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

Campfens, E.

2 Private title claims

ABSTRACT

Chapter 2 addresses claims to cultural objects in a private law setting by their former owners who lost these in another country. Although international conventions clearly establish the rule that misappropriated artefacts should be returned, the legal reality is less straightforward. The question of whose interests are given priority in disputes that regard such losses – those of the former owner or a new possessor – vary per jurisdiction. Moreover, restitution claims with regard to artefacts that were lost longer ago are often inadmissible due to limitation periods for claims or other obstacles in a private law approach. Given this fragmented situation, an increasing number of international soft-law instruments promote an ethical approach and alternative dispute resolution (ADR) to resolve title disputes: apparently to fill the 'gaps' between the law and present-day morality. This chapter analyses what (ADR) procedures are available for parties to settle title disputes over looted cultural objects. A lack of transparent and neutral procedures to implement and clarify standards in European jurisdictions has proven problematic in that regard.

Questions that are addressed in this chapter are: What are the main difficulties that obstruct restitution claims by former owners, both in civil law and in common law jurisdictions? Given the increasing reliance on soft law and Alternative Dispute Resolution (ADR) as the preferred way to solve disputes: what about access to justice in such an 'ethical' model?

*Restitution of looted art: What about access to justice?**

1 INTRODUCTION

'What is stolen should be returned' is probably one of the oldest legal principles.[1] When it comes to the return of artefacts stolen longer ago, the legal reality is less straight-forward. Given the reliance on non-binding soft law in this area and obstacles in the positive legal framework, the question of *how* former owners can have their stolen artefacts returned – in terms of access to justice – deserves further attention. Often, an 'ethical' approach and alternative dispute resolution mechanisms are promoted as the way to resolve such claims. Over the last decades, a body of international soft law and transnational private regulatioin has emerged in support of redress for losses of cultural objects such as Nazi-looting[2] or takings from indigenous peoples.[3] On the other hand, such claims tend not to be supported by positive law, especially in civil law jurisdictions. Thus, grey categories of 'tainted' artefacts have come into existence, where expectations have been raised that 'justice' will be done – expectations that in many countries cannot be fulfilled by relying on regular legal channels. On the practical level this means that certain artefacts cannot be sold or sent on international loans for as long as their title is not 'cleared'. And although market forces have come to fill in some of the gaps in the law, it is questionable whether this is a guarantee for justice. Problematic in this regard is the lack of transparent neutral procedures to implement and clarify the often vague soft-law norms, and a trend where 'big' European restitution cases are brought before US courts (forum-shopping).

---

* This Chapter was originally published in *Santander Art and Culture Law Review* (2/2018 (4): 185-220). To avoid major overlaps with other chapters, some sections were shortened for the purpose of this thesis and some of the discussed ongoing cases were updated.

1 The duty to return objects obtained in violation of the law 'can be found in the oldest known legislation, such as, for example, Eshnunna law going back to the middle of the twenty-third century BC'. W.W. Kowalski, 'Restitution of Works of Art Pursuant to Private and Public International Law' in *Collected courses of the Hague academy of international law*, vol. 288 (2002) Brill, Nijhoff, 28.

2 E.g. the Washington Conference Principles on Nazi-Confiscated Art (3 December 1998) Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC (Washington Principles).

3 E.g. the Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295 (13 September 2007) UN Doc A/RES/61/295 (UNDRIP).

The questions raised here are: why is ADR necessary; what kind of ADR procedures are available; and how this ethical approach guarantees clear standards and neutrality and transparency in the event of disputes? In other words, what about access to justice? This chapter sets out in the first section with an overview of the legal setting; followed by an examination of the ethical model that relies on soft law and ADR procedures in the second section.

2 THE LEGAL SETTING

Artefacts cross borders and are meant to be kept over time, meaning that the laws of different times and places may be relevant to their legal status. Artefacts are also unique and have an intangible quality, although that may differ per setting: the same object that in the hands of a collector or museum is of aesthetic, monetary, or art-historical value, may be held sacred by the former owner, or it may be a symbol of a family history. In consequence, the legal framework based on such a variety of interests is highly fragmented.[4] Moreover, at times, more than one party may have a justified interest in the same artefact. Whose interests are given priority when it comes to ownership claims, however, varies per jurisdiction. What follows is a birds'-eye overview of the legal framework.

2.1 The international level

On the international level a clear choice was made for the principle that 'the possessor of a cultural object which has been stolen shall return it', marking a victory for the interests of dispossessed owners over the interests of subsequent possessors.[5] This echoes and confirms the special status cultural objects have had since the beginning of international law: both the destruction of monuments and looting of cultural objects are prohibited during times of war or foreign occupation.[6] The 1899 Hague Regulations codified this prohibition,[7]

4 The multi-layered and de-centralised structure of cultural property law is well explained in F. Fiorentini, 'A Legal Pluralist Approach to International Trade in Cultural Objects' in J.A.R. Nafziger and R. Kirkwood Paterson (eds) *Handbook on the Law of Cultural Heritage and International Trade* (2014) Edward Elgar Publishing.

5 See e.g. Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 7 July 1998) 2421 UNTS 457 (1995 UNIDROIT Convention) art 3(1).

6 The terms 'looting' and 'pillage' are used in the cultural heritage field to define misappropriation of cultural goods in the event of an armed conflict, see M. Cornu, C. Wallaert and J. Fromageau, *Dictionnaire comparé du droit du patrimoine culturel* (2012) CNRS Editions. However, in the present context the term 'looting' is used to include takings in a situation beyond an 'armed conflict', such as confiscation as a result of racist legislation.

and after the massive plundering during the Second World War, the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol firmly established the norm that looted artefacts should be returned to the place they came from.[8] Since the adoption of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 Convention), this obligation also applies to looting in peacetime.[9] In this conventional framework, states are appointed as 'right holders' to the cultural objects within their territory. The question of ownership, however, is not addressed in these UNESCO treaties but left to the national level.[10] Given that regulation of ownership and property is, generally, considered a matter of state sovereignty, rules on the transfer of ownership title over stolen goods vary widely per jurisdiction.[11] Also within the European Union, for example, Article 345 of the Treaty on the Functioning of the European Union leaves issues of 'property ownership' to Member States.[12]

– *1995 UNIDROIT Convention*

In 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 was adopted that aimed at the harmonisation of national laws in this field. Its main principles include that:

---

7 Regulations Concerning the Laws and Customs of War on Land, Annex to the Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899) 32 Stat. 1803 (Hague Regulations) arts 46, 47, 56. For more on the development of the norm, see See E. Campfens, 'The Bangwa Queen: Artefact or Heritage?' (2019) 26 *International Journal of Cultural Property*.

8 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.

9 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.

10 At times, this causes tensions, see E. Campfens, 'Whose Cultural Heritage? Crimean Treasures at the Crossroads of Politics, Law and Ethics' (2017) 22 *Art Antiquity and Law* 193; A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) Oxford University Press, 138; I.F. Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (2004) Transnational Publishers, 52.

11 With the exception of the human right to property and rights of indigenous peoples to their cultural property regulation is a matter of national legislatioin. See below.

12 Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. Article 36 exempts from free trade 'national treasures possessing artistic, historic or archaeological value', and constitutes the basis for European Parliament and Council Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) OJ L 1159.

i) Stolen cultural objects should be returned to their owners;[13]
ii) Claims should be brought within three years from the time the location of the artefact and the identity of its possessor are known – with a maximum of 50 years from the time of the theft. No time limitation is set out if it concerns 'a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection' or concerns 'a sacred or communally important cultural object belonging to and used by a tribal or indigenous community as part of its community's traditional or ritual use', although also for these categories states may set limitation periods up to 75 years;[14] and
iii) A new possessor can claim compensation if his or her due diligence at the time of the acquisition can be proven, for which standards are set.[15]

These rules, however important for future restitution claims, only apply insofar as it concerns the loss of an artefact *after* ratification and implementation by states on the national level.[16] The 1995 UNIDROIT Convention, however, has not been widely adopted.[17] This means that many categories of stolen artefacts remain beyond the scope of their application: misappropriated artefacts tend to surface much later and, as a consequence, today's restitution cases deal with takings from the past. The legal situation with regard to such title disputes will be illustrated hereafter by a discussion of some case examples and an appraisal of new developments. A sketch of the ethical framework of soft law and ADR initiatives in this field will follow in the second part.

2.2 Different national approaches

A common denominator in art restitution cases based on a past loss is that the relevant facts are spread out over many years and involve multiple juris-

13 1995 UNIDROIT Convention art 3(1).
14 Ibid. arts 3(3), 3(5), 3(8).
15 Ibid. art 4(4): 'In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances'.
16 Ibid. art 10(1): 'The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought'.
17 Few Western European States ratified the Convention, see 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995) – Status', *International Institute for the Unification of Private Law* <https://www.unidroit.org/status-cp> accessed 2 May 2021.

dictions, whereas national ownership laws differ widely.[18] This is at the core of what causes title disputes over looted or stolen artefacts to be so complex and unpredictable.

