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DIVISER C'EST DÉTRUIRE:

ETHICAL PRINCIPLES AND LEGAL RULES IN THE FIELD OF RETURN OF CULTURAL PROPERTIES

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1. Purpose of this Study

This study is intended to be presented at the 15th session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation[1] (Paris, 11-13 May 2009). The purposes of the study are to

- show why the principles embodied in international legal instruments are indispensable for the protection of cultural heritage and serve the purpose of international action for the return of cultural properties;
- define the limits of existing international legal instruments;
- restate the principles that are being developed in international practice;
- explain how these principles contribute to the evolution of international law in the fields of protection of cultural heritage and restitution or return of cultural properties.

As it clearly appears from the purposes, this study cannot be limited to legal analysis, but needs to be extended to the ethical dimension inherent in the subject of return of cultural heritage to the States of origin. Moreover, where legal considerations are made, they cannot be restricted to international law today in force (*lex lata*), but need to take into account what seems to be the present evolutionary trend in international law (*lex ferenda*). Also in view of the responsibilities of the ICPRCP, as set forth in Art. 4, paras. 1 and 2, of its Statutes[2], what is most important is to proceed in a direction, corresponding to where a body of rules is bound for, rather than to make a stop at a certain point, corresponding to how a given case should be decided in the light of the rules in force today. Where evolutionary trends are being discussed, the distinction between morality and law may become blurred. But the cultural heritage[3] is too important to be understood only in the light of legal technicalities.

While various non-State actors are involved in the transboundary movements of cultural properties (called also cultural objects or, more generally, cultural heritage)[4], this study will focus mainly on States and on principles and rules which apply or should apply in the relationships between States.

A last caveat relates to the instances that will be recalled hereunder. The subject of cultural heritage is rich in fascinating instances where claims for return of properties have been put forward with very diverse outcomes. However, due to restrictions in time and space, this study cannot be analytic and provide references to each single case. It will refer to some selected instances which seem particularly useful in clarifying the basic aspects of the question[5].

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[1] Hereinafter: the ICPRCP. In this study the word "return" is used in a general sense that includes both the concepts of return (in a narrow sense) and restitution. A distinction is often made between "return", used for illegally exported properties, and "restitution", used for properties stolen from the owner. The term "repatriation" could also be used.

[2] Namely, "seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin" and "promoting multilateral and bilateral co-operation with a view to the restitution and return of cultural property to its countries of origin".

[3] On the concept of cultural heritage see Francioni, *A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage*, in Yusuf (ed.), *Standard-Setting in UNESCO – Normative Action in Education, Science and Culture*, vol. I, Paris, 2007, p. 221.

[4] As pointed out by Nafziger, *Cultural Heritage Law: The International Regime*, in Nafziger & Scovazzi (eds.), *Le patrimoine culturel de l'humanité – Cultural Heritage of Mankind*, Leiden, 2008, p.147, non-State actors can be divided into seven categories, namely: private dealers, auction houses and collectors; museums and art galleries; anthropologists and archaeologists; indigenous and minority ethnic groups; artists; historic preservationists, archivists and art historians; criminals and criminal organizations (in their turn divided into: forgers, fakers and defrauders; thieves; grave robbers and other illegal excavators; smugglers; war criminals).

[5] Many instances discussed hereunder relate to the practice of Italy. Yet this practice is more accessible to the author of this study. However, the choice can also be explained by the fact that, in the last years, Italy has been particularly active both in returning cultural properties to other States and in claiming the return of national cultural properties held by other States.

2. The Antecedents: Canova's Journey to Paris and London

The French revolutionaries discussed whether works of art deserved to be destroyed as memories of the shameful age of tyrannies or should be preserved as such to help nations to progress in new directions. The second view prevailed, especially in the variation according to which France had the right and even the duty to "free" the works of art detained in other countries by royal or religious oppressors and to expose them to the public in the national museums, beginning with the Louvre. The treaties concluded by France with defeated countries in Italy, such as those with the Papal State (armistice of Bologna of 5 Messidor IV / 23 June 1796[6] and peace treaty of Tolentino of 1st Ventôse V / 19 February 1797[7]) and others[8], included, as a shadow of legality, provisions on the right to remove a certain number of cultural properties chosen by a French commission[9].

In 1815, after the fall of Napoleon, Pope Pius VII sent to Paris the sculptor Antonio Canova (1757-1822) as his special envoy to king Louis XVIII in the attempt to recover the one hundred works of art and five hundred manuscripts delivered by the Papal State to France under the treaty of Tolentino. Although the question had been largely discussed, the instruments adopted within the framework of the Congress of Vienna (1815) did not provide explicitly for the return of cultural properties to the territories where they had been taken by France. For his outstanding artistic talent and personal qualities, Canova was known and celebrated everywhere in Europe. He had been working for the most important private and public purchasers, including Venetian and English noblemen, the popes, Napoleon and his family, the emperor of Austria, the kings of Naples and of Bavaria, the czar of Russia. The fact that one of Napoleon's favourite artists[10] was later in charge of recovering the masterpieces removed by the former French emperor himself should not be seen as a change in human inclinations, but simply as a confirmation that the merit of art goes beyond the fate of the protagonists of history.

Yet the habit of Napoleon to remove works of art from the defeated countries was criticized even at the time of the peak of the glory of the emperor. In his mission Canova had a strong ally in a booklet published in 1796 by the French scholar Antoine-Chrysostome Quatremère de Quincy (1755-1849), containing seven letters on the prejudice that would be caused to arts and science by the removal of monuments of art from Italy. In this work, re-published in Rome in 1803 and 1815, Quatremère took a clear position against the spoliation of the Italian territories[11].

According to Quatremère, a sort of "republic of arts and sciences" (*république des arts et des sciences*) had been established in Europe among a group of selected individuals. It was ruled by the

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[6] Art. VIII: "Le pape livrera à la république française cent tableaux, bustes, vases, ou statues, au choix des commissaires qui seront envoyés à Rome; parmi lesquels objets seront notamment compris le buste de bronze de Junius Brutus et celui en marbre de Marcus Brutus, tous les deux placés au capitole; et cinq cent manuscrits au choix des mêmes commissaires" (Parry, *Consolidated Treaty Series*, vol. 53, p. 128).

[7] Art. XIII: "L'article VIII du traité d'armistice signé à Bologne, concernant les manuscrits et objets d'arts, aura son exécution entière et la plus prompte possible" (*ibidem*, p. 489).

[8] For example, the treaty of 9 May 1796 between France and Parma or the armistice of 16 May 1797 between France and Venice.

[9] "Il n'en était fait aucun mystère. (…) Les comités chargés de diriger l'entreprise menaient leurs opérations en toute clarté, et les chefs-d'oeuvre pillés étaient reçus à Paris avec le faste et les honneurs qu'ils méritaient. Ils étaient exposés au Louvre pour témoigner de glorieuses victoires, puis envoyés dans des musées de province, sauf s'ils étaient de très grande valeur" (Pomian, *Biens culturels, trésors nationaux, restitution*, in *Museum International*, No. 228, 2005, p. 87). See also *L'arte contesa nell'età di Napoleone, Pio VII e Canova*, Cinisello Balsamo, 2009 (catalogue of an exhibition held in Cesena in 2009).

