Cross-border title claims to cultural objects: property or heritage?

Campfens, E.

1 Introduction

1 INTRODUCTION

In 1971, Norton Simon, founder of the Norton Simon Museum of Arts in California, bought two paintings by Lucas Cranach the Elder. In 2007, the heirs of the Dutch Jewish art dealer Jacques Goudstikker filed a lawsuit claiming restitution of these two paintings in the US. They had been part of Goudstikker's trade stock that Nazi official Hermann Göring had acquired in a forced sale in 1940, days after Goudstikker had managed to escape the country. This marked the beginning of twelve years of litigation that eventually was halted and resolved in the US Supreme Court in 2019.[1] However, the legal saga took a new turn in October 2020. This time, the Ukrainian government considered filing a claim to the two Cranachs.[2] In the 1920s, they appear to have been confiscated from a Ukrainian monastery by the Soviet authorities, who sold them at the (infamous) 1931 Berlin Lepke auction to Goudstikker, who subsequently lost them to Göring.[3] The paintings then passed through other hands – including the Dutch government after the Second World War – before making it to California in 1971. In a nutshell, this case highlights the complexities of the field of looted art and a problem this dissertation aims to address: what to do if more than one party claims rights over the same cultural object? Is this merely a matter of ownership and property law? The case may seem extraordinary, but many such stories exist. What to think for example of the Benin Bronze statue brutally pillaged by British colonial forces at the close of the 19th century and acquired by a German Jewish collector shortly after, only to be auctioned at a forced Nazi sale in the 1930s?[4] The 'provenance' or ownership history of cultural objects is an endless source of history and injustice. But this dissertation does not focus on historical injustices or reparation schemes. Rather, it is a quest for standards that define the legal status

1 In the sense that the Supreme Court denied to review the case after earlier rulings in favour of the museum. *Von Saher v Norton Simon Museum of Art at Pasadena* (2019) 587 U.S. 18-1057.

2 M. Baranovskaya and O. Klymchuck in 'Ukraine seeks to bring home Renaissance artworks sold under false pretenses' (27 Oct. 2020) *Deutsche Welle*.

3 See Chapter 3, section 1.3.

4 The statue surfaced at an auction house in Germany where a financial settlement was reached between the new owner and the Jewish collector's successors in rights, see <https://www.tribal-art-auktion.de/en/news-and-events/news-detail/revealed-royal-benin-head-from-jewish-art-collection/>.

of cultural objects that were lost in one country and, over time, found their way to another country.

It consists of seven chapters, five of which have been published in journals on international (art and heritage) law. In addition to these publications, the dissertation includes this introduction and concluding observations. The previously published chapters can be considered both separately and as a whole. Their overarching themes and coherence will be clarified in this introductory chapter.

The persistent gap between rhetoric on the need to return looted art to its 'rightful owners' and the legal reality prompted and served as inspiration for this doctoral project.[5] Whilst many people believe that restitution claims in relation to Nazi-looted art, colonial booty, and more recently looted antiquities need to be honoured, often positive private law does not support such claims at all. Although international treaties clearly set the norm that looted cultural objects should be returned, these do not apply to losses that predate their adoption and, besides, depend on implementation on the national level to sort effect. This all adds up to a highly fragmented legal framework that often results in the inadmissibility and denial of claims, most notably in civil law countries. This may be fair in a specific case, given the many interests at stake, but it also seems at odds with today's perception of justice. Moreover, a legal framework that condones the 'laundering' of stolen cultural objects undermines international policy that aims to curb the illicit trade in looted cultural objects.

For the category of Nazi-looted art, an ethical model was developed at the end of the 20th century: claims by victims of Nazi persecution or their heirs to family heirlooms were to be assessed as 'moral claims' through extra-legal procedures, to circumvent obstacles in the law.[6] Besides Nazi-looted art, such an ethical model is increasingly promoted for other categories of looted art as well, such as colonial takings.[7] It would imply that this field does not rely on the rule of law, but on morality instead. From a legal-theoretical perspective, this raises a fundamental question: if we believe that the application of the law leads to injustice, is that law (or the way it is applied) not due for a change? Might the increase of 'soft law' and other informal regulations in this field be a sign of emerging law?[8]

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5 'Looting' refers to various types of misappropriation. See Chapter 1, section 4.

6 On the basis of the so-called 'Washington Principles', adopted by over 40 governments in 1998. Washington Conference Principles on Nazi-Confiscated Art (US State Department 1999), in J.D. Bindenagel (ed.) *Washington Conference on Holocaust-Era Assets*, 971-972. See Chapter 4.

7 E.g. Van Beurden in his doctoral thesis proposes a translation of the Washington Principles for colonial takings. Van Beurden JM, *Treasures in Trusted Hands: Negotiating the Future of Colonial Cultural Objects* (2017) Sidestone Press.

8 The term 'soft law' covers a variety of not directly binding yet authorative legal instruments, as opposed to binding 'hard law'. See Chapter 1, section 2.4.

This study explores how cross-border claims to cultural objects fit in the wider legal framework, and where blind spots or clashes of norms occur. The aim is to identify new directions that can help develop this field further. To that end, the five substantive chapters of the dissertation analyse the relevant 'hard' as well as the 'soft' law instruments and international practice from different perspectives on the basis of various case studies. This case-based approach was chosen to deal with the problem that the legal framework is highly fragmented: an approach from one specific field of law or one category of contested cultural objects would not provide the intended overview. Whilst the category of Nazi-looted art will be an important case study on account of its long-standing international practice, other categories such as colonial booty and more recently lost antiquities, will also be addressed. In spite of their differences, they have important elements in common. The main commonality identified in this dissertation is that the intangible heritage value of cultural objects, as symbols of an identity, often lies at the core of claims whilst adequate legal tools to address such values are lacking.

The present chapter serves as an introduction. The next section provides an outline of the legal background and identifies problems in need of further analysis. This is followed by sections on the central research question, on issues of terminology, on the methodology, and a final section on the structure of the dissertation. The annex to this chapter provides an overview of the publication status of the five articles that make up the body of this dissertation.

2 Background to the research

The types of cases that are addressed in the five substantive chapters of this dissertation are: private title claims (Chapter 2); interstate return claims (Chapter 3); claims to Nazi-looted art (Chapter 4); claims to colonial takings (Chapter 5); and claims to more recently looted antiquities (Chapter 6). This represents a wide array of cases that may be perceived as fundamentally different given that the circumstances of the loss vary. Indeed, different rules apply to historical losses or present-day losses, mostly because international treaties in this field do not apply retro-actively. Yet, the protection of cultural objects, and their preferential status under the law, did not start or end with these treaties. Moreover, even if the loss of an object itself – and a claim based on that loss – is not covered by 'hard' law rules that support claims to certain present-day takings, increasingly soft law *does* support such claims. Besides, the possession of 'tainted' cultural objects – i.e. objects that do not have a 'clean' ownership history due to an irregular loss in the past – is increasingly being condemned, which implies a shift in focus from the injustice of a loss in the past to the 'lawful' possession of such objects today. At times, this censure is more vehement for historical losses than when it concerns recently looted cultural objects that *are* covered by international treaties.

From that perspective, I will argue that a common normative framework to the various categories is needed and already exists to a certain degree, even though this is not (yet) a homogeneous body of binding law. This section provides a survey of this common background, and identifies problems that arise in the law on various levels.

2.1 Competing interests and fragmentation of the law

Cultural objects have a multifaceted nature. They can be seen as possessions and, as such, can be owned, traded, and are subject to property law regimes. The commodification of cultural objects may be as old as time itself, and is expanding as a result of globalisation.[9] Yet, it is their intangible cultural or heritage value that sets these objects apart from other goods. That intangible value is by no means a static notion: an artefact may be valued by the general public because of its (art) historical or scientific value, but at the same time it may be of spiritual importance to a specific community, symbolic of the cultural identity of a people or nation, or it may be a special family heirloom. This wide variety of interests means that many fields of law interact and sometimes clash.[10] Whereas, in broad terms, private law norms address cultural object as possessions, public law norms address the intangible cultural and heritage interests at stake.

Another commonality, closely related to the former, is that the relevant facts in cases that concern contested cultural objects are often spread out over a period of many years and can involve multiple jurisdictions. Laws and regulations that determine their legal status, however, differ widely in time and place. This means that norms are to be found on many levels: international and national, private and public, hard law as well as soft law norms, they may all influence that legal status. Fragmentation of the law lies at the core of what causes disputes over contested cultural objects to be so complex and unpredictable.

This dissertation focuses on international standards, but the interrelationship and interaction with domestic law will prove crucial. For example, the specific function of an object may have an immediate effect on that object's legal status under national law: as *res extra commercium* a cultural object may be inalienable.[11] In most countries archaeological objects, elements of monu-

9 This commodification in its illicit form has recently reached alarming levels, also as a result of possibilities for the (anonymous) trade over the internet. The illicit flow of cultural goods is believed by UNESCO to be the third largest in terms of volume, after drugs and arms, operating largely online via platforms. E.g. E. Ottone Ramirez, Editorial (October 2020) The UNESCO Courier.

10 For an in-depth analysis, Chapter 6, section 2.

11 In some countries all public museum collections are inalienable, e.g. in France, this is codified in Art. L451-5 *Code du patrimoine*.

ments, or religious objects are inalienable. Furthermore, indigenous peoples may perceive certain cultural goods not as objects at all – but perhaps as incarnated ancestors, not susceptible to ownership.[12] Nevertheless, once it is in another cultural setting and in another jurisdiction such an object may well be classified as any other good.

Another reason that national (private) law is often decisive, is that litigation over contested cultural objects generally takes place at the national level in the country where an object is located, at some distance from international law that oversees the protection of cultural heritage of all people. In fact, the only international body that was envisaged to have a role in this field,[13] the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (the ICPRCP), is solely accessible to states and in practice mainly acts as a discussion forum for governments, not as a forum where disputes are resolved.[14]

The distinction between the model for claims in a private law approach and the model under public international law, as introduced below, will be used as a basis to explore the normative framework.