Common law countries, most notably the US legal system, 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* rule), whereas in countries with a civil law tradition (most European countries with the exception of the UK and Ireland), the position of the new possessor is stronger and a valid legal title can be obtained over stolen artefacts if they were acquired in good faith, or even just by the passage of time. Besides, time limitations for ownership claims may either start to run from the moment of the loss of property, or from the moment of discovery of the object (or when one would reasonably have been able to discover it); or – as under New York – from the moment of 'demand and refusal'.[19] These differences may cause tension within the legal framework.

The opposite outcomes reached in very similar Dutch and UK cases regarding Second World War looting may serve as illustration. While the Dutch Supreme Court denied a claim to a painting looted from Dresden in the aftermath of the Second World War by the Red Army in its 1998 *Land Sachsen* ruling, the UK High Court honoured a similar claim in the *City of Gotha* case the same year.[20] The Dutch court argued it had no choice but to apply the absolute (30-year) limitation period for ownership claims, which dated from the moment of the loss and runs irrespective of the good or bad faith of the present possessor. The court in the UK, on the other hand, honoured the claim, observing that it would have invoked the public order exception if German law would have implicated a ruling in favour of a possessor that was not in good faith.[21]

A case concerning Camille Pissarro's 1897 depiction of a Paris street scene, *Rue Saint-Honoré, Après-midi, Effet de Pluie*, at the centre of litigation in the US for almost 14 years, may highlight this point in more depth.[22] Today, the

18 For a general overview of the obstacles to restitution, see B. Schönenberger, *The Restitution of Cultural Assets* (2009) Eleven International Publishing, ch. 4.

19 Ibid. See also Chechi (2014) 89.

20 *Land Sachsen* (1998) Hoge Raad, Case No. 16546, ECLI:NL:HR:1998:ZC2644 (Supreme Court of the Netherlands); *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance SA* (1998) No. 1993 C 3428 (QB). For a similar US case, see *Kunstsammlungen zu Weimar v Elicofon* (1982) United States Court of Appeals for the Second Circuit, 678 F2d 1150.

21 Two expert interpretations were presented on this point and, eventually, there was no need to invoke the public order exception.

22 Claude Cassirer, the grandson of Lilly Cassirer, filed the law suit in 2005 in California. The first rulings confirmed the US Foreign Sovereign Immunity Act's exception to sovereign immunity for lawsuits concerning rights to property taken in violation of international law. Two rulings on appeal confirmed this: *Cassirer v Kingdom of Spain* (2010) United States Court

Pissarro painting is part of the Thyssen-Bornemisza Museum in Madrid. However, it once belonged to Jewish art collector Lilly Cassirer Neubauer, who was forced to sell it just before her escape from Germany in 1939. After the war, it surfaced in the US and changed hands several times before Baron Thyssen-Bornemisza acquired it from a New York dealer in 1976. He brought the Pissarro to Switzerland, after which the Spanish State acquired it as part of the Baron's art collection in 1993. Whereas the first years of the litigation revolved around the question whether a US court had jurisdiction over property of the Spanish State – foreign states' property usually being immune – the next question was which law should apply – Spanish or US law? In its 2015 ruling Judge Walter held that according to conflict rules Spanish law should be applied, which was a (temporary) victory for the museum, inasmuch as the doctrine of acquisitive prescription under Spanish law – as in many European countries – would mean that ownership of the painting passed to the museum.[23] In a July 2017 appellate ruling, the choice of Spanish law was confirmed, however the question was raised whether the museum can be seen as an 'accessory to the theft' (*encubridor*) under Article 1956 of the Spanish Civil Code, which might mean the painting could still be claimed as stolen property.[24] On referral in its 30 April 2019 ruling the district court concluded, albeit very reluctantly, that the Thyssen-Bornemisza Museum acquired lawful ownership according to Spanish law.[25]

Interestingly, Judge Walter advised the parties in an *obiter dictum* in the 2015 ruling, to 'pause, reflect and consider whether it would be appropriate to work towards a mutually agreeable resolution (…) in light of Spain's acceptance of the Washington Conference Principles (…), and its commitment to achieve just and fair solutions for victims of Nazi persecution'.[26] Apparently Spanish law on this point was not considered to be 'just and fair' – hence the advice that the parties consider resolving their dispute in an alternative way.

---

of Appeals for the Ninth Circuit, 616 F. 3d 1019; *Cassirer v Thyssen-Bornemisza Collection Foundation* (2013) United States Court of Appeals for the Ninth Circuit, 737 F. 3d 613.

23 *Cassirer v Thyssen-Bornemisza Collection Foundation* (2015) United States District Court for the Central District of California, 153 F. Supp 3d 1148.

24 According to the verdict, 26 years after acquisition by the Spanish State. *Cassirer v Thyssen-Bornemisza Collection Foundation* (2017) United States Court of Appeals for the Ninth Circuit, 862 F. 3d 951, 29-30.

25 *Cassirer v Thyssen-Bornemisza Collection Foundation* (2019) United States District Court for the Central District of California, No. CV 05-CV-03459. E. Pettersson, 'Spanish Museum Can Keep Nazi-Looted Masterpiece, Judge Rules' (30 April 2019) *Bloomberg News* <https://www.bloomberg.com/news/articles/2019-04-30/spanish-museum-can-keep-nazi-looted-masterpiece-judge-rules>.

26 *Cassirer v Thyssen-Bornemisza Collection Foundation* 2017.

Given the course of the earlier *Altmann* litigation (2001-2004) this may not be surprising.[27] The *Altmann* case dealt with six paintings by Gustav Klimt – amongst them the famous *Lady in Gold* – of the Viennese Jewish Bloch-Bauer family who had been persecuted by the Nazis. The paintings had come into the possession of the Austrian National Gallery, which had refused to return them to the family ever since the Second World War, amongst other reasons because they were protected 'national treasures'. The case is considered seminal because it opened the doors of US courts to claimants seeking redress against foreign states or their institutions, even though foreign states and their acts would normally be exempt from jurisdiction in another state. The implication of the US Supreme Court's 2004 ruling is that, in spite of the immunity provided for by the Foreign Sovereign Immunity Act (FSIA), Nazi confiscations fall under an exception.[28] This exception 'abrogates sovereign immunity in any case where rights in property *taken in violation of international law* are in issue and that property (…) is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in *a commercial activity* in the United States'.[29] As to this last condition, the availability of a museum catalogue in the US was deemed sufficient. Such a low threshold may illustrate the US courts' readiness to claim jurisdiction over Holocaust-related cases.[30]

In this regard, interesting too is the rejection by the California District Court in 2001 of the plea by Austria that the matter should have been litigated in Austria (the US being a *forum non conveniens*). The court found that: 'Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years. (…) [Then] she would be left without a remedy; clearly, therefore, Austria is not an adequate alternative forum for Plaintiff's claims'.[31] After this victory, the Austrian government agreed to arbitration

27 In this case several court rulings led to two arbitral awards: *Maria V Altmann v Republic of Austria et al* (2001) United States District Court for the Central District of California, 142 F. Supp. 2d 1187; *Maria V Altmann v Republic of Austria et al* (2002) United States Court of Appeals for the Ninth Circuit, 317 F. Supp. 3d 954, as amended 327 F. Supp. 3d 1246 (2003); *Republic of Austria et al v Altmann* (2004) Supreme Court of the United States, 541 US 677. For an overview, see C. Renold and others, 'Case Six Klimt Paintings – Maria Altmann and Austria' (2012) Platform ArThémis, Art-Law Centre, University of Geneva.

28 This was a 'statutory holding' allowing for retroactive application of the exceptions in the FSIA to foreign states' immunity from suit, thus allowing US courts to assume jurisdiction. The parties then agreed on international arbitration.

29 As cited in *David L. de Csepel et al. v Republic of Hungary et al* (Memorandum Opinion, 2016) United States District Court for the District of Columbia, No. 10-1261 (ESH) 28 (emphasis added).

30 B. Schönenberger (*The Restitution of Cultural Assets* (2009) Eleven International Publishing), citing in fn 1102 from a review by G. Cohen of M.J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003) New York University Press: 'The author (…) posits that the 'real hero' is the American justice system, the only forum in the world where Holocaust claims can be heard today'.