[10] See, among Canova's works, the bronze statue of Napoleon (Brera Palace, Milan) and the marble statue of Paolina Bonaparte (Borghese Gallery, Rome). In 1802 Canova personally complained with Napoleon about the spoliation of works of art from Italy (D'Este, *Memorie di Antonio Canova*, Firenze, 1864, reprint Bassano del Grappa, 1999, p. 127).

[11] Quatremère de Quincy, *Lettres sur le préjudice qu'occasionneroient aux Arts et à la Science, le déplacement des monumens de l'art de l'Italie, le démembrement de ses Ecoles, et la spoliation de ses Collections, Galeries, Musées, etc.*, Rome, 1815, published for the first time in 1796 (the 1815 edition, that Canova took with him to Paris, is used for the quotations in the following footnotes). On the period of Quatrèmere, see Pommier, *L'art de la liberté – Doctrines et débats de la Révolution française*, Paris, 1991.

principle of universal brotherhood which could not be defeated by the bloody practice of war[12]. A corollary to this general principle was that nobody had the right to seize properties which are the heritage of all peoples[13]. To imitate the old Romans who had the habit of looting the conquered cities would have been to move backwards from civilization to chaos[14]. For the French scholar, to divide cultural properties by removing them from the places where they had been created was to destroy them (*diviser c'est détruire*[15]). The removal struck a mortal blow to the education of foreign countries, without being useful for the country that seized them[16].

Quatremère's thoughts did apply not only to cultural properties taken as war booty, but also to the traffic in such properties in time of peace. For the same reason that a State cannot remove the cultural properties from other States, it cannot trade its own cultural properties for an economic gain[17]. Cultural properties have a special status and cannot be treated as commercial goods[18]. We owe to Quatremère also the profound intuition that the richest can also be the most undeserving, especially if they are accustomed to appreciate only the commercial value of the objects that they possess[19].

The thoughts of Quatremère clearly reflect the idea of a collective interest which is shared by all human beings and aims at the protection of cultural heritage and its preservation in the context where it has been created. At his time, the concept that belligerent States cannot destroy cultural properties had already been enunciated[20]. But he stated very clearly that to divide and remove is the same as to

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[12] "En effet, vous le savez, les arts et les sciences forment depuis long-temps en Europe une république, dont les membres, liés entre eux par l'amour et la recherche de beau et du vrai qui sont leur pacte social, tendent beaucoup moins à s'isoler de leurs patries respectives, qu'à en rapprocher les intérêts sous le point de vue si précieux d'une fraternité universelle. Cet heureux sentiment, vous le savez encore, ne peut être étouffé même par ces discordes sanglantes qui poussent les nations à s'entre-déchirer" (*ibidem*, p. 3).

[13] "Ainsi, je ne puis bien répondre à votre question, qu'en faisant abstraction de ce faux intérêt de pays, qui est le partage des ignorans et des fripons: ce sera comme membre de cette république générale des arts et des sciences, et non habitant de telle ou telle nation, que je discuterai de cet intérêt que toutes les parties ont à la conservation du tout. Quel est-il cet intérêt? C'est celui de la civilisation, du perfectionnement des moyens de bonheur et de plaisir, de l'avancement et des progrès de l'instruction et de la raison, de l'amélioration enfin de l'espèce humaine. Tout ce qui peut concourir à cette fin appartient à tous les peuples; nul n'a le droit de se l'approprier ou d'en disposer arbitrairement" (*ibidem*, p. 4).

[14] "Je sais bien aussi qu'il existe sur l'objet de cette discussion des maximes de droit public, que quelques esprits pervers ou pervertis feignent d'ignorer, et dont l'oubli, s'il pouvoit avoir lieu, feroit rétrograder l'Europe, et rentrer son droit des gens dans le chaos de la politique léonine des anciens Romains" (*ibidem*, p. 8).

[15] *Ibidem*, p. 25.

[16] "Le déplacement des principaux monumens de l'art enlevés à leur patrie, doit porter un coup funeste à l'instruction des autres nations, sans devenir utile à la nation qui se les approprieroit" (*ibidem*, p. 87). "Mais voyez combien ce transport de monumens qui ne peut jamais être que partiel et très-borné, combien ce transfèrement funeste à l'Europe, devient encore inutile au pays qui en aura été le recéleur. En effet, croyez-vous que la nation qui se seroit adjugé à son prétendu profit, quelques-uns des modèles du beau, comme autant de ballots de marchandises, trouveroit un gros bénéfice dans cette importation? Pensez-vous qu'elle y trouve de quoi fournir à ses artistes les moyens complets de l'enseignement sans sortir de chez eux? Ce seroit s'abuser étrangement" (*ibidem*, p. 55).

[17] "Je pense aussi que dans la défense d'une cause, il y a un choix de moyens à faire: je n'aime pas, je vous l'avoue, qu'au milieu des grandes considérations morales qui abondent dans celle-ci, on s'attache à des argumens intéressés, et qu'on fasse en quelque sorte dépendre le sort des arts et de la science en Europe, des calculs partiels de la balance du commerce. Quoi de plus contraire au véritable esprit et à l'amour éclairé des arts, que ces théories fiscales, qui ne trouvent que des objets de commerce dans les monumens de l'instruction des peuples, qui ne découvrent dans les chefs-d'oeuvre du goût et du génie, que des impôts indirects sur la curiosité étrangère" (*ibidem*, p. 82).

[18] "Quand cessera-t-on de regarder les objets de l'instruction publique comme des joyaux, comme des diamans dont on ne jouit que pour le tarif de leur valeur?" (*ibidem*, p. 65).

[19] "L'amour de l'argent n'a jamais produit que de l'argent" (*ibidem*, p. 84). "Il est évident qu'on ne peut pas diminuer autour de soi les lumières, les connoissances, les talens, le goût et l'amour des arts, sans les diminuer aussi chez soi" (*ibidem*, p. 91).

[20] "Pour quelque sujet que l'on ravage un pays on doit épargner les édifices qui font honneur à l'humanité, & qui ne contribuent point à rendre l'ennemi plus puissant; les temples, les tombaux, les bâtiments publics, tous les ouvrages respectables par leur beauté. Que gagne-t-on à les détruire? C'est se déclarer l'ennemi du genre humain, que de le priver de gaieté de coeur, de ces monuments de l'art, de ces modèles du goût" (de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite & aux affaires des nations & des souverains*, Londres, 1758, t. III, l. III, chap. IX, paras. 168 and 169).

destroy and gave to this concept a general sense, covering both war and peace time. In fact, the *république des arts et des sciences* existed only in Quatremère's mind and it is likely that it will never exist in an international community composed of sovereign States. But such a trivial remark has no importance for our purposes. Quatremère put forward an ethical principle that goes beyond the provisions of the applicable law and is relevant also today.