2.2 A private law approach: Lost possessions

Private law is the field that traditionally arranges title disputes over lost possessions. Laws on ownership and property, however, differ widely per jurisdiction, with many variations on the theme of how ownership over a (stolen) good can be transferred to a new possessor. Common law countries accord relatively strong rights to the dispossessed former owner on the basis of the principle that a thief cannot convey good title (the *nemo dat quod non habet* rule), whereas in civil law countries the position of a new possessor is stronger and title over stolen goods can pass after an acquisition in good faith or simply after the lapse of time (acquisitive perscription).[15] In spite of a

12 Futher to be discussed in Chapters 4 and 6.

13 None of the UNESCO Conventions were accompanied with the setting up of a dispute settlement system.

14 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (adopted October-November 1978, amended 2005) UNESCO Doc CLT/CH/INS-2005/21 (ICPRCP). The ICPRCP was set up in 1978 to address issues *not* arranged for by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 UNESCO Convention). See Chapter 5, section 4.2.

15 Chapter 2, section 2.2. For a comparative analysis (in Dutch) see L.P.W. van Vliet 'Verjaring en Kunstwerken' in MA Loth and LPW van Vliet 'Recht over tijd. Hoever reikt het privaatrecht in het verleden?' (2018) Preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Zutphen 2018.

choice on the international level for the model where ownership over stolen or looted cultural objects can*not* easily pass, this distinction between national legal systems still proves highly relevant for restitution claims. According to private international law (conflict of law) rules in the majority of states, the law of the place where a property is located determines proprietary rights in movable goods (the *lex rei sitae*).[16] In civil law countries that may well favour new possessors.

2.2.1 The problem illustrated

The opposite outcomes reached in very similar Dutch and UK cases regarding Second World War looting may serve as an example. Both cases concerned a title claim with regard to paintings looted in the aftermath of the Second World War from Germany, probably by the Red Army, and both paintings surfaced at auctions in the late 1990s. In both cases, the dispossessed owners – in the Dutch case the state Sachsen and in the English case the city of Gotha – filed claims and both claims were decided in 1998. Whereas in the Netherlands, the *Hoge Raad* (the Dutch Supreme Court) denied the claim to the painting *Cloister in Landscape* by Jan van der Heyden, in its *Land Sachsen* ruling, the High Court of England and Wales in the same year upheld the claim to the painting *The Holy Family* by Joachim Wtewael in the *City of Gotha* case.[17] In the Dutch ruling, the Court held that the absolute limitation period for claims under the applicable Dutch law (30 years at the time) runs from the moment of the loss, irrespective of the good or bad faith of the present possessor. Legal security, in the Court's view, could neither be set aside by the fact that the deprived owner did not know where its painting was located, nor by the possible lack of good faith of a new possessor.[18] The English Court, however, upheld the claim under application of German law. Illustrative for the different views on 'justice' in this regard, is that in the English case, Judge Moses J. observed that he would have invoked the public order exception if the application of German law had necessitated a ruling against the interests of the

16 The domicile of a new possessor or where the acquisition took place (being usually that location). See, for example the German ruling *Oberlandesgericht Frankfurt am Main* of 4 February 2013 (OLG *Frankfurt*, Urt. v. 04.02.2013 - 16 U 161/11, holding that acquisitive prescription as arranged for in German private law governed the matter of ownership of antiquities in possession in Germany and, thus, the lawful ownership title of the new possessor, a priori, stands in the way of the Turkish return claim.

17 *Land Sachsen* (1998) Supreme Court of the Netherlands, ECLI:NL:HR:1998:ZC2644; *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance SA* (1998) No. 1993 C 3428 (QB).

18 Ibid. under 3.5 and 3.6. On Dutch property law see, e.g., A.F. Salomon 'National Report on the Transfer of Ownership of Movables in The Netherlands', in W. Faber, B. Lurger (eds) National Reports on the Transfer of Movables in Europe, Vol. 6 (Sellier, Munich, 2011), p. 17. See also Chapter 2, section 2.2; Chapter 3 section 4.1.1; Chapter 6 section 1; and Chapter 7, section 2.1, n. 1.

deprived owner and in favour of a possessor who was not in good faith.[19] The same contrast surfaces in two rulings that regard Cypriot church relics that were looted in the 1970s. In the US *Goldberg* case, the application of US (Indiana) law to the question of ownership resulted in restitution of the artefacts to the Church,[20] whilst in the Dutch *Lans* case the claim was denied under application of Dutch civil law and the collector was deemed the lawful owner due to acquisitive perscription.[21] As an aside: this controversial outcome – also in the light of the obligations of the Dutch state under the First Protocol to the 1954 UNESCO Convention –[22] was afterwards corrected by acquisition of the icons by the Dutch state and their return to Cyprus.[23]

Arguably, today such an outcome where even a possessor who was (or could be) aware of the tainted provenance upon acquisition gains lawful ownership title, could (or should) be different. For the specific Dutch situation, it is relevant that courts in recent years have developed some 'escape routes' for manifest unjust effects of time limitations.[24] Amongst those is the possibility to regain lost property from a bad faith new possessor (who became the owner due to acquisitive prescription), by awarding compensation of damages in the form of restitution of the property.[25] This would open up the door to claimants to regain their lost artefacts also beyond the (very limited) categories of cultural objects for which the Dutch law already provides exceptions to

19 As a 'framework for further debate' he notes in this respect that '[i]t does seem […] possible to identify, […], a public policy in England that time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith'. In the end, there was no need to invoke the public order exception after it was established the German 30-years' limitation period (of para 221 BGB) had not expired at the time of the claim. *City of Gotha* case, II.4.

20 *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.* - 917 F.2d 278 (7th Cir. 1990).

21 *Autocephalous Greek Orthodox Church in Cyprus v. Lans,* Rechtbank (*First Instance Ct)* Rotterdam, 4 February 1999 (NJ 1999, 37)*; Autocephalous Greek Orthodox Church in Cyprus v. Lans,* Hof *(*Ct of Appeal) The Hague, 7 March 2002. NIPR (2002) No 248. Discussion follows in Chapter 3, section 4.1.1.

22 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 and First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358.

23 Discussion follows in Chapter 3, section 4.1.1.

24 In certain (serious) cases reliance on limitation periods to deny a (tort) claim was held unreasonable and unjust, e.g. *Plaintifs v. the Dutch State*, Hof (Ct of Appeal) the Hague, 1 October 2019 (ECLI:NL:GHDHA:2019:2524) concerning a claim for compensation for family of Indonesian men executed during colonial actions in Indonesia in 1947. Ownerhsip claims, however, concern rights *in rem*.

25 *Municipality Heusden v. Plaintifs*, Supreme Court of the Netherlands 24 Feburary 2017 (ECLI: NL:HR:2017:309). I.e. a claim for an unlawful act (ex art 6:162 Dutch Civil Code) after ownership passed duet o acquisitive prescription (art 3:305 Dutch Civil Code).

acquisitive prescription.[26] The question this dissertation should address is whether, from the patchwork of regulations that typifies the legal framework today, general (international law) standards on the lawful possession of looted art may be deducted. If so, domestic courts might apply such standards, also if these are not directly binding law in the specific jurisdiction, by making use of open norms that exist in all legal systems such as 'reasonableness and fairness', 'public policy', 'moral standards of the trade' and the like.[27]

2.2.2 Attempts at harmonisation

Although the examples given above may give the impression that in common law jurisdictions claimants stand good chances to reclaim their lost artefacts, many other obstacles exist in a private law approach to regain ownership over looted cultural objects. These are caused by the fact that, as a general rule, foreign public law will not be applied in another jurisdiction. Export restrictions or other public law instruments that render cultural objects inalienable, as touched upon above, however often form the basis of the unlawfulness of a taking in the country of origin.[28] Another obstacle is that foreign forms of (collective) ownership may not be acknowledged by the private law system of the country where the object ended up.[29]

Such complications were addressed in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Object that aims at harmonisation of these issues in the private law of member states.[30] It introduces a model where ownership title over objects *cannot* (easily) pass if these were stolen or unlaw-

26 Pursuant to Art. 3:86a; 3:86b; 3:87a; 3:310a; 3:310b, and 3:310c of the Dutch Civil Code, exceptions apply if it regards (European) cultural objects claimed on the basis of (i) the EU Directive of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast) (OJ 2014, L 159); (ii) Dutch cultural heritage that is protected from export from the Netherlands under the Heritage Act (Erfgoedwet); or (iii) objects claimed by States Parties under the 1970 UNESCO Convention lost *after* the implementation of the 1970 Convention in 2009. See also E. Campfens, 'Bridging the Gap between Ethics and Law: The Dutch Framework for Nazi-looted Art' (2020) 25 *Art Antiquity Law* 1, p. 13-16.

27 Discussion follows in Chapter 6 section 1, sections 3.1.2 and 5.4; and Chapter 7, section 2.1.

28 The US case *United States v. McClain* 593 F2d 658 (at 670) held that the Mexican ownership claim, based on its heritage laws, was not expressed 'with sufficient clarity to survive translation into terms understandable and binding upon American citizens'; see also the UK ruling *Attorney General of New Zealand v Ortiz* (1982) 3 All ER 432, holding the denial of New Zealand's claim to (protected) Maori carvings that were acquired in the US by Ortiz.

29 For a Dutch ruling, *Village Communities of Yangchun and Dongpu v Van Overveem, Design & Consultancy BV* (Judgment of 12 December 2018) Amsterdam District Court, No. ECLI:NL:RBAMS:2018:8919; a French ruling: *Association Survival International France v SARL Néret-Minet Tessier Sarrou* (2013) *Tribunal de Grande Instance de Paris*, No RG 13/52880 BF/No 1. See Chapter 2, section 2 and Chapter 6, section 1.

30 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 7 July 1998) 2421 UNTS 457 (1995 UNIDROIT Convention).

fully taken – according to the country of origin's laws – and the introduction of extended limitation periods for claims.[31] Such a preference for the laws of the country of origin (the *lex originis*) over the law of the country where the object was traded or ended up (the *lex rei sitae*), has also been promoted by the *Institut de Droit international*.[32]

The adoption of the 1995 UNIDROIT Convention would enhance a smooth and lawful international art trade in the future. However, 'market countries' (i.e. countries with major art markets or where cultural objects tend to end up in collections) mostly did not accede to the 1995 UNIDROIT Convention[33] and, moreover, today's claims deal with past losses. In other words, even if all states were to accede to the UNIDROIT Convention today, the fragmented situation will continue in as far as it concerns looted or stolen objects that are already circulating.