31 *Maria v Altmann v Republic of Austria et al* (2001) (n. 27) 1209.

and eventually returned five of the six Klimt paintings to Maria Altmann, the Bloch-Bauer heir.[32]

A similar clash of laws as in the *Pissarro* case was at issue in the *Malewicz v City of Amsterdam* case.[33] This case revolved around a claim by the heirs of the painter Malewicz to 14 of his paintings in the Amsterdam Stedelijk Museum collection which had been on temporary loan in the US, on the grounds that the painter had been forced to leave them behind in Berlin in 1927 and could not retrieve them as a result of persecution by the Bolsheviks.[34] Two court rulings made it evident that the position of the City of Amsterdam that it was the legitimate owner of the paintings, was not looked upon favourably by the judges in New York. The City of Amsterdam argued that title had passed on grounds of acquisition in good faith of the collection from a relative of Malewicz in 1958, and that even if that sale would not be valid, the absolute prescription periods under Dutch law would render a claim time-barred. Similarly as in the *Altmann* case, the American judge ruled in favour of the former owners and stated that the taking of the paintings without paying compensation to the 'true owner' is a violation of international law – referring to the human right to property – and therefore the facts provided a sufficient basis for jurisdiction by a US court.[35] The *Malewicz* case was also eventually settled out of court, in this instance with the help of a neutral third party who mediated a settlement.[36] Under the settlement, five paintings were returned to the ownership of the heirs, while the heirs acknowledged legal title of the City of Amsterdam to the remainder of the collection in the Stedelijk Museum.[37] The settlement agreement of 2008 acknowledges, on one hand, the circumstances that prevented Malewicz from returning to his artworks and the interests of the heirs while, on the other hand, it aims at keeping 'such a part of the collection together, that in essence it embodies a representation of and homage to Malewicz as one of the major artists of the twentieth century

32 *Maria v Altmann and others v Republic of Austria* (Arbitral Award, 15 January 2004) <http://bslaw.com/altmann/Klimt/award.pdf> accessed 1 April 2019; *Maria v Altmann and others v Republic of Austria* (Arbitral Award) (6 May 2004) <http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf> accessed 1 April 2019.

33 *Malewicz v City of Amsterdam* (2005) United States District Court for the District of Columbia, 362 F. Supp. 2d 298; *Malewicz v City of Amsterdam* (2007) United States District Court for the District of Columbia, 517 F. Supp. 2d 322.

34 A. Chechi, E. Velioglu and M.A. Renold, 'Case Note – 14 Artworks – Malewicz Heirs and City of Amsterdam' (2013) Platform ArThémis, Art-Law Centre, University of Geneva.

35 *Malewicz v City of Amsterdam* (2007) (n. 33) 340. On this point, see also *David L. de Csepel et al v Republic of Hungary et al* (2016) (n. 29) 28.

36 J.M. Boll, at the time a member of the Dutch State Council, in this instance acted in his personal capacity without formal involvement or (financial) ties with the parties. Interview with author (14 August 2018) (on file with the author).

37 Settlement Agreement between the Municipality of Amsterdam and the Malewicz heirs (24 April 2008) (on file with the author).

and as a leading source of modern and contemporary art'.[38] This enabled the continued public exhibition by the Amsterdam Stedelijk Museum of a considerable collection of Malewicz works.

The *Malewicz* case was not the first restitution claim that revolved around paintings that were on a temporary loan in the US: a similar case concerned Egon Schiele's *Portrait of Wally*, seized while on loan from the Leopold Museum in Austria for a temporary exhibition in New York.[39] Anxiety in the museum world that these developments would hinder cross-border loans resulted in the adoption of a law aimed at providing greater security for foreign museums sending their works on loan to the US: the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.[40] Nevertheless, under this law two exceptions apply. The first exception concerns 'Nazi-era claims', and the second concerns artefacts 'taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group'. In other words, owing to these exceptions the door of the US judiciary would remain open to cases alleging property takings in the course of human rights violations.[41]

As a last example to illustrate the willingness of US courts to assess Nazi-era restitution claims, the 2016 ruling in *Simon v Republic of Hungary* should be mentioned.[42] In this case the court argued that confiscation of private property by the Hungarian Wartime authorities – in this instance not artefacts – may, in itself, constitute genocide and therefore violates international law. Although this interpretation of the term 'genocide' seems inconsistent with the generally-accepted notion of genocide,[43] the verdict may underline that in the US such

38 Ibid. g, h.

39 *United States v Portrait of Wally* (2009) United States District Court, SD New York, 663 F. Supp. 2d 232. N van Woudenberg and JAR Nafziger, 'The Draft Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purpose' (2014) 21 *International Journal of Cultural Property* 481.

40 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016, PL 114-319.

41 I. Wuerth, 'An Art Museum Amendment to the Foreign Sovereign Immunities Act' (2017) *Lawfare* <https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act>.

42 *Simon v Republic of Hungary* (2016) United States Court of Appeals for the District of Columbia Circuit, No. 14-7082: 'Such takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as themselves genocide'.

43 In its *Genocide* case (2007), the International Court of Justice (ICJ) concluded that: '(…) the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention'. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Rep 2007. See also Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

cases are approached from the perspective of fundamental human rights. In that sense, also Eric Jayme argued that the *Altmann* case should be seen as an example of the retroactive application of human rights.[44]

The above overview highlights the different setting of restitution claims in European civil law jurisdictions, where new possessors of looted artefacts often have a more advantageous position. With respect to Holocaust takings, one reason for this is the expiration of the special restitution laws that were enacted after the Second World War, in an attempt to return looted art to the victims of Nazi-plundering.[45] Such laws often had very short limitation periods and in today's practice mostly lost their meaning. At times these may still apply.[46] In France, for example, the Tribunal de Grande Instance de Paris ruled that the painting *Pea Harvest* by Camille Pissarro should be returned to the grandson of Jewish art collector Bauer, who had lost his collection through confiscation by the Vichy government in 1943 and this ruling was upheld on appeal.[47] Generally speaking however, the 2018 German court ruling that denied a claim to a painting by Max Pechstein from the collection of Jewish art collector Robert Graetz lost as a result of Nazi persecution, seems more representative of legal systems in Europe where claims tend to be inadmissible after a certain period of time.[48] As the German ruling explains: When the law is clear on the matter of ownership and limitation periods for ownership claims, the hands of a judge are tied.

---

44 E. Jayme, 'Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?' (2006) 11 *Uniform Law Review* 393.

45 For more on post-war restitution laws, see E. Campfens, 'Sources of Inspiration: Old and New Rules for Looted Art' in E. Campfens (ed) *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing, 21-26. In the Netherlands, for example, claims had to be filed before July 1951. Regulation Concerning Article 21 of Law KB E 100 'Koninklijk Besluit Herstel Rechtsverkeer' (1950) 251 Dutch Staatscourant 5.

46 In France courts held claims admissible on the grounds of a 'void' transaction, see the *Gentili di Giuseppe* case (*Gentili di Giuseppe et al v Musée du Louvre* (1999) Court of Appeal of Paris, 1st Division, Section A, No RG 1998/19209) and the *Bauer* case discussed hereafter. In the German *Hans Sachs Poster collection* case, a claim was honoured on grounds that it had been impossible for claimant to meet deadlines earlier (*Hans Sachs Poster Collection* (2012) *Bundesgerichtshof*, V ZR 279/10).

47 *Bauer et al v B and R Toll* (2017) Tribunal de Grande Instance de Paris, No RG 17/58735 No 1/FF; upheld in appeal on 2 October 2018, see V. Noce, 'Paris Court Orders US Collector to Turn Over Pissarro Painting' (3 October 2018) *The Art Newspaper* <https://www.theartnewspaper.com/news/paris-court-orders-us-collector-to-turn-over-pissarro-painting> accessed 30 April 2019. Previously, on 8 November 1945, a Paris court had ruled the confiscation of the painting – from Simon Bauer – to be null and void. See *Bauer et al v B and R Toll* (2017) 4.

48 *Landesgericht Frankfurt am Main Urt,* Judgement of 2 November 2016, Az:2-21 O 251/15; *Oberlandesgericht Frankfurt am Main,* Judgment of 8 February 2018, Az:1 U 196/16.

Obviously, regulations that provide time limits for claims serve a purpose. In the interest of legal certainty, at some point in time the legal reality adapts itself to the prevailing situation. Those who 'sit' on their rights may lose these, and those who acquired an object in good faith may gain valid legal title. The American couple that had acquired the Pissarro from Christie's in New York in 1995 for $800,000 in good faith and had to part from it without compensation, for example, certainly did not agree that the outcome was 'pure justice'. While the verdict was being welcomed with these words by the representative of the family whose heirloom was confiscated by the Nazis, they voiced their discontent by stating that: 'It surely is not up to [us] to compensate Jewish families for the crimes of the Holocaust'.[49] It may illustrate the complexity of finding a 'just' balance between the interests of the original owner against those of a subsequent possessor.