In his mission, Canova was able to overcome a number of obstacles[21], including the existence of a treaty provision under which the objects had been removed[22]. An even stronger objection was that the works of art in question were much better kept and exhibited to the public in the galleries of the Louvre Museum than in the obscurity and neglect of the Roman churches and palaces. In this regard, Canova undertook to have the properties collected in a newly established museum once they had returned to Rome. This was in fact done by the papal government[23]. Relying also on the political support by Great Britain, the sculptor succeeded in recovering from France seventy-seven of the removed works of art (including the Laocoon, the Apollon of Belvedere and the Transfiguration by Raphael[24]) and several manuscripts.

An interesting appendix is that the pro-rector of the university of Heidelberg took advantage of the renown of Canova's mission to ask the Pope for the return of thirty-nine codes of the Palatine Library, that in the 17th century had been looted in wartime from Heidelberg, donated to the Pope by Maximilian of Bavaria, included among the manuscripts taken by France under the Tolentino treaty and finally recovered by Canova. Also for the sake of consistency, the codes where returned to the pro-rector.

Another interesting appendix is that, after his visit to Paris, Canova moved to London, also to thank the British prince regent for his support. He had the opportunity to admire the Parthenon marbles and advised the British government to purchase them from Lord Elgin[25]. What else could Canova, the most eminent neoclassical artist, have suggested with regard to a universal symbol of art, inherited from the classical age, and one of the cornerstones of European civilization? The purchase was made in 1816, for the price of 35,000 pounds, by the British Museum of London, where the marbles are exhibited still today. The case of the Parthenon marbles is now pending before the ICPRCP and will not be specifically considered in this study. Perhaps it can be added that, in the same period when the marbles were sold, another eminent artist, the English poet Lord Byron (1788-1824), was of a quite different opinion[26].

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[21] See Jayme, *Antonio Canova, la repubblica delle arti e il diritto internazionale*, in *Rivista di Diritto Internazionale*, 1992, p. 897.

[22] It is amazing to see how a sculptor was able to discuss with competence complex legal question, such as the validity or nullity of a treaty concluded under coercion or the termination of a treaty as a consequence of its breach (see Zuccoli, *Le ripercussioni del trattato di Tolentino sull'attività diplomatica di Antonio Canova nel 1815, per il recupero delle opere d'arte*, in *Ideologie e patrimonio storico-culturale nell'età rivoluzionaria e napoleonica*, Roma, 2000, p. 617).

[23] See the letter written on 16 September 1815 by Canova to Cardinal Consalvi, in Zuccoli, *op. cit. supra* note 22, p. 623.

[24] These three masterpieces are today exhibited at the Vatican Museums in Rome.

[25] The marbles were removed from Athens in 1801 by Thomas Bruce, earl of Elgin, ambassador of Great Britain to the Ottoman Empire, on the basis of a firman (decree) of the Ottoman emperor. The text of the firman, of which we keep only a coeval translation in Italian, is not completely clear about the rights granted to Lord Elgin (text in St. Clair, *Lord Elgin and the Marbles*, Oxford, 1998, p. 338).

[26] "I opposed, and will ever oppose, the robbery of ruins from Athens, to instruct the English in sculpture (who are as capable of sculpture as the Egyptians are of skating)": this sharp statement is reproduced in Meyer, *The Plundered Past*, New York, 1973, p. 178.

3. Return after Removal in Time of War:

A. Customary International Rules

Provisions on the reciprocal restitution of "archives, writings and other movables", a wording which implicitly included also what today we consider cultural properties, can already be found in the so-called Westphalia treaties, concluded in 1648 in Osnabrück and in Münster by 194 European powers[27].

At the latest at the beginning of the 19th century, the principle that, in time of war, cultural properties, either public or private, cannot be seized was established in international law. Not only the destruction of cultural properties was prohibited during war operations, but also their removal which was assimilated to their destruction. The Regulations concerning the Laws and Customs on Land, annexed to the Fourth Hague Convention (1907), provided as follows:

"The pillage of a town or place, even when taken by assault, is prohibited" (Art. 28).

"Pillage is formally prohibited" (Art. 47).

"The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings" (Art. 56).

Similar provisions were included in Arts. 28, 47 and 56 of the Regulations annexed to the previous Second Convention on the Laws and Customs of War on Land (The Hague, 1899).

Under customary international law, if a wrongful act has been committed, the responsible State is bound, *inter alia*, to re-establish, if possible, the situation that existed before the wrong (*restitutio in integrum*). In the case of the wrongful removal of cultural properties[28], this means that they must be returned to the State from where they had been seized. The rule was followed in the peace treaties concluded after the First World War.

According to the Treaty of Versailles (1919), Germany had to return to France, Hedjaz, Great Britain and Belgium a number of cultural properties which had been removed during the First World War and, in the case of France, also during the Franco-German war of 1870-1871:

> "Within six months after the coming into force of the present Treaty the German Government must restore to the French Government the trophies, archives, historical souvenirs or works of art carried away from France by the German authorities in the course of the war of 1870-1871 and during this last war, in accordance with a list which will be communicated to it by the French Government; particularly the French flags taken in the course of the war of 1870-1871 and all the political papers taken by the German authorities on October 10, 1870, at the chateau of Cercay, near Brunoy (Seine-et-Oise) belonging at the time to Mr. Rouher, formerly Minister of State" (Art. 245).

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[27] See, for example, Art. CXIV of the Münster Treaty between the Holy Roman Empire and France: "Restituantur etiam archiva et documenta literaria aliaque mobilia ut et tormenta bellica, quae in dictis locis tempore occupationis reperta sunt et adhuc ibi salva reperiuntur. (…)". On the question discussed in this paragraph see in general Nahlik, *La protection internationale des biens culturels en cas de conflit armé*, in *Recueil des cours de l'Académie de Droit International de la Haye*, vol. I, 1967, p. 65; Frigo, *La protezione dei beni culturali nel diritto internazionale*, Milano, 1986; Panzera, *La tutela internazionale dei beni culturali in tempo di guerra*, Torino, 1993; Kowalski, *Restitution of Works of Art pursuant to Private and Public International Law*, in *Recueil des Cours de l'Académie de Droit International de la Haye*, vol. 288, 2001, p. 9; Gattini, *Le riparazioni di guerra nel diritto internazionale*, Padova, 2003; O'Keefe R., *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006; Zagato (a cura di), *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo 1999*, Torino, 2007.

[28] In certain cases the removal of cultural properties can be lawful. For instance, if it is done for the purpose of protecting them from the danger of being destroyed during the hostilities.

> "Within six months from the coming into force of the present Treaty, Germany will restore to His Majesty the King of the Hedjaz the original Koran of the Caliph Othman, which was removed from Medina by the Turkish authorities and is stated to have been presented to the ex-Emperor William II.
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> Within the same period Germany will hand over to His Britannic Majesty's Government the skull of the Sultan Mkwawa which was removed from the Protectorate of German East Africa and taken to Germany. (…)" (Art. 246)
>
> "(…) Germany undertakes to deliver to Belgium, through the Reparation Commission, within six months of the coming into force of the present Treaty, in order to enable Belgium to reconstitute two great artistic works:
> (1) The leaves of the triptych of the Mystic Lamb painted by the Van Eyck brothers, formerly in the Church of St. Bavon at Ghent, now in the Berlin Museum;
> (2) The leaves of the triptych of the Last Supper, painted by Dierick Bouts, formerly in the Church of St. Peter at Louvain, two of which are now in the Berlin Museum and two in the Old Pinakothek at Munich" (Art. 247)[29].

