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

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7 Concluding observations

1 INTRODUCTION

This dissertation aimed to shed light on the legal framework for cross-border claims to involuntarily lost cultural objects. Are such claims a matter of justice and the law, or merely of ethics and politics? Moreover, if we take a legal perspective, should we approach the objects as property, or as heritage? The guiding question throughout this study was how the interests of former owners in their lost cultural objects can be addressed more effectively. To that end, a critical analysis was needed to identify blind spots and clashes in the law that obstruct such claims at present. The preceding chapters have attempted to provide this analysis. The main finding was that although the heritage value of cultural objects, as symbols of an identity, mostly lies at the core of claims, adequate legal tools to address these interests are lacking.

Chapters 2 and 3 addressed the two main models that currently exist for claims to contested artefacts: private restitution claims to lost possessions, and interstate return claims to national cultural heritage. The subsequent Chapters 4 and 5 were studies of two types of historical claims: Chapter 4 covered the field of Nazi-looted art, with a focus on claims by dispossessed private owners; Chapter 5 explored the category of colonial looting, with a focus on claims by indigenous communities. Chapter 6, written as the substantive conclusion of this dissertation, revisited the legal framework from the wider perspective of heritage protection and the international art trade. It analysed the inter-relation (and disconnect) between private and public law in this field and put forward proposals to bridge the gaps. The analysis in Chapter 6 included more recently looted antiquities. Although referred to here as 'chapters', these were written as independent publications, not as a subsequent set of chapters of a book.

These concluding observations summarise the findings in the separate chapters and the replies to the research questions defined in the introduction. In section 3 some further observations and proposals will be made.

2 SUMMARY OF FINDINGS

2.1 Private title claims

Claims to lost cultural objects are generally perceived as title claims over lost possessions. As such these are covered by private law rules. The second chapter gave an overview of this model, evaluated its limits and reflected on the emergence of the 'ethical model' for claims.

'What is stolen should be returned' may sound so simple, the reality for dispossessed owners to regain their lost cultural objects lost is more complex. 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. Regulation of property and ownership is traditionally a matter of state sovereignty and domestic law and, consequently, the legal framework is typified by major differences amongst jurisdictions. Dispute settlement in this field is complex and the outcomes are often unpredictable. According to private international law rules in most countries, the law of the country where the cultural objects is located at the time of the claim or where it was last traded governs title issues over lost cultural objects (the *lex rei sitae*), although that rule may be interpreted differently. The main obstructions for cross-border title claims in a private law approach that were identified are: the transfer of ownership title to a new possessor; limitation periods for claims; the non-applicability of foreign administrative law in court proceedings; and the non-retroactivity of treaties that contain return obligations.

In common law countries, the basic rule is that a thief cannot convey good title over stolen possessions - a choice for security of title. In countries with a civil law tradition, however, ownership title can pass after an acquisition in good faith or simply by the passage of time - a choice for security of transactions and a smooth market. Since most European countries have a civil law tradition, former owners here have a relatively weak starting position in comparison to common law jurisdictions like (most states of) the US and the UK. These last countries, nevertheless, are important trendsetters due to their dominant position on the international art market.

Claims by former owners are often barred by limitation periods. At a certain point, the law tends to adjust itself to the situation as it appears and if that is not challenged within a specific time, a new possessor will *be* the legitimate owner. Nonetheless, the moment when that time period starts differs widely. It may start to run from the moment of the loss, or only from the moment of discovery of the object by the dispossessed owner, with many variations. Generally, time limitations will not run in favour of a bad faith

possessor, who is or reasonably could be aware that the artefact was stolen. Then again, in some jurisdictions this *may* be possible.[1]

Another obstacle to claims is that courts will generally not apply foreign public law, whilst export restrictions or rules on their inalienability typically lie at the basis of claims that regard antiquities or communally owned (sacred) objects.[2] This is reason why states increasingly vest state-ownership over (undiscovered) archaeological objects.[3]

Given this fragmented situation, attempts have been undertaken to harmonise private law. In that regard, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[4] was adopted in 1995 to clarify and further elaborate on the principles underlying the 1970 UNESCO Convention.[5] The Convention's main rule is that cultural objects that were stolen or unlawfully exported - according to the law in the country of origin - should be returned upon a claim by the deprived owner or the state or origin.[6] This implicates a shift from the *lex rei sitae* (the law where the cultural objects is located upon a claim or was last traded) towards the 'lex originis' - the law of the country of origin -, as the law that should govern cross-border title disputes over unlawfully exported cultural objects.

Under the 1995 UNIDROIT Convention claims should be filed within three years from the moment the object was located with the option to set a maximum of 75 years also if it concerns objects that qualify for enhanced protection (public collections, elements of monuments or archaeological sites or indigenous peoples cultural object). Although countries such as the Netherlands and Germany did not accede to the 1995 UNIDROIT Convention, in their implementation legislation of the 1970 UNESCO Convention they did introduce such

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1 E.g. in the Netherlands a new possessor in bad faith may gain lawful ownership title, a reason for some controversial rulings in this field (Chapter 1, section 2.2.1 and Chapter 2, section 2.2). As discussed in Chapter 1 (section 2.2.1), in the light of recent Dutch case law, today such outcomes could (should) be different. Moreover, it is out of line with the international standard that only innocent new possessors deserve protection.

2 E.g. (UK) *Attorney General of New Zealand v Ortiz* (1982) 3 All ER 432. More recently, courts in the US and the UK have accepted and endorsed state ownership over antiquities in two seminal cases: *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd*. (2007) EWCA Civ. 1374 and *United States v Schultz*, 178 F. Supp. 2d445 (SDNY 3 January 2002).

3 As promoted in the UNESCO-UNIDROIT Model Provisions on State's Ownership of Undiscovered Cultural Objects, drafted by the Expert Committee on State Ownership of Cultural Heritage (1 July 2011), CLT-2011/CONF.208/COM.17.5.

4 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).

5 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 1, section 2.2 and Chapter 2, section 2.2.1.

6 Arts. 3 and 5, 1995 UNIDROIT Convention. The return of unlawfully exported cultural objects depends on their cultural significance to the source states (art. 5 (3)).

a maximum period of 75 years.[7] An observation in this regard is that, whilst this is a considerable extension compared with regular limitation periods, the time span that currently separates us from the Nazi era is over 80 years (i.e. more than the maximum time limit provided for in the 1995 UNIDROIT Convention). This highlights that a model based on the moment of a loss of ownership in the past does not fit all cases we currently believe should be addressed.

Furthermore, a new possessor, upon return, may be entitled to 'fair and reasonable' compensation if it can prove it exercised due diligence upon acquisition. 'Due diligence', as introduced in the 1995 UNIDROIT Convention, implicates that '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'.[8] Although most market states did not accede to the 1995 UNIDROIT Convention, these due diligence standards gained legal importance in their own right as *the* international standard, and are replicated in many later instruments in this field. Accordingly, a new possessor who was not duly diligent upon acquisition – i.e. did not perform (solid) provenance research –, should be unprotected.

The 1995 UNIDROIT Convention on itself is not widely adopted and, most importantly in the present context, it is not retroactive. Even if all countries were to adopt the UNIDROIT Convention today, in other words, this would not affect the legal status of artefacts that are already circulating. Such objects, nevertheless, *will* surface as 'tainted' as a result of the more stringent due diligence standards and required provenance research in the market. The non-retroactivity of international conventions, in sum, proves to be the major obstacle to claims by dispossessed owners.

In the last decades, a vast body of international soft law and transnational private regulation has emerged in support of return claims by former owners, reflecting a new morality and normativity on the possession of looted art, also if such losses occurred in the past and are inadmissible under positive private law. Thus, grey categories have emerged where expectations have been raised that 'justice' will be done, expectations that often cannot be fulfilled by relying on regular legal channels for claims, especially in civil law countries. Such non-binding instruments generally promote equitable solutions (not *per se* restitution of full ownership) after an 'unjust' loss in the past (not *per se* an

7 E.g., countries such as The Netherlands (see art 3:310 (a) of the Dutch Civil Code) and Germany (art 55 (2) Cultural Property Protection Act of 31 July 2016) introduced such an (extended) limitation periods of 75 years as the absolute maximum for most categories in their implementation legislation of the 1970 UNESCO Convention.

8 Art. 4 (4) 1995 UNIDROIT Convention. See Chapter 2, section 2.1.

unlawful loss) and voluntary settlement of claims through alternative dispute resolution (ADR).

The traditional private law model for title claims to looted art as a model to guide judges to a 'just' outcome on the basis of domestic private law, has thus clearly come under pressure. Mostly in civil law countries and mostly for older losses the 'ethical' model for claims has come in its place. Given that soft law is not binding, compliance depends on the willingness of the parties and on ADR to 'clear' the title of tainted objects. A lack of transparent neutral procedures to implement and clarify soft-law norms has proven problematic in terms of access to justice.

2.2 The interstate model

Cultural objects that were removed from the territory of a state may be subject to interstate return claims. This model reflects the long-standing protected status of cultural objects in international law, not merely as possessions (of an individual or a state) but as the 'intellectual patrimony' of communities of origin.[9] This means, in the first place, that cultural objects may not be seized in times of war. The protection of cultural objects in international law developed through the law of wars. To cite an 1813 verdict that condemns the seizure of artefacts during the Anglo-American War as war booty:

> '(t)he arts and sciences are admitted amongst all civilized nations, […] as entitled to favour and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.'[10]

The first multilateral treaty dedicated to cultural heritage, the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, confirmed this rule and provides that states should 'prohibit, prevent and […] put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property', and 'refrain from requisitioning movable cultural property'.[11] Its (1954) First Protocol obliges states to take into their custody cultural objects removed from an occupied territory with the aim of their return to the territory previously occupied: these should never be retained as war reparations. Its (1999) Second Protocol further

9 Chapter 3, section 4; The term was used in the Treaty of Peace of Saint-Germain (1919) 226 CTS 8.

10 Ibid.; Vice-Admiralty Court of Halifax, Nova Scotia Stewart's Vice-Admiralty Reports 482 (1813).

11 Art. 4, Hague 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 (1954 Hague Convention).

strengthens such obligations with regard to cultural objects misappropriated in times of armed conflict.[12]

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is the second multilateral treaty in this field. Its aim was to curb the ever-growing trade in looted cultural objects, also beyond a situation of armed conflict or foreign occupation. This treaty provides for a system where states designate protected 'national cultural heritage' (and declare that inalienable), set up a system of export licences, and cooperate in the return after the unauthorised export.

Chapter 3 explored the interstate model for return claims on the basis of a dispute under litigation in the Netherlands. At stake in this dispute are archaeological objects from various Crimean museums that had been sent to Amsterdam for a temporary exhibition. The period of this exhibition coincided with the Russian occupation and the subsequent secession of Crimea from the Ukraine in March 2014. This change of borders, however, is generally not recognised.[13] At the close of the exhibition, the Allard Pierson Museum, in custody of the artefacts, was confronted with two competing claims. The Ukrainian State claims the objects as national patrimony and state property; the Crimean museums seek their return on the basis of the loan agreements that stipulated their return after the exhibitions, and entitlement as 'operational manager' under Ukrainian law. They argue, moreover, that Crimea is the genuine home of these antiquities as they were discovered and preserved there over time.

In 2016, the Amsterdam District Court ruled that the objects should be returned to Ukraine, unsurprisingly perhaps in light of the political situation. The Court argued that the non-return after a temporary loan adds up to the 'unlawful' export within the meaning of the 1970 UNESCO Convention, and that the issue of return is an interstate affair. The Amsterdam Appeals Court in its 2019 interlocutory judgment, however, rejected that view: neither the export nor the import of the artefacts can be seen as unlawful behaviour the 1970 UNESCO Convention aims to reverse.[14] Instead, it qualified the dispute as a matter of private law and asked the parties to further clarify the matter of title.[15]

Two questions relevant to the present study arise in the Crimean case. First, what is the basis for entitlement of states to their national cultural heritage

12 See Chapter 1, section 2.3.

13 See the condemning UNGA Res. 68/262 (27 March 2014) UN Doc A/RES/68/262, entitled 'Territorial Integrity of Ukraine', adopted by 100 states in favour, 11 against and 58 abstentions.

14 *The Travida Central Museum et al. v the State of Ukraine v University of Amsterdam* (Judgment of 16 July 2019) Amsterdam Court of Appeal, Case No. 200.212.377/01, ECLI:NL:GHAMS:2019:2427. Chapter 3, section 6.

15 Ibid. The appeals procedure is ongoing at the moment of writing.

(patrimony)? And, second, what is the position of sub-state actors such as communities or individuals with regard to 'their' lost cultural objects?

Neither the 1954 UNESCO Convention nor the 1970 UNESCO Convention are clear on the matter of entitlement. The 1954 UNESCO Convention seems to propagate territoriality by providing for the 'return to … the territory after cessation of hostilities.' The 1970 UNESCO Convention, however, is based on nationality. National cultural heritage is defined 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'.[16] Article 4 sets out five categories of objects that can qualify as national cultural heritage. The first two categories bear a clear territorial link: objects created by nationals or others *within that territory* or objects found *within that territory*.[17] The other three categories cover artefacts that were the subject of a 'freely agreed exchange' or acquired 'with the consent of the authorities of the country of origin'.[18] *What* states designate as their national patrimony, from that point on, is open to their own discretion as they have the 'indefeasible right … to classify and declare certain cultural property as inalienable', and other member states should then 'facilitate recovery of such property'.[19] That this may result in clashes is for example illustrated by the fact that, since 2015, a Russian law also designates the Crimean collections as Russian cultural heritage.[20]

Clues as to what may serve as a basis for entitlement do however exist. The *Institut de Droit international* advised for example that a 'country of origin' should be understood as the country with which the object is 'most closely linked from a cultural point of view'.[21] Likewise, the 1995 UNIDROIT Convention uses the criterion 'significant cultural importance' as a ground for return requests by states.[22] Clues as to what objects may qualify as such are given in article 5 (3), namely if the removal significantly impairs (a) the physical preservation of the object or its context; (b) the integrity of a complex object; (c) the preservation of scientific or historic information; or (d) the traditional or ritual use of the object by indigenous or tribal communities. Although this listing is open to a myriad of interpretations, the general idea is 'cultural significance'. That this is not *per se* tied up to nation states follows from the acknowledgement of the interests of communities separately: this illustrates

16 1970 UNESCO Convention, Art. 1, listing 11 types of objects ranging from objects of historical, archaeological, ethnological or artistic interest (e.g., pictures, paintings, drawings and sculpture) to furniture and antiquities of more than 100 years old, rare stamps and archival material.

17 Ibid, Art. 4, section (a)-(b).

18 Ibid, Art. 4, sections (c)–(e).

19 Ibid, Art. 13, 1970 UNESCO Convention; Chapter 6, section 3.1.2.

20 Chapter 3, section 3.3.

21 Chapter 3, section 4.2.1; Chapter 6, section 4.1.

22 Ibid.; Art. 5(3), 1995 UNIDROIT Convention.

a step away from the paradigm of one national culture that underlies the 1970 UNESCO Convention.[23]

The more recent 2001 UNESCO Convention for Underwater Cultural Heritage can also serve as inspiration where it introduces a 'verifiable link' as the basis for responsibilities and limited rights by states (but not for exclusive right).[24] In sum, a verifiable cultural link between objects and people in my opinion should underly entitlement of a state to its national patrimony. Archaeological objects or elements of a built monument would, in this outlook, normally follow the territory.

With regard to the 'nationality' prong in the 1970 UNESCO Convention, it should be kept in mind that that treaty's primary goal was to set up a system to preserve cultural heritage *in situ* and protect it from illicit trade. Against that background, states can be seen, and are appointed, as custodians of the cultural heritage within their borders, for the benefit of all mankind. This should not be confused with entitlement of states as exclusive and absolute right holders ('owners'). Normally such a state-oriented framework works well, but tensions arise if communities or individuals do not, or no longer, feel represented by a specific state they were part of, like in the Crimean case. This also applies to claims that concern Nazi-looted art: private (Jewish) dispossessed owners are often no longer citizens of the state from which the objects were looted.

Increasingly communities and individuals are acknowledged as independent right holders in other (soft law) instruments and this is reflected in recent practice. For example, in the *Altmann* litigation and subsequent international arbitration about a number of paintings by the Viennese painter Gustav Klimt, claimed by Austria as its national patrimony, were overruled by the interests of the individual family of the pre-war owner who no longer resided in Austria but in the US.[25] Another example is the United Nations Declaration for the Rights of Indigenous Peoples that attributes independent rights to indigenous communities to their (lost) cultural objects.[26]

The analysis in this chapter highlighted that the UNESCO treaty system – the 1954 and 1970 UNESCO Conventions – focus on the preservation of cultural objects but do not provide tools for competing claims. Entitlement by states to their national heritage should, in my view, depend on a verifiable cultural link, as follows from more recent legal instruments. In Chapter 6 of this thesis, this was developed into the notion of 'heritage title'.

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23 This paradigm surfaces in the preamble of the 1970 UNESCO Convention 'Considering that cultural property constitutes one of the basic elements of civilization and *national culture*, […]' (emphasis added).

24 Chapter 6, section 4.1.

25 Chapter 6, section 4.2.

26 UNGA Res. 61/295 (13 September 2007) UN Doc A/RES/61/295, arts. 11 and 12. Chapter 5, section 4.5.

2.3 Nazi looting

Chapter 4 addressed the normative framework for claims to Nazi-looted art. The background to this category is the wide-scale looting by the Nazis, both in occupied territories and within Germany. Public collections as well as private collections were systematically seized or acquired under duress, and in neighbouring 'Aryan' countries suitable art was also acquired on the market through regular (but prohibited) sales.

The post-War restitution framework aimed to reverse all these different types of looting.[27] It relied on a process of 'external restitution' of artefacts to the countries from where they had last been removed – irrespective of the grounds for removal – and a process of 'internal restitution' to dispossessed owners at the local (national) level. To organise the process of internal restitution, states enacted special regulations that suspended regular private law rules. Typically, such laws declared void (*ab initio*) confiscations on the basis of discriminatory Nazi regulations, whilst other transactions were voidable if the loss was a result of persecution by the Nazis.[28] Within Germany, the Allies imposed laws that aimed to reverse the deprivation of property 'for reasons of race, religion, nationality, ideology or political opposition to National Socialism'.[29] Their aim was 'to remedy wrongs caused by the failure of a government to observe minimum international standards for the treatment of human beings' by rearranging ownership relations, a field generally considered to be an internal affair of states.[30] Besides, even neutral countries like Switzerland where looted art had come on the market, were to enact special restitution laws. Contemporary legal scholars explained this interference in national private law by pointing at the 'more comprehensive idea of interstate law'.[31] In other words, it was a matter of international human rights law (emerging at the time). Another point of interest is the distinction that was made between regular possessions and possessions such as artefacts or personal

27 Based on the Inter-Allied Declaration against Acts of Dispossession committed in the Territories under Enemy Occupation or Control (5 January 1943) *The Department of State Bulletin*, vol. 8 (1943) US Government Printing Office. Chapter 4, section 2.1.

28 Chapter 4, section 2.2.

29 Art. 1 (1) 'Law No. 59, Restitution of Identifiable Property' of the Military Government for Germany, US in United States Courts of the Allied High Commission for Germany, *Court of Restitution Appeals Reports* (1951) 499-536. See Chapter 4, section 2.2.

30 N. Bentwich, 'International Aspects of Restitution and Compensation for Victims of the Nazis', in *BYIL (1955/1956)* Oxford University Press. See also A.F. Vrdoljak, 'Gross Violations of Human Rights and Restitution: Learning from Holocaust Claims' in L.V. Prott, *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (2013) Institute for Art & Law. Chapter 4, section 2.2.

31 G. Weiss, 'Beutegueter aus besetzten Laendern und die privatrechtliche Stellung des schweizerischen Erwebers' (1946) 42 *Schweizerische Juristen-Zeitung* 274. See Chapter 4, section 2.2. Further elaboration in E. Campfens, *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing, p. 15-27.

property with sentimental value for the dispossessed owners.[32] This underscores the special interests involved in claims over cultural objects.

Due to the lapse of the often short limitation periods, post-War restitution laws hardly play a role in today's practice. At times they do, as in French litigation about a Pissarro painting that had been confiscated from a Jewish collector and, eventually, was found in the hands of an American collector who had acquired it in the 1990s, unaware of its provenance.[33] Since the original confiscation was void, under application of French law legal title had remained with the pre-War owner and, thus, the claim by the heirs for restitution could be awarded. At the time of writing, this outcome is being challenged before the European Court of Human Rights by the American collectors for a violation of their right to property, not having received any compensation.[34] This underscores the potential for human rights law to develop this field further. At the same time, it highlights the weakness of the zero-sum outcome in an ownership approach – as it caters for only one absolute right holder (the lawful owner) whilst, over time, more parties may surface with legitimate interests.

Under positive private law, claims to Nazi-looted art are usually 'stale' due to the time that passed since their loss. In reaction to the apparent injustice this causes for deprived families whose paintings re-appeared on museum walls, in 1998 over 40 states adopted the non-binding Washington Conference Principles on Nazi-Confiscated Art. They introduced the, by now, internationally recognised standard for claims that former owners or their heirs are entitled to a 'just and fair solution', recognising this may vary according to the 'facts and circumstances surrounding a specific case'.[35] Along with later instruments, they furthermore stress the importance of ADR for resolving claims: the ethical model for claims.

Whilst it is clear that the 'just and fair' rule calls for redress for dispossessed families that lost their artefacts as a result of Nazi-looting, what it means *exactly* is less clear, even - or perhaps even more so - after almost twenty-five years. My hypothesis is that the rule has two pillars. First, the fact that it concerns personal *cultural* property justifies a special, favourable, treatment. Looted heirlooms that symbolise a (lost) family life are not merely stolen possessions or commodities, and therefore impediments under regular private law to claims should not apply equally. Second, the rule for Nazi-looted art

32 At least in some of the laws. Chapter 4, section 1; Further elaboration in Campfens (2020), p. 10.

33 *Bauer et al v B and R Toll* (2017) *Tribunal de Grande Instance de Paris*, No RG 17/58735 No 1/FF; confirmed *Cour de Cassation*, No B 18-25.695. Chapter 4, section 1.

34 Under Article 1 of the First Protocol to the European Convention on Human Rights. See <https://www.theartnewspaper.com/news/pissarro-european-court>.

35 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) Principle VIII.

sees to *looted* art, implicating that it concerns involuntary losses such as confiscation, theft or sales under duress with a direct causal relationship with Nazi persecution. If these two elements are fulfilled, an equitable solution should follow; if not, a claim should be dismissed. What that equitable solution should entail – restitution of full ownership or another solution – depends on the circumstances of the case, most notably the due diligence of the new possessor on acquisition of the artefact (the provenance research performed) and compensation received for the loss at an earlier stage.

Nevertheless, international practice in this field is inconsistent and not transparent. Often, claims are settled confidentially on the occasion of an intended sale, which puts market parties at the fore. Settlements will then depend on the power relations between parties. Besides, the standards applied by European governmental panels differ considerably. Even where it concerns artefacts from the same collection that were lost in the exact same manner, outcomes are inconsistent.[36] An explanation for such differences by a comprehensible argumentation is also often lacking. This is problematic from the perspective of justice since 'just' would imply that similar cases are treated similarly, and disparities are comprehensible.

Given that private laws in most jurisdictions do not support ownership claims based on a loss so long ago, alternative procedures are often the *only* way to settle title claims. Around the turn of the millennium, several European countries installed governmental panels to review claims to Nazi-looted art in public collections. In countries such as France and the Netherlands, the focus originally was on so-called 'heirless art' collections, a term for artefacts left in the custody of governments since the post-War 'external restitution' programme. In such cases the interests of the present possessor (i.e. the state that received these as a custodian) obviously are not, or should not be, an issue.[37] Yet, in other instances the interests of new possessors would seem legitimate if these new possessors were unaware of the 'tainted' provenance upon acquisition and they gained valid ownership title under domestic private law. The Dutch Restitutions Committee upon weighing the interests of new possessors,

36 This mostly surfaces in the categories of 'early' sales or so-called *Fluchtgut*, see Chapter 4, sections 3.2.2 and 3.2.3. See also M. Weller 'In search of 'just and fair' solutions: Towards the future of the Washington Principles of Nazi-confiscated art' and C. Woodhead 'Action towards consistent 'just and fair' solutions', both in the publication *Guide to the work of the Restitutions Committees* (2019) CIVS.

37 The agreement for delivery reads: 'the said Government hereby agrees … as custodians, pending the determination of the lawful owners …'; NARA M1941, Records Covering the Central Collecting Points, (OMGUS Headquarters Records 1938-1951). See Chapter 4 section 1; further elaboration in Campfens (2020); 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, p. 17.

nevertheless, came under strong criticism for doing so.[38] Also the German governmental panel, the *Beratende Kommission*, seems under constant criticism. Interventions by politicians in individual cases pending before these panels in both countries highlight the political dimension of these procedures.[39] From the point of view of justice, this also illustrates that an extra-legal model based on morality has its limits.

In terms of access to justice, the US system serves as the exception. As mentioned above, the US legal system is more open to claims by former owners. Besides, a law was introduced that extends limitation periods for claims to Nazi-looted art – enabling litigation on the merits even though under regular limitation periods claims would be stale.[40] This discrepancy has led to an increasing number of typically 'European' cases (that concern artefacts in European museums) being litigated before US courts.[41] By comparison to the European panels, however, US courts appear to use a narrower notion of what loss qualifies as 'Nazi loot'. Accordingly, claims to artefacts lost as a result of sales that were not under direct Nazi threat (i.e. without a direct causal relation) are denied by US courts, whilst similar claims are honoured by European panels.[42]

This appears to reflect the different settings. With the exception of the UK Spoliation Panel, the European governmental panels were primarily installed to compensate families of Nazi victims for injustice that the specific governments can be held responsible for, either by being the successor to a Nazi (affiliated) government or by a failure to return the repatriated artefacts that became part of state collections to the rightful owners in time. In other words, different *rationales* for redress operate in this field. On the one hand, for example in the case law in the US, it concerns the recognition and reparation of the dispossessed owner's (or their heirs') lawful title with regard to a specific artefact, irrespective of in whose hands it is found (i.e. a right *in rem*). On the other hand, in the Dutch or German setting, this reparation extends to com-

38 Heavily criticised was the recommendation regarding a Kandinsky where the outcome relied on the value of the painting for the museum (RC 3.141). See Chapter 4, section 3.4.2. Subsequently, in 2020, a new policy was introduced that basically denounces the weighing of interests. See <https://www.raadvoorcultuur.nl/english/documenten/adviezen/2020/12/07/striving-for-justice>. See also T. Oost 'From "Leader to Pariah"? On the Dutch Restitutions Committee and the inclusion of the public interest in assessing Nazi-spoliated art claims', *International Journal of Cultural Property* (2021), 1-31.

39 E.g. Letter of the Mayor and Aldermen to the Amsterdam Municipal Council of 19 February 2021, see <https://amsterdam.raadsinformatie.nl/modules/1/Berichten%20uit%20het%20college/651069>, acc. 5 August 2021. As to political interference in individual cases in Germany, see <https://www.sueddeutsche.de/kultur/limbach-kommission-raubkunst-monika-gruetters-restitution-1.5218083>.

40 The Holocaust Expropriated Art Recovery Act of 2016, see Chapter 4, section 4.3.1.

41 Chapter 4, section 4.3.2. More cases have followed since.

42 Chapter 4, sections 3.2.2 and 3.2.3. Litigation in the US often then revolves around technical issues such as jurisdiction and immunity, prescription and the equitable defense of latches (requiring a dispossessed owner to be duly diligent in searching for their artefacts).

pensation for injustices afflicted on the persecuted owners that is not specifically related to the cultural object at stake. In these countries the governmental panels honoured, for example, claims regarding artefacts that were not even owned by the family to whom these were 'returned',[43] or that were sold in a neutral country for market value in seemingly voluntary transactions,[44] losses that can hardly be qualified as 'Nazi loot'. Since the focus in this dissertation is on the (legal) status of cultural objects in relation to their former owners – not on reparation for victims of historical injustices more generally – the conclusions and proposals made in Chapter 6 and hereafter in section 3.1 relate to the first objective.

Apart from such differences, a general principle of law can be deducted from this practice of national courts and panels, namely that dispossessed owners of Nazi-looted art are entitled to equitable solutions with regard to their lost family heirlooms.[45] This rule increasingly resonates in (binding) domestic legislation that singles out Nazi-looted art as a special category (for which regular law does not equally apply),[46] has been embraced by the private sector in ethical codes, and is generally supported by legal scholars.[47]

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43 E.g. *Beratende Kommission*, Recommendation of the Advisory Commission in the case of heirs of A. B. vs. Bavarian State Painting Collections (1 July 2020) concerning the restitution of the painting The Lemon Slice, that had been the collateral for a loan. Although it had never been owned by the predecessor in rights of the claimants, a Jewish banker, the claim was awarded 'to make a contribution toward the recognition and amendment of historical injustice'.

44 Chapter 4, sections 3.2.3. for Dutch and German restitutions concerning so-called *Fluchtgut*.

45 Lubina concludes that no rule of customary rule for the return of Nazi spoliated art (respectively human remains) exists, although she admits to 'a general trend to facilitate returns.' KRM Lubina, *Contested Cultural Property. The Return of Nazi Spoliated Art and Human Remains from Public Collections* (2009) (doctoral thesis) Maastricht, p. 460. Cf. B. Schönenberger (2009), p. 285. Ten years later, state practice has intensified. For a customary rule, however, the threshold is high. O*pinio juris* that this rule concerns a legal obligation, arguably, is still insufficient.

46 See Chapter 4, section 4.3.1 on the US HEAR Act and other US laws exempting Nazi looted art from other movable goods in order to allow access for justice for claimants. Other examples are the UK *Holocaust (Return of Cultural Objects) Act 2009* - allowing for the deaccessioning of Nazi looted art from public museums -; and section 44 of the *German Cultural Property Protection Act* of 31 July 2016, that provides for enhanced due diligence standards to ascertain artefacts were not lost due to Nazi persecution.

47 E.g. 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. Van Woudenberg takes the view that cases involving Holocaust confiscated art involve a 'serious breach of an obligation arising under a peremptory norm of general international law' (N. van Woudenberg, 'Developments Concerning Immunity from Seizure for Cultural State Property on Loan' in A.M. Carstens, E. Varner (eds) *Intersections in international cultural heritage law* (2020) OUP, p. 363). Since domestic takings (i.e. Nazi-confiscations of Jewish property in Germany or in France by the Vichy Government) are generally 'off limits' under (traditional) international law, an obligation, in my view, can only be based on international human righs law. The rule that Nazi-looted art should be returned is mostly taken for granted, at times under referral to the 1943 Interallied Declaration. As discussed in Chapter

Without doubt, such practices contribute to the emergence of a general principle of international law. However, caution is needed as it does *not* extend to an obligation of restitution in full ownership, is mostly limited to Western-Europe and the US, and is often presented as merely 'moral' in nature. In that vein for example, Weller concludes that, usually, no legal claims exist, and, moreover, that this cannot be remedied by (retroactive) legislation.[48] Whilst that may be the correct view in as far as it concerns a right to the restitution of full ownership under private law, legal obligations or rights (not to full ownership but to an equitable solution) may also follow from other norms such as international human rights law – the view advocated in this dissertation.

In summary, from Chapter 4 it became clear that, at least in Western Europe, the legal model for dispute resolution in the field of Nazi-looted art (both the interstate and the post-War model for private claims) has been mostly superseded by the ethical model, at least in Western-European civil law countries. Market forces and politics set the tone in that model. To address the interests of former owners more efficiently, standards need to be clarified and neutral claims procedures – with guarantees in terms of due process – should be more widely available.

2.4 Colonial looting and indigenous peoples' lost cultural objects

Chapter 5 addressed colonial looting, a category with similarities to Nazi-looted art: neither category is covered by modern-day treaties in this field. For Nazi-looted art, however, the rule that cultural objects removed from the territory of an occupied state should be returned was (and is) widely acknowledged. Moreover, on the sub-state level, private claims were covered by special restitution laws in the post-War period and, today, by the ethical model. This contrasts sharply with the framework for cultural losses in a colonial setting. In order to understand these differences, this chapter took a closer look at the development of international law in the field of heritage protection. Given the broad notion of 'colonial looting', the discussion in Chapter 5 focussed on a case example concerning the loss of an ancestral statue by the indigenous Bangwa people in the course of the colonial annexation of an area in West Africa in today's Cameroon in 1899.

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4 this declaration was an official warning that acquisitions by the Nazis in occupied territories (not in Germany) *would* be voided, and be seen as a legal basis for internatonal law obligations with regard to confiscated private property in Germany.

48 As this would violate other fundamental rights (and the prohibition to expropriate new owners without compensation). M. Weller,'Study … (2017), p. 100. He therefore proposes stricter due diligence standards and a refinement of the 'ethical model' by EU funding of a restatement of restitution principles. However useful, in my view an extra-legal model based on morality fails to address the problem of access to justice.

Cultural objects have a protected status in international law because of their intangible value to people, as symbols of an identity. Precisely that identity is often targeted in looting practices. That was the case with Nazi looting, and similarly racial discrimination instigated the looting in colonial settings.[49] Looting may be as old as history, the notion that harming other people's cultural objects is 'uncivilized', is also remarkably old. Cicero in his Verrines argues, for example, that while pillage was allowed, an honourable Roman should show respect for the material culture of defeated people. Through the writings of Grotius, De Vattel, and others, and through a series of peace treaties, this notion gained legal importance. The 1815 Treaty of Paris, arranging for the restitution of artefacts after Napoleon's defeat on the basis of territoriality, is generally seen as a key moment in this development. On that occasion, return of cultural objects on the basis of territoriality after their removal in times of foreign occupation was acknowledged as a 'principle of justice amongst civilized nations'.

This process continued in the 19th century, to be codified in the Hague Regulations concerning the Laws and Customs of War on Land of 1899 that prescribed that 'All seizure of […] works of art or science, is prohibited, and should be made the subject of proceedings'.[50] Eventually, the 1954 UNESCO Convention confirmed that cultural objects removed in violation of the prohibition to seize cultural objects in times of armed conflict may never be retained, as also discussed in Chapter 3.

This means that seizure of artefacts in the course of military actions at the close of the 19th century was unlawful by contemporary (European) standards of international law. When *exactly* this rule is to be considered as having status of customary international law is a matter of scholarly debate; some argue this was the case at the close of the 18th century, others later.[51] Nevertheless, such standards were only applied among a small group of 'civilized nations'. Yet territories such as those in West Africa were considered 'terra nullius'.[52] In that vein, colonial powers had arranged for the division of Africa at the Berlin Conference on West Africa in 1884-85, justifying the appropriation of land and resources by relying on their religious duty to spread the 'blessings of civilization'.[53] Although this may explain the events at the time, that line

49 Chapter 5, section 3.2.

50 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 (1899) 32 Stat. 1803. Repeated in the 1907 version of the Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 205 CTS 277).

51 Chapter 5, section 3.5.

52 Chapter 5, section 2.2.

53 General Act of the Berlin Conference on West Africa (1885), Art. 6: 'All the Powers ... bind themselves ... to care for the improvement of the conditions of their moral and material well-being. ... They shall ... protect and favour all religious, scientific or charitable institutions and undertakings ... which aim at instructing the natives and bringing home to them the

of argumentation can hardly be used as justification for acts with a continuing effect today – such as looting and holding on to cultural objects.[54] For cultural objects that were taken in violation of international law and are still in the hands of the state responsible for that violation (e.g. booty taken during colonial punitive actions at the close of the 19th century), reparations are warranted. In this respect, Article 14(2) ARSIWA clarifies that a '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.'[55] Nevertheless, as discussed in Chapter 5, claims based on the unlawfulness of the taking in the past will encounter many legal obstacles in terms of access to justice, for source communities.

Return of cultural objects after decolonisation may also fit in with concepts of state succession and self-determination, as argued by Vrdoljak and Jakubowski.[56] After the dissolution of the Austrian-Hungarian empire in Europe, for example, cultural objects were redistributed to successor states on the basis of territorial provenance. In that spirit, the 1973 UN General Assembly Resolution 'on restitution of works of art to countries victim of expropriation' seemed indeed promising for former colonies that had gained independence.[57] It linked the return of cultural objects to the right to self-determination, as a necessary element for the cultural development of new states. The 1975 Dutch-Indonesian agreement to return certain cultural objects 'directly linked with persons of major historical and cultural importance or with crucial historical events' may be seen in that light.[58] Similarly, the 2008 Italian return to Libya of the so-called Venus of Cyrene confirms that outlook. The return was based on a ruling by the Italian supreme administrative court, stating that the right of self-determination of former colonies implicates that cultural objects removed from these territories should be returned to the people they came from.[59]

On the whole, however, former colonial powers did not accept legal obligations in this respect, and did not return dispersed cultural objects. Hence, a separation between two scenarios of return of dispersed cultural objects became the legal reality. Colonial losses were to be discussed as a matter of 'return'

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blessings of civilization.'

54 See *Western Sahara* (Advisory Opinion) ICJ Rep 1975, 79; Chapter 5, section 3.5.

55 See Chapter 1, section 2.3.3.

56 Chapter 5, section 3.6.

57 UNGA Res. 3187 (18 December 1973) UN Doc A/RES/3187 (XXVIII); Chapter 5, section 3.6.

58 Joint Recommendations by the Dutch and Indonesian Team of Experts concerning Cultural Cooperation in the Field of Museums and Archives including Transfers of Objects (22 November 1975, Archive of the Ministry of Foreign Affairs 1975-1984, inv. No. 10266); Chapter 5, section 3.2.

59 *Associazione nazionale Italia Nostra Onlus c Ministero per i beni e le attività culturali et al.* (23 June 2008) Consiglio di Stato, No. 3154; Chapter 5, section 3.6.

on moral grounds – in the setting of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Its Restitution in Case of Illicit Appropriation (ICPRCP) – as opposed to restitution on legal grounds in the European context (e.g. the external restitution process after the Second World War). The 2002 Declaration on the Value and Importance of Universal Museums highlights the long-prevailing paradigm that it is in the best interest of civilisation that former colonial powers remain in custody of the cultural objects of their former colonies.[60]

Over the last years, this status quo is being challenged by a change in public opinion reflected in soft-law and museum policy guidelines. The 2015 UNESCO Museum Declaration for example urges member states to take appropriate measures to encourage and facilitate dialogue between museums and indigenous peoples concerning the management of those collections and, where appropriate, facilitate return or restitution.[61] This trend extends to non-indigenous source communities.

Human rights law instruments mirror this development. Of particular importance to the category of colonial losses is the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[62] It contains a right of redress with respect to cultural objects taken without the 'free, prior and informed consent' of indigenous peoples.[63] Depending on the cultural importance of the object at stake, redress may vary from a right to 'access and control' to a straightforward right to repatriation of human remains.[64] To fulfil this aim, states are expected to provide assistance – 'effective mechanisms in conjunction with indigenous peoples' – in addressing claims. These provisions of the UNDRIP are considered the implementation of the human right to culture in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights in as far as it concerns indigenous peoples' cultural heritage.[65] Though the UNDRIP started out as a non-binding declaration, these provisions on the cultural rights of indigenous peoples therefore gained strong legal status. Moreover, they are considered by some to have crystallised into principles of customary international law.[66]

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60 Chapter 5, section 3.6.

61 UNESCO Museum Recommendation, adopted by the General Conference at its 38th session (17 November 2015) Doc 38 C/25, at 18; Chapter 5, sections 4.1 and 4.2.

62 Chapter 5, section 4.5.

63 Article 11(2) of UNDRIP defines this as 'redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.'

64 Article 12 deals with rights to objects of special importance – namely, a right to 'use and control' where it concerns lost ceremonial objects, while for human remains a straightforward right to repatriation applies

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

66 See Chapter 5, section 4.5.2. and Chapter 6, section 5.2.4.

In this light, recent initiatives in Western-European countries to establish procedures in the museum sector to address claims to colonial takings can be seen as the fulfilment of an international obligation in as far as it concerns indigenous peoples' lost cultural objects.[67] For such claims, standards are provided in UNDRIP. This implicates for example that indigenous communities should be allowed to independently file claims - irrespective of the support of governments of their home states.[68]

Notwithstanding the difficulties for indigenous communities to reclaim their lost cultural objects in foreign museums in terms of access to justice, claims do find their way to courts. One roadmap on how to proceed was given in a 2017 Colombian verdict.[69] In its ruling, the court ordered the Colombian government to pursue the return by Spain of a treasure taken at the close of the 19th century, on behalf of the indigenous Quimbaya people. The argumentation was that by today's standards of international law – referring to UNDRIP, but interestingly also to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention – indigenous peoples are entitled to their lost cultural objects.

Such developments, in combination with recent government policies in Western Europe that enable the return of cultural objects to source communities, and (older) policies and laws to that effect in settler states,[70] signal evolving law. Although the law is all but settled, these practices contribute to the emergence of international law obligations: it is evidence of *opinio juris* that the return of cultural objects to indigenous source communities is not merely a matter of political discretion, but a matter of justice and the law.[71]

In summary, contrary to the prevailing paradigm that no legal standards exist for cultural objects looted in a colonial setting, it can be concluded that a variety of standards are in place. A lack of political will by Western holding states is the explanation why claims have generally not been honoured in the past. Also for this category, however, the ethical model is gaining in import-

67 The 2020 Report of the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/45/35), at 87 and 92, concludes that 'States should enact or reform legislation on repatriation in accordance with [UNDRIP, *EC]* with the full and meaningful participation of indigenous peoples and the safeguard of free, prior and informed consent'; and that 'Museums, universities and other collecting institutions must become partners in ensuring that articles 11, 12 and 31 of the Declaration are respected and upheld. Museums must develop relationships of collaboration and trust, and seek out and respect indigenous peoples' knowledge, protocols, traditional laws and customs regarding items in their collections.'; V.M. Tünsmeyer, *Repatriation of sacred indigenous cultural heritage and the law: Lessons from the United States and Canada* (2020) Maastricht University, proposes the repatriation of indigenous sacred cultural heritage is an obligation following from Art. 27 ICCPR.

68 Especially in situations where national states may be seen as a 'colonial construct' this seems important.

69 *Judgment SU-649/17* (2017) Republic of Colombia, Constitutional Court; Chapter 5, section 4.5.4.

70 Such as NAGPRA in the US, see Chapter 5, section 4.5.3.

71 Cf. Article 38 of the Statute of the International Court of Justice international customary law pre-supposes an established practice and *opinio juris*.

ance. To address the interest of former owners more effectively, the human rights law model of UNDRIP is useful, also beyond the category of indigenous people's lost cultural objects. Since the notion of an indigenous people has (on purpose) not been strictly defined, it could – either directly or indirectly – provide for standards in cases that concern communal (often sacred) cultural objects. In this model, the focus is on: (i) a continuing cultural link (also: cultural affiliation) – not only on a loss in the past; (ii) on sub-state actors as independent right holders (indigenous peoples and communities); and (iii) on differentiated rights – of access, control or return – that depend on the identity value at stake.

2.5 Cross-border trade and claims: A synthesis

The last chapter zoomed out from specific categories and provided an analysis of the international framework for the cross-border trade in cultural objects and how it accounts for interests of former owners. In that sense, Chapter 6 is the synthesis of the preceding chapters. It included examples of more recent looting.

A first observation is that similar obstacles to claims arise in the various categories looked at in this thesis, including present-day looting. A striking example is the denial by a Dutch court of the claim by a Chinese community to a sacred Buddha statue with a mummified monk inside - known and revered to as Zhanggong-zushi –, that was stolen as recently as 1995.[72] It was found in the hands of a Dutch collector in 2014 who claimed ownership title under Dutch private law.[73] This is not unlike the outcomes of litigation over indigenous cultural objects lost in a colonial setting, or litigation over Nazi-looted art in civil law countries. An approach solely from the perspective of national ownership law that typifies such outcomes, nevertheless, is clearly at odds with the principles and *rationale* of heritage protection on the international level. This highlights a tension between cultural objects as heritage – symbolic of an identity – and cultural objects as possessions – representing economic interests and exclusive rights. It also illustrates a disconnect between norms on different levels: where international standards are unequivocal in the rule that title over looted cultural objects should not pass, domestic private law often appears not (yet) to be in line with those standards. This disconnect

72 *Village Communities of Yangchun and Dongpu v Van Overveem, Design & Consultancy BV, Design Consultancy Oscar van Overveem B.V.* (Judgment of 12 December 2018) Amsterdam District Court, Case No. C/13/609408, ECLI:NL:RBAMS:2018:8919.

73 The Netherlands only implemented the 1970 UNESCO Convention recently (2009). For a loss in 1995 regular private law would therefore apply (and a 20-years' period for acquisitive prescription). The claim was denied in a short ruling on the basis of a lack of standing of the Chinese communities. See Chapter 6, section 1.

is an incentive for the trade in looted artefacts and, in my view, the main reason why the interest of former owners are not addressed effectively.

Regulation of the international art trade is about finding a balance between the interests of free trade and the exchange of cultures on the one hand, and heritage interests that are worthy of protection, on the other. This regulation relies on the 1970 UNESCO Convention, introducing a system of export controls, and the 'national treasure' exception in both the GATT and TFEU free trade systems. In broad terms, it provides for a system where states designate protected cultural objects that cannot be freely traded – their national treasures, patrimony or national cultural heritage – and interstate cooperation following unauthorised export.

The most prominent blind spots in this system that were identified are: (1) that nationality is both inefficient and insufficient as a criterion for entitlement – and may have as an undesirable side effect the 'nationalisation' of cultural objects instead of fostering cultural diversity;[74] (2) that the position of sub-state rights holders such as communities and individual owners is not accounted for – and this clashes with other (more recent) regulations; and (3) that it only covers losses *after* their adoption and implementation in all countries involved – whilst claims concern past losses and market states only recently started to adopt the 1970 UNESCO Convention (and mostly did not accede to the 1995 UNIDROIT Convention).

This means that many categories of claims are *not* covered by these international treaties. Through trade and acquisition, ownership title can be (or has been) passed on to a new possessor, and objects are 'laundered' in civil law countries: the illegality of the looting simply does not 'stick' to the objects.[75] Often, the provenance of a specific object (its ownership history) is also omitted or unknown by new possessors along the line: the trade in unprovenanced cultural objects has been the rule rather than the exception for a long time, and is still common practice. With that reality in mind, solutions need to be found.

A first step to counter the illicit trade in the future is therefore to focus on the *possession* of looted artefacts and to oblige actors in the art world to abide by clear standards of due diligence: to only trade, buy, and possess objects that have a documented lawful provenance. The need for measures in that regard resonates even in the UN Security Council.[76] Such measures are indeed being adopted at present. On the regional level, the introduction

74 In this sense K.A. Appiah, 'Whose Culture Is It, Anyway?' in K.A. Appiah (ed) *Cosmopolitanism: Ethics in a World of Strangers* (2006) W.W. Norton & Company, 119. The patriotism involved in repatriation efforts by the Chinese government is also what Ai Wei Wei critiques with his 2010 'Circle of Zodiac Heads'. E. Wong 'Ai Weiwei's Animal Heads Offer Critique of Chinese Nationalism' (10 August 2016) *The New York Times*.

75 Chapter 6, section 2.2.1.

76 UNSC Res. 2347 (24 March 2017) UN Doc S/RES/2347; Chapter 1, section 2.3.1; Chapter 6, sections 2.2.1 and 3.2.1.

of the 2019 EU Import Regulation for example prohibits (as of December 2020) the *im*port of unlawfully *ex*ported cultural objects – independent of implementation of the 1970 UNESCO Convention in the countries in question.[77] This should force art market participants to be transparent and knowledgeable about the former history of objects, not merely as a matter of ethics but as a legal standard that can be enforced under penal law. Nevertheless, this will still not solve title issues: who should be seen as legitimate 'right holders' when ownership laws differ per jurisdiction?

Legitimate ownership under the private law of the country where an object ended up or was acquired as *the* criterion for contested cultural artefacts is being challenged by state practice and soft law instruments. In that respect, international standards slowly but steadily influence how courts adapt domestic private law rules to the specific field of cultural property, also in cases where such standards are not directly binding. The main principle of the 1995 UNIDROIT Convention, that stolen or unlawfully exported cultural objects – according to the law of the country of origin – should be returned and that only a new possessor who was duly diligent upon acquisition deserves (some) protection, is key in this regard.

The contours of such practice, where courts find ways to reach an outcome in line with international standards (that themselves may not be binding), by relying on open norms such as 'public policy' and the like, surfaced in case law discussed in this dissertation.[78] A noteworthy recent example is the 2020 Chinese *Zhanggong-zushi* ruling – a follow-up of the case mentioned above concerning a claim to a stolen sacred Buddha statue that was dismissed by a Dutch court in 2018.[79] After litigation in the Netherlands had stranded, the claim was pursued in China.[80] This time, the claim *was* awarded. Under reference to the object and purpose of the 1970 UNESCO and 1995 UNIDROIT

77 Regulation (EU) 2019/880 of 17 April 2019 on the introduction and the import of cultural goods (2019) OJ L 151. See also Chapter 1, section 2.3.1.

78 See Chapter 1, section 2.2; Chapter 6 sections 1, 3.1.2 and 5.4. Public policy was invoked in two UK cases concerning looted art, namely the *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance SA* (1998) No. 1993 C 3428 (QB) (See Chapter 1, section 2.2.1) and in *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd.* (2007) EWCA Civ. 1374. In this last case the court enforced Iranian patrimony laws as 'it is certainly contrary to public policy for such claims to be shut out. There is international recognition that states should assist one another to prevent the unlawful removal of cultural objects ...' (paras 154-155). Another example is the German ruling *Allgemeine Versicherungsgesellschaft v EK*, BGHZ 59, 82 (1972), in which an insurance contract (relating to unlawfully exported masks from Nigera) was deemed void on the basis of 'morality of the international trade in cultural goods', though Germany was no party to the 1970 UNESCO Convention at the time. More examples are given by Chechi (2014), p. 281.

79 *The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V.* (Judgment of 4 December 2020) Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626.

80 *Village Communities of Yangchun and Dongpu v Van Overveem, Design & Consultancy BV, Design Consultancy Oscar van Overveem B.V.* (Judgment of 12 December 2018), above n 29.

Conventions (neither of which applied directly to this case), the court held that in cases that concern cultural property, the law of the country where the object was stolen should govern the issue of ownership.[81] This meant that not Dutch law but Chinese law should apply and, accordingly, ownership could not have passed.[82] This indeed reflects the preferred international standard.[83] A special conflict of law rule for cultural objects, under which the law of the country of origin (the *lex originis*) or the law of the country where the loss occurred (the *lex furti*) governs the question of ownership, is generally acknowledged as an important tool to prevent the laundering of looted cultural objects in civil law countries.[84] In that sense, such practices signal the birth of a specialised conflict of law rule for cross-border title disputes over cultural objects and strengthen the principles containted in the 1995 UNIDROIT Convention.

Still, this does not solve title issues with regard to objects that were lost longer ago in civil law jurisdictions. Since that loss, innocent new possessors may have gained lawful ownership title and to retroactively void such title would challenge other settled rules of international law. More so than in cases that concern present-day looting where all participants of the art market should be aware of the need for due diligence standards before acquisition, in cases that concern older losses the legitimate interest of innocent third parties may be at stake. The proliferation of soft law instruments and private regulations, as discussed in the previous chapters, highlight the need for a legal framework also for these cases. Given that a zero-sum (ownership) approach is not particularly suited to those cases, another model is needed.

The 'humanization' of cultural heritage law, in that regard, offers prospects. Soft law instruments in this field generally aim at equitable solutions, depending on the significance of specific objects for the former owners. This attention for the social dimension of cultural objects and their intangible value for source

81 More precisely: the *lex rei sitae* - generally understood as the place where the object is at the time of the claim or the last transaction - was to be interpreted as the *lex furti* - the place where the misappropriation took place. H. Zhengxin, 'The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector – What Role has Private International Law Played?' in *Conflict of Laws.net, Views and News in Private International Law* (12 December 2020). Quite another matter, of course, is how to enforce such a judgment.

82 An appeal is ongoing at the moment of writing. Information kindly provided by dr. Meng Yu from Bejing China University of Political Science and Law.

83 See Chapter 1, section 2.2 and Chapter 6, section 2.2.1. Such instruments are, e.g., the 1995 UNIDROIT Convention, Art. 3(2); Arts. 2, 3 and 4 the 1991 IDI Basel Resolution of the *Institut de Droit international*; Regulation (EU) 2019/880 of 17 April 2019 on the introduction and the import of cultural goods [2019] OJ L 151), Recital at (8); an example of domestic legislation is Article 90 of the Belgian Code of Private International Law (introducing the *lex furti*).

84 E.g. S.C. Symeonidis 'A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property' (2005) 38 *Vand. J. Transnat'l L.* 1177.

communities is mirrored in international cultural heritage law instruments.[85] In this sense, international cultural heritage law can be said to be evolving from a property-based framework towards a human rights framework. The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) is an example of this 'humanization', by defining cultural heritage as 'a group of resources inherited from the past which people identify, *independently of ownership*, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions'.[86] As right holders, the Faro Convention introduces the notion of a 'heritage community', defined as 'people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations'.[87] In as far as it concerns competing claims to heritage, it proposes 'equitable solutions' – similar to the norm in soft law instruments.

Extending a human rights law approach to the issue of contested cultural objects, this can be understood as the acknowledgement that communities or individuals may have rights with regard to cultural objects on the grounds of their specific intangible heritage interests. The right of access to one's culture, as developed in the realm of Article 15(1) ICESCR, plays a central role in this model. Remaining separated from certain objects, in this outlook, may then add up to a continuing human rights violation.

To disentangle the matter of title, the notion of 'heritage title' was introduced. It is based on the idea that specific heritage values – defined as a continuing cultural link – entitle people with rights to their lost cultural objects. On the basis of existing and evolving law, two types of heritage title can be distinguished. In the first place, source states are entitled to national cultural heritage if a continuing cultural link can be established. This type of heritage title is based on the traditional interstate model as codified in the 1954 and 1970 UNESCO Conventions and in the 1995 UNIDROIT Convention, and (directly) only applies after these treaties were adopted and implemented. Indirectly, however, this rule is gaining ground also for instances *not* covered by these treaties, especially where it concerns looted antiquities protected under patrimony laws in source states.[88]

The second type is heritage title that communities or individuals may have with regard to their lost cultural objects. In the context of this dissertation, this is the more important type as it codifies, so to speak, existing practice and soft law addressing sub-state right holders, and covers claims that current-

85 Chapter 6, section 5.1.

86 Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005) CETS No. 199 (emphasis added), Art. 6.

87 Faro Convention, Art. 2(b).

88 Chapter 6, section 4.3. See also *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd*. (2007) EWCA Civ. 1374 and *United States v Schultz*, 178 F. Supp. 2d445 (SDNY 3 January 2002).

ly seem to be floating in a legal void.[89] The distinguishing feature of this model is that the focus is not on (restitution of) ownership rights, but on rights of access and control, depending on the heritage interests at stake – which obviously may add up to a right to return of the object to its original setting.[90]

Various human rights may inform heritage title.[91] Apart from the right to culture as a general basis for this model, the rights provided in UNDRIP are relevant for indigenous communities with regard to their cultural objects lost in a colonial setting, whereas the human right to property and respect for private and family life appear the logical base for heritage title individual owners may have with regard to their lost artefacts. Potentially, other human rights qualify to inform heritage title, depending on the type of object and identity values involved.

Heritage title that thus surfaces is based on a continuing cultural link and three elements shape its content.[92] First, not to be able to have access to, or control over, objects over which one has heritage title, implicates a continuing injustice of remaining separated from those objects. Such an approach brings with it a shift in focus from past events to present-day interests: not the unlawfulness of the loss in the past is decisive, but the continuing cultural affiliation today is key. Second, the rights involved are defined in terms of access, control, return, or 'equitable solutions', not in terms of absolute ownership. This enables the weighing, and ideally reconciliation, of competing (legitimate) interests that parties may have in the same cultural object – by aiming at creative and participatory solutions. It implicates a more social notion of ownership over cultural objects, where the content of ownership depends on possible (cultural) rights of others. A third element is that this focus on heritage interests enables the classification of (looted) cultural objects, depending on their specific social function. This means, for example, that sacred or other highly symbolic objects stand out on account of their identity value for specific people, whereas a painting that was produced for the market will not easily pass the test – unless it concerns a family heirloom that is symbolic for a (lost) family life.

Obviously, heritage title will often coincide with ownership title (of an individual, community or state) and, where this is the case, there is no need

89 Since such claims are often inadmissible in a 'regular' private law approach, mostly in civil law countries, as discussed in Chapter 2.

90 The suggestion of Appiah (elaborating on the notion of 'shared heritage') to constitute 'universal collections' and make these available in places that suffered from colonial looting – at the cost of former colonial powers – might be an example of a creative equitable solution. K.A. Appiah 'Cosmopolitanism and Cultural Heritage. Thomas Thiemeyer in conversation with Kwame Anthony Appiah' in Humboldt Forum *(Post)Colonialism and Cultural Heritage. International Debates at the Humboldt Forum* (2021) Hanser Verlag.

91 Chapter 6, section 5.2.

92 Chapter 6, section 5.3.

to rely on heritage title or human rights in title claims.[93] Conversely, where no heritage title surfaces, cases would fall under regular private law. However, in all those 'grey' categories of lawfully owned but unlawfully – or unjustly – lost cultural objects, heritage title could play a role. Irrespective of the ownership situation in a specific jurisdiction, it entitles former owners at the very least to rights of access to their cultural heritage and information about its provenance. Depending on the identity values involved, this may add up to a right of control or return in its original setting. According to rules already operative in the art world based on the principle set out in the 1995 UNIDROIT Convention, the new owner's position should depend on its due diligence on acquisition, most notably the provenance research performed. Although this model does not pretend to offer solutions for all the complexities that surround the field of looted art, it could be a step towards a more balanced and 'humanized' ownership concept with regard to cultural heritage, and one that takes better stock of the interests of former owners.

3 FURTHER CONSIDERATIONS AND PROPOSALS

3.1 Beyond ownership

This dissertation explored how cross-border claims to cultural objects fit in the wider legal framework, and how the interests of former owners could be addressed more effectively.
In the model developed in Chapter 6 a key insight was taken into account, namely that the intangible heritage value of cultural objects, that distinguishes them from other goods, is not sufficiently covered by a notion of ownership that entitles one right holder with exclusive rights.

Today, a number of treaties are in place that set the norm that looted cultural objects should be returned after involuntary loss. In order for this system to work well, and to avoid that they are passed on in ownership anyway – e.g. by omitting provenance details – the trade and import need to be regulated by a solid licensing system in combination with due diligence standards for the trade. That, however, by no means solves title issues with regard to objects that are already in circulation and were looted before these regulations came into force, or objects of which the exact provenance is unknown. A subsequent possessor, by now, may well have become the legitimate owner of such artefacts under application of private law rules, as has been illustrated throughout this study. Irrespective of such ownership title under domestic private law, soft law instruments and private regulations

93 It has become common for states to vest state ownership over vulnerable categories such as undiscovered (and therefore undocumented) archaeological finds: a claim to future losses may then rely on ownership title.

increasingly support former owners in their claims to their lost cultural objects. As a consequence, grey categories of tainted cultural objects have emerged that today can only be 'cleared' through extra-legal procedures: the ethical model for title disputes. In that approach, claims depend on the willingness of new possessors to relinquish their rights – who may be influenced by market forces or political pressure – whilst norms remain vague. Such a situation is prone to legal insecurity, ad-hoc political decisions and, at times, injustice.

To align the law in this field, it has often been suggested that states should adapt their private laws to ensure the restitution of cultural objects to the former ('rightful') owners.[94] However, it is unlikely that states – especially with a civil law tradition – would ever be willing to retroactively change their ownership laws that way as it would implicate the expropriation of new owners and, thus, the need for compensation of those new owners by these states - in accordance with settled norms of international law. Another obstacle in an ownership approach is that the unlawfulness of the loss is mostly decisive for claims. Although the *injustice* of a loss may be obvious in certain situations, a model that relies on the *unlawfulness* of a loss misses an essential point. Looting practices were at times undeniably unlawful – and in respect of colonial looting practices, this certainly has been insufficiently acknowledged – but not seldom the unlawfulness of a removal is not obvious at all, or simply undocumented. For these and other reasons discussed in this dissertation, a strict ownership approach appears not well suited as a general model for the problems at hand. Although the types of claims in this study vary, they also all share one commonality and that is that the interests at stake go beyond private ownership.

3.2 Heritage title

The better option that *was* explored, therefore, is to focus on the present-day interest of people in specific cultural objects as a base for entitlement. Accordingly, the notion of heritage title was introduced to capture the legal bond between people and cultural objects, apart from ownership. Although we are used to defining relationships between objects and people by way of ownership, its exclusivity and focus on economic aspects appear not to fit *cultural* property. Owners of protected cultural objects are not free to destroy or export these as this could be contrary to the (heritage) interests of the wider public: in international cultural heritage law preservation and accessibility are well accepted public interests that limit private ownership. Owners of cultural objects, in other words, at the same time should be seen as the custodians of cultural objects since these all make up the 'heritage of mankind'. This comes

94 Chapter 6, sections 2.1 and 2.2. Various soft-law declarations on Nazi-looted art suggest this (Chapter 4, section 4.2).

with obligations. Museums, for example, should research the history of their collections and ensure wide access to these collections, ideally also beyond the obvious places where universal museums already allow for such wide access.[95] Similarly, and more immediate, the (heritage) interests of former owners or creators may limit the rights of new owners. Original owners, in that perspective, retain certain rights over their lost cultural objects if there is a continuing cultural link. This notion is not unlike the artist's or author's moral right over its creation.[96] The notion of heritage title – based on a continuing cultural link –, in other words, builds further on the idea that owners of cultural objects are custodians of heritage of mankind, and also fits the (private law) notion that others that are intellectually linked to an object remain entitled to certain rights if it has passed in ownership to a new possessor. From different angles, these notions all centre around an ownership concept that is non-exclusive and comes with obligations.

The humanization of cultural heritage law more in general and the evolution of the right of access to one's culture in particular, appear to provide sufficient ground for the acknowledgement of a legal bond between people and their lost heritage if there is a continuing cultural link. As such, heritage title informed by human rights and internatonal law standards can act as a bridge between international public law and domestic private law.

Depending on the specific (domestic) situation, heritage title may be made operational either by relying on binding human rights, or on open norms that exist in all legal systems. As the *lingua franca*, international human rights law seems suited to further develop this field within the law, as it addresses both identity values as well as the right to property, is universal, and may penetrate and shape private law - the usual setting for title disputes. And although originally human rights law was thought to cover the relationship between a state and its own nationals, its broader scope as a standard for the conduct of a state in its relationship also with others (i.e. foreign claimants), by now seems well accepted.[97] Alternative dispute resolution and cultural diplomacy may at times be best equipped to solve disputes over contested cultural objects, however in the end, access to justice is key. This is not only needed in recognition of unequal power relations that obviously influence outcomes of voluntary procedures, but also in the understanding that precedents are needed to develop and clarify standards.

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95 Cf., e.g., Appiah (n. 57).

96 See Berne Convention for the Protection of Literary and Artistic Works (1886) 828 UNTS 221, Art. 6 bis. These are linked to the person of the artist. In the proposed model, rights are linked to communities (or families).

97 On extra-territoriality, see e.g. Schuberth S, Tuchtfeld E, Lischewski I, Eschenhagen P, #3 Bindung an Menschenrechte im Ausland: So close, no matter how far?, Podcast (5 March 2021) *Völkerrechtsblog*; see also the acknowledgement that the private sector should adhere to human rights standards, Chapter 6, section 5.4.

3.3 An integrated approach

Since the administration of justice is a public task, governments should ensure that neutral procedures with guarantees in terms of due process are in place to effectively address the rights of dispossessed owners with regard to their lost cultural objects. Apart from the above proposal for conceptual changes that should ensure access to justice also for individuals and communities – which may resonate in the long run – this also calls for solutions in the short run.

As a result of the legislative action of the UN Security Council, protection of cultural heritage and prevention of the illicit trade have become a matter of global public policy. In the words of Jakubowski:

> 'Without doubt the protection of cultural heritage today constitutes a global imperative, calling for political, legal and technical cooperation among transnational actors, […]. However, the value of cultural heritage for global development, the maintenance of peace, and the protection of all human rights is hampered by the weaknesses of the existing legal mechanisms on the one hand, and the evolving multipolar and multilevel initiatives and programmes on the other. A more integrated approach and focused guidance are necessary.'[98]

That this is a widely-shared conviction is highlighted by the first-ever declaration on culture of the G20 of July 2021 that calls for harmonisation of regulation and enforcement to combat illicit trafficking by reference to the importance of cultural heritage for identity, social cohesion, peace and security.[99]

In a relatively short period, cultural heritage protection has thus become a matter of peace and security; of international criminal justice; of human rights; and is also listed as one of the overarching principles of the sustainable development of societies.[100] All this implicates that states are under the obligation to adopt measures to prevent looted cultural objects from freely circulating on their markets. Title issues can therefore no longer be dismissed as an internal matter that concerns domestic private law. One immediate consequence is that stricter (legal) standards for the 'lawful provenance' of cultural objects are being introduced. In that sense, in its 2017 Resolution the UN Security Council calls on states to adopt measures to prevent and counter the illicit trade and trafficking in cultural property 'which lack clearly documented and certified provenance', to allow for their eventual safe return.[101] It also urges states to adopt measures to engage 'museums, relevant business

98 A. Jakubowski, 'Resolution 2347: Mainstreaming the protection of cultural heritage at the global level' (2018) 48 Question of International Law 21, p. 32.
99 Rome Declaration of the G20 Ministers of Culture, adopted 30 July 2021.
100 Chapter 1, sections 1.3.1 and 2.3.4; Chapter 6, sections 2.2 and 5.1.
101 Above, n. 52, para. 8.

associations and antiquities market participants on standards of provenance documentation, differentiated due diligence and all measures to prevent the trade of stolen or illegally traded cultural property'.[102] The EU Import Regulation that prohibits the import of unlawfully exported cultural objects (as of December 2020) indeed relies on documentation to support the lawful provenance before an object may be imported.[103] Such binding regulations underscore the importance of provenance research, not merely as a matter of ethics as is the case in soft law instruments, but as a matter of criminal justice. Buyers, dealers, auction houses and museums must thus assure themselves not only of the authenticity of an object (is it real?) but also of its provenance (who were the previous owners and was it lawfully acquired?).

This has important ramifications for the possession of all sorts of cultural objects, not only antiquities that can be identified as coming from war-torn areas today.[104] Cultural objects with an incomplete provenance will surface as 'tainted', although it is unsettled what exactly a 'lawful' provenance is. Furthermore, no mechanisms are in place where parties can turn to for clarification of title issues as was demonstrated throughout this dissertation.[105]

In the first place, this calls for raising awareness about the illicit trade and (new) regulations, and education in international cultural heritage law. If consumers and professionals in the art world, or even law enforcers, are not aware of such regulations on the international level, it can hardly be expected that these will be followed up or enforced.

Furthermore, in light of the institutional vacuum in European jurisdictions for claims that regard losses that predate the implementation of international treaties, and the rise in litigation concerning 'European' cases in the US, in Chapters 2 and 4 the establishment of a European claims procedure was proposed.[106] This proposal gained urgency in the light of the recent regulations mentioned above: in the EU region, as a result of the 2019 EU Import Regulation. A pragmatic and integrated approach would be to set up an EU agency as a central coordinating office, or embed this task in an existing agency in a related field.[107] Logically, the licensing system envisaged in the 2019

102 Ibid., under 17(g).

103 Above, n. 53. The Regulation introduces a licensing system that will gradually become operational before June 2025. Chapter 1, section 1.3.1; Chapter 6, section 3.2.2.

104 Chapter 6, section 3.2.

105 E.g. Chapter 1 section 2.3.1; Chapter 6, section 3.2.

106 Chapter 2, section 5; Chapter 4, section 5.

107 For similar ideas see N. Palmer 'The best we can do? Exploring a collegiate approach to Holocaust-related claims' in E. Campfens (ed), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing; M.A. Renold, 'Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations' (2016) European Parliament, Directorate General for Internal Policies, PE 556.947; M. Weller 'Study on the European added value of legislative action on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil

EU Import Regulation – that should be operative by 2025 – needs to be accompanied by the establishment of a clearance system to address the problems that will surface with regard to cultural objects without a clear provenance. Such a system should provide for neutral and transparent procedures to assess title and provenance issues. Beyond acting as a clearance institute, such an organisation could serve as a central coordination and administration office for issues relating to due diligence and provenance – for example by setting up a publicly administered and accessible registration system similar to those in place in other fields (e.g. endangered species or precious metals), or even the setting up of a mandatory title insurance system to spread risks that, at times, are unequally divided.[108]

In sum, public guidance is needed for a successful transition from a market with many grey areas to a transparent and licit art market. Measures in that regard would not only serve the interests of former owners but *all* stakeholders. The main message is that the present institutional vacuum needs to be addressed not only by market parties or museums, but also by governments who have obligations in that regard under international law. Experiences in the field of Nazi-looted art underscore that the topic of cultural objects looted in the past is not a temporary 'problem'.

4 In conclusion

> '*One of the most noble incarnations of a people's genius is its cultural heritage. The vicissitudes of history have nevertheless robbed many peoples of this inheritance. They … have not only been despoiled of … masterpieces but (were) also robbed of a memory. … These men and women have the right to recover these cultural assets which are part of their being.*'[109]

These words, spoken by Director General to UNESCO M'Bow in 1978, underline that the current attention for looted cultural objects is no whim of the day. In all places and at all times, cultural objects have inspired people and this was reason for their protected status, even if these were 'foreign'. In that vein, lawyers like Cicero and Grotius already argued that it is uncivilised to take what is of 'great worth' to others, but history has also shown us that rules

procedure', *Annex 1 to European Added Value Assessment* (2017) European Parliament Research Service, PE 610.998.

108 E.g. a transparency register for antiquities similar to the EU Transparency register, introduced in 2017 – in the context of the regulation on due diligence requirements for the trade in zinc, tungsten, tantalum and gold – as proposed in the ILLICID Report (2020), p. 12; On a mandatory insurance system, see J. Nathan, 'Mandatory Title Insurance for Cultural Property: A Solution for Claimants and Owners of Looted and Stolen Art' (2018) 23 *Art Antiquity & Law* 247.

109 A.M. M'Bow, 'A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It' (1978) <http://www.unesco.org/culture/laws/pdf/PealforReturn_DG_1978.pdf>.

for their protection do not prevent them from being looted after all. This has always been the case and has gained importance in this era of globalisation. Increased legislation at the international level and a rise of soft law underscore the importance attached to cultural heritage, not only in terms of its intrinsic value for humanity at large but also in terms of its specific value for community and family life, as symbols of an identity. Nevertheless, if tools are lacking to address such values at the level where disputes arise and are addressed – in domestic courts – this aspiration remains mere rhetoric.

The main finding in this dissertation was that although the heritage value of cultural objects generally lies at the core of claims, adequate legal tools to address these values are lacking. Entitlement to cultural objects is not merely a matter of domestic property law, but also a matter of heritage and international (cultural heritage and human rights) law. This means that even though ownership title passed under private law, former owners may still have rights over their lost cultural objects. To bridge the gap that presently exists between private law and public law the notion of heritage title was introduced in a human rights law approach to claims. This notion is based on: (i) the continued injustice of remaining separated from one's cultural heritage; (ii) the classification of cultural objects depending on their identity value to people; and (iii) rights that are defined in terms of access, return or equitable solutions. For quite some time, the traditional private law model to solve title issues over lost cultural objects – with a focus on ownership according to the law in the country where an object is situated – has come under pressure, and the same can be said for the interstate model – with its focus on the nationality of cultural objects. The proposed model reflects soft law, but may be based on binding human rights law norms that can be invoked in a court of law. Especially for historical losses, such a human rights' approach may offer tools to overcome obstacles former owners encounter in traditional approaches. In practice, heritage title may operate by reference to international standards that can enter a private law setting either by reliance on binding human rights law norms or through open norms that exist in all jurisdictions.

Furthermore, to address the shortcomings of the legal framework in the short run, awareness raising and education on cultural heritage law, and the setting up of a regional coordinating and clearance institute for objects that already circulate, are being proposed.

The main challenge throughout the dissertation was to identify rules that operate on different levels. That search was undertaken in various branches of the law and for various categories of looted art. This broad approach has resulted in insights, but also had its limits: certain relevant fields of law to the topic of looted art could not be addressed, such as the legal framework for reparations for historical injustice. The above proposals should therefore be understood as a way forward in the development of the law and as a basis for further legal analysis. An (extra-legal) ethical model, based on morality and a willingness of the parties to find solutions, is not a guarantee for justice.

In that sense, the role of the law is to ensure access to justice and provide a solid and predictable framework in which injustices can be addressed, similar cases can be dealt with similarly, and outcomes can be challenged.