Tension between national private law systems may also arise as a result of cultural differences: unknown forms of (collective) ownership of cultural objects may not be recognised in foreign courts. In December 2018, for example, the Amsterdam District Court denied a claim by two Chinese villages seeking the return of a stolen sacred Buddha statue.[50] The statute was allegedly stolen from a local temple in 1995 and, in 1996, was bought in Hong Kong by a Dutch collector. Without addressing the many substantive issues raised by the case, the claim was dismissed on the grounds that the status of the village committees as a legal entity that owned of the statute was unclear. Similarly, a claim by the Hopi tribe in 2013 French litigation aimed at preventing an auction in Paris of their sacred 'Katsina', masks that represent incarnated spirits of their ancestors, based on their communal and inalienable property rights, was deemed inadmissible and reason for denial by the French courts.[51]

2.3 Appraisal of the legal framework

Claims to artefacts lost in the past are predominantly approached as a matter of stolen property and thus rely on national private law. In terms of national private law, there is a discrepancy between the legal framework in the US and Europe. In the US, the interests of original owners of stolen artworks are traditionally taken more into consideration and courts are willing to assume

49 A. Quinn, 'French Court Orders Return of Pissarro Looted by Vichy Government' (8 November 2017) *The New York Times* <https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?searchResultPosition=1> accessed 16 January 2019. According to the representative of the Toll couple, Ron, the contract with Christie's stands redress 'upstream' in the way.

50 Judgment of 12 December 2018, Amsterdam District Court, ECLI:NL:RBAMS:2018:8919.

51 The auction was considered legitimate since their claim has no legal basis in French law. *Association Survival International France v SARL Néret-Minet Tessier Sarrou* (2013) *Tribunal de Grande Instance de Paris*, No RG 13/52880 BF/No 1.

jurisdiction over cases that concern looted art, even if these concern artefacts in European collections.[52] In Europe, the situation is fragmented. At times, national laws offer a loophole in specific cases (as in the *Bauer* case). But often, cases depend on voluntary adherence to soft-law norms, provided that the parties are willing, in accordance with the 'ethical' approach. In such a situation settlements will often depend on the bargaining chips brought to the table by the parties.[53] One of such bargaining chips may be the possibility of taking 'big' cases to the US for costly and lengthy litigation.

In its 2019 resolution on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars, the European Parliament has addressed the problems claimants encounter in regaining their lost artefacts (2019 EP Resolution).[54] The resolution calls on the European Commission and Member States to support restitution claims by former owners. As a solution for *future* cases, the Parliament proposes the harmonisation of laws of member states through the adoption of certain elements of the 1995 UNIDROIT Convention.[55] The introduction of due diligence standards as a legal standard indeed would indeed be an important step, as this would prevent the trade in unprovenanced and possibly looted artefacts (i.e. where a history of ownership is not fully documented). Possibilities for 'laundering' stolen or looted artefacts in European civil law countries where new possessors may gain valid ownership title over stolen artefacts, would likewise be diminished. Nevertheless, the implementation of the 1995 UNIDROIT Convention would not solve title disputes regarding artefacts that already circulate and were lost *before* the implementation of the Convention in national private law. These cases would remain in limbo and older, incompatible national norms in European jurisdictions would continue to apply.[56] In other words, due to increased transparency and efforts to enlist potentially looted artefacts in databases, as proposed in the 2019 EP Resolution, more claims will be facilitated, while at the same time the question of *how* to resolve these claims remains unaddressed. In such cases the 2019 EP Resolution proposes the use of alternative dispute resolution mechanisms (ADR): a confirmation of the extra-legal 'ethical model' for restitution claims.[57]

52 For a listing, see E. Campfens, 'Nazi-Looted Art: A Note in Favour of Clear Standards and Neutral Procedures' (2017) 22 *Art Antiquity and Law* 339-342.

53 F. Shyllon, 'The Rise of Negotiation (ADR) in Restitution, Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure' (2017) 22 *Art Antiquity and Law* 130-142.

54 European Parliament Resolution on Cross-Border Restitution Claims of Works of Art and Cultural Goods Looted in Armed Conflicts and Wars (17 January 2019) 2017/2023 INI.

55 Ibid. paras 11, 12.

56 1995 UNIDROIT Convention, art 10(1).

57 Ibid. para 15 and further.

3 THE ETHICAL MODEL

Since the end of the last century, the adoption of various soft-law instruments underscores that norms are changing with regard to the possession of looted art, even if artefacts are lawfully owned under private law rules. Ethical codes, professional guidelines, and declarations tend to have a similar pattern, one that focuses on equitable solutions for title disputes that take the interests of former owners into account; and, in the second place, on the use of ADR mechanisms to resolve claims.[58] The following section provides a discussion of such soft-law instruments and their referral to ADR procedures. This is followed by a closer look at two institutionalised procedures in this field – the Binding Opinion Procedure of the Dutch Restitutions Committee, a procedure established by the Dutch government for the assessment of Nazi-looted art claims; and the recently-established international Court of Arbitration for Art, a private initiative.

3.1 Soft-law instruments

Soft law in the field of Nazi-looted art, arguably the most well-known category of restitution claims, follows the above outline promoting equitable solutions by means of ADR in the system of the 1998 Washington Principles.[59] The referral by Judge Walter in the Spanish/US *Pissarro* case mentioned above highlights their impact. With the adoption of the Washington Principles, 40 states agreed to assist parties in finding 'just and fair' solutions to ownership disputes that regard Nazi-confiscated art. The relevant rule reads as follows:

> 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.[60]

ADR mechanisms are advocated in Principle no. 9: 'Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues'. Their adoption instigated a practice of settlements and returns, initially restricted to national public collections, but soon followed by the

58 For more co-operative solutions, see M.A. Renold, 'Cultural Co-Ownership: Preventing and Solving Cultural Property Claims' (2015) 22 *International Journal of Cultural Property* 163-176.

59 'Washington Conference Principles on Nazi-Confiscated Art' (n. 2).

60 Ibid. principle 8.

private sector.[61] Today, works that are 'tainted' by a possible history of Nazi-looting are unsaleable on the international art market and cannot be sent on international loans by museums. In other words, the reputation of a work of art and its market value has come to fill a gap where the law is lacking.

While this extra-legal 'ethical' approach can overcome legal obstacles that today are seen as leading to immoral outcomes, given the special circumstances of the loss, such an approach nonetheless has a drawback: the field is hampered by a lack of clear rules and compliance mechanisms.[62] Some believe a 'fair and just solution' means the full restoration of property rights – a straightforward and absolute right on the part of dispossessed owners to restitution of their lost property. Others believe interests of other parties should also weigh in to reach a 'fair and just' solution.[63] Likewise, views on what exactly is 'Nazi-looted art' differ. While it is well-understood that the confiscation of artefacts on basis of racial (Nazi) laws, theft, and forced sales fall under the notion, some argue that sales in neutral countries by Jewish refugees – having an indirect causal relation with the Nazi regime – should also be considered as forced sales.[64] Clearly the norm is widening, and is also applied to wartime losses at the hands of others than the Nazis.[65] The twin-pronged question is: In what direction is it evolving and who is to clarify these rules?

61 E.g. German/US Joint Declaration Concerning the Implementation of the Washington Principles from 1998 (26 November 2018) <https://www.lootedart.com/web_images/pdf2018/2018-11-26-gemeinsame-erklaerung-washingtoner-prinzipien-engl-data.pdf> accessed 6 December 2018: 'Both our governments recognize that the Washington Principles and Terezin Declaration apply to public *and private* collections, although we recognize the latter presents a particular challenge. We therefore call on art auction houses and other private dealers in each of our countries to adhere to the Washington Principles, taking note of positive examples set by some auction houses and art dealers in handling possible Nazi-looted artworks' (emphasis added).

62 Further discussion in E. Campfens (2017), 'Nazi-Looted Art …'. It has also not been clarified by later international declarations, such as: Council of Europe, Resolution 1205, 'Looted Jewish Cultural Property' (1999) Doc 8563; Vilnius Forum Declaration (2000) <https://www.lootedart.com/MFV7EE39608> accessed 23 April 2019 (signed by 38 governments) and the Terezin Declaration on Holocaust Era Assets and Related Issues (2009) <https://www.lootedartcommission.com/NPNMG484641> accessed 23 April 2019, with 46 signatory states. For an overview of such later instruments, see E. Campfens (2015) 37.

63 See, however, the commotion over a Dutch decision that held that the interest of the museum outweighed the interests of former owners (discussed below). See C. Hickley, 'Dutch Policy on Nazi-Loot Restitutions under Fire' (21 December 2018) *The Art Newspaper* <https://www.lootedart.com/news.php?r=TETJ4L309041> accessed 23 April 2019.