According to the Treaty of Peace between the Allied and Associated Powers and Austria (Saint Germain-en-Laye, 1919),

> "In carrying out the provisions of Article 184 Austria undertakes to surrender to each of the Allied and Associated Powers respectively all records, documents, objects of antiquity and of art, and all scientific and bibliographical material taken away from the invaded territories, whether they belong to the State or to provincial, communal, charitable or ecclesiastical administrations or other public or private institutions"[30] (Art. 191).

The treaty provided also for the restitution to Italy of a number of cultural properties removed from the States which existed in Italy before the unification of the country (1861), as well as for other restitutions to Belgium, Poland and Czechoslovakia:

> "Within a period of twelve months from the coming into force of the present Treaty a Committee of three jurists appointed by the Reparation Commission shall examine the conditions under which the objects or manuscripts in possession of Austria, enumerated in Annex I hereto, were carried off by the House of Hapsburg, and by the other Houses which have reigned in Italy. If it is found that the said objects or manuscripts were carried off in violation of the rights of the Italian provinces the Reparation Commission, on the report of the Committee referred to, shall order their restitution. Italy and Austria agree to accept the decisions of the Commission.

Belgium, Poland and Czecho-Slovakia may also submit claims for restitution, to be examined by the same Committee of three jurists, relating to the objects and documents enumerated in Annexes II, III and IV hereto. Belgium, Poland, Czecho-Slovakia and Austria undertake to accept the decisions taken by the Reparation Commission as the result of the report of the said Committee" (Art. 195).

Under the Treaty of Peace with Bulgaria (Neuilly-sur-Seine, 1919),

> "Bulgaria undertakes to seek for and forthwith to return to Greece, Romania, and the Serb-Croat-Slovene State respectively any records or archives or any articles of archaeological, historic or artistic interest which have been taken away from the territories of those countries during the present war. (…)" (Art. 126)[31].

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[29] More generally, under Art. 238, Germany was bound to return "animals, objects of any nature and securities taken away, seized or sequestrated, in the cases in which it proves possible to identify them in territory belonging to Germany or her allies".

[30] The content of Art. 184 is similar to that of Art. 238 of the Treaty of Versailles (*supra*, note 29).

[31] The content of Art. 125 is similar to that of Art. 238 of the Treaty of Versailles (*supra*, note 29).

At the regional level, the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, concluded in 1935 by twenty-one American States (so-called Roerich Pact), provided that "the historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents" (Art. I).

After the Second World War, the Peace Treaties of 1947 between the Allied and Associated Powers and, respectively, Bulgaria (Art. 22), Finland (Art. 24), Hungary (Art. 24), Italy and Romania (Art. 23) included provisions on return of cultural properties. For instance, the Treaty of Peace with Italy generally provided that "Italy accepts the principles of the United Nations Declaration of 5 January 1943 and shall return, in the shortest possible time, property removed from the territory of any of the United Nations" (Art. 75, para. 1)[32]. Restitution by equivalent was envisaged in the particular case that the removed cultural properties had been lost or destroyed:

> "If, in particular cases, it is impossible for Italy to make restitution of objects of artistic, historical or archaeological value, belonging to the cultural heritage of the United Nation from whose territory such objects were removed by force or duress by Italian forces, authorities or nationals, Italy shall transfer to the United Nation concerned objects of the same kind as, and of approximately equivalent value to, the objects removed, in so far as such objects are obtainable in Italy" (Art. 75, para. 9).

A special provision dealt with properties removed from Ethiopia and applied also to properties removed after the beginning of the Second Italo-Ethiopian War (1935-1936):

> "Within eighteen months from the coming into force of the present Treaty, Italy shall restore all works of art, religious objects, archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia since October 3, 1935" (Art. 37)[33].

An interesting remark is that the Peace Treaty provided for the return of properties, including cultural properties, removed from Italy itself by Germany in connection with war events:

> "Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after 3 September 1943 shall be eligible for restitution" (Art. 77, para. 2).
>
> "The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany" (Art. 77, para. 3).

In fact, after the war, Italy, with the cooperation of the Powers occupying Germany and of Germany itself[34], was able to recover several works of art which had been removed for different reasons[35], including the fact that Adolf Hitler and especially Hermann Göring were art collectors[36]. This occurred

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[32] Under the London Declaration of 5 January 1943, eighteen allied powers reserved "all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have been under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected".

[33] The date of 3 October 1935 corresponds to the beginning of the aggression by Italy to Ethiopia (see *infra*, para. 3.B).

[34] On 1st May 1953 the Federal Republic of Germany and Italy concluded an exchange of notes relating, *inter alia*, to the restitution of works of art.

[35] See the catalogues of the exhibitions held in 1947 in Rome (Ministero della Pubblica Istruzione, *Mostra delle opere d'arte recuperate in Germania*, Roma, 1947) and in 1984 in Florence (*L'opera ritrovata – Omaggio a Rodolfo Siviero*, Firenze, 1984). For the works which were still missing in 1995 see Ministero degli Affari Esteri & Ministero per i Beni Culturali e Ambientali, *L'opera da ritrovare – Repertorio del patrimonio artistico italiano disperso all'epoca della Seconda Guerra Mondiale*, Roma, 1995 (some of the works listed therein have been subsequently located and returned).

[36] "I knew my passion for collecting (...) since I had put my entire fortune into these works of art" (statement by Göring, in *The Trial of German Major War Criminals - Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, London, vol. 9, p. 270). In the case of the objects and codes of the abbey of Montecassino, Göring justified the removal of works of art by the need to preserve them from destruction: "If my troops had not intervened, these priceless art

to several masterpieces, such as the "Discobolus Lancellotti" (where Art. 77, para. 2, of the Peace Treaty received a rather generous application, as the statue had been removed five years before 1943[37]), the "Antea" by Parmigianino and the "Danae" by Titian[38].

Art. 33 of the 1949 fourth Geneva Convention on the protection of civilian persons in time of war prohibits in general pillage and reprisals against the property of protected persons.

The experience of Second World War inspired the provisions of the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954) on the prohibition of exportation of cultural properties from the occupied territories and on the obligation to return them:

> "Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention (…)" (Art. I, para. 1).
>
> "Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations" (Art. I, para. 3)[39].

As all treaties, the Hague Convention applies only to States parties. It has no retroactive application. However, due to the high number of ratifications it has received[40], most of its provisions, including those on the prohibition of seizure of cultural properties and the obligation of their return, can be considered as belonging to customary international law.