Complications for former owners to reclaim their lost cultural objects in a private law setting form the subject of Chapter 2 and will be further analysed and set off against the interstate model in Chapter 6. This introduction serves to highlight the need for international standards: not only to ensure a smooth art trade – by setting clear rules to enhance legal security – but also to safeguard the intangible (heritage) interests of people in their lost cultural objects that are found in another jurisdiction. Such international standards exist. They vary from directly binding norms such as UN Security Council resolutions that impose a ban on the trade of antiquities from Syria and Iraq,[34] to treaty obligations that apply to the extent that states have ratified the relevant treaties and implemented those standards in their national (private) law.[35] Furthermore, a wide variety of non-binding resolutions and other informal legal instruments define the status of cultural objects that were lost in one jurisdiction and, over time, made their way to another jurisdiction.

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31 The 1995 UNIDROIT Convention, articles 3 and art 5. See also Chapters 2 and 6.

32 See the arts. 2, 3 and 4 of the 1991 IDI Basel Resolution. Institut de Droit International, 'The international Sale of Works of Art from the Angle of the Protection of the Cultural Heritage', Resolution adopted at Basel (1991).

33 Fifty states did so, but excluding Western 'market countries' such as the US, the UK, Germany and France (status 10 April 2021). Although Switzerland and the Netherlands are signatories these countries did *not* ratify.

34 As a matter of peace and security certain UN SC resolutions contain obligations imposed on all states, aimed at the return of objects to the people they came from: UNSC Res. 2199 (2015) UN Doc S/RES/2199; UNSC Res. 1483 (2003) UN Doc S/RES/1483. These are both based on articles 39 and 41 of Chapter VII of the UN Charter. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter). See also Chapter 6.

35 Most notably the 1954 UNESCO Convention; the 1970 UNESCO Convention; and the 1995 UNIDROIT Convention.

2.3 The topic in public international law: Protected heritage

Cultural heritage is under special protection in international law, and the prohibition to pillage cultural objects has a long history. It developed through the laws of warfare.[36] Already in the 17th century Hugo Grotius exempts cultural objects from the right to pillage in times of war – in his turn referring to the writings of Polybius and Cicero:

> 'There are some things of that nature, that they can no way contribute either towards the making or maintaining of a war, which things even common reason will have spared during a war. … Polybius called it an act of extreme madness to destroy those things … Such are temples, porticos, statues, and all other elegant works and monuments of art. ... Our ancestors used to leave to the conquered, what things were grateful to them, but to us of no great importance.'[37]

The enhanced protection for sacred objects highlights that the *rationale* for this protection is their intangible value for local communities, as symbols of an identity:

> 'But as this maxim ought to be observed in regard to public ornaments, … so more especially in regard to things dedicated to sacred uses …'[38]

Although this immunity of cultural objects in times of armed conflict certainly did not always prevail, it did find its way into the first legal instruments on the laws of war. Eventually, it was codified in Article 56 of both the 1899 and 1907 Regulations concerning the Laws and Customs of War on Land, reading:

> 'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.'[39]

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36 'Pillage' is the traditional term for the misappropriation of private property during times of war (i.e. constitutes 'looting' as used in this study). See Art. 47 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (1907 Hague Convention).

37 Usually Grotius is quoted confirming the rights to spoils; however, this is his 'moderation' in Chapter XII of Book III of *De Jure Belli Ac Pacis (On the Law of War and Peace)* (1625), under (V). R. Tuck (ed.) *The Rights of War and Peace,* from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund, 2005). Vol 3, p. 1466-1467.

38 Ibid., Book III, Chapter XII, under (VI).

39 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1990) 32 Stat. 1803.

After the Second World War, the first dedicated convention on the topic of heritage protection, the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, confirmed the protected status of cultural objects in times of war.[40] The 1954 Hague Convention obliges states to respect cultural heritage, and in that regard to 'prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property', and to 'refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.'[41] The obligation to return cultural objects taken in violation of these provisions was arranged for in a separate Protocol of the same year.[42]

When in the 1990s cultural heritage was deliberately targeted in the Balkan conflicts and the shortcomings of this protective system became clear, in 1999 the Second Protocol to the 1954 Hague Convention was adopted.[43] It extends the protection of cultural heritage to armed conflicts *not* of an international character;[44] clarifies that any transfer of cultural property (including archaeological finds) from occupied territories is prohibited[45] arranges for obligations for states to criminalise and prosecute grave violations;[46] and to adopt measures to supress the 'illicit export or other removal or transfer of ownership of cultural property from occupied territory'.[47] These and other regulations of humanitarian law illustrate the importance attached by the international community to the protection of cultural objects when they are most vulnerable to looting: in times of armed conflict.

With the adoption of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property this special protection of cultural object under international law was extended beyond situations of armed conflict. It was an answer by the international community to the one-way flow of cultural objects from culturally rich but economically weak 'source countries' to Western 'market countries',

40 The 1954 Hague Convention. In July 2021, 133 states ratified the Convention

41 Ibid, Art 4.

42 First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358. In July 2021, 110 states ratified the 1954 Protocol.

43 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 212 (Second Protocol). In July 2021, 84 states ratified the 1999 Protocol. For a history of the UNESCO Conventions see A.F. Vrdoljak and L. Meskell 'Intellectual Cooperation Organisation, Unesco, And The Culture Conventions' in F. Francioni and A.F. Vrdoljak (eds.) *The Oxford Handbook of International Cultural Heritage Law* (OUP, 2020)

44 Second Protocol, Art 22.

45 Ibid, Art 9.

46 Ibid, Art 15-17;

47 Ibid, Art 21 (b).

a process that had been ongoing since colonial times and continues today. The 1970 UNESCO Convention can be considered a milestone in the development of international cultural heritage law by setting the standard that the trade in unlawfully exported or looted cultural objects is illicit.[48]

It was adopted after lengthy negotiations, hindered by opposing interests between source states (favouring protection) and market or holding states (favouring a liberal trade).[49] The defensive US reaction to an earlier draft, that its museums displayed the 'cultural heritage of mankind' and 'deserved encouragement' and 'not the threat of being impeded in this dedicated purpose', as cited by Vrdoljak and Meskel, illustrates these opposing interests that still characterise the field of the illicit trade.[50] The outcome of these negotiations at the time is the 1970 UNESCO Convention. It aims to curb the illicit trade by reliance on a system of protected 'national cultural heritage'; export licenses; and internatonal cooperation on issues of return. Its focus, thus, is on the protection of cultural heritage in source countries, whilst the provisions on return are reknown for their general and, at times, ambiguous wording.[51]

The entry into force of the 1970 Convention – in 1972 – is often considered as the watershed moment: export without the authorisation of the source country after that moment is unlawful, whereas earlier looting practices would not be covered by clear legal standards – and therefore, according to some, lawful. That last point of view is challenged by recent practice, but should also be dismissed on account of the long-standing protected status of cultural heritage in international and national laws.[52]

2.3.1 Criminal accountability

In terms of criminal accountability, the Nuremberg Trials after the Second World War set a precedent in the prosecution of individuals for grave offences

48 On 22 July 2021 141 states are party to the 1970 UNESCO Convention,. Most market states acceded recently.

49 On these developments, e.g. Vrdoljak and Meskell (2020).

50 Means of Prohibiting the Illicit Export, Import and Sale of Cultural Property, Preliminary Report, UNESCO Doc. UNESCO/CUA/123 (1963), 10. As cited in Vrdoljak and Meskell (2020).

51 See also Chapter 3, section 3.4.1 and Chapter 6 section 3.1.2.

52 On this watershed moment, see Chapter 6, section 3. Art 15 of the 1970 UNESCO Convention implicitly acknowledges this by providing that in spite of its non-retroactivity '(n)othing in this Convention shall prevent State Parties thereto from concluding special agreements … 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'. This must have been the compromise after calls for retroactivity so as to cover earlier (colonial) takings failed.

against cultural heritage such as looting and destruction.[53] After the International Criminal Tribunal for the Former Yugoslavia gave impetus to the matter during the 1990s, international law has gradually come to recognise that acts against cultural heritage may amount to war crimes and crimes against humanity.[54] In that sense, in 2016 the International Criminal Court (ICC) in the first case that solely focussed on cultural heritage, convicted Ahmad Al Faqi Al Mahdi for 'intentional attacks against historic monuments and buildings dedicated to religion in Mali'.[55] In response to the wide-scale destruction and looting of heritage sites during the conflicts in Syria and Iraq, in 2017 the UN Security Council unequivocally reiterated that unlawful attacks against sites or historical monuments constitute a war crime for which perpetrators must be brought to justice.[56] Criminal accountability of states or individuals or protection schemes will not be the topic of this study. Instead, it takes as an hypothesis that to 'break the chain' of looting and plundering, apart from the protection of cultural heritage *in situ* and criminalisation of the act of looting, the legal status of cultural objects themselves - the matter of entitlement - deserves our attention.

In that regard, the conflicts in Syria and Iraq brought about a new awareness. Awareness on the scale of the looting and the illicit trade in looted cultural objects, often said to be the largest only after drugs and weapons; on the involvement of terrorist groups and organised crime in their commodification; and on the detrimental effects for source communities who are left without their cultural heritage after looting practices.[57] It prompted the involvement of the UN Security Council and the adoption of directly binding sanction measures, as a matter of peace and security, that introduced a ban on the trade in and possession of cultural objects that were removed from Syrian territories (since 2011) and Iraqi territories (since 1990).[58]

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53 E.g. in the case of Rosenberg – the leader of the special unit responsible for looting, the 'Einsatzstab Reichsleiter Rosenberg' (ERR). See also A.M. Carstens 'The Swinging Pendulum of Cultural Heritage Crimes in International Criminal Law' in A.M. Carstens & E. Varner (eds.) *Intersections in International Cultural Heritage Law* (2020) OUP, pp. 109-131. See also Chapter 4, section 2.

54 See F. Lenzerini 'The Role of International and Mixed Criminal Counts in Enforcement of International Norms concerning the Protection of Cultural Heritage', in F. Francioni and J. Gordley (eds.) *Enforcing Cultural Heritage Law* (2013) OUP, pp. 40-59.

55 *Prosecutor v Al Mahdi* (Trial Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016).

56 UNSC Res. 2347 S/RES/2347 (2017), at 4.

57 See e.g. the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, adopted by the UN General Assembly in its resolution 69/196, of 18 December 2014. See also the 'red lists' published by ICOM, <https://icom.museum/en/resources/red-lists/>.