64 Examples in E. Campfens (2017) 'Nazi-Looted Art …' 23-26.

65 Reports of the Spoliation Advisory Panel Regarding the *Beneventan Missal* (23 March 2005 and 15 September 2010). Dutch Restitutions Committee, Recommendation Regarding Krasicki (2017) RC 1.152.

It has been argued that a similar instrument to the Washington Principles should be developed for restitution claims that concern colonial takings.[66] On the national level – in France, the Netherlands, and Germany – guidelines and declarations of this type have recently indeed been adopted.[67] It demonstrates a political will to act. It should be noted, however, that the Washington Principles themselves are not more specific or legally binding than already existing instruments in other categories.

Insofar as it concerns claims where museums are involved, the 1986 International Code of Ethics adopted by the International Council of Museums (ICOM) , an example of transnational private regulation, gives guidance.[68] Most museums are members of ICOM and are expected to adhere to the principles adopted in the ethical code. Similar to the approach outlined above, these guidelines state that with regard to restitution issues, museums should collaborate with source communities. The Code encourages readiness to enter into dialogue, preferably on a non-governmental level. The relevant provisions read as follows:

- Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level.
- When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international law and international conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return.

---

66 J.M. van Beurden, *Treasures in Trusted Hand: Negotiating the Future of Colonial Cultural Objects* (2017) Sidestone Press; see also H. Parzinger, 'Bauen Wir Museen in Afrika!' (25 January 2018) *Frankfurter Allgemeine Zeitung*.

67 In France, recommendations were presented but not yet policy lines; see 'Remise du Rapport Savoy/Sarr sur la Restitution du Patrimoine Africain' (*Elysée*, 2018) <https://www.elysee.fr/emmanuel-macron/2018/11/23/remise-du-rapport-savoy-sarr-sur-la-restitution-du-patrimoine-africain> accessed 23 April 2019; German: 'Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten' (2019) <https://www.kmk.org/fileadmin/pdf/PresseUndAktuelles/2019/2019-03-25_Erste-Eckpunkte-Sammlungsgut-koloniale-Kontexte_final.pdf> accessed 23 April 2019; for the Dutch guideliens, see 'Dutch National Museum of World Cultures Announces Principles Claims Colonial Collections' (*Museum Volkenkunde*, 2019) <https://www.volkenkunde.nl/en/about-volkenkunde/press/dutch-national-museum-world-cultures-nmvw-announces-principles-claims> accessed 23 April 2019.

68 The ICOM Code of Professional Ethics was adopted by the General Assembly of the International Council of Museums on 4 November 1986, retitled 'ICOM Code of Ethics for Museums' in 2001, and revised in 2004. See 'ICOM Code of Ethics for Museums' (2004) <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>, ICOM Code 6.2 (Return of Cultural Property), and ICOM Code 6.3 (Restitution of Cultural Property).

Another instrument that provides guidelines is the 2006 Principles for Co-operation in the Mutual Protection and Transfer of Cultural Material.[69] Adopted by the International Law Association, they emphasise a general duty on the part of institutions and governments to enter into 'good-faith negotiations' regarding restitution claims by persons, groups, or states. The principles also list what should be taken into account during those negotiations, namely '(…) the significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting state, and protection of the cultural material'.[70] Insofar as concerns the outcome, a focus is placed on 'caring and sharing': the alternatives to outright restitution mentioned include loans, production of copies, and shared management and control.[71] Two categories are singled out: Principle 4 sets out the obligation 'to respond in good faith and to recognise claims by indigenous groups or cultural minorities whose demands are not supported by their national governments'; whereas Principle 5 confirms the special status of human remains with a straightforward obligation of repatriation.

Indigenous peoples' cultural property claims form a category that increasingly is acknowledged as a matter of international human rights law. For this category, the adoption in 2007 – after 20 years of negotiations – of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is of major importance.[72] The primary obligation is for states to 'provide redress, (…) which may include restitution, with respect to cultural property taken without their free, prior and informed consent'.[73] Beyond emphasising the need for redress, it also obliges states to set up 'fair, transparent and effective mechanisms' to address claims. Given the fact that in many (civil law) jurisdictions new possessors gained valid legal ownership/title over objects lost longer ago, states would seem to have the choice to either (i) arrange by law for expropriation and restitution; or perhaps more feasibly as a first step, to (ii) provide assistance in finding solutions through the setting up of transparent ADR mechanisms.[74]

Apart from these instruments that address right-holders on the sub-state level, numerous UN and UNESCO declarations underline the importance of

69 International Law Association, Report of the Seventy-Second Conference (2006), Annex to J.A.R. Nafziger, 'The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' (2007) 8 *Chicago Journal of International Law* 147. Nafziger states that current practice is the jurisprudential basis.

70 Ibid. principle 8.

71 Ibid. principle 3.

72 UNDRIP (n. 3) arts 11(2), 12(2).

73 Ibid.

74 Further discussion in E. Campfens (2019), 'The Bangwa Queen…'.

return of (a representative part of) a country's lost cultural patrimony.[75] In this regard, in 1978 the UNESCO Intergovernmental Committee (ICPRCP) was established to assist Member States with return requests that concern cultural property 'which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation'.[76] In various UN Resolutions attention is drawn to the services of the ICPRCP, and, once more, the 2015 Operational Guidelines to the 1970 UNESCO Convention reiterate this.[77] Notwithstanding this appreciation and the introduction of a special mediation procedure, the relatively low number of cases referred to the Committee indicates that the state-centred approach of the ICPRCP creates a political setting that may not *per se* be suitable to resolve these matters.[78] It therefore mostly is used as a forum for best practice examples and for governments to state certain claims.

3.2 Alternative dispute resolution

In the context of cultural property claims, adversarial litigation is generally considered a last option, to be entered into only after good-faith negotiations and ADR mechanisms and procedures have been exhausted.[79] Their specific nature and the complex moral and legal issues that are involved are often cited as reasons. The main reason for resorting to ADR is that positive legal standards

75 For an overview of UN Resolutions, see 'Restitution of Cultural Property: Resolutions Adopted by the United Nations General Assembly about Return and Restitution of Cultural Property' (*UNESCO*) <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/resolutions-adopted-by-the-united-nations-general-assembly-about-return-and-restitution-of-cultural-property/> accessed 29 April 2019.

76 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 24 October-28 November 1978, amended October 2005) UNESCO Doc CLT/CH/INS-2005/21.

77 See, e.g., UNGA Res. 67/80 (12 December 2012) UN Doc A/RES/67/80 para 80. UNESCO, '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 18-20 May 2015) C70/15/3.MSP/11 (UNESCO Operational Guidelines).

78 Chechi (2014) 104-106. The General Conference of UNESCO adopted Resolution 44 (UNESCO General Conference, 33rd Session, Paris, 2005) 33 C/Resolution 44, adding mediation and conciliation to the mandate of the Intergovernmental Committee.

79 M. Cornu and M.A. Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' (2010) 17 *International Journal of Cultural Property* 1, 1-3; ALBandle and S Theurich, 'Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre' (2011) 6 *Journal of International Commercial Law and Technology* 28; N. Palmer, 'Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims' in A.L. Bandle, A. Chechi and M.A. Renold (eds) *Resolving Disputes in Cultural Property* (2012) Schulthess Verlag, 81.

will not provide the redress promised in soft-law instruments.[80] Consequently, also international organisations such as UNESCO and ICOM promote the use of alternative procedures in cultural property disputes.[81] Below are some comments on specific ADR formats.

3.2.1 *Arbitration*

Arbitration is specifically mentioned in the 1995 UNIDROIT Convention, which provides that: 'The parties may agree to submit the dispute to any court or other competent authority or to arbitration'.[82] In 2003, at a seminar at the Permanent Court of Arbitration (PCA), the idea was launched of creating a special arbitral regime equipped with unique substantive and procedural rules for handling cultural property claims.[83] Whereas arbitration may offer advantages, its value probably mainly lies in the field of contractual claims over authenticity and attribution, due to the confidentiality that it grants.[84] So far, arbitration plays hardly any role in restitution claims.[85] The *Altmann* arbitration, which was instituted after the initial stage of litigation as discussed above, is amongst the few such cases. In the words of Chechi: 'In effect, while negotiation is very common and mediation is becoming increasingly popular, it appears that recourse to arbitration is the exception rather than the rule'.[86]

3.2.2 *Mediation and negotiated settlements*

Mediation, an informal procedure in which a mediator helps parties to settle a dispute by identifying their interests but without imposing a decision, is a method that has gained considerable popularity in cultural property disputes. In the private sector special mediation initiatives have been created, such as

80 As was illustrated by the examples in the first section. See also C. Woodhead, 'Nazi Era Spoliation: Establishing Procedural and Substantive Principles' (2013) 18 *Art Antiquity and Law* 167-192. In the UK, for example, the Spoliation Panel is not an alternative method – it is the sole way to resolve Nazi-era claims on their merits.