As regards the criminal aspects of the illegal removal of cultural properties, the Charter of the International Military Tribunal of Nuremberg, established under the Agreement signed in 1945 by France, the Soviet Union, the United Kingdom and the United States, included among the crimes of war the "plunder of public or private property" (Art. 6, *b*). The Tribunal, in the judgment of 30 September 1946, found Alfred Rosenberg guilty of several crimes, including the systematic plundering of cultural properties from the territories occupied by Germany during the Second World War:

> "Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January 1940 to set up the 'Hohe Schule', he organized and directed the 'Einsatzstab Rosenberg', which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own reports show the extent of the confiscations. In 'Aktion-M' (Moebel), instituted in December 1941 at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to

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treasures which were stored in Monte Cassino and belonged to the monastery there would have been entirely destroyed by enemy bombardment, that is to say, the British-American bombardment. Thus they have been saved" (*ibidem*, p. 271).

[37] This marble statue, a Roman copy of a Greek original, was found in 1781 in Rome and was the property of the family Lancellotti. In 1937 the prince of Essen was sent to Rome to buy works of art for Germany. According to the Italian legislation, the Discobolus could not be exported from Italy. However, Galeazzo Ciano, the Italian Minister of Foreign Affairs, asked the Minister for Public Education to allow the exportation of the statue "for administrative reasons" and "in view of the personal interest of the *Reich* Chancellor". The statue left Rome for Germany in 1938 and returned in 1947 (see Siviero, *L'arte e il nazismo*, Firenze, 1984, p. 20). It is now exhibited at the National Roman Museum of Rome.

[38] Both paintings had been removed in 1943 by the paratroopers of the "Hermann Göring Division" from the Capodimonte Gallery of Naples and transported to Berlin. The Danae was given to Göring in 1944 as a birthday gift and was on display in his private house.

[39] Under Art. 9, para. 1, of the Second Protocol (1999) to the 1954 Hague Convention, "without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory: a. any illicit export, other removal or transfer of ownership of cultural property; b. any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property; c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence. (…)" (Art. 9, para. 1).

[40] 123 States are today parties to the Convention and 100 to the Protocol.

> transport the confiscated furnishings to Germany. As of 14 July 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West"[41].

The Statute of the International Criminal Tribunal for the Former Yugoslavia (Security Council Resolution 827 of 25 May 1993) includes among the crimes of war the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" (Art. 3, *d*) and the "plunder of public or private property" (Art. 3, *e*). The Statute of the International Criminal Court (Rome, 1998) includes among war crimes the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (Art. 8, para.2, *a,* iv) and "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" (Art. 8, para. 2, b, xiii). "Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol" (Art. 15, para. 1, *c*) and the "theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention" (Art. 15, para. 1, *e*) are listed among the serious violations of the Second Protocol to the 1954 Hague Convention.

After having clarified the content of the relevant treaty and customary rules, some remarks can be added on a few recent instances of return of cultural properties seized in time of war.

B. The Return of the Axum Obelisk

In Axum (or Aksum), Ethiopia, giant obelisks (or stelae)[42], royal tombs and ancient castles may be found. These massive ruins date from between the 1st and the 13th century A.D., when the Kingdom of Axum was a great power. In 1980 the property "Aksum" was included in the World Heritage List, as established under the Convention concerning the Protection of the World Cultural and Natural Heritage (Paris, 1972).

In 1937 the second largest obelisk of Axum, erected some 1700 years before, weighing 150 tons and 24 meters high, was removed after the Italian aggression and annexation of Ethiopia. At the time of removal, the obelisk was lying on the ground broken into five fragments. Overcoming serious obstacles, it was transported by road from Axum to Massawa, by ship from Massawa to Naples and finally by road to Rome[43]. The obelisk was then erected in 1937 in front of the building of the former Italian Ministry of Colonies (now the FAO building)[44]. At that time Italy considered itself to be somehow the heir of ancient Rome which used to plunder booty from conquered cities[45].

When the obelisk was removed, Italy was a party to the Second 1899 Hague Convention on the Laws and Customs of War on Land[46]. This treaty applies only in case of war between two or more parties and Ethiopia was not a party to it. However, unlike Italy, Ethiopia was a party to the Fourth 1907 Hague Convention on the Laws and Customs of War[47] which re-states the prohibition of the

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[41] *The Trial* cit., vol. 22, London, 1950, p. 496.

[42] See Chwaszcza, *Le Royaume de la Reine de Saba – Aksoum*, in *Les trésors du patrimoine mondial*, vol. I, Paris, 2000, p. 123.

[43] A one meter piece was removed from the base of the obelisk to lighten the heaviest fragment and prevent the trailer from sinking into the sand. On the removal see ICCROM (International Centre for the Study of the Preservation and Restoration of Cultural Property) & Ministero degli Affari Esteri, *La stele di Axum – Progetto di smontaggio e trasporto della stele di Axum dall'Italia in Etiopia*, 1999.

[44] For the project of the new ministry see *La nuova sede del Ministero dell'Africa Italiana*, in *Gli Annali dell'Africa Italiana*, 1938, p. 1301.

[45] See Pankhurst, *Ethiopia, the Aksum Obelisk, and the Return of Africa's Cultural Heritage*, in *African Affairs*, 1999, p. 235.

[46] *Supra*, para. 3.A.

[47] *Supra*, para. 3.A.

seizure of historical monuments and works of art. In 1937 there formally was no state of war between Ethiopia and Italy, as the former had already been unilaterally annexed by the latter. However, the illegality of the removal of the obelisk can be considered as a mere consequence of the fact that the war waged by Italy against Ethiopia was itself illegal. On 7 October 1935 the Council of the League of Nations approved a report which stated that Italy had resorted to war against Ethiopia in disregard of Art. 12[48] of the Covenant of the League of Nations and adopted a number of sanctions against Italy.

After the end of the war, the return of the obelisk of Axum was envisaged by a number of treaties, namely Art. 37 of the already mentioned Peace Treaty between Italy and the Allied and Associated Powers[49], the Agreement between Ethiopia and Italy on the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration (Addis Ababa, 1956)[50] and a joint statement signed by the two States on 4 March 1997[51]. Only after a memorandum of understanding on the transfer and handover of the Axum obelisk, signed in Rome on 18 November 2004, an executive project for the transport of the obelisk was approved. According to this instrument,

> "The Italian Government shall transport the three sections of the Axum Obelisk from Italy to Ethiopia. The Italian Government shall also ensure that the air transport of the three sections of the Axum Obelisk from Fiumicino Airport to Axum Airport is carried out under conditions of maximum safety and security" (Art. I).
> "The Italian Government shall take charge of all the operations associated with the off-loading of the three sections of the Obelisk from the airplane at the Axum Airport" (Art. II).
> "The Italian Government commits itself to finance the re-erection and restoration of the Obelisk in the Axum archaeological site, to be executed by UNESCO with technical support from Italian experts in collaboration with the Ethiopian side" (Art. VI).

In April 2005, the obelisk was disconnected into three pieces and transported to Axum by Antonov airplanes, the biggest available cargo aircraft. The pieces were deposited near the original location of the monument[52]. In the same year the UNESCO World Heritage Committee applauded "the

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[48] "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council" (Art. 12, para. 1).

[49] See *supra*, para. 3.A.