58 UNSC Res. 1483 (2003) UN Doc S/RES/1483; UNSC Res. 2199 (2015) UN Doc S/RES/2199; UNSC Res. 2347 (2017) UN Doc S/RES/2347. These are implemented in the EU by means of Regulations (EC) No. 1210/2003 of 7 July 2003 and No. 1332/2013 of 13 December 2013.

This new awareness also instigated a new generation of international instruments that do not only focus on protection *in situ* and criminalisation of destruction and looting, but also on the trade in and possession of looted artefacts. Besides the UN Security Council resolutions, the 2017 Nicosia Council of Europe Convention on Offences relating to Cultural Property – that has yet to enter into force – takes this approach.[59] On the European level, the 2019 EU Import Regulation prohibits the import of unlawfully exported cultural objects and, in a similar way, shifts the focus from the act of looting to the possession of looted cultural objects.[60] Irrespective of whether such regulations apply directly to a particular case – mostly they only cover future losses – it contributes to a setting where the 'clean' provenance of cultural objects (the ownership history) has become a crucial requirement in the art trade. In that sense, measures that prohibit and criminalise the possession, trade, or import of certain categories of looted cultural objects also influence the legal status of objects that already circulate and have an unknown or 'tainted' – but not *per se* unlawful – provenance.

2.3.2 *Return obligations*

The obligation to return looted cultural objects is the logical counterpart of the prohibition to loot or possess looted objects. 'Return' is also referred to as 'restitution', if a legal obligation is implied, or as 'repatriation', which denotes the physical return of an object.[61]

With regard to wartime looting, the legal obligation to return dispersed cultural objects is well established in international law. The Peace Treaties after the Napoleonic Wars in the early part of the 19th century are generally considered the turning point in the development of the law in this respect: on that occasion the European powers considered that restitution on the basis of geographic origin (territoriality) of dispersed heritage was a principle of justice – not merely a matter of 'winners takers'.[62] Eventually, the legal obligation to return cultural objects looted in times of war, further than a general

59 Nicosia Council of Europe Convention on Offences relating to Cultural Property (adopted 3 May 2017) CETS No. 221. The Convention aims to prevent and combat the illicit trafficking and destruction of cultural property, and falls within the Council of Europe's action to fight terrorism and organised crime. It is open to all states and on 9 January 2021 the number of signatures were 10, ratifications 2 (Cyprus and Mexico).

60 Regulation (EU) 2019/880 of 17 April 2019 on the introduction and the import of cultural goods (2019) OJ L 151. Art 3: 'The introduction of cultural goods […] which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited'. The Regulation introduces a licensing system – for some goods a licence and for others an 'importer statement' is needed – that will gradually become operational. Regulations are binding in their entirety and are directly applicable in all European Union countries.

61 In Chapter 1, section 4, these terms will be further discussed.

62 On this development see Chapter 5, section 3.2.

call for legal proceedings in the 1907 Hague Convention, was codified in the First Protocol to the 1954 Hague Convention.[63]

Beyond situations of armed conflict, the 1970 UNESCO Convention provides for the rule that unlawfully exported designated cultural objects should be returned.[64] Where initially only a few market countries acceded to the 1970 UNESCO Convention, this changed at the beginning of the millennium. Today, 141 states have ratified or acceded to the Convention including market states,[65] and its main principle that the unauthorised export of protected cultural objects ('national cultural property') is unlawful has been recognised as international public policy on several occasions.[66] Nevertheless, the exact scope of this principle in terms of return obligations is far from evident, not in the last place because the 1970 UNESCO Convention itself is not unambiguous on return obligations.[67] The 1995 UNIDROIT Convention, discussed above, aims to further clarify the issue of return and fills some of the lacunae of the 1970 UNESCO Convention, for example by including undocumented (archaeological) cultural objects. However, it is not widely adopted.[68]

Although, today, the obligation to return looted cultural objects for certain categories may be considered to have the status of customary international law – or, at least, as a general principle of international law –, the exact scope of that rule remains unsettled.[69] Does it only cover situations of pillage and looting during armed conflict, or does it extend to the unauthorised export

63 First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358.

64 For an in-depth discussion, see Chapter 3, section 3.4 and Chapter 6, section 3.1.2.

65 As of 22 July 2021. Amongst these are the major art market states: the US (1983), China (1989), France (1997), the UK (2002), Japan (2002), Switzerland (2003) and Sweden (2003). The Netherlands ratified in 2009.

66 Cf. the Statute of the ICJ, Article 38, general principles of law are subsidiary sources of international law. International customary law pre-supposes an established practice and *opinio juris*. Nevertheless, practice is not unambigious. See Chapter 6, sections 3.1.2 and 5.4.

67 Although the spirit of the 1970 UNESCO Convention may be clear in its stance that looted cultural objects should be returned, the only straighforward return obligation concerns Art 7 (b) regarding 'cultural property stolen from a museum or a religious or secular public monument or similar institution .. after the entry into force of this Convention, provided that such property is *documented* as appearing in the inventory of that institution' under the condition of 'just compensation to an innocent purchaser or to a person who has valid title to that property. Other obligations contained in the articles 7 and 13 are less clear because those depend on consistency with national legislation.

68 On 5 May 2021 the status was 50 contracting states, excluding Western-Eurpean countries such as Germany, UK, France, Switzerland and the Netherlands. See Chapter 2, section 2.1 and Chapter 6, section 3.1.3.

69 See, e.g., F. Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 EJIL 9, page 14; A. Chechi, *The Settlement of International Cultural Heritage Dispute* (2014) OUP, p. 244-292. Acc. to the Statute of the ICJ, Article 38, international customary law pre-supposes an established practice and *opinio juris*. Practice, however, is not unambigious. See Chapter 6, sections 3.1.2 and 5.4.

irrespective of a situation of war? Another question is whether the return obligation is of a general nature, or only addresses the perpetrator of the norm, such as the individual looter or the occupying state in the event of an armed conflict?[70] This matter is of importance since cultural objects are no longer looted as trophies by the conqueror to be exhibited in public places – as in Roman, Napoleonic, colonial or Nazi times – but as commodities and irrespective of a situation of (official) war. 'Since financial value has been added to the historical, cultural and scientifc aura of cultural objects, creating unlimited monetary value for limited resources, the illicit trade has become their major threat', as observed in a study by the International Council of Museums (ICOM).[71] Objects often surface years after the looting and may do so in any given (public or private) collection. An obligation resting only on the perpetrator of the norm that prohibits looting would therefore be ineffective to address injustices on the object.

The general nature of the duty to return looted cultural objects is certainly strengthened by the UN Security Council resolutions that provide for a full ban on the trade and possession of looted antiquities.[72] In these resolutions, the duty to return looted cultural objects is also incumbent upon third parties. Whereas these measures are limited to objects from a specific place and lost in a specific (recent) time period, this development is supported by a range of other new instruments that criminalise the possession of looted art.

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70 (ICRC) Rule 41, Export and Return of Cultural Property in Occupied Territory: *The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory*.

71 F. Demarais and M.A. Haldiman 'Bids on the Rise, Object on the Go: Are Cultural Objects Commodities Like Any Other? (2014) ICOM News 67, pp. 16. Recently, empirical studies are undertaken that aim at mapping routes and quantifying data regarding the illicit trade; e.g. N. Brodie, D. Yates e.a., *Illicit trade in cultural goods in Europe Characteristics, criminal justice responses and an analysis of the applicability of technologies in the combat against the trade: final report* (2019), European Commission; The German ILLICID Report analyses the trade in ancient cultural objects in Germany over a 24-month period and substantiates fears that the majority of such ojects are traded without documentation of a lawful provenance: B. Hemeier and M. Hilgert 'Transparency, Provenance and Consumer Protection. Facts and Policy Recommendations Concerning the Trade in Ancient Cultural Property in Germany. Findings of the Federal Ministry of Education and Research's Collaborative Project «Analysing the Dark Figure as a Basis for Countering and Preventing Crime Using the Example of Ancient Cultural Property» (ILLICID)' (2020).

72 UNSC Resolution 2199 of 12 February 2015 (n. 58): 'Reaffirms its decision in para 7 of Resolution 1483 (2003) and decides that all member states shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property […] illegally removed from Iraq', 'thereby allowing for their eventual safe return to the Iraqi and Syrian people […]'. These resolutions are limited in time in the case of Iraq to objects that left the country as of 6 August 1990 and in the case of Syria as of 15 March 2011. Of a more general nature, condemning the illicit trade, UNSC Resolution 2347 (n. 56).

2.3.3 The issue of time

In the context of this study, it is of crucial importance that a binding rule that prohibits looting and obliges the return today, does not have direct legal consequences for objects looted in the past. According to the principle of intertemporal law, a juridical fact must be appreciated in the light of the law contemporary with it.[73] For claims that are based on an unlawful loss in the past, the time dimension is important both in a private law approach, as well as in an international law approach.[74]

In accordance with the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) by the International Law Commission (ILC) of 2001,[75] two requirements are of importance in this regard: (1) Was the looting an internationally wrongful act at the time; or (2) Is the denial of the original owner's right a breach of an international obligation with a continuing character? If one of these requirements is fulfilled, reparations by the responsible states should follow.[76] For the fulfilment of the first requirement, it must be established that the specific taking was a breach of international law at the time, which will depend on the specific circumstances at the time. Was the loss, for example, the result of pillage by a foreign (occupying) army at a time when the obligations to return cultural objects attained customary status?[77] Then again, the unlawfulness of the loss at the time is not relevant if the need for reparation would follow from a more recent norm. In that case, it would be needed to establish a rule that entitles former owners to rights in the present. A denial of those rights may then add up to a violation of a norm with a continuing character.[78] If so, the responsibility of a state to repair the situation would extend over the entire period the situation is not in conformity with the obligation.

Given the focus in this study on the legal status of the objects in relation to the people to whom these are meaningful – not *per se* on the injustices of the past – this latter approach seems the better option. On the one hand,

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73 *Island of Palmas Arbitration*, ICA (1928).

74 For a discussion on the relation between private law and historical claims see (in Dutch) see M.A. Loth 'Houdbaar recht; over de aansprakelijkheid voor historisch onrecht', in M.A. Loth and L.P.W. van Vliet, *Recht over tijd. Hoever reikt het privaatrecht in het verleden?* (2018) Preadviezen Nederlandse Vereniging voor Burgerlijk Recht, Zutphen 2018.

75 ILC, Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission (2001) UN Doc A/56/10, 'commended to the attention of governments' by the UNGA: 13 and 14.

76 Under certain conditions, e.g. that there are no conditions precluding the wrongfulness such as consent (Art. 20 ARSIWA) and the right was not lost as a result of acquiescence (Art. 45 ARSIWA).

77 This question will be explored for cultural objects looted in a colonial setting in Chapter 5.

78 Article 14(2) ARSIWA reads: 'The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.'

because the exact circumstances of a loss in the past are often unknown: for obvious reasons, illicit practices by which cultural objects were removed are not always documented. In practice, therefore, it may be impossible to identify cultural objects as being unlawfully looted.[79] On the other hand, the assessment of historical wrongs such as colonial takings by contemporary standards of international law that for long was biased and unfavourable to non-Western stakeholders, is problematic. It would implicate a critical examination of the origins of international law that exceeds the limits of this study.[80] Apart from the analysis of the post-war legal framework for Nazi-looted art in Chapter 4, and the assessment of the legitimacy under contemporary international law of the looting of an ancestor statue at the close of the 19th century in Chapter 5, the following chapters will therefore focus on the possible existence and evolution of *new* norms in this field. Furthermore, this dissertation will focus on the legal status of cultural objects, not on reparations or compensation schemes for past injustices.

The question is thus: even though the unlawfulness of a specific loss at the time may not be established, and in spite of the fact that ownership title may have passed under domestic private law, might there be other norms that 'link' a cultural object to its former owner or creator?

2.3.4 *Another perspective: A human rights approach*

In international law, the obligation to return looted cultural objects developed through the laws of war: restitution as the preferred form of reparation after the removal of cultural objects during armed conflict or foreign occupation. Since the adoption of the 1970 UNESCO Convention, this obligation also extends to cultural objects looted in peacetime. The recipient of the rights to restitution in these 'traditional' international law approaches are national states. The question of which party is eventually entitled to (returned) cultural objects in that model is a matter of state sovereignty and domestic (private) law. Complications may arise in such a model when rights of others are at stake, for example an individual or community that no longer feels represented by the government of a state from where the object was removed. Such complications will be explored in Chapter 3 – on the position of communities after a (*de facto*) change of borders – and in Chapter 4 – on the rights of victims of the Nazi regime who mostly emigrated to other countries since the loss.

Increasingly, international law vests rights on cultural objects with individuals and groups such as minorities and indigenous peoples. This is part and parcel of the emergence and evolution of human rights law. Another

79 Provenance (the ownership history of cultural objects) has only recently become a requirement in the trade. See e.g. Chapter 6.

80 Similarly, expropriation by states of their own nationals (e.g. Nazi looting within Germany) traditionally is not covered by international law. See Chapter 4, sections 3.2.3 and 4.3.1.

model in international law is therefore return as a remedy for human rights violations. In such a model, the recipients of rights ('right holders') are not states, but individuals or communities.

For example, according to the UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, victims of human rights violations are entitled to reparations for harm suffered. This can be effectuated by the restitution of lost possessions.[81] An early example of a human rights' approach to the issue of restitution – the Allied internal restitution programme after the Second World War that made national states (temporarily) adapt their private laws in favour of the persecuted dispossessed former owners – will be discussed in Chapter 4.[82]

Under contemporary international law, individuals and communities such as minorities also enjoy a direct right to culture. This follows from a number of human rights instruments, most notably Article 15(1)(a) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[83] According to the 2009 General Comment on the right to culture of the supervisory treaty body of this Covenant, this has come to include 'access to cultural goods'. This implicates that states have an obligation to adopt 'specific measures aimed at achieving respect for the right of everyone … to have access to their own cultural … heritage and to that of others'.[84] In other words, access to cultural objects may be seen as an essential dimension of human rights. In that sense, claims to lost cultural objects are not merely a matter of stolen property, but also a matter of lost heritage where it concerns identity values for specific people. Such different approaches activate different norms.

The interrelationship of cultural heritage law and human rights law is illustrated by the active involvement of the UN Human Rights Council in heritage protection and the illicit trade. This heightened involvement coincided with the conflicts in the Middle East, where the detrimental effects for source

81 Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly Res. 60/147 of 16 December 2005. As remedies for victims are named: (a) access to justice, (b) reparation for harm suffered, and (c) access to information concerning violations and reparation mechanisms.

82 Chapter 4, section 2.1.

83 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Art. 15, para. 1(a): the right of everyone to take part in cultural life. See also Art. 27 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res. 217 A (III) (UDHR). See also the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Res. 61/295 (13 September 2007) UN Doc A/RES/61/295.

84 Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009), UN Doc E/C.12/GC/21, para 49(d); see also paras 15(b) and 50.

communities[85] of destruction of heritage sites and wide-scale looting became vividly clear. In its 2007 Resolution dedicated to the protection of cultural heritage, the Human Rights Council confirms in this respect 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'.[86] Apart from concerns about looting and destruction, the Council also addressed the illicit trade and the need for measures to ensure the return of looted cultural objects.[87] In other words, people who are left *without* their cultural objects after looting practices may well be affected in their human rights.

In the following chapters, I will evaluate whether a human rights law approach can help develop the field of contested cultural objects further, especially where it concerns older losses. The hypothesis is that it might solve several of the problems identified above. Most importantly, human rights law appears equipped to address the intangible (cultural or heritage) interests at stake, addresses the rights of sub-state actors such as private individuals and communities, and does so by universally accepted notions. The contours of this approach will surface in all chapters, most notably in Chapter 5 in the context of indigenous peoples rights to their cultural heritage, and will be further elaborated upon in Chapter 6.

2.4 Soft law: Evolving law?

Over the last decades, in addition to 'hard' law such as international treaties and other directly binding law, a vast body of informal 'soft' law has emerged on the topic of looted art. From a law-making perspective the term 'soft law' is simply a convenient description for a variety of non-legally binding yet authorative instruments used in contemporary international relations.[88] Its impact in terms of normative force varies and may even equal binding legal instruments. At times, soft law simply operates as a practical solution to a

85 The term 'source communities' in this study refers to communities of origin.

86 UNHRC, Res. 6/11 on Protection of Cultural Heritage as an Important Component of the Promotion and Protection of Cultural Rights (28 September 2007) UN Doc A/HRC/RES/6/11, Preamble.

87 UNHRC, Res. 33/20 on Cultural rights and the protection of cultural heritage (6 October 2016) UN Doc. A/HRC/RES/33/20 at p. 4; repeated in UNHRC Res. 37/17 on Cultural rights and the protection of cultural heritage (9 April 2018) UN Doc A/HRC/RES/37/17 at p. 4: '*Calls for* enhanced international cooperation in preventing and combating the organized looting, smuggling and theft of and illicit trafficking in cultural objects and in restoring stolen, looted or trafficked cultural property to its countries of origin, and invites states to take measures in this regard at the national level'.

88 A. Boyle, 'Soft Law in International Law-making' in M. Evans, *International Law* (4th, 2014) p. 118 et seq.

problem for which existing legal tools are insufficient.[89] Beyond this, soft law may be a forebode of evolving law, clarify vague conventional law, or be a source of law. Particularly in a situation where positive 'hard' law is unclear or in a situation where norms clash, soft law can have normative significance. As will surface in the subsequent chapters, in the present context the unclarity and clash of positive law norms indeed appears to be a reason why soft law has stepped in: to bridge the gaps.[90]

Soft law instruments in the field of looted art vary widely. Some merely condemn looting practices and the illicit trade, whilst others formulate specific rights of former owners with regard to their lost cultural objects and may even set out rules for procedures. In their form soft law instruments in this field also vary and include declarations by international organisations,[91] ad-hoc multilateral declarations (also with the participation of non-state actors),[92] and operational or explanatory guidelines.[93] Apart from such instruments adopted at the interstate level (soft law in the strict sense), ethical codes for professional conduct in the art and museum world also contain international standards. Not seldom, such instruments of transnational private regulation are developed under the auspices of intergovernmental organisations such as UNESCO.[94] For the purpose of this study, therefore, such hybrid instruments are at times also discussed under the sections on soft law.[95] Often, instruments in this field operate in mixed settings of states and non-state actors – not only on the interstate level – and address states, but also institutions (e.g. museums), individuals (e.g. dispossessed private owners or collectors) and communities (e.g. indigenous peoples or other source communities).

89 'Soft law as tools to make the behaviour of those involved predictable for the joint benefit, even without enforceable rules' in H. Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 EJIL 499.

90 Esp. Chapters 2, 4, and 6.

91 E.g. a multitude of UNESCO, UNGA Declarations, and those by the Human Rights Council, discussed above.

92 E.g., the 1998 Washington Principles undersigned by states but also by non-state actors (n. 6). See Chapters 2 and 4.

93 E.g. Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted at the UNESCO Meeting of States Parties, 18-20 May 2015) C70/15/ 3.MSP/11; Resolution of the Institute de droit international on the International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage (1991), in *Institut of International Law Yearbook* 64 II (1991 IDI Basel Resolution).

94 E.g. the 'ICOM Code of Ethics for Museums', adopted by the 15th General Assembly of the International Council of Museums (4 November 1986, renamed and revised in 2001 and 2004). ICOM is an affiliate of UNESCO. Another example is the UNESCO International Code of Ethics for Dealers in Cultural Property, UNESCO Doc. CLT/CH/INS-06/ 25 REV.

95 Another term could be 'informal international lawmaking'. See J. Pauwelyn 'Informal International Lawmaking: Framing the concept and research questions' in J. Pauwelyn, R.A. Wessel and J. Wouters (eds.) *Informal International Lawmaking* (2012) OUP, p. 13 et seq.

The content of the various soft law instruments varies widely. On the one hand, they take the form of non-specific declarations that looting is 'wrong' – detrimental to peace and security and the sustainable development of societies – and therefore states are urged to cooperate to prevent the trade in looted cultural objects. These are recurring phrases in declarations of international organisations. In fact, the United Nations General Assembly adopted a whole series of resolutions, beginning in 1973, on the subject of restitution and return.[96] Although these resolutions differ in wording, they all encourage international cooperation in the return of cultural objects, urging states to adopt adequate measures to prevent illicit trafficking, raise awareness amongst the public and to strengthen museum due diligence standards.

Others entail specific standards for claims. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), for example, provides very specific rules for the return of indigenous peoples' lost cultural objects.[97] National or international policy guidelines for museums for claims to Nazi-looted art or colonial takings, increasingly, also set specific substantive and procedural standards for claims.[98] These may be merely aspirational, such as the standard that (since 1986) features in the International Council of Museums (ICOM) ethical code that museums should neither display nor acquire unprovenanced material or material that may have been looted in the past – a standard that is hardly attainable and is certainly not met today.[99] On the other hand, some of these informal regulations set standards that in terms of adherence – and *opinio juris* – sort more effect than binding international conventions.[100]

Nazi-looted art is an example of a category for which the norm is embodied in a non-binding declaration that gained status as *the* prevailing international rule. The 1998 Washington Principles on Nazi-confiscated art, a declaration in which 44 states and 13 non-governmental organisations essentially voiced their intention to promote the identification and return of looted artefacts, form

96 More than twenty, starting with UNGA A/Res/3187 (XXVIII) of 18 December 1973, bi-annually repeated in similar or (slightly) different wording until recently. For an overview, see the list of General Assembly instruments at the end of this dissertation.

97 See above, n. 83. Discussion in Chapter 5, section 4.3 and Chapter 6, section 5.2.4.

98 See e.g. Dutch National Museum of World Cultures, Principles and Process for addressing claims for the Return of Cultural Objects (2019), see <https://www.volkenkunde.nl/en/about-volkenkunde/press/dutch-national-museum-world-cultures-nmvw-announces-principles-claims>; the UK 'Procedures for claims for the Return of Cultural Objects from Oxford University Museums and Libraries' (2020), see <https://www.glam.ox.ac.uk/procedures-for-return-of-cultural-objects-claims>.

99 The ICOM Ethical Code (n. 71) prescribes that museums should acquire objects only after establishing 'the full history of the item since discovery or production' (in 2.3) and should 'avoid displaying or otherwise using material that has a questionable origin or lacking provenance' (in 4.5).

100 E.g. often provenance research is primarily focused on the identification of Nazi-looted art - not addressed by any formal treaty-, whereas the identification of illegally excavated antiquities – addressed in the 1970 UNESCO Convention - lags behind.

the basis of widespread international practice.[101] The Principles highlight the need for 'just and fair' solutions for heirs of the victims of Nazi looting with regard to confiscated artefacts 'depending on the facts and circumstances surrounding a specific case', and, besides, urge states to 'develop national processes to implement these principles'.[102] Often, the extraordinary circumstances of Nazi looting, as part of genocide, are cited as a reason for the need for a 'moral' approach to such claims. These would justify an extra-legal treatment, i.e. not according to regular private law under which, often, such claims are stale. Through an in-depth analysis of this model in Chapter 4 and a comparison with other looted art cases such as colonial takings – the topic of Chapter 5 – this proposition and the pitfalls of such an 'ethical model' will be further explored.

Also for the category of colonial takings, soft law instruments urge Western states to return cultural objects that were taken from former colonies, amongst which the 2007 UNDRIP on indigenous peoples' cultural rights. As mentioned above, since the era of decolonisation, a series of over twenty UN General Assembly Declarations have been passed on the issue of return.[103] In fact, already in 1979, at the request of UNESCO, ICOM presented a study stating that

> '[t]he reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of countries having been deprived thereof, is now considered to be an ethical principle recognised and affirmed by the major international organizations.'[104]

It even predicted that this principle would 'soon become an element of *jus cogens* of international relations'.[105] Nevertheless, the political will to follow up on such calls has generally been lacking.

The by now famous 2017 speech of French President Emanuel Macron in which he addressed the rights of Africans to their own cultural heritage, appears to have changed this status quo.[106] It signalled a departure from

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101 1998 Washington Principles. See Chapter 4.

102 Ibid. Principle 9: 'If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.'; Principle 11: 'Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.'

103 See above, n. 96.

104 Ad hoc Committee appt. by the Executive Council of ICOM (H. Ganslmayr, H. Landais, G. Lewis, P. Makambila, P. Perrot, J. Pré and J. Vistel), 'Study on the principles, conditions and means for the restitution or return of cultural property in view of reconstituting dispersed heritages' (1979) 31 *Museum International* 62.

105 Ibid. p. 66.

106 E. Macron, President of the French Republic, Speech at the University of Ouagadougou, Burkina Faso (28 November 2017), see: <https://www.youtube.com/watch?v=8I3exI4f9BY&feature=youtu.be>.

'cultural internationalism', the long prevailing school of thought developed and named by John Henry Merryman, and the line taken in the 'Declaration on the Value and Importance of Universal Museums'.[107] In this 2002 Declaration, the main Western encyclopaedic museums argued that cultural treasures from around the world – no matter their provenance and how they were taken – are shown to their best advantage and can be best kept under the care of the big 'universal' museums, and should remain in these institutions. Recent developments in the field of colonial takings are reminiscent of earlier developments in the field of Nazi-looted art since 1998.[108]

That parallel underscores that not the form of an instrument but the willingness of stakeholders, and public awareness that creates the need to act, shape the norms in this field. At the same time, it also underscores the last essential problem in this field: which institution and by which procedure can non-binding soft law standards be implemented, monitored and amended, if necessary? What are the pitfalls of an ethical model where alternative dispute resolution is the sole way to resolve disputes, and what does this mean in terms of access to justice for parties in a dispute?[109] These pitfalls were an incentive to search for solutions *within* the existing legal framework. The human rights model that will surface throughout the following chapters and mostly in Chapter 6, is the result of that search. An advantage is that such a model may overcome the problem of access to justice for non-state 'right holders', which is important in an understanding that culture is not *per se* defined by nationality.

2.5 Concluding remark: Different models

Different models exist for claims to lost cultural objects. Apart from possibilities for former owners to claim lost possessions in a private law setting, public international law caters for the interstate model where restitution is seen as an obligation, or right, of states. Claims may also be seen as a matter of international human rights law. Furthermore, in the 'ethical model' claims by individuals or communities are based on soft law instruments. These models and their interrelation, as well as the question whether such non-binding instruments reflect evolving law in this field, will be explored in this study.

107 J.H. Merryman, 'Cultural Property Internationalism' (2005) 12 *International Journal of Cultural Property* 11. See Chapter 6.2.

108 See Chapters 2, 5, and 6 (section 2.2).

109 To be addressed mainly in Chapters 2 and 4.

3 CENTRAL RESEARCH QUESTION

Cultural objects are under special protection in international law and looting and destruction are prohibited. Today, a number of international conventions codify the norm that looted cultural objects should be returned. Nevertheless, they generally do not regard cultural objects that were lost longer ago and already circulate on the market or form part of museum collections. Furthermore, these conventions primarily operate on the interstate level. In contrast, soft law instruments increasingly support the rights of (non-state) former owners to their lost cultural objects, also if these were lost before the adoption of international conventions, and even if ownership title passed to a new possessor under domestic private law. As a consequence, 'grey' categories of tainted cultural objects have emerged that presently can only be 'cleared' through extra-legal (alternative) procedures: the ethical model for title disputes. In such a situation, abidance by the rules depends on the willingness of parties and political pressure, while norms often remain vague. This can give rise to legal insecurity and, at times, injustice.

The central research question in this dissertation is: How could the interests of former owners who involuntarily lost their cultural objects be addressed more effectively? This central question is divided into the following sub-questions per chapter.

Chapter 2 addresses claims to cultural objects in a private law setting by their former owners who lost them in another country. Sub-questions addressed in this chapter are: What are the main difficulties that obstruct restitution claims by former owners, both in civil law and common law jurisdictions? Given the increasing reliance on soft law and alternative dispute resolution (ADR) as the preferred way to solve disputes: how does access to justice work in such an 'ethical' model?

Chapter 3 addresses claims to cultural objects after a loss in another country under the interstate system of the 1954 Hague Convention and the 1970 UNESCO Convention. The following sub-questions are addressed: How does the 'nationality' prong for entitlement to cultural objects in the 1970 UNESCO Convention relate to territoriality and cultural-historical considerations? What is the position in this system of non-state right holders who lost their cultural objects, such as communities or private owners?

Chapter 4 addresses claims to cultural objects that were lost as a result of Nazi looting. In this chapter, the following sub-questions are addressed: How was restitution of Nazi-looted art arranged in the post-War period, and how is it arranged in today's system of the Washington Principles? In addition, what are the consequences of the differences between the 'legal' model in the US and the 'ethical' model in Western Europe?

Next, Chapter 5 addresses claims to cultural objects that were lost as a result of colonial actions at the close of the 19th century. Sub-questions addressed are: How did international law with respect to looting and restitu-

tion of cultural objects develop? How were claims to colonial booty in the post-colonial era generally perceived? Can recent soft law and national policy guidelines in this field be seen as a reflection of evolving human rights law, and what is the status of the UNDRIP in this regard?

Chapter 6 elaborates on the insights of Chapters 2, 3, 4, and 5, and develops a model in answer to the main research question of how the interests of former owners with regard to their lost cultural objects could be addressed more effectively. It analyses the international framework for the art trade and how that arranges for the issue of contested cultural objects – including the category of more recently looted artefacts. Sub-questions addressed in this last chapter are: What interests are at stake in cultural heritage protection, on the one hand, and in the art trade, on the other hand? What are the blind spots in this system? It furthermore addresses the question whether international human rights law is equipped to clarify standards in this regard and how such standards can be transposed to a private law setting of title claims.

4 Issues of terminology

4.1 International cultural heritage law

International cultural heritage law is that branch of international law that has as its centre the protection of cultural heritage by an international regime. This regime extends to tangible cultural heritage – artefacts, antiquities, ethnographic objects, and monuments – above[110] and under water,[111] as well as intangible heritage such as traditions and specific ways of life.[112] The present study is limited to tangible, movable cultural heritage for which the neutral term 'cultural object' is used. Obviously, fragments of monuments – parts of immovable cultural heritage – may turn into movable objects after the removal from their original sites. More specifically, this dissertation concerns cultural objects that have been transferred to another country and are contested on account of their specific ownership history.

A useful perspective of this field of law is given by Chechi who introduces the term '*lex culturalis*' for the growing body of rules that aim at the protection of cultural heritage, underlining their status as *lex specialis*.[113] This implicates that cultural objects are subject to special rules and should not be automatically treated as ordinary goods.

110 Most notably: the 1954 Hague Convention; the 1970 UNESCO Convention; and the 1995 UNIDROIT Convention.

111 UNESCO Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force on 2 January 2009) 2562 UNTS 3.

112 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3.

113 Chechi (2014), p. 246.

4.2 Cultural objects, cultural heritage or cultural property?

The central assumption in this study is that cultural objects are distinct from other goods because they represent intangible values that people identify with.[114] Cultural objects may be of specific interest to an individual, a community or national state, or even to mankind as a whole.[115] From that perspective, and because the intangible value is not a static given, no definition of cultural objects can be strictly limited.

The term 'cultural property' is also often used and features in both the 1954 Hague Convention and the 1970 UNESCO Convention. As a protected category in international law 'cultural property' first appeared in the 1954 Hague Convention. This new concept was supposed to serve as a wide-ranging and synthetic category of objects worth protecting because of their inherent values.[116] It defines cultural property as movable as well as immovable property 'of great importance to the cultural heritage of every people', such as religious and secular monuments, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical, or archaeological interest.[117]

In the 1970 UNESCO Convention, the definition shifts to emphasise not the universal heritage interest of cultural objects to all people, as the 1954 Hague Convention appears to do, but the national interest in preserving its cultural heritage. It defines 'cultural property' as '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 one of the eleven categories listed in Article 1.[118] Moreover, Article 4

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114 That cultural goods cannot be treated as ordinary consumer goods because they are 'vehicles of identity, values and meaning' is, for example, recognized in Art 1 (g) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311.

115 The preambles of various UNESCO Conventions, such as the 1954 Hague Convention and the 1972 World Heritage Convention, refer to the importance of cultural heritage for all mankind. For a discussion of the notion of 'universal heritage', see Chapter 6.

116 F. Francioni, 'A dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in A.A. Yusuf (ed.), *Standard Setting in UNESCO, Vol I: Normative Action in Education, Science and Culture* (2007) Leiden, Martinus Nijhoff, pp. 221-236, 225.

117 1954 Hague Convention, Art. 2. The list is non-exhaustive.

118 These are: Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; 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; products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; elements of artistic or historical monuments or archaeological sites which have been dismembered; antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; property of artistic interest, such as pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); original works of statuary

sets standards for the possible inalienability of cultural objects ('the cultural heritage of each State'), by introducing nationality, in terms of creation and territorial provenance, as a criterion. This aspect – the 'nationality' of objects and the perception of cultural objects as exclusive property of states – will be topic of analysis in the Chapters 3 and 6. The 1995 UNIDROIT Convention, the third important treaty in this field, let go of the nationality prong and deploys the more neutral term 'cultural object' throughout.[119] In a more nuanced way, the UNIDROIT Convention provides a basis for states to reclaim their national patrimony if that is of 'significant cultural importance' to that state.[120]

As this short survey may illustrate, definitions usually take on the prevalent view in a specific time and no term is completely value free. Where in the 1950s the recognition of cultural heritage as a matter of international public policy (for all mankind) was in focus, at the time of the 1970 UNESCO Convention the organisation of a protection scheme to counter the illicit trade (by appointing states as 'proprietors' of that heritage) was in the minds of the drafters. In that respect, today the broader term 'cultural heritage' is preferred over 'cultural property', to express a more holistic view of cultural objects. Indigenous peoples, for example, generally also do not perceive cultural objects in terms of 'property' or individual rights, but in terms of community values and responsibilities.[121]

As the term 'cultural property' suggests exclusive entitlement which touches upon the research question in this study, that term is considered less suitable. In line with the 1995 UNIDROIT Convention (and authors such as Vrdoljak), in this dissertation the more neutral term 'cultural object' will therefore be used for tangible, movable cultural items that are valued for their intangible, symbolic, meaning. The term 'artefact', within the context of this dissertation, is seen as a subcategory of cultural objects, and 'cultural heritage' as the wider category.[122]

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art and sculpture in any material; original engravings, prints and lithographs; original artistic assemblages and montages in any material;- rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments. NB these categories are mostly used (also in the 1995 UNIDROIT Convention), although the age threshold varies.

119 1995 UNIDROIT Convention, Art. 2: 'Cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science' and which belongs to one of the eleven categories listed in the Annex. This corresponds to the 1970 UNESCO Convention list.

120 1995 UNIDROIT Convention, Art. 5. For a discussion, see Chapter 3, section 4.2, and Chapter 6, sections 3 and 4.

121 K. Kuprecht, *Indigenous Peoples' Cultural Property Claims* (2014) Springer International Publishing, p. 40.

122 I consider the term 'cultural good', used in the 2019 EU Import Regulation, as equivalent to 'cultural object'. For the EU Regulation, supra, n. 60.

4.3 Return and restitution

'Return' is also referred to as 'restitution', if a legal obligation is implied, or as 'repatriation', which implies the physical return home ('patris' being Greek for native community). Much can be said on the difference between the terms 'restitution' and 'return'; in the end, the use of either of the two terms tends to reflect the particular view on whether there is a legal obligation.[123]

The term 'return' in legal instruments was introduced in the 1970s to address colonial takings in museum collections of former colonial powers. With regard to that category, Western-European countries did not want to acknowledge any legal obligation. Hence, claims with regard to pre-1970 losses were to be referred to as 'return' claims, whereas 'restitution' was reserved for post-1970 claims in as far as countries adopted and implemented the Convention. This argumentation lies behind the name of the 'Intergovernmental Committee for Promoting the *Return* of Cultural Property to its Countries of Origin or its *Restitution* in Cases of Illicit Appropriation'. Obviously, differences of opinion on the legitimacy of the continued possession of cultural objects from colonised people existed at the time, however only very recently this outlook is gaining ground in Western holding countries.[124] The development of international law and the double standards in this regard will be addressed in Chapter 5.[125]

Nevertheless, over the last decades the term 'restitution' has become commonly used also for older losses, most notably in the field of Nazi-looted art. Within the context of this study 'return' and 'restitution' are both used: 'return' as a neutral term for the physical return of an object in an original setting, and 'restitution' mostly if transfer of ownership is implied.

4.4 Former owners, (mis)appropiation and looting

Former owners can be individuals, communities or national states. The original title may indeed be based on ownership title under private law, but an original title may also be based on norms (laws or custom) that exempt certain cultural objects from private ownership. In many cultures throughout history that is

123 For an overview, see R. Peters, 'Complementary and Alternative Mechanisms beyond Restitution: An Interest-oriented Approach to Resolving International Cultural Heritage Disputes' (Doctoral thesis, European University Institute, Florence, 2011), pp. 40-50.

124 Not in the last place as under influence of claims by countries that had suffered cultural losses and, today, have gained political strength, such as China or Turkey.

125 A legal obligation *was* recognised for objects looted during European wars, e.g. after the Second World War such obligations were based on the 1907 Hague Convention.

the case for objects of religious importance, archaeological finds, or even for family heirlooms.[126]

The involuntary loss in the cases under consideration may have been in the distant or more recent past. As the counterpart of such losses, at times the neutral term 'taking' will be used as well as the term (mis)appropriation. The term 'looting' is commonly used to describe the misappropriation of a cultural object without consent of the owner or local authorities, originally in a setting of armed conflict or foreign occupation.[127] The term is also widely used for the illicit excavation of antiquities irrespective of a situation of war. What exactly, according to present-day standards, constitutes an unlawful taking or looting will be touched upon in the next chapters.

Today, however, the term 'looting' is also widely used to indicate a taking that is seen as unjust, not *per se* a taking that was unlawful at the time. For example, the term 'Nazi looting' is used today for sales that are viewed as the result of general circumstances of persecution – sales that were not unlawful at the time.[128] Such developments may well be an indication of evolving law. Whilst international law first regulated restitution after looting in the specific situation of a formal war under the laws of warfare, with the adoption of the 1970 UNESCO Convention the term 'looting' became mainstream for the unauthorised export of cultural objects and, today, has come to include losses that were the consequence of persecution. In a similar vein, the term 'restitution claim' – traditionally used for a claim for the return of full ownership – at times is also used as a generic term for claims that fall short of a claim for full ownership (e.g. claims to Nazi-looted art for example often take the form of a sharing in the sales proceeds between the present owner and the heirs of the former owner). This may indicate that norms are changing. These thoughts will be recurring in Chapters 2, 4, and 6.

5 METHODOLOGY

Fragmentation was identified above as one of the main problems of the normative framework for cross-border disputes over cultural objects: inter-

126 E.g., the concept of 'fidei commissum' e.g. in old German law, where property should be kept to pass on to the next generation.

127 M. Cornu, J. Fromageau, C. Wallaert, (eds.) *Dictionnaire comparé du droit du patrimoine culturel* (2012) CNRS Editions, defines 'looting' as the appropriation of goods by force or by constraint in the event of a national or international armed conflict. However, 'looting' today is also a common word for the illicit excavation of antiquities beyond situations of war.

128 The definition of looting as takings 'offensive to the principles of humanity and dictates of public conscience' is useful here. See UNESCO Draft of the Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War (5 October 2009), principle II. Hereafter, Chapter 4.

national and national, private and public law of different places and times, hard law as well as soft law, may all influence the legal status of cultural objects. Fragmentation obviously is a more general problem of international law,[129] but especially true for cultural heritage law and particularly for the topic of this study. The most obvious reasons for this are that cross-border disputes involve multiple jurisdictions and cultural objects are valued in many different ways. Not only as a commodity or possession, but also for their (art) historical or scientific value, that may be of universal importance, and for their intangible heritage value as symbols of an identity of specific communities, nations or individuals.

This last element underscores that an approach of the issue solely from the perspective of national private law – as title issues over stolen property – would be insufficient. Conversely, to approach the topic of contested cultural objects solely from a public international law perspective would also not do justice to the issue, as private interests – for example those of innocent new possessors – need to be taken into account as well. Moreover, due to the absence on the international level of a specialised court or compliance mechanism in the field of contested cultural objects, adjudication in this field is mainly a matter of national courts and mechanisms for ADR, at some distance from international law.[130] This means that domestic legal doctrines define the contours for dispute resolution in this field, whilst the relevant international norms may not be directly applicable, depending on the domestic legal system, or may simply be unknown.

5.1 Legal pluralism

The methodological problems caused by this fragmentation where rules apply that may be binding, but also non-binding, in a setting where multiple stakeholders operate, was the reason to follow others in cultural heritage studies and to adopt a legal pluralist outlook.[131] Whereas a legal positivist stance would implicate a focus on binding instruments, a legal pluralist approach opens the door to the perception of law as a 'legal order', not as the sum total

129 See 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' (2006) Report of the Study Group of the International Law Commission, finalised by M. Koskenniemi (A/CN.4/L.682); D. Shelton, 'International Law and Relative Normativity', in M.D. Evans *International Law* (4th ed., 2014) OUP.

130 See also A. Chechi, 'Some reflections on International Adjudication of Cultural Heritage-related Cases' (2013) 10(5) Transnational Dispute Management.

131 E.g., F. Fiorentini 'A legal pluralist approach to international trade in cultural objects' in JAR Nafziger, RK Paterson (eds) *Handbook on the law of cultural heritage and international trade* (2014), 589-621; K. Kuprecht, *Indigenous Peoples' Cultural Property Claims* (2014) Springer, p. 20 et seq.; F. Francioni, 'Public and Private in the International Protection of Global Cultural Goods' (2012) 23 EJIL 719.

of binding norms that states enact, but as a social structure that is made up of much more than that. As Francioni puts it, law from that perspective consists of a plurality of legal orders that are made 'within, outside and above the state'.[132]

That concept suits the topic. In fact, disputes are often *not* solved by referral to binding legal instruments but to soft law instruments. Moreover, extra-legal methods such as negotiated settlements or cultural diplomacy, not litigation, are the preferred way to solve disputes. As such, the normative framework in this field can be perceived as a 'transnational legal order' where the conduct of a varied set of actors – e.g. states, individuals, communities, museums, and corporations – is informed by a multi-levelled set of norms.[133] These norms are to be found in binding national law (national private law, heritage laws, and import and export regulations); binding international law (such as UN Security Council resolutions, treaties in as far as applicable, and EU Regulations); in non-binding law and declarations (e.g. certain treaty standards that are not directly applicable, UN resolutions, the 1998 Washington Principles on Nazi-Confiscated Art, and the like); and in ethical codes for professional conduct (e.g. the ICOM Code of Ethics and art dealers guidelines).

In terms of methods, this means that whilst this study is a search for international (or transnational) standards, it will not focus on the identification of the traditional sources of international law as provided for in Article 38 of the Statute of the ICJ. These sources are: treaties and conventions; international custom; general principles of law; and as subsidiary sources judicial decisions and legal teachings.[134] Instead, this study has a broader perspective and also takes account of soft law instruments, transnational private regulation, national policies, and other documents in as far as these are perceived as standard-setting in the field. An extra reason for more flexibility in this regard is that norms on the issue of contested heritage are rapidly changing. Where at first, significant alterations of the legal approach occurred in the field of Nazi-looted art – moving away from a strict private law approach – this is presently happening in the field of colonial takings, and also in the wider field of looted antiquities. Depending on one's perspective, this is more or less visible.

132 Referring to Santi Romani's ideas of law as a 'plurality of legal orders'. Francioni (2012), p. 720.

133 See also T.C. Halliday and G. Shaffer, *Transnational Legal Orders* (2015) Cambridge University Press, New York.

134 Cf. the Statute of the ICJ, Article 38. Treaties are only binding on the parties to them, and customary international law pre-supposes an established practice and *opinio juris*.

5.2 A case-based approach

These dynamics and similarities were the reason to not focus solely on one specific category, even though these are often perceived as self-contained areas with specific rules, but instead to compare different categories. The question is, how to limit the scope of this study? In that regard, a case-based approach is chosen for this dissertation: in five separate publications, different types of claims are addressed through the spectrum of case studies. In this way, the research remains focussed on the peculiarities of the legal framework and practices in those specific types of claims, while at the same time insights are gained on similarities, differences, and the effectiveness of the law. Besides, by using case examples, it can be established whether a certain level of consistency of theory and practice exists in the particular category.

That choice, and the decision to write the dissertation in separate publications that stand on their own – instead of writing a monograph – has meant that a certain overlap is unavoidable. Several instruments are relevant to all categories in one way or another and since the aim of this study is to discover common principles, a comparison of categories from the perspective of the given case study is also a recurring theme. Some conclusions turned out similar for different categories, which is fortunate from the perspective of the aim of this study. For the reader of this dissertation as a whole, however, it results in some repetition.

5.3 Sources and research methods

As discussed above (section 2.3), soft law instruments and transnational private regulations in this field are numerous and have considerable normative significance. Whether a normative consistency can be established amongst such instruments and in comparison with hard law rules such as treaties or other binding law, will be explored in the following chapters. Apart from soft law and transnational private regulation, to that end domestic case law and outcomes of ADR procedures or diplomatic negotiations – in as far as possible since such procedures are often confidential – are also taken into account.[135]

Domestic case law from a wide number of jurisdictions is included in this study. An extensive comparative analysis would, however, exceed its scope. Differences between jurisdictions will be addressed by a comparison of jurisprudence in common law countries (such as the US and the UK), and civil law countries (most European countries).[136] But this study will not be limited to those jurisdictions, as this would give a misplaced outlook on the field of colonial takings. Available case law from other regions will therefore be

135 See Chapter 4.
136 See Chapters 2, 3, and 5.

included, though Western-European (mostly Dutch) and US case law will, overall, be the primary focus. The reason for this is pragmatic: familiarity with the Dutch and Western-European situation, and the availability of US case law due to the prominent US position in the international art trade.

The findings in this dissertation are primarily rooted in classical legal research: the study of legal documents, jurisprudence, literature, and other sources such as archives, databases, and policy and news reports. Over the last two decades, an impressive number of monographs, publications and dissertations[137] on the legal framework for (contested) cultural objects saw the light, signalling the proliferation of international cultural heritage law as a distinct branche of international law.[138] The present dissertation builds further on these studies and owes much to their insights.

In conclusion, although this study is ultimately a search for new rules, the main challenge is to identify the rules that already operate on the various levels, and to examine how these are followed up. That search is undertaken for each category in the subsequent chapters. Ideally, this would all add up to an organised 'transnational legal order'. However, due to rapid changes which are not synchronously per country or region, it seems that this ideal is not yet possible.

137 Amongst which the following dissertations: P.S. Sjouke, *Het behoud van cultuurgoederen, twee werelden, twee visies* (1999) Ars Aequi Libri [in Dutch]; A.F. Vrdoljak, *International law, museums and the return of cultural objects* (2006) CUP; K.R.M. Lubina, *Contested Cultural Property. The Return of Nazi Spoliated Art and Human Remains from Public Collections* (2009), Maastricht University; B. Schönenberger, *The Restitution of Cultural Assets* (2009) Eleven; I.A. Stamatoudi, *Cultural Property Law and Restitution. A Commentary to International Conventions and European Union Law* (2011) Elgar; R. Peters, *Complementary and Alternative Mechanisms beyond Restitution: An Interest-oriented Approach to Resolving International Cultural Heritage Disputes* (2011), European University Institute; A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) OUP; K. Kuprecht, *Indigenous Peoples' Cultural Property Claims* (2014) Springer; Z. Liu, *Repatriation of cultural objects: The case of China* (2015), UVA-Dare; A. Jakubowski, *State Succession in Cultural Property* (2015) OUP; J.M. Van Beurden, *Treasures in Trusted Hands: Negotiating the Future of Colonial Cultural Objects* (2017) Sidestone Press; V.M. Tünsmeyer, *Repatriation of sacred indigenous cultural heritage and the law: Lessons from the United States and Canada* (2020) Maastricht University. Related Dutch disssertations, e.g.: W.J. Veraart, *Ontrechting en rechtsherstel in Nederland en Frankrijk in de jaren van bezetting en wederopbouw* (2005) Kluwer [in Dutch]; N.A.F. Van Woudenberg, *State immunity and cultural objects on loan* (2012) Martinus Nijhoff; L.P.C. Belder, *The Legal Protection of Cultural Heritage in International Law and Its Implementation in Dutch Law* (2014), Universiteit Utrecht.

138 See, e.g., the OUP series on Cultural Heritage Law and Policy; handbooks such as the 2014 *Handbook on the law of cultural heritage and international trade*, edited by J.A.R. Nafziger and R.K. Paterson (2014, Elgar); the *Oxford Handbook of international cultural heritage law*, edited by F. Francioni and A.F. Vrdoljak (OUP, 2020); commentaries on the various conventions; and edited volumes on the topic of restitution, amongst which, e.g., V. Vadi and H.E.G.S. Schneider (eds), *Art, Cultural Heritage and the Market. Ethical and Legal Issues* (2014) Springer.

6 STRUCTURE

The series of five chapters that make up the body of this dissertation address different categories of claims, each from different legal perspectives. These chapters (the publications) can be considered separately – and were all published as such – but they also form a whole as they all add insights to the analysis. The types of disputes that are subsequently addressed are: private title claims (Chapter 2); interstate return claims (Chapter 3), Nazi-looted art (Chapter 4); colonial takings from indigenous peoples (Chapter 5); and more recently looted antiquities (Chapter 6).

The structure is as follows. Chapters 2 and 3 address the legal framework for the two models that currently exist for cross-border claims to cultural objects: as private claims and as interstate claims. Chapter 2 deals with claims by non-state actors to their lost cultural objects – as stolen possessions – for which (international) private law and soft law instruments are key, and specific problems that occur on that level. Chapter 3 addresses the interstate model of the 1954 and 1970 UNESCO Conventions for claims to cultural objects that were removed from the territory of a state – claims to lost national heritage – and specific problems related to that model. Chapters 4 and 5 are in-depth case studies of two types of 'historical' claims, i.e. claims based on a loss that occurred before the adoption of international treaties in this field. Chapter 4 analyses the field of Nazi-looted art, with a focus on private claims by heirs of owners who lost their artefacts as a result of Nazi persecution. Chapter 5 explores the category of 'colonial looting', i.e. title disputes over cultural objects that were taken by Western powers in a colonial setting, with a focus on losses at the close of the 19th century by indigenous peoples. Chapter 6, finally, approaches the topic of contested cultural objects from the wider perspective of heritage protection, the international art trade and the system of the 1970 UNESCO Convention. It analyses the interrelation (and disconnect) between private and public law in this field and puts forward proposals for the notion of 'heritage title' and a human rights law approach as legal tools to bridge gaps. This chapter can be seen as the substantive concluding chapter of the dissertation.

Each chapter aims to add a layer of insight and a different perspective to the questions how cross-border claims to cultural objects fit in the wider legal framework, and how the interests of former owners can be addressed more effectively. These insights then add up to the final observations and a summary of the answers to the research questions in the concluding Chapter 7 as well as the propositions put forward for purposes of the public defence of this doctoral dissertation.