81 'Competing claims (…), if they cannot be settled by negotiations between the States or their relevant institutions (…) should be regulated by out of court resolution mechanisms, such as mediation (…) or good offices, or by arbitration'. UNESCO Operational Guidelines (n. 83) 18-20. At the ICOM level, see A. Cummins, 'Promoting the Use of Mediation in Resolution of Disputes over the Ownership of Objects in Museum Collections: Statement by the President of ICOM Alissandra Cummins' (2006).

82 1995 UNIDROIT Convention art 8(2).

83 'Resolution of Cultural Property Disputes', organised in 2003 by the PCA in The Hague. See O.C. Pell, 'Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art' in International Bureau of the Permanent Court of Arbitration (ed) *Resolution of cultural property disputes* (2004) Kluwer Law International, 307-327.

84 Cf. Chechi (2014) 177.

85 Ibid. 181.

86 Ibid.

Art Resolve;[87] and also in the public sector specific mechanisms for cultural property disputes have been set up. In 2011 ICOM established its mediation programme for the museum sector in cooperation with the World Intellectual Property Organization (WIPO).[88] It was presented after positive experiences in the restitution case regarding a *Makonde Mask* stolen from a museum in Tanzania and acquired in 1985 by a Swiss museum, a case that fell outside of any 'hard law' rules obliging restitution, as Switzerland acceded to the UNESCO Convention only much later.[89] The programme/procedure is administered by ICOM-WIPO in Geneva. As regards the question whether only the interests of the parties or soft-law norms are guiding, Article 14(a) of the WIPO-ICOM Mediation Rules states that 'the mediator and the parties shall bear in mind the ICOM Code of Ethics for Museums'. Nevertheless, the implication of these words remains unclear, as in mediation the parties' respective interests are leading, which do not need to coincide with ethical standards. Interestingly, the Guidelines on Dealing with Collections from Colonial Contexts of the German Museum Association of 2018 advise that disputes be solved through mediation, and refer to the ICOM-WIPO procedure.[90]

The usual way to resolve Nazi-looted art claims is by way of mediation or negotiated settlement, with or without the help of auction houses or organisations such as the Art Loss Register. The confidentiality of such procedures, and the leading role of the parties, offer advantages in terms of costs and the quick resolution of claims. On the other hand, confidentiality – however justifiable in a specific case – will not add to the clarification of vague norms. A public debate, legal analysis and development of norms is only possible over public decisions. Moreover, the lack of a 'back-up' neutral procedure with standards of due process in the event the parties cannot agree voluntarily, could hinder the application of soft-law norms in a situation of unequal power relations.

3.2.3 Government advisory panels for Nazi-looted art

Whereas Nazi-looted art cases are often settled through confidential settlements, several European States have set up special advisory bodies. Around the year 2000 five of such committees were established: the Spoliation Advisory

87 'Art Resolve' <https://artresolve.org/>.

88 'ICOM-WIPO Art and Cultural Heritage Mediation' (*World Intellectual Property Organization*) <https://www.wipo.int/amc/en/center/specific-sectors/art/icom/>.

89 See S. Slimani and S. Theurich, 'The New ICOM-WIPO Art and Cultural Heritage Mediation Program' in A.L. Bandle, A. Chechi and M.A. Renold (eds) *Resolving Disputes in Cultural Property* (2012) Schulthess Verlag.

90 German Museums Association, 'Guidelines on Dealing with Collections from Colonial Contexts' (2018) 98.

Panel in the UK, the CIVS[91] in France, the Dutch Restitutions Committee in the Netherlands, the Beratende Kommission in Germany, and the Beirat in Austria.[92] These are government-appointed panels to enable the assessment of Nazi-looted art claims on their merits. Over the last decades these panels have dealt with many claims and have fulfilled an important role in terms of offering redress for victims of Nazi-looting.

In establishing these panels, the focus was on the specific national situation of each country. For example, in France and the Netherlands so-called 'heirless art' collections – that consist of artefacts that all have a certain 'war history' and are in custody of these governments since the post-War period – call for specific obligations and solutions, while in Germany museums may have objects acquired directly from their persecuted owners.[93] Their working methods, organisational structure, and recommendations differ, consequently, a great deal. On the other hand, art collections that were forcibly sold by persecuted owners often were dispersed throughout the art market, hence claims in different countries may concern objects from the same collection lost in the exact same way. The different standards applied and outcomes reached in similar cases can sometimes cause confusion. Nevertheless, in terms of (procedural) justice the neutrality and transparency of these procedures obviously are important.[94]

3.2.4 Two examples of institutionalised ADR procedures

As examples of institutionalised ADR procedures in the field of restitution claims, this section looks closer at the Binding Opinion Procedure of the Dutch Restitutions Committee – a national claims procedure aimed at the assessment of claims that regard Nazi-looted art – and the recently established international Court of Arbitration for Art – a private initiative aimed at resolving a wide range of disputes in the field of cultural property.

91 Commission pour l'indemnisation des victimes de spoliations intervenues du fait de législations antisémites en vigueur pendant l'Occupation.

92 For an overview of the committees, see A. Marck and E. Muller, 'National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, the Netherlands and Germany – a Brief Overview' in E. Campfens (ed) *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing.

93 Futher elaborated on in E. Campfens (2017) 'Nazi looted Art…'.

94 In January 2019, a network was created linking the committees. Commission for the Compensation of Victims of Spoliation, 'Establishment of a Network of European Restitution Committees' (2019) <http://www.civs.gouv.fr/news/establishment-of-a-network-of-european-restitution-committees/> accessed 30 April 2019.

3.2.4.1 The binding expert opinion procedure by the Dutch Restitutions Committee

The Restitutions Committee was established by the Dutch government by a decree dated 16 November 2001.[95] Its task is two-fold: first, to advise the Minister of Culture on decisions to be taken concerning claims for the restitution of artefacts that were lost as a result of Nazi looting which are currently in the possession of the State of the Netherlands. A well-known case in this category is the 2005 *Goudstikker recommendation*, in which the Committee advised the Dutch government to return 202 paintings to the heirs of Jewish art dealer Jacques Goudstikker after denial of the claim by a Dutch court.[96] The Committee's second task is to assess claims that concern non-state Nazi-looted art that are brought before the Committee; such cases can be referred to the Committee, the so-called 'binding expert opinion procedure'. This procedure takes a middle ground between mediation and arbitration and is, as all ADR mechanisms, based on the voluntary decision by the parties to refer their case to the Committee. If they choose this procedure, the parties must agree beforehand to accept the opinion of the Committee as binding upon them. In other words, the binding nature of the Committee's decision is based on a contract between the parties and, obviously, does not have the same strong status of an arbitral award or court ruling.

A distinguishing element of this procedure is the factual research report, which plays a central role.[97] After the parties are given an opportunity to clarify their positions, a neutral investigation into the facts is carried out by researchers based at the Netherlands Institute for War Documentation (NIOD).[98] The relevant information is summarised and cited in a draft investigation report, sent to both parties for comments. Furthermore, the Committee may order further investigations, a hearing, or consultation between the parties at any time. The Committee is guided by 'principles of reasonableness and fairness' in delivering its binding opinions.[99] An overview of the considera-

95 Besluit Adviescommissie Restitutieverzoeken Cultuurgoederen en Tweede Wereldoorlog [Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War] 2001 WJZ/2001/45374(8123) (Establishing Decree). For more information, see the yearly reports and other information published on the website: <https://www.restitutiecommissie.nl/>.

96 While denying the heirs' claim to 31 paintings on the grounds that rights to these works had been relinquished in the post-war period. See Restitutions Committee, Goudstikker, Summary RC 1.15 <https://www.restitutiecommissie.nl/en/summary_rc_115.html> accessed 12 May 2019.

97 The Committtee has drawn up Regulations for this procedure, see <https://www.restitutiecommissie.nl/en/regulations_binding_expert_opinion_procedure.html> (acc. 2 May 2021)

98 'Expertisecentrum Tweede Wereldoorlog En Restitutieverzoeken' (*NIOD*) <https://www.niod.nl/nl/expertisecentrum-restitutie>. The 'Expertisecentrum' at the NIOD was established in 2019.

99 Establishing Decree, arts 2(4), 2(5). The weighing of verious interests this implicates, however, been rejected as being not in accordance with the Washington Principles (see below).

tions the Committee may take into account is given in Article 3 of its regulations, and is summarised below:

- The Washington Principles and other policy guidelines;
- The circumstances of the loss of possession of the work;
- The extent efforts were made earlier to recover the work;
- The circumstances in which the present possessor acquired the work;
- The importance of the work to the claimant;
- The importance of the work to the present possessor;
- The interest of the general public (i.e. public access).

As to the possible solutions or outcomes, Article 11 of the Regulations provides any solution the Committee deems fit, which may be restitution or another solution. Commemoration by means of a plaque has also been recommended.[100]

The positive elements of this procedure are, in my view, neutrality, transparency, and flexibility. Neutral research into the often ambiguous historical circumstances is important from the perspective of truth-finding – to establish if an artefact can be identified as the lost work and was looted – but also from the perspective of procedural justice. The acknowledgement of past injustices in a neutral factual report may, at times, serve as a remedy in its own right (i.e. by telling the story of this injustice). As to transparency, the procedure follows a set sequence and recommendations are published on the Committee's website and may thus serve as precedents. A third positive element is that the procedure is flexible and, given the central role of the research report, also less adversarial than arbitration, which may heighten the chances for creative or cooperative solutions.

An important reason for the initial success of this procedure has been that the Dutch Museum Association had advised its members to refer all Nazi-looted art claims to this procedure as a matter of general policy.[101] Over the last years, however, the Committee has been widely criticised on account of its interpretation of the 'fair and just' rule in its recommendation regarding a claim on the painting *Bild mit Häusern* by Wassily Kandinsky, which had

100 Restitutions Committee, 'Binding Opinion in the Dispute on Restitution of the Painting Entitled Christ and the Samaritan Woman at the Well by Bernardo Strozzi from the Estate of Richard Semmel, Currently Owned by Museum de Fundatie' (2013) RC 3.128; Restitutions Committee, 'Binding Opinion Regarding the Dispute About the Return of the Painting Madonna and Child with Wild Roses by Jan van Scorel from the Collection of Richard Semmel, Currently in the Possession of Utrecht City Council' (2013) RC 3.131.

101 Letter from the State Secretary for Education, Culture and Science to Parliament (22 June 2012).

been sold by its Jewish owner to the Stedelijk Museum in Amsterdam in 1940.[102] The Committee rejected this claim on the argument that the interests of the museum outweighed the interest of the claimant: 'The work has an important art historical value and is an essential link in the limited overview of Kandinsky's work (…) and is included in the [museum's] permanent display'; whereas the claimant had not shown an 'emotional or other intense bond with the work'. Such a balance of interests is – according to the critics – incompatible with the Washington Principles. And indeed, the essential question if the loss should be seen as voluntary or under duress was not clearly addressed by the Committee. If nothing else, it illustrates that the 'fair and just' norm is open to many different interpretations. An appeal of this decision was instigated by the claimants but denied by a Dutch court in December 2020.[103] It must be taken into account, however, that a court of law is bound by positive law and, thus, can only marginally review such outcomes: it will not be able to apply or even explain the soft-law norm in the Washington Principles.

3.2.4.2 The Court of Arbitration for Art

A second example of an institutionalised ADR mechanism is the Court of Arbitration for Art (CAfA). In June 2018, CAfA was launched as a specialised 'tribunal' providing for alternative dispute resolution in the field of art-related disputes.[104] The spectrum of disputes aimed at by the organisation is much wider than the procedure before the Dutch Restitutions Committee described above: these may include authenticity issues, and contract or title disputes.

The CAfA is the result of a cooperation between the Authentication in Art foundation (AiA), founded in 2012 as a platform for stakeholders to promote best practices in art authentication, and the Netherlands Arbitration Institute (NAI). Its base is in The Hague, but proceedings in a case can be held anywhere.[105] The main 'special' feature of the CAfA is the fact that experienced art lawyers are the arbitrators in charge of the assessment of cases. These arbitrators are chosen from a pool made up by the AiA Board and the NAI. In addition, for factual evidence the CAfA relies on (neutral) experts, appointed by the tribunal whenever forensic science (authentication issues) or provenance

102 Restitutions Committee, Binding Opinion Regarding the Dispute About Restitution of the Painting with Houses by Wassily Kandinsky, Currently in the Possession of Amsterdam City Council (2018) RC 3.141. For criticism, see, e.g., Hickley (2018).

103 *Claimants (anonymised) v City of Amsterdam et al.*, Amsterdam Disctrict Court 16 December 2020 in the case ECLI:NL:RBAMS:2020:6277.

104 See 'CAfA – Court of Arbitration for Art' (*Authentication in Art*) <https://authenticationinart.org/cafa/>.

105 CAfA Adjunct Arbitration Rules (entered into force 30 April 2018), Explanatory Note (6.2): 'Notwithstanding the seat of arbitration in The Hague, the arbitral tribunal may decide under Art. 21(8) and 25(2) of the NAI Rules to conduct the hearing of factual and/or expert testimony and/or oral argument at any other location in the world'.

issues arise.[106] Like the arbitrators, these experts are chosen from a controlled pool. Evidence offered by a party-appointed expert is only admissible in matters that are *not* 'forensic science or provenance issues'; and even then may not 'compete with or supplement the expert evidence from the arbitral tribunal-appointed expert'.[107] This reliance on neutral expertise appears a valuable element in cases involving provenance issues – i.e. in restitution claims – where the uncertainty about the factual circumstances and weighing of (missing) evidence is often the major challenge.[108]

The parties can either agree on the governing substantive law, or may authorise the arbitral tribunal to decide equitably as *amiable compositeur*.[109] If no choice is made, the CAfA Adjunct Arbitration Rules provide for the law of the principal location of the seller in the case of a sales transaction, and the law of the principal location of the owner of the art object as 'the appropriate choice of law'.[110] In other words, a preference for the owner's national law – which usually will be where the object is located. This choice may be problematic for restitution cases, given that in title disputes the question of who should be seen as the legitimate owner is usually the contentious issue at stake, especially in the light of the differences in approach between common and civil law jurisdictions (as described above).

Furthermore, the CAfA rules highlight one substantive rule: 'Unless agreed otherwise, the tribunal shall (…) respect the applicable periods of limitation, prescription, and repose as well as similar time-bar principles when claims or defences have not been acted on within a reasonable time'.[111] In other words, restitution claims brought long after a work was lost are deemed time-barred, and this is explained by the argumentation that parties should be protected from 'stale' claims or defences which were not pursued with reasonable diligence, and that situations of 'undue prejudice' should be avoided, i.e. where evidence has been lost due to the lengthy passage of time.[112] As has been oft-mentioned above, however, the decisive element for the admissibility of claims with respect to cultural losses are frequently time limits. Abiding by the legal restrictions in this regard, in other words, ignores present-day

106 AiA/NAI CAfA Adjunct Arbitration Rules, Point 4: 'Arbitrators shall in principle be chosen from among those persons listed in the Pools. Only in the event of compelling reasons with the consent of the AiA Board and the administrator may an arbitrator be appointed from outside the Pools'. On expert evidence, Point 10: 'On issues of forensic science or the provenance of an object, the only admissible expert evidence shall be from an expert or experts appointed by the arbitral tribunal. The arbitral tribunal may appoint such experts from within the Expert Pool'.

107 Ibid. Point 10.

108 Ibid. Explanatory Note (2.2).

109 Ibid. Explanatory Note (13.9); art 42 of the NAI Arbitration Rules.

110 Ibid. Explanatory Note (9). Nota bene the question of who is the legitimate 'owner' of the artefact is not a given; but often the contested issue.

111 Ibid. Point 14.

112 Ibid. Explanatory Note (9.3).

soft-law norms, which urge an appraisal of claims 'on their merits'. In fact, it might even be in conflict with laws that lift such time limits for claims, like the US HEAR Act for claims that concern Nazi-looted art.[113]

Apart from arbitration, since January 2019 mediation is also a possibility.[114] As in the procedure for arbitration, the mediators are drawn from a pool composed of mediators with demonstrated experience in art law disputes and/or international mediation. Also similar to the arbitration procedure is that special attention is given to expert advice: a mediator may, with the prior consent of the parties, appoint an expert to provide the parties with neutral third-party advice on specific questions in dispute. On issues of forensic science or the provenance of an art object, only advice from experts from within the controlled 'Expert Pool' is admissible. Such expert advice shall be confidential and non-binding (unless otherwise agreed) and may not be used or referred to outside of the mediation.[115]

Given the absences of a follow-up to the 2003 initiative to give the Permanent Court of Arbitration a central role in the resolution of cultural property disputes exactly 15 years before the launch of the CAfA,[116] one can draw the conclusion that arbitration is not well-suited for dispute resolution in this field. The mediation procedure of the CAfA in combination with the reliance on neutral expert advice, however, might be promising. More generally, the CAfA procedure may be better suited for commercial disputes than for disputes where public interests – or unequal power relations between the parties – are an issue, given the confidentiality of the procedures. This, however, is an observation that with regard to all voluntary ADR procedures: without having a back-up of a regular judicial system to apply norms, it is questionable whether ADR procedures can act as a guardian of 'neutrality, transparency and justice' – as envisaged for example by the 2019 EP Resolution.

4 DEVELOPMENTS: FROM A PROPERTY FRAMEWORK TOWARDS A HUMAN RIGHTS FRAMEWORK

Whereas the approach to restitution of looted art still mainly relies on the framework for stolen property in national private law, often implicating these are time-barred and inadmissible before regular courts of law, human rights law notions appear to gain importance. This development surfaces in references to the human right to property as the rationale for redress for losses in the course of Nazi persecution in soft-law instruments, (US) court rulings and

113 Holocaust Expropriated Art Recovery Act (2016, 114th Congress, 2nd Session, S.2763).
114 CAfA Mediation Rules (entered into force 1 January 2019) (NAI Mediation Rules and AiA/NAI Adjunct Mediation Rules Combined).
115 Ibid. 5.
116 O. Pell (2004). To my knowledge not one resitution dispute was referred tot he PCA since.

policy instruments. The 2019 EP Resolution, for example, refers to identity values (of societies, communities, and individuals) and the human right to property of Article 1 of Protocol 1 to the European Convention on Human Rights.[117] It is also noticeable in the discussion about cultural objects taken in a colonial context. In this regard, the reference to the right of everyone to have access to one's own culture in recent Western-European instruments is noteworthy. For example, French President Macron, in his November 2017 policy announcement, underlined the need for Africans to be able to access their own culture and, hence, he considered it no longer acceptable that most of it is in European collections.[118] Likewise, the rationale for the 2019 German policy framework is to enable the return of colonial takings so that 'all people should have the possibility to access their rich material culture (…) to connect with it and to pass it on to future generations'.[119] This is reminiscent of the 2009 General Comment on the 'right of everyone to take part in cultural life' of Article 15 (1)a of the International Covenant on Economic, Social and Cultural Rights, stating this has come to include 'access to cultural goods'.[120]

For the time being, the state of the law in this field is unsettled, therefore soft law and ADR remain important to resolve restitution disputes in a way that reflects a new sense of justice. In the meantime, it should also be noted that the term 'restitution' has deviated from its traditional legal meaning on several points. Traditionally, restitution has been the preferred remedy for an unlawful act on the interstate level and has been aimed to restore the previous state of affairs (*restitutio in integrum*).[121] On three levels this approach has undergone changes.

First, within the context of present-day practice that relies on soft law, there is a shift from a state-centred approach towards an approach that focusses on the interests of non-state entities, such as private former owners (families) or (indigenous) communities. In the second place, the unlawfulness of the taking at the time is, in today's restitution cases, not always a given. Often, the losses occurred during times of historical injustice, such as the Holocaust or colonial suppression of indigenous communities. At the core of such claims is a changing notion of justice and legality: In some cases the original taking can indeed be classified as unlawful, but in other cases the loss was legal at

117 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952) ETS 9 art 1: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

118 See E. Macron, Speech at the University of Ouagadougou (28 November 2017) <https://www.elysee.fr/emmanuel-macron/2017/11/28/discours-demmanuel-macron-a-luniversite-de-ouagadougou> accessed 23 April 2019.

119 'Eckpunkte zum Umgang mit Sammlungsgut aus Kolonialen Kontexten' (n. 67).

120 Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009) UN Doc E/C.12/GC/21.

121 W.W. Kowalski, *Art Treasures and War* (1998) Institute of Art and Law.

the time. For example, a sale by a Jewish owner of an artefact in the years of Nazi-rule was probably lawful at the time; likewise, the confiscation of indigenous peoples' cultural objects may also have been sanctioned by colonial laws at the time. This deviation from the earlier paradigm should be kept in mind. Similarly, the term 'restitution' in the 2018 French Sarr/Savoy report – 'The Restitution of African Cultural Heritage. Toward a New Relational Ethics'[122] – is deliberately used to underline the authors' views on the *injustice* of colonial acquisition practices – not their *unlawfulness*. This term has undergone changes, not unlike the term 'confiscation' as the central element within the context of Nazi-era losses. The sale of artefacts by Jewish collector Curt Glaser in 1933 in Berlin, i.e. before racial laws were enacted by the Nazis, could for example hardly be qualified as a 'confiscation' in the legal sense or even unlawful. Still, the loss *did* qualify for restitution under the soft law system of the Washington Principles.[123] In other words, many of today's restitution cases rely on present-day norms, and not on the unlawfulness of the taking at the time.[124] Such norms provide redress for a continuing injustice and aim to reunite people with objects that have a specific symbolic meaning, like a family heirloom or works that are sacred to a certain community.

A third remark about the evolution of the term 'restitution' is that present-day soft-law norms do not aim *per se* at the restoration of full ownership rights, but may be limited to a lesser right, like a right to an equitable solution – defined as the right to a 'just and fair solution' in the Washington Principles, and as a right of 'redress which may include restitution' in the context of the UNDRIP.

All the above points may underline that changes in this field have legal implications, and that international cultural property law is moving away from a property framework towards a human rights framework. This would mean that the ethical model for (historical) restitution cases – including voluntary ADR procedures without guarantees in terms of due process – may eventually be replaced with a more solid legal model.

---

122 F. Sarr and B. Savoy, 'The Restitution of African Cultural Heritage. Toward a New Relational Ethics' (2018) 29 <http://restitutionreport2018.com/sarr_savoy_en.pdf>.

123 Dutch Restitutions Committee, Recommendation Regarding Glaser (2010) RC 1.99. Also in Germany Glaser's claims were upheld, see 'Stiftung Preußischer Kulturbesitz Findet Erneut Faire Und Gerechte Lösung Mit Den Erben von Prof. Dr. Curt Glaser' (2016) *Stiftung Preußischer Kulturbesitz* <http://www.preussischer-kulturbesitz.de/pressemitteilung/article/2016/04/20/pressemeldung-stiftung-preussischer-kulturbesitz-findet-erneut-faire-und-gerechte-loesung-mit-den-erb.html> accessed 1 April 2019. See also E. Campfens, (2017) 'Nazi-Looted Art, 325.

124 A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006) Cambridge University Press, 2-3.

5 Final observations

In art restitution claims the application of regular property law rules, and the system of conflict of law rules that would normally guide judges to a 'just' outcome, appear to no longer fulfil this aim. A common theme in soft-law instruments and transnational private regulations. that have emerged in this field includes a call for equitable solutions to title disputes, and for alternative methods to settle claims. Such procedures are advocated as being more efficient, less adversarial, and more flexible to culturally sensitive arguments. However, in many jurisdictions alternative procedures are the *only* way to assess claims, because the positive legal framework has not (yet) adapted to the newly emerging standards of morality and justice. Seen in this light, the 'ethical' framework and reliance on extra-legal procedures may be viewed as an intermediate solution in a process of evolving law.

For the time being, most legal systems do not support title claims regarding cultural losses that took place in the past. Grey categories of 'tainted' artefacts have thus emerged, whilst soft law instruments raise expectations that 'justice' will be done. On the practical level this also means that certain artefacts cannot be sold or sent on international loans as long as their title is not cleared. And although market forces have come to fill in some gaps in the law, this does not guarantee justice. Problematic in this regard is the lack of transparent neutral procedures to implement and clarify soft law norms. In the view of the author this institutional vacuum in terms of access to justice in Europe, needs to be addressed. A lack of clarity at both the substantive and the procedural levels – e.g. what is the norm and who will interpret and apply it? – will otherwise aggrevate legal uncertainty. In its 2019 Resolution the European Parliament acknowledged the fragmented situation and advocated for the adoption of the principles of the 1995 UNIDROIT Convention as a roadmap to a transparent, responsible, and ethical global art market in the future, and for an ethical approach and voluntary ADR procedures to address claims of works of art looted in armed conflicts and war in the past.[125] In this regard the establishment of a European claims procedure could be considered. This would also meet the obligation that states have taken upon themselves – by signing instruments like the Washington Principles and the UNDRIP – to develop neutral and accessible procedures to ensure that promises about justice are upheld.

The ethical model and ADR may, at times, indeed be the best setting to resolve disputes in a non-adversarial manner and to foster dialogue, cooperation, and creative solutions. Nevertheless, ultimately these cases are about justice and the role of law should be to provide a framework where similar cases will be dealt with similarly, independent of power-relations. This may not be guaranteed in a legal framework that depends solely on non-binding

125 Above n. 54.

soft law and voluntary ADR procedures. In that respect, developments of international cultural property law from a property framework into a human right framework are promising.