[50] "The Italian Government undertakes to dismount, remove from its present site and to transport f.o.b. Naples, for transportation to Ethiopia, the large Axum obelisk now located in Rome and recognized by the Italian Government as being subject to restitution to Ethiopia. Such dismounting and removal from site and transport f.o.b. Naples shall have been completed within six months following the entry to force of the Agreement to which the present document constitutes Annex C; shall be at the expense of the Italian Government, which shall take such measures as are necessary to ensure that said obelisk shall be delivered f.o.b. Naples, properly reinforced and packed for transportation to Ethiopia, and in its present existing condition except for the removal of any non-Ethiopian base or socle which may have been constructed for the purpose of its erection in Rome, and except for such dismantling as may be agreed to by the Ethiopian official hereinafter mentioned, as being necessary for the purposes of transportation to Ethiopia, and, further, to assure that said obelisk may be freely and without charge or hindrance exported from Italy on such vessel as the Imperial Ethiopian Government may choose. Each High Contracting Party shall designate an official to be present at the dismounting, if necessary dismantling, removal, reinforcement, packing, and transportation f.o.b. Naples. The two officials may, in agreement, designate technicians to assist them in their functions" (Annex C).

[51] The two countries declared themselves "appreciative of the inestimable value of the Axum obelisk to Ethiopia" and "fully cognizant of the positive impact of the obelisk's restitution on the friendship" between them. "The Italian delegation appreciated the central importance that the Ethiopian people and Government attach to the return of the Obelisk. The Ethiopian delegation expressed its deep appreciation for Italy's resolve to shoulder the responsibility for the restitution of the Obelisk to Axum. This gesture of great significance would set the seal on the renewed friendship between the two countries and peoples". The statement defined the "stages through which the operation to effect the return of the obelisk to Ethiopia shall be performed within the current year" (that is 1997).

[52] The budget for the project, amounting to 4,736,033 $, was provided by Italy.

cooperation between the States Parties of Ethiopia and Italy, leading to the return of the obelisk, which could enhance the value of Axum" and welcomed "the tripartite cooperation between UNESCO and the States Parties of Ethiopia and Italy in the preparation of the re-erection of the obelisk"[53].

In June 2007 a contract for the re-erection of the obelisk was concluded between the UNESCO World Heritage Center and an Italian construction company. The work, which was financed by Italy through an extraordinary contribution to the UNESCO budget, constituted a complex and unprecedented operation[54]. On 4 September 2008 the celebrations were held for the re-erection of the Axum obelisk. For its symbolic value, this has been a memorable event for Ethiopia, Africa in general and for Italy as well. In October 2008, the UNESCO Executive Board "expressed its deep appreciation for the successful completion of the project and congratulated Italy and Ethiopia for their exemplary cooperation"[55]. As stated by the President of Ethiopia,

> "The decision of the Italian government to return the obelisk became a reality, among other things, as a result of the contribution of UNESCO. The diplomatic offensives of the current government of Ethiopia since the1990s, and the goodwill of the Italian government and its change of attitude, together with the role played by the Ethiopian people and by the international and diplomatic community at various levels, were based, by and large, on respect of international rules (…)"[56].

Despite a delay of about 57 years and one month from the deadline set forth in the 1947 Peace Treaty[57], what is important today is that the obligation to return the obelisk has finally been complied with. It is preferable not to mention here all the doubtful justifications advanced in the past by public and private Italian circles to avoid or delay the return[58]. It is difficult to understand how Italy, a country which is rightly proud of its own outstanding cultural heritage, could not see that the Axum obelisk is a symbol of the Ethiopian people's culture, religion and identity. At the end Italy undertook to re-establish the situation that would have existed if the monument had not been removed. To be precise, Italy also agreed to improve the original situation. The obelisk, which in 1937 was on the ground and broken into five fragments, has been re-erected in its original site. This can be considered as a sort of reparation for the delayed return.

C. The Return of the Venus of Cyrene

On 31 August 2008, on the occasion of a visit by the Italian President of the Council of Ministers, Italy returned to Libya the statue of the Venus of Cyrene. This headless marble statue, dating back to the 2nd century A.D., is a Roman copy of an original Hellenistic work that has never been found. It is also called the Venus "Anadyomene", that is the Venus coming out of the waves. Found in 1913 by the Italian troops nearby the ruins of the old Greek and Roman settlement of Cyrene, in 1915 the Venus was removed to Rome, where it was exhibited at the National Roman Museum. When the statue was found, Italy had already unilaterally annexed Libya (Tripolitania and Cyrenaica) that previously belonged to the Ottoman Empire (Italo-Turkish War of 1911-1912).

In 1982 the property "archaeological site of Cyrene" was inscribed on the World Heritage List[59]. On 4 July 1998 Italy and Libya signed a joint declaration according to which Italy engaged itself to return "all manuscripts, artefacts, documents, monuments and archaeological objects brought to

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[53] Decision 29 COM 7B.34.
[54] See Bandarin, *The Reinstallation of the Aksum Obelisk*, and Croci, *The Engineering Project*, both in *World Heritage*, No. 51, 2008, p. 13 and p. 20.
[55] UNESCO Executive Board, *Decisions Adopted by the Executive Board at its 180th Session*, doc. 180 EX/Decisions of 17 November 2008, p. 55.
[56] *Interview – H.E. President Girma Wolde Giorgis*, in *World Heritage*, No. 51, 2008, p. 11.
[57] The Peace Treaty entered into force on 10 September 1947.
[58] See Pankhurst, *op. cit. supra* note 45, p. 236; Sbacchi, *Italia e Etiopia: la rilettura del periodo coloniale e la valutazione delle sue conseguenze sul paese africano*, in *I Sentieri della Ricerca*, December 2007, p. 192.
[59] See Göttler, *Les oracles de la Pythie*, in *Les trésors du patrimoine mondial*, vol. III, Paris, 2001, p. 8.

Italy during and after the Italian colonization of Libya, pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property"[60]. On 11-13 December 2000, during the first meeting of the Committee for the Italo-Libyan Partnership, the Venus of Cyrene was identified as one of the objects to be returned. By a decree of 1 August 2002, the Italian Ministry for Cultural Properties and Activities, in execution of the above international obligation, removed the statue from the State demesne in order to allow its return to Libya.

However, an action for the annulment of the decree was brought before the Regional Administrative Tribunal of Latium by *Italia Nostra*, a non-governmental organization established in 1958 with the aim to "concur in the protection and enhancement of the historical, artistic and natural heritage of the nation". According to the plaintiff, the removal of a cultural property from the State demesne could be effected only through a law, as such properties are inalienable under the provisions of the Italian civil code which itself has the status of a law. Moreover, the content of the ministerial decree was seen by the plaintiff as contradictory: the decree was based on the assumption that there was a need to put the statue into the cultural context to which it belonged, without considering that a "Roman copy of a Greek original of the Hellenistic age is more relevant to our artistic context than to the Islamic one". Finally, the return of the Venus would have established a precedent leading to the impoverishment of the Italian artistic and archaeological heritage[61].

The Tribunal, by a judgment rendered on 28 February 2007, dismissed for several reasons the claim to annul the decree and upheld the arguments put forward by Italy, through the Ministry for Cultural Properties and Activities, and Libya, which intervened in the litigation through its diplomatic mission in Rome. The Tribunal remarked that the removal in 1915 of the statue was an exception to the traditional Italian policy of keeping archaeological artifacts in the place where they had been found (so-called non-decontextualization policy) and that this was done to preserve the object from the risks of the military operations which were carried out in the region. The Tribunal held that the Italian annexation of Tripolitania and Cyrenaica (Royal Decree 5 November 1911, No. 1247) was a unilateral act adopted long before the time when Italy was able to acquire an effective control over the whole Libyan territory, as it can be inferred from the fact that the Italian sovereignty over Libya was internationally recognized only by the 1924 Peace Treaty of Lausanne. In fact, when the statue was found and removed, the region of Cyrenaica, far from being a part of the Italian territory, had the legal status of an area subject to military occupation. Having not been found within the Italian territory, the statue could not be considered as belonging to the State demesne. It may be added that, in 1915, both Turkey and Italy were parties to the Second 1899 Hague Convention on the Laws and Customs of War on Land.

The Tribunal added that, in any event, the prohibition of alienation of cultural properties belonging to the State, as set forth by the Italian domestic legislation, does not apply to cases falling under international treaties by which Italy accepts an obligation to return cultural properties to other States[62]. For the Tribunal, the return of the Venus was not only provided for in the 1998 Italo-Libyan joint declaration, but it also reflected an obligation already existing under two customary

[60] The recent treaty of friendship, partnership and cooperation between Italy and Libya (Benghazi, 30 August 2008) includes a provision on further cooperation for the restitution to Libya of archaeological artifacts and manuscripts, also through the establishment of a Joint Committee: "Le due Parti daranno ulteriore impulso alla cooperazione nel settore archeologico. In tale ambito è altresì esaminata, da un apposito Comitato Misto, la problematica concernente la restituzione alla Libia di reperti archeologici e manoscritti. Le due Parti collaborano anche ai fini della eventuale restituzione alla Libia, da parte di altri Stati, di reperti archeologici sottratti in epoca coloniale" (Art. 16, para. 2).

[61] The litigation presents a strange aspect. Many non-governmental organizations are well known for their advanced positions that often governments are not prepared to follow. In this case, a non-governmental organization distinguished itself for its rather regressive attitude, while a government took the opposite position.

[62] In this regard the Tribunal recalled Art. 20 of the Legislative Decree 29 October 1999, No. 490, providing that "the activity of protection and promotion of cultural properties shall comply with the principles of co-operation between States, also within the framework of international organizations, as set forth in the conventions implemented in Italy in the field of protection of the world cultural heritage and the national heritages" (English translation).

rules of international law: first, the rule according to which, in case of a newly independent State, "movable property, having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State" and "movable State property of the predecessor State (…) to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory", as provided for in Art. 15, para. 1, sub-paras. *e* and *f*, of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts[63]; second, the rule according to which the cultural heritage removed in time of war shall be restored in its original situation, as provided in the above mentioned 1899 and 1907 Hague Conventions[64], in several peace treaties and in 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol[65]. There was consequently no need of a law to give domestic execution to the 1998 Italo-Libyan joint declaration, considering that rules of customary international law are already self-executing under Art. 10 of the Italian Constitution.

The Tribunal rightly remarked that the Venus of Cyrene was not unrelated to the Libyan cultural context, as several important Roman settlements, such as Sabrata and Leptis Magna, were established in the antiquity in the present Libyan territory[66] and the Hellenistic period was characterized by a strong exchange of artistic styles coming from different areas. Finally, far from being a ground for impoverishment of the national heritage, a policy of return of cultural properties was seen by the Tribunal as a way for setting precedents for claiming the return of works illegally removed from Italy in the past and found today elsewhere.

On appeal, the ruling of the Tribunal was confirmed by a judgment rendered on 8 April 2008 by the Council of State. *Inter alia*, the Council of State found that a new rule of customary international law has today been developed as a consequence of the prohibition of the use of force and of the principle of self-determination of peoples. This new rule sets forth the obligation to return all cultural properties which have been taken as a result of colonial domination or war events[67].

Both these recent Italian decisions are noteworthy for the priority they give to international obligations over the provisions of domestic legislation, as required by general international law and Art. 27 of the 1969 Vienna Convention on the law of treaties.

D. The Return of the Books of the National Library of Peru

On 16 November 2007, 3,788 books were returned by Chile to Peru. They had been removed in 1881 during the Pacific War (1879-1883) from the National Library of Peru in Lima, when the city was occupied by the Chilean troops[68]. According to an official statement made by Chile on 5 November 2007, the decision to transfer these cultural properties stems from the obligation to respect the culture of all peoples:

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[63] Even if the 1983 Convention had not entered into force, the Tribunal found that Art. 15 reflected "a principle in force as regards the international succession of States which have acquired independence as the result of a process of decolonization" (English translation). It quoted the passage of the report of the International Law Commission to Art. 15, para. 1, sub-para *f*, of the future Convention, where it is stated that "this provision represents a concrete application of the concept of equity forming part of the material content of a rule of positive international law, which is designed to preserve, *inter alia*, the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned" (United Nations, *Yearbook of the International Law Commission*, 1981, vol. II, part 2, p. 38)

[64] *Supra*, para. 3.A.

[65] *Supra*, para. 3.A.

[66] The Tribunal also reminded that the Roman emperor Septimius Severus was born in one of these settlements.

[67] According to the Council of State, ownership on the objects to be returned cannot be acquired by prescription.

[68] See Hampe Martínez, *¿Cómo recuperar el patrimonio documental llevado a Chile durante la Guerra del Pacífico?*, in *Revista Peruana de Derecho Internacional*, May – August 2008, p. 77.

> "la decisión de devolver estos bienes culturales a la actual Biblioteca Nacional del Perú reitera nuestro profundo compromiso con el respeto y valoración de la cultura de todos los pueblos, y en particular la de los países vecinos"[69].

Other books and manuscripts removed during the same war are still requested by Peru, including the papers of Saint Office of the Inquisition of Lima, which are presently at the National Historical Archives of Santiago. For the time being, Chile has removed from the category of national historical properties (*monumentos históricos*) 77 volumes and 32 manuscripts that belong to the Peruvian historical heritage. This was done under the Chilean Decree No. 2,490 of 13 December 2007, on the basis of the assumption that every people has a right over its own cultural heritage:

> "los bienes culturales, sean materiales o inmateriales, expresan de manera profunda la cosmovisión de los pueblos, la creatividad, imaginación y capacidad de transformación de sus habitantes y comunidades, como también son testimonio de su memoria, de sus sentidos de identidad y pertenencia, por lo cual es indispensable reconocer el derecho de los pueblos a su patrimonio cultural, como herencia privilegiada de los que les antecedieron y de los acervos para crear nuevas obras y contenidos culturales" [70].

E. The Principle of Non Exploitation of the Weakness of Another Subject to Get a Cultural Gain

The three instances recalled above show that, in recent international practice, the rule that cultural properties cannot be removed in time of war and, if so, must be returned is today acquiring a rather broad scope. Chile returned to Peru cultural properties which had been removed 126 years before. Italy returned to Ethiopia a monument which had been removed 68 years before and took charge of improving the original situation by re-erecting it. Italy returned to Libya a statue which had been removed 93 years before, not only in conformity to ethical precepts, but also in application of rules of customary international law, as very clearly stated in the two exemplary decisions rendered by the Italian administrative courts in the litigation about the Venus of Cyrene.

It is true that many cases of claims on cultural objects removed under various circumstances are still pending[71]. Nevertheless, especially in the light of the recent practice, the question may be asked whether the rule on the prohibition of war booty is being gradually transformed into a broader principle, relating to the non-exploitation of the weakness of another subject to make a cultural gain. The question is far from being negligible. Requirements to return cultural properties are today not limited to spoils of warfare and military occupation. Other instances may be recalled to show a trend to move from rules applying only in time of war to a regime having a broader purpose.

A draft Declaration of principles relating to cultural objects displaced in connection with the Second World War is presently being discussed within UNESCO[72]. While a few aspects of this future non-binding instrument are still under discussion, it is generally understood that the principles apply to cultural objects "removed from, or the possession of which has been lost within, a territory during or in connection with hostilities or occupation related to the Second World War, even if such

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[69] *Ibidem*.

[70] *Ibidem*, p. 90.

[71] To recall only one instance, in 1866 French troops invaded the island of Ganghwa in Korea. About 6,000 *uigwe* (systematic collections of writings and paintings that provide a detailed account of the royal ceremonies and rites), stored in the *oegyujanggak* (the archives of the Joseon royal dynasty, located in the island), were destroyed by fire. 297 *uigwe* were taken by the troops to France. Most of them are still conserved at the *Bibliothèque Nationale* of Paris. Negotiations are being carried out between France and the Republic of Korea for the return of the *uigwe*, with no clear results so far. See Shin, *Returning the National Records of the Joseon Dynasty*, Paper delivered at the Expert Meeting to celebrate the 30th anniversary of the ICPRCP, Seoul, 2008 (where the following question is asked: "What meaning or significance would the official national records of one nation have in another nations?").

[72] See UNESCO doc. 34 C/22 Add. of 15 October 2007. The principles "are intended to provide general guidance for bilateral or multilateral interstate negotiations in order to facilitate the conclusion of agreements related to cultural objects" (Principle I).

occupation was total or partial or had met with no armed resistance" (Principle I, *ii*). The concept of "loss of possession or removal" is intended in a quite broad meaning, being referred to cultural objects that

> "(i) were looted or plundered; or
> (ii) were appropriated in a manner contrary to the law in force in the territory where they were located at the time, or appropriated in a manner in conformity with a law or a judicial or administrative measure, the recognition of which would be offensive to the principles of humanity and dictates of public conscience;
> (iii) were transferred pursuant to a transaction apparently, but not actually legal, or vitiated for whatever reason, even when the transaction purports to have been voluntarily effected; or
> (iv) had otherwise left the possession of a person or an entity in circumstances deemed offensive to the principles of humanity and dictates of public conscience" (Principle II).

Here it is clear that the matter goes beyond the (however important) question of properties removed in connection with the war by a State from another State. Second World War also evokes the sinister crime of genocide and the "massive and unprecedented looting and confiscation of art and other cultural property owned by Jewish individuals, communities and others", as stated in the Declaration adopted in 2000 by the States participating to the Vilnius international forum on Holocaust era looted cultural assets[73]. The draft UNESCO Declaration is intended to apply also to cultural properties which were arbitrarily appropriated from persecuted people, both in occupied and in non-occupied territories, through any kind of means, including transactions which, while apparently legal, were in reality the product of the inequality of the bargaining powers of the parties and the state of need of one of them. The draft sets forth that

> "(i) a State, being also the State of location, that was responsible for he loss of possession or removal of cultural objects, should return such objects to the competent authorities of he territory from which they were removed or where their possession was lost;
> (ii) A State, not being the State of location that was responsible for the loss of possession or removal of cultural objects, should participate in the search for and in negotiations to secure the return of such objects" (Principle III)[74].
> The draft UNESCO Declaration shows how the rule on the prohibition of war booty is now being gradually transformed into a principle of non-exploitation of the weakness of another subject, including private individuals, to make a cultural gain.

The analysis should be enlarged to encompass the question of cultural objects removed from peoples subjected to colonial or foreign occupation and from indigenous peoples[75]. Newly independent States have brought claims against their former colonial States for the return of cultural properties which are today found outside the territories that have created them. The return of the obelisk of Axum and of the Venus of Cyrene was due not only to their removal in connection with a war, but also to the fact that the territories deprived of them were subjected to colonial occupation. The efforts of newly independent States and indigenous peoples to recover cultural properties previously removed are based on the right of self-determination and the need to recover or develop their cultural collective identity[76].

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[73] Under Art. 1 of the Declaration, the Vilnius Forum "asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs".

[74] Under Principle VI, "the competent authorities of the territory to which the cultural objects have been returned should exercise due diligence to seek out and identify the person or the entity, if any, which was entitled to the cultural objects at the time of the loss of possession occurred, or the successor to that person or entity, and to return these objects to such a person or entity".

[75] See the considerations made by Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge, 2008, and Vrdoljak, *Reparations for Cultural Loss*, in Lenzerini (ed.), *Reparations for Indigenous Peoples*, Oxford, 2008, p. 197.

[76] For example, in the final report (*Chega!*) published in 2005, the Commission for Reception, Truth and Reconciliation for Timor-Leste recommended to the government to "(…) establish a programme of repatriation for East Timorese artefacts, documents and culturally-related material currently outside the country and invites governments, institutions

In this regard, the United Nations General Assembly, in Resolution 3187 (XXVIII) of 18 December 1973 (Restitution of Works of Art to Countries Victims of Expropriation), deplored "the wholesale removal, virtually without payment of *objets d'art*, from one country to another, frequently as a result of colonial or foreign occupation" and called for their prompt restitution. The General Assembly also recognized "the special obligations in this connection of those countries which had access to such valuable objects only as a result of colonial or foreign occupation" (para. 2) and declared itself convinced that "the restitution of such works would make good the serious damage suffered by countries as a result of such removal".

As stated in 1978 by a former Director-General of UNESCO,

> "architectural features, statues and friezes, monoliths, mosaics, pottery, enamels, masks and objects of jade, ivory and chased gold – in fact everything which has been taken away, from monuments to handicrafts – were more than decorations or ornamentation. They bore witness to a history of a culture and of a nation whose spirit they perpetuated and renewed.
> The peoples who were victims of this plunder, sometimes for hundred of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better. (…)
> The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations"[77].

While different from military occupation, colonial domination can be seen as sort of prolonged foreign occupation of a territory. Again, these developments also show how the rule on the prohibition of war booty is being gradually transformed into a principle of non-exploitation of the weakness of another subject to make a cultural gain.

4. Return after Removal in Time of Peace:

A. The Universal Treaties

Apart from cases occurring in war time or particular situations of weakness, the issