural History of the University of Florence. "Document on the request by the Australian Government for the restitution of human skeletal remains deriving from Australian territory and conserved in the Anthropology and Ethnology of the Museum of Natural History of the University of Florence". *Museologia Scientifica* 5 (1-2) (2011):11-21.

Kreder, Jennifer Anglim. "The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities". *University of Miami Law Review* 64 (2010): 997, 1030.

Lenzerini, Federico. "The UNESCO Declaration Concerning the International Destruction of Cultural Heritage: One Step Forward and Two Steps Back". *Italian Yearbook of International Law* 13 (2003): 131- 145.

Mcilwrath, Michael and John Savage. *International Arbitration and Mediation: A Practical Guide*. The Hague, London : Kluwer Law International, 2010.

Merryman, John Henry. "A Licit International Trade in Cultural Objects", *International Journal of Cultural Property* 4 (1995): 11-39.

Merryman, John Henry. "Cultural Property, International Trade and Human Rights". *Cardozo Arts & Entertainment Law Journal* 19 (2001): 51-67.

Merryman, John Henry. "Protection of the Cultural Heritage?". *American Journal of Comparative Law* 38 (1990): 513-522.

Merryman, John Henry. "The Free International Movement of Cultural Property". *New York University Journal of International Law and Politics* 31(1) (1998): 4-14.

Merryman, John Henry. "The UNIDROIT Convention: Three Significant Departures from the Urtext". *International Journal of Cultural Property* 5 (1) (1996): 11-18.

Merryman, John Henry. "Two Ways of Thinking about Cultural Property". *American Journal of International Law* 80 (4) (1986):831-853.

Miller, Michele A. "Introduction to Feature Section: Looting and the Antiquities Market". *Athena Review* 4 (3) (2007): 18-26.

Moustakas, John. "Groups Rights in Cultural Property: Justifying Strict Inalienability,". *Cornell*

Law Review 74 (6) (1989):1179-1227.

Nafziger, James A. R. "The Principles of Co-operation in the Mutual Protection and Transfer of Cultural Material". *Chicago Journal of International Law* 8 (2007): 147-167.

Nicholas II, Talbot J. "EEC Measures on the Treatment of National Treasures". *Loyola of Los Angeles International and Comparative Law Review* 16 (1993): 127-166.

O'Keefe, Roger. "World Cultural Heritage Obligations to the International Community as a Whole?". *International and Comparative Law Quarterly* 53 (2004):189-209.

Prayer, Giuseppina. "La questione della "repatriation": motivazioni culturali, vincoli giuridici, implicazioni museo logiche". *Antropologia Museale* 18 (2008): 53-55.

Prott, Lyndel V. "Problems of Private International Law for the Protection of Cultural Heritage", *Recuil Des Cours*, (1989): 215- 293.

Prott, Lyndel V. "The International Movement of Cultural Objects". *International Journal of Cultural Property* 12 (2) (2005): 225- 248.

Prott, Lyndel V. "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On". *Uniform Law Review,* Rome, UNIDROIT, 14 (1-2) (1996): 215-237.

Prott, Lyndel V. and Patrick J. O'Keefe, "Cultural Heritage" or "Cultural Property"?" *International Journal of Cultural Property* 1 (1992): 307-320.

Robbins, Bruce and Elsa Stamatopoulou, "Reflections on Culture and Cultural Rights", The South Atlantic Quarterly 103 (2/3) (2004): 419-434.

Roehrenbeck, Carol A. "Repatriation of Cultural Property – Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments". *International Legal Information* 38 (2010): 185-200.

Scovazzi, Tullio. "Convention on the Protection of Underwater Cultural Heritage". *Environmental Policy Law*, IOS Press, 32, (3-4) (2002): 152-157.

Scovazzi, Tullio. "Dal Melqart di Sciacca all'Atleta di Lisippo". *Rivista di diritto internazionale privato e processuale* 1 (2011): 5-18.

Scovazzi, Tullio."*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties". *Rivista di diritto internazionale* 2 (2011): 341-395.

Scovazzi, Tullio. "La Restituzione dell'Obelisco di Axum e della Venere di Cirene". *Rivista di diritto internazionale privato e processuale* 45 (3) (2009): 555-566.

Scovazzi, Tullio. "The Law of the Sea Convention and Underwater Cultural Heritage". *The International Journal of Marine and Coastal Law* 27 (2012): 753–761.

Shapiro, Daniel. "Repatriation: A Model Proposal". *New York University Journal of International Law and Politics* 31 (1998): 95-108.

Short Myren, Robin. "Provenance Factors for Antiquities Acquisitions". *Society for California*

Archeology Proceedings (24) (2010), 1-13.

Sidorsky, Emily. "The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration". *International Journal of Cultural Property* 5 (1) (1996):19-72.

Squillante, Francesca. "La tutela dell'acquirente a non domino di beni culturali rubati secondo la Convenzione UNIDROIT ed il disegno di legge per l'esecuzione della Convenzione". *Rivista Di Diritto Internazionale* 82 (1) (1999): 120-137.

Vitale, Katherine D. Note, "The War on Antiquities: United States Law and Foreign Cultural Property." *Notre Dame Law Review* 84 (4) (2009): 1835-1873.

Vitano, Victoria J. "Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects". *Fordham International Law Journal* 17 (1994): 1164-1201.

Wilder, Mark A. "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries". *Defense Counsel Journal* 1 (2000): 92-105.

International treaties and soft law instruments

Convention with Respect to the Laws and Customs of War on Land (Hague, II). The Hague, The Netherlands. 29 July 1899.

Council of Europe. *European Convention on the Protection of the Archaeological Heritage*. Valletta, Malta. 16 January 1992. Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm
Council of Europe. *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11)*. Paris, France. 20 March 1952 (1 November 1998). Available at: http://conventions.coe.int/treaty/en/treaties/html/009.htm

General Agreements on Tariffs and Trades. Geneva, Switzerland. April 1947. Available at: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm
International Committee of the Red Cross. *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, 1125 UNTS 3.

International Court of Justice. *ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, No. 131. 9 July 2004.

International Law Association. *Sofia Conference (2012), Rights of Indigenous Peoples. Final Report*. Available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1024

League of Nations. *Draft Declaration concerning the Protection of Historic Buildings and Works of Art in Time of War*, League of Nations Official Journal (1) (20), January 1939.

Organization of African Unity. *African Charter on Human and Peoples' Rights*. Banjul, The Gambia. 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: http://www1.umn.edu/humanrts/instree/z1afchar.htm

Organization of American States. *American Convention on Human Rights*. San José, Costa Rica. 21 November 1969, OAS TS No. 36, 1144.

Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye). Saint-Germain-en-Laye, France. 10 September 1919.

Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Paris, France. 28 June 1919.

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. Washington, United States. 15 April 1935. Available at: http://www.icrc.org/ihl.nsf/FULL/325
UNESCO General Conference. *Records of the General Conference, 33rd Session*. Paris, France. 21 October 2005, 33 C/Resolution 44. Available at: http://unesdoc.unesco.org/images/0014/001428/142825E.pdf

UNESCO General Conference. *Records of the General Conference, 9th Session*. New Delhi, India. 1956. Available at: http://unesdoc.unesco.org/images/0011/001145/114585e.pdf
UNESCO Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property. *Draft Operational Guidelines for the better implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*. Paris, France. 2-3 July 2013, U.N. Doc. C70/13/1.SC/INF.2/REV2. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/INF2-SC1_StudyLVP_en_REV2.pdf
UNESCO World Conference on Cultural Policies. *Mexico City Declaration on Cultural Policies*. Mexico City, Mexico. 6 August 1982. Available at: http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf

UNESCO. *Convention for the Protection of Cultural Property in the Event of Armed Conflict*. The Hague, The Netherlands. 14 May 1954, 249 UNTS 215. Available at: http://www.unesco.org/culture/laws/hague/html_eng/fulltext.htm
UNESCO. *Convention for the Safeguarding of Intangible Cultural Heritage*. Paris, France. 17 October 2003, 2368 UNTS 3.

UNESCO. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Paris, France. 14 November 1970, 823 U.N.T.S. 231.

UNESCO. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Paris, France. 14 November 1970. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html
UNESCO. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Paris, France. 20 October 2005, 2440 UNTS 311.

UNESCO. *Declaration Concerning the Intentional Destruction of Cultural Heritage*. Paris, France. 17 October 2003. Available at: http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO. Extracts from *Approved Programme and Budget 2012-2013*, 36 C/5, Major Programme IV. Available at: http://www.unesco.org/new/en/culture/about-us/how-we-work/strategy/
UNESCO. *International Code of Ethics for Dealers in Cultural Property*. Paris, France. November

1999. Available at: http://unesdoc.unesco.org/images/0012/001213/121320M.pdf

UNESCO. *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*. The Hague, The Netherlands. 14 May 1954, 249 U.N.T.S. 358.

UNESCO. *Recommendation on International Principles Applicable to Archaeological Excavations*. New Delhi, India. 5 December 1956. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO. *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. The Hague, The Netherlands. 26 March 1999.

UNESCO. *UNESCO General Conference Resolution 20 C4/7.6/5*. 1978. Available at: http://unesdoc.unesco.org/images/0011/001140/114032e.pdf#page=92

UNESCO. *Universal Declaration on Cultural Diversity*. Paris, France. 2 November 2001. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNIDROIT. *Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*. Rome, Italy. 24 June 1995.

UNIDROIT. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. Rome, Italy. 24 June 1995.

United Nations Committee on Economic, Social and Cultural Rights. *General Comment No. 21, Right of everyone to take part in cultural life (Article 15, paragraph 1 (a), International Covenant on Civil and Political Rights)*. 21 December 2009, U.N. Doc. E/C.12/GC/21.

United Nations Committee on the Elimination of Racial Discrimination. *General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997)*. 18 August 1997, U.N. Doc. A/52/18, annex V at 122 (1997). Available at: http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Open

United Nations Committee on the Rights of the Child. *Convention on the Rights of the Child*. 20 November 1989, GA Res. 44/25, 1577 UNTS 3.

United Nations Committee on the Rights of the Child. *General Comment No. 11 (2009), Indigenous children and their rights under the Convention*. 12 February 2009, U.N. Doc. CRC/C/GC/11.

United Nations Conference on the Human Environment. *Declaration of the United Nations Conference on the Human Environment*. Stockholm, Sweden. 16 June 1972. Available at: http://sustainabledevelopment.un.org/index.php?menu=1373

United Nations Economic and Social Council. *Human Rights of Indigenous Peoples. Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*. 19 June 2000, U.N. Doc. E/CN.4/Sub.2/2000/26. Available at: http://cwis.org/GML/UnitedNationsDocuments/

United Nations General Assembly. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. 18 December 1992, U.N. Doc. A/RES/47/135.

United Nations General Assembly. *Human Rights and Cultural Diversity*. 18 December 2007, U.N. Doc. A/RES/62/155.

United Nations General Assembly. Restitution of Works of Art to Countries Victims of Expropriation. 18 December 1973. U.N. Doc. A/RES/3187 (XXVIII).

United Nations General Assembly. *United Nations Declaration on the Rights of Indigenous Peoples*. 13 September 2007, U.N. Doc. A/RES/61/295. Available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
United Nations Human Rights Committee. *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*. 8 April 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5.

United Nations International Law Commission. *Eighth Report on Succession of States in Respect of Matters Other than Treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur*. 8 April 1972, U.N. Doc. A/CN.4/292.

United Nations International Law Commission. *Fifth Report on Succession of States in Respect of Matters Other Than Treaties by Mr. Mohammed Bedjaoui, Special Rapporteur*. 4 April 1972, U.N. Doc. A/CN.4/247 and Add. 1.

United Nations International Law Commission. *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi*. April 13, 2006, UN Doc. A/CN.4/L.682; July 18, 2006, U.N. Doc. A/CN.4/L.702.

United Nations. *Charter of the United Nations*, "Chapter VI: Pacific Settlement of Disputes". Available at: http://www.un.org/en/documents/charter/chapter6.shtml
United Nations. *International Convention on the Elimination of All Forms of Racial Discrimination*. 7 March 1966, GA Res. 2106 (XX), 660 UNTS 195.

United Nations. *International Covenant on Economic, Social and Cultural Rights*. 16 December 1966, GA Res. 2200A (XXI), 993 UNTS 3.

United Nations. *Universal Declaration of Human Rights*. Paris, France. 16 December 1949. Available at: http://www.un.org/en/documents/udhr/
Vienna Convention on Succession of States in respect of State Property, Archives and Debts. Vienna, Austria. 8 April 1983.

Washington Conference on Holocaust Era Assets. *Washington Conference Principles on Nazi-Confiscated Art*. Washington, United States. 3 December 1998.

EU Legislation

Commission Proposal for a Council Regulation on the Export of Cultural Goods; Commission Proposal for a Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, COM (91) final – SYN 382

Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. COM(2000)325 def.

Communication from the Commission to the Council on the protection of national treasures possessing artistic, historic or archaeological value: needs arising from the abolition of frontiers in

1992. COM (89) 594 final, 22 November 1989.

Consolidated Version of the Treaty on the Functioning of the European Union. Available at:http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.doc

Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ No L 74, 27.3.1993.

Council Regulation (EC) No 974/2001 of 14 May 2001 amending Regulation (EEC) No 3911/92 on the export of cultural goods.

Council Regulation (EC) No 1210/2003 of 7 July 2003.

Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods, OJ No L 395, 31.12.1992, as amended by information of 27 March 1993, OJ No L 74, 27.3.1993.

Council Regulation 116/2009 of 18 December 2008 on the Export of cultural goods, O.J. L. 39/1, February 10, 2009. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:039:0001:0007:en:PDF (last visited August 4, 2013).

Directive 93/7/EEC recast. http://ec.europa.eu/enterprise/policies/single-market-goods/internal-market-for-products/cultural-goods/

European Commission, Impact analysis, p. 128 – SWD (2013) 189 final.

Treaty on European Union, February 7, 1992, O. J. C. 224/01 (1992), [1992] 1 C.M.L.R. 719, reprinted in 31 I.L.M. 247 (1992).

European Parliament resolution on the Commission report to the Council, the European Parliament and the Economic and Social Committee on the implementation of Council Regulation (EEC) No 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (COM(2000) 325 - C5-0509/2000 - 2000/2246(COS))

Report on the proposal for a directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (recast) (COM(2013)0311 – C7-0147/2013 – 2013/0162(COD)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0058+0+DOC+XML+V0//EN

Sub-working group on the Prevention of thefts and Illicit trafficking of cultural goods.", Prepared by Smaragda Boutopoulou & Marlen Mouliou (Greece), February-May 2010, Available at: http://ec.europa.eu/culture/documents/due_diligence_report.pdf

International Case Law

Arbitral Award: 5 Klimt paintings, Maria V. Altmann and others v. Republic of Austria, 15 January 2004, Arthemis, Art-Law Centre, University of Geneva, available at: https://plone2.unige.ch/art-adr/Affaires/case-adele-bloch-bauer/Maria%20V.%20Altmann%20and%20others%20v.%20Republic%20of%20Autria%20-%20Austrian%20Arbitration%20Court%20Janu

ary%202006.pdf/view

Case of the Moiwana Community v. Suriname (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 15 June 2005, *Series C No. 124*, paragraph 195.

European Court of Human Rights, "Case Bayeler v. Italy". Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58832#{"itemid":["001-58832"]}

Liechtenstein v. Germany, June 1, 2001. Available at: http://www.icj-cij.org/docket/files/123/7077.pdf

Inter-American Court of Human Rights, Case of the Moiwana Community v. Suriname, Judgment of February 8, 2006. (Interpretation of the Judgment of Merits, Reparations, and Costs) http://www.corteidh.or.cr/docs/casos/articulos/seriec_145_ing.pdf

Islamic Republic of Iran v. Barakat Galleries Ltd. [2007] EWCA Civ. 1374.

The International Court of Justice, "North Sea Continental Shelf Cases. Judgment of 20 February 1969". Available at: http://www.icj-cij.org/docket/index.php?sum=295&p1=3&p2=3&k=cc&case=51&p3=0

National Judgments

Italy

Court of Cassation, 18 January 2011, No. 6558.

Tribunal of Pesaro, Order of 10 February 2010, No. 2042/07 RGNR, 33.

Tribunal of Pesaro, Order of 12 June 2009, No. 2042/07 RGNR. Available at: http://it.scribd.com/doc/92449731/ORDINANZA-LISIPPO-2012-05-03

National legislation and policy instruments
Australia

Aboriginal Cultural Heritage Act (March 31, 2003). Available at: https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TorresStIsCuA03.pdf

Australian Human Rights Committee, International Review of Indigenous issues in 2000: Australia -- 6. Indigenous children as victims of racism, Indigenous children as victims of racism. Available at: https://www.humanrights.gov.au/publications/international-review-indigenous-issues-2000-australia-6-indigenous-children-victims

Australian Government, Ministry for the Arts, "The National Cultural Heritage Control List". Available at: http://arts.gov.au/movable/export/list

Australian State of the Environment Committee. Department of the Environment and Heritage, Canberra. Available at: http://www.environment.gov.au/system/files/pages/e535aa20-601d-4e5f-9279-5fe172d2b708/files/r

epatriation.pdf

Australian Government. “Torres Strait Islander Cultural Heritage Act 2003”. Available at: https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/T/TorresStIsCuA03.pdf

Australian Government. Queensland Government. DATSIMA. “Human remains”. Available at: http://www.datsima.qld.gov.au/atsis/aboriginal-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-cultural-heritage/human-remains

France

Gouvernement français. “Guidelines on Administrative Co-operation Between the Competent Cultural Authorities”. Available at: http://www.circulation-biens.culture.gouv.fr/pdf2/Cooperation_en.pdf

LOI n° 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections (1). Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022227321&dateTexte

Italy

Corte dei Conti. Royal Decree July12, 1934, N. 1214 is available at: http://www.corteconti.it/export/sites/portalecdc/_documenti/normativa/corte_dei_conti/r.d._12_luglio_1934x_1214.pdf

Gazzetta Ufficiale della Repubblica Italiana supplement no. 49, February 24, 1976.
Italian Code of the Cultural and Landscape Heritage, as amended by the legislative decrees n. 156 and 157, on March 24, 2006, by Minister Rocco Buttiglione, which modified the previous Code “Urbani” on Cultural and Landscape Heritage (Leg. Decree 42/2004).

Joint Declaration by the Prime Minister of the Republic of Italy and the Prime Minister of the Commonwealth of Australia on Indigenous ancestral remains”. L’Aquila. July 10, 2009.

Law No. 1089 of 1 June 1939 (Gazzetta Ufficiale, No 184 of 8 August 1939).

Ministerial Decree July 29, 2009 of the Ministry for Cultural Heritage and Activities setting up Joint Working Group on Indigenous Remains.

United Kingdom

House of Commons. “Code of Practice for the Control of Trading in Works of Art. Available at: http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcumeds/371/0052308.htm

Human Tissue Act 2004, (Ch. 30). Available at: http://www.legislation.gov.uk/ukpga/2004/30/section/47

Oxford University Gazette, Supplement (2) to N. 4787. “Policy on Human Remains held by the University of Oxford’s Museums”. Wednesday, 15 November 2006. Available at: http://www.ox.ac.uk/gazette/2006-7/supps/2_4787.pdf

United States

CPIA as Public Law 97-446, or as 19 U.S.C. 2601 et seq. United States, Department of State. Bureau of Education and Cultural Affairs. "Cultural Heritage Center". Available at: http://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/background#sthash.fxGHwuY2.dpuf

U.S. Department of Interior. "Native American Graves Protection and Repatriation Act". Available at: http://www.nps.gov/nagpra/mandates/25usc3001etseq.htm

United States, Department of State, Bureau of Educational and Cultural Affairs, "Italy. Cultural Property Agreement with the U.S.". Available at: http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/bilateral-agreements/italy

Website sources

Art & Antiques Unit. Scotland Yard Metropolitan Police. Available at: http://content.met.police.uk/Site/artandantiques

Association of International Antiquities Dealers. Code of Conduct,. Available at: http://aiad.org.uk/about-us/code-of-conduct/

"Blue Shields".Available at: http://www.ancbs.org/cms/index.php/en/home

CINOA. Code of Ethics, http://www.cinoa.org/page/2273

FBI Art Theft Program. Available at: http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft

Federal Office of Police in Switzerland. Available at: http://www.fedpol.admin.ch/content/fedpol/en/home/themen/sicherheit/polizeistruktur/polizeiarbeit_auf.html

ICCROM ."ICCROM and the Conservation of Cultural Heritage, A History of the Organization's First 50 Years, 1959-2009". Available at: http://www.iccrom.org/pdf/ICCROM_ICS11_History_en.pdf

ICOMOS. "Executive Committee". Available at: http://www.icomos.org/en/about-icomos/governance/general-information-about-the-executive-committee

IFAR. Available at: http://www.ifar.org/home.php

IFAR, "Provenance Guide". Available at: http://www.ifar.org/provenance_guide.php

International Association of Dealers in Ancient Art, http://www.iadaa.org/en/about-us

International Union for Conservation of Nature. Available at: http://www.iucn.org/

Italia Nostra, http://www.italianostra.org/?page_id=4

IUNC. Commissions. Available at: http://www.iucn.org/about/union/commissions/

La Direction de la lutte contre la criminalité contre les biens (DJB). WBelgian Police official website", available at: http://www.polfed-fedpol.be/org/org_dgj_djb_fr.php#djb04

L'office central de lutte contre le trafic de biens culturels. Available at: http://www.police-nationale.interieur.gouv.fr/Organisation/Direction-Centrale-de-la-Police-Judiciaire/Lutte-contre-la-criminalite-organisee/Office-central-de-lutte-contre-le-trafic-de-biens-culturels

Memorandum of Understanding between the World Customs Organization (WCO) and the International Council of Museums on Combating the Illicit Traffic in Cultural Property. http://people.exeter.ac.uk/watupman/undergrad/serena/website/pages/icom.html

Safercorner, "Saving Antiquities for Everyone, Italy and the Met: Three Decades of Controversy Finally Resolved?", December 9, 2006. Available at: http://www.savingantiquities.org/italy-and-the-met/

Skidegate Repatriation & Cultural Committee, "End of Mourning Ceremony". Available at: http://www.repatriation.ca/Pages/End%20of%20Mourning.html

Online official documents

American Alliance of Museums (AAM). "Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era". Available at: http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era.

American Association of Museum Directors (AAMD). "Guidelines. Introduction to the Revision to the 2008 Guidelines on the Acquisition of Archeological Material and Ancient Art", January 29, 2013 Revision. Available at: https://aamd.org/sites/default/files/document/Guidelines%20on%20the%20Acquisition%20of%20Archaeological%20Material%20and%20Ancient%20Art%20revised%202013_0.pdf

American Association of Museum Directors. (AAMD). "Final Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933.1945)". Available at: https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.docx,

CECOJI-CNRS. "Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Final Report". Available at: http://ec.europa.eu/dgs/home-affairs/doc_centre/crime/docs/report_trafficking_in_cultural_goods_en.pdf

Comune di Cerveteri, "Eufronio racconta la Guerra di Troia". Press release. Available at: http://www.comune.cerveteri.rm.it/comunichiamo/comunicati-stampa/eufronio-racconta-la-guerra-di-troia

Deregibus, Alberto. “Fight against illicit traffic of cultural property in South-East Europe”, Gazientep, Turkey, 19-21 November 2012. Available at: http://www.slideshare.net/UNESCOVENICE/alberto-deregibus-the-international-code-of-ethics-for-dealers-in-cultural-property

Executive Summary of the Law Library of Congress of Australia on the” Repatriation of Historic Human Remains”(July 2009). Available at: http://www.loc.gov/law/help/repatriation_%20final_%20rpt.pdf

ICOM. “2013 ICOM Code of Ethics“.Available at: http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf

ICOM, “ICOM, Red List of Cambodian Antiquities at Risk. Fighting the illicit traffic of cultural goods”. Available at: http://icom.museum/uploads/tx_hpoindexbdd/RedList_Cambodia_PressFile.pdf

ICOM-WIPO. “ICOM-WIPO Art and Cultural Heritage Mediation”. Available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/

ICOM-WIPO. “Recommended ICOM-WIPO mediation contract clause and submission agreement”. Available at: http://icom.museum/programmes/art-and-cultural-heritage-mediation/recommended-icom-wipo-mediation-contract-clause-and-submission-agreement/

Kris K. Hirst, “Provenience, Provenance, Let's Call the Whole Thing Off”, May 16, 2006. Available at: http://archeology.about.com/b/2006/05/16/provenience-provenance-lets-call-the-whole-thing-off.htm

Melbourne Policy Library, University of Melbourne. Available at: http://policy.unimelb.edu.au/MPF1226

Metropolitan Museum of Art, New York. “Guidelines for all Acquisitions. Collections Management Policy”. Last Revised March 13, 2012. Available at: http://www.metmuseum.org/about-the-museum/collections-management-policy#acquisitions

Morris, Dune. “Arbitration, Mediation and Alternative Dispute Resolution”, Available at: http://www.duanemorris.com/practices/arbitration_mediation_adr.html

Museum of Fine Arts, Boston, “Acquisition and Provenance Policy” “Provenance - For Archaeological Materials and Ancient Art”. Available at: https://www.mfa.org/collections/art-past/acquisitions-and-provenance-policy

Museum of Fine Arts, Boston, “Italian Ministry of Culture Agreement”. Available at: http://www.mfa.org/collections/art-past/italian-ministry-culture-agreement

Press Release, “Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome”, September 25, 2007. Available at: http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html

Prott, Lyndel V. “Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption”, Background paper for participants in the meeting “The fight against the illicit trafficking of cultural objects. The 1970 convention: past and future.” Paris, UNESCO Headquarters, 15-16 March 2011. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the1970%20convention.pdf

Submission for the National Cultural Policy Discussion Paper, “Executive summary of the international workshop, ‘Illicit traffic in cultural objects: Law, Ethics and the Realities’”, University of Western Australia, October 24, 2011. Available at: http://creativeaustralia.arts.gov.au/assets/Submission%20407_Redacted.pdf

The Metropolitan Museum of Art, An Overview of the Museum. Available at: http://www.metmuseum.org/about-the-museum/press-room/general-information/2010/an-overview-of-the-museum

The J. Paul Getty Trust Press Release. “Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome, September 25, 2007”. Available at: http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html

The J. Paul Getty Museum.”Policy for Acquisitions, approved by the Board of Trustees on October 23, 2006J. Paul Getty Museum. “Conditions of Acquisition”. Available at: http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf

The J. Paul Getty Trust Press Release, “Statement about the Ruling in Pesaro on the Getty Bronze”, February 11, 2010, accessed May 25, 2012. Available at: http://www.getty.edu/news/press/center/pesaro.html

UNCITRAL. “1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the “New York Convention”. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

UNESCO, “Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation”. Available at: http://portal.unesco.org/culture/en/ev.phpURL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO. “Modalities of requesting return or restitution”. Available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=36196&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO. “Recent examples of successful operations of cultural property restitutions in the world”. Available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=36505&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNESCO. “Records of the General Conference, General Conference, 33rd Session, October 3-21, 2005 (33 C/Resolution 44)”. Available at: http://unesdoc.unesco.org/images/0014/001428/142825E.pdf

UNESCO, “Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expression”, http://unesdoc.unesco.org/images/0014/001495/149502e.pdf

UNIDROIT, “Status”. Available at: http://www.unidroit.org/status-cp

United Nations Conference on Environment and Development (UNCED), (Rio de Janeiro, 1992), Johannesburg Summit 2002”. Available at: http://www.un.org/jsummit/html/basic_info/basicinfo.html

United Nations Conference on Sustainable Development, Rio+20. Available at: http://sustainabledevelopment.un.org/rio20.html

United Nations. “History of the United Nations”. Available at: https://www.un.org/en/aboutun/history/

Washington Conference on Holocaust-Era Assets, available at: http://fcit.usf.edu/holocaust/resource/assets/index.HTM (accessed February 5, 2014).

“WIPO ADR Arbitration and Mediation Center website”. Available at: http://www.wipo.int/amc/en/

WIPO. “Customary Law and the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge”, WIPO Revised Paper (December 2006), 11. Available at: http://www.wipo.int/export/sites/tk/en/consultations/customary_law/issues-revised.pdf

World Bank International Finance Corporation “Performance Standard 7, Indigenous Peoples”, (1 January 2012). Available at: http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES

World Conference against Racism, "Doctrines of Dispossession" – Racism against Indigenous peoples. Available at: http://www.un.org/WCAR/e-kit/indigenous.htm

Academic Articles Published in Online Platforms

Bandle, Anne Laure, and Raphael Contel, Marc-André Renold, “Case Ancient Manuscripts and Globe – Saint-Gall and Zurich,” Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

Chechi, Alessandro, and Raphael Contel, Marc-André Renold, “Case Victorious Youth - Italy v. J. Paul Getty Museum”. Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011.

Fincham, Derek. “Transnational Forfeiture of the “Getty” Bronze”, (work in progress), (August 22, 2013). Available at SSRN: http://ssrn.com/abstract=2238204 or http://dx.doi.org/10.2139/ssrn.2238204

Soldan, Giulia, and Raphael Contel, Alessandro Chechi, Case 13 Antiquities – Italy and Boston Museum of Fine Arts, ArThemis, Art-Law Center, University of Geneva, April 2012. Available at: https://plone.unige.ch/art-adr/cases-affaires/13-antiquities-2013-italy-and-boston-museum-of-fine-arts-1/case-note-13-antiquities-italy-and-boston-museum-of-fine-arts

Articles in a Newspaper or popular magazine

Adam, Georgina. BBC, Culture, The Art Market, "Is Art a good investment?". November 4, 2013. Available at: http://www.bbc.com/culture/story/20131104-is-art-a-good-investment

Albertson, Lynda. CEO, ARCA, "OpEd: Italy's Corte Suprema di Cassazione and the Getty Bronze: What will be the fate of the Fano Athlete?", February 26, 2014, ARCA. Available at: http://art-crime.blogspot.it/2014/02/italys-corte-suprema-di-cassazione-and.html

Bailey, Martin. "Benevento Missal returns home". *The Art Newspaper*. November 24, 2010. Available at: http://www.theartnewspaper.com/articles/Benevento+Missal+returns+home/21936

Bailey, Martin. "How The Art Newspaper changed the law". *The Art Newspaper*. November 10, 2010, available at: http://www.theartnewspaper.com/articles/How-i-The-Art-Newspaper-i-changed-the-law/21774

Bailey, Martin. "Natural History Museum Returns Aboriginal Remains". *The Art Newspaper* 818. London, June 1, 2007, 1.

Bernman, Russell. "Met Chief to Discuss "Hot Pot" in Rome", The New York Sun 1, November 11, 2005. Available at: http://www.nysun.com/new-york/met-chief-to-discuss-hot-pot-in-rome/22903/

Blystone, Richard. "Scotland's 'Stone of Scone' finds its way home".CNN. Available at: http://edition.cnn.com/WORLD/9611/15/stone.of.scone/

Cliatt, Cass."Princeton University Art Museum and Italy sign agreement over antiquities". October 30, 2007, http://www.princeton.edu/main/news/archive/S19/37/62Q26/index.xml

CBS, "Dallas Museum Of Art Returns Antiquities To Italy", October 31, 2013. Available at: http://dfw.cbslocal.com/2013/10/31/dallas-museum-of-art-returns-antiquities-to-italy/

Corio, Massimo."L'affaire dei resti umani nelle collezioni etnografiche". *Italia Arte*. December 1, 2010. Available at: http://www.legaleuro.eu/it/blog/index.php?id=nd0abcde

Eakin, Hugh and Elisabetta Povoledo. "Met's Fears on Looted Antiquities Are Not New". *New York Times E1*, February 20, 2006.

Fantauzzi, Paolo."Ridateci l'aborigeno", *L'Espresso*, September 9, 2010.
Hoving, Thomas. 'Super art gems of New York City: The "Hot Pot" III – The shit hits the fan'", 2001, artnet.com. Available at: http://www.artnet.com/magazine/features/hoving/hoving7-5-01.asp

Felch, Jason "A twist in Getty Museum's Italian court saga. Documents show that billionaire J. Paul Getty had legal concerns about a statue that his museum ended up purchasing after his death. It became known as the Getty Bronze". *Los Angeles Times*, January 14, 2010. Available at: http://articles.latimes.com/2010/jan/14/local/la-me-getty14-2010jan14

Felch, Jason. "Robert Hecht Jr. Dies at 92". *Los Angeles Times*, February 9, 2012. Available at: http://articles.latimes.com/2012/feb/09/local/la-me-robert-hecht-20120209

Felch, Jason and Ralph Frammolino. 'Italy says it's proven vase at Met was looted'. *Los Angeles Times*, October 28, 2005. Available at: http://articles.latimes.com/2005/oct/28/local/me-met28

Fenici, Cinzia."La confisca della statua denominata "Atleta Vittorioso". *Il Sole 24 ore*, April 26, 2010. Available at:

http://fiere24.ilsole24ore.com/content/law24/penale/primiPiani/2010/04/la-confisca-della-statua-denominata--atleta-vittorioso-.html

Gage, Nicholas. 'Dillon stands by vase'. *New York Times*, June27, 1973. Available at: http://graphics8.nytimes.com/packages/pdf/arts/Dillonstands.pdf

Gage, Nicholas. 'Farmhand tells of finding Met's vase in Italian tomb'. *New York Times*, February 25, 1973.

Gage, Nicholas "How the Metropolitan Acquired 'The Finest Greek Vase There Is'." *The New York Times*, February 19, 1973.

Gage, Nicholas. "Met's Evidence Backs Vase Dillon Says". *The New York Times*, June 27, 1973.

"Giallo archeologico", *Il Tirreno*, November 20, 2007. Available at: http://ricerca.gelocal.it/iltirreno/archivio/iltirreno/2007/11/20/LT4PO_LT403.html
Lufkin, Martha. "Greek Bronze Will Stay in the Getty Villa". *The Art Newspaper.* April 14, 2010. http://www.theartnewspaper.com/articles/Greek-bronze-will-stay-in-the-Getty-Villa%20/20504

Hess, John. "The Vase: Not Easy To Piece Together". *The New York Times*, February 25, 1973.

Horowitz, Jason. "How Hot Vase It?" *The New York Observer*, February 20, 2006. Available at: http://observer.com/2006/02/how-hot-vase-it/

"Is Art a good investment?" *BBC. Culture, The Art Market*. November 4, 2013. Available at: http://www.bbc.com/culture/story/20131104-is-art-a-good-investment

Isman, Fabio and Gareth Harris. "Smuggler's Final Appeal Fails". *The Art Newspaper*. March 2012.

Kennedy, Randy and Eakin, Hugh. 'Met agrees tentatively to return vase in '08', *New York Times*, 4 February 2006.

Kennedy, Randy. "Collecting Antiquities, Cautiously, at the Getty", *The New York Times*, June 26, 2007.

Le Figaro, AFP, "La France va restituer des têtes maories". Available at: http://www.lefigaro.fr/flash-actu/2010/04/29/97001-20100429FILWWW00470-la-france-va-restituer-des-tetes-maories.ph

Liberation, D.P.O. ,"Rouen restitue une tête maorie", May 9, 2010. Available at: http://www.liberation.fr/culture/01012336306-rouen-restitue-une-tete-maorie

"Maori artefacts will be returned". *BBC News*. 18 July 2006. Available at: http://news.bbc.co.uk/2/hi/uk_news/scotland/5189490.stm

"Maori heads will return to NZ", *BBC News*, 24 June 2004. Available at: http://news.bbc.co.uk/2/hi/uk_news/scotland/3834501.stm

Mellow, James. 'A new (6th Century B.C.) Greek vase for New York'. *New York Times Magazine,* November 12, 1972, 42-116.

Miller, Michele A. "Editor, Old World Archaeology". Available at:

http://www.athenapub.com/15-intro-looting.htm
Povoledo, Elisabetta. 'Ancient vase comes home to a hero's welcome'. *New York Times***.** January 19, 2008. Available at:
http://www.nytimes.com/2008/01/19/arts/design/19bowl.html?_r=1&ref=euphronioskrater

Povoledo, Elisabetta. "Boston Museum Returns 13 Ancient Works to Italy," *The New York Times*, September 29, 2006. Available at: http://www.nytimes.com/2006/09/29/arts/design/29mfa.html

Povoledo, Elisabetta. "Italy and U.S. Sign Antiquities Accord". *The New York Times*. February 22, 2006, accessed August 17, 2011. Available at:
http://www.nytimes.com/2006/02/22/arts/design/22anti.html?_r=1&pagewanted=print

Povoledo, Elisabetta." Pact Will Relocate Artifacts to Italy From Cleveland". *The New York Times*. November 19, 2008. http://www.nytimes.com/2008/11/20/arts/design/20arti.html?_r=0

Povoledo, Elisabetta, 'Repatriated art in Rome'. *New York Times*, 29 March 2008. Available at:
http://www.nytimes.com/2008/03/29/arts/29arts-REPATRIATEDA_BRF.html?pagewanted=print

Ritter, Karl. "Swedish museum to send a stolen generation home", theage.com.au. November 28, 2003. Available at:
http://www.theage.com.au/articles/2003/11/27/1069825923163.html?from=storyrhs

Shirey, David L. "Greek Bronze for Sale for $3.5 Million," The New York Times. 10 March 1973. Available at:
http://news.google.com/newspapers?nid=2457&dat=19730319&id=LYIzAAAAIBAJ&sjid=azgHAAAAIBAJ&pg=753,1252248

The New York Times, "MET MUSEUM SIGNS ACCORD WITH ITALY". May 7, 1982. Available at: http://www.nytimes.com/1982/05/07/arts/met-museum-signs-accord-with-italy.html

Van Gelder, Lawrence. 'Odyssey of the vase: Contradictions and conflicts'. *New York Times*, 25 February 1973.

Whitman, Alden. "J. Paul Getty Dead at 83; Amassed Billions From Oil". *New York Times.* June 6, 1976. Available at: https://www.nytimes.com/learning/general/onthisday/bday/1215.html

Thesis or dissertations

Spagnoli, Simona."Resolving International Disputes Over Cultural Property: The Case of Italy v. J. Paul Getty Museum". Thesis Submitted to the Faculty of the Department of Arts Administration In Partial Fulfilment of the Requirements for the Degree of Master of Arts Savannah College of Art and Design, March 2011.

Paper Presented at a meeting or conference

Truscott, Marilyn. "Repatriation of Indigenous cultural property (2006)". Paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra: Available at:

http://www.environment.gov.au/soe/2006/publications/emerging/repatriation/pubs/repatriation.pdf

Richardson, Lori. “The Repatriation of Australian Indigenous Ancestral Remains”. Paper presented at the Seminar: “La Restitutzione dei Resti Umani degli Antichi Aborigeni”. October 31, 2007. “Pigorini” Museum of Rome.

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"*Senti il dolore si scioglie nel tempo*
Che scorre e che scivola via
Non resterò qui a guardare
Ho già iniziato a viaggiare"
LJC

Rome, April 2014
Gabriella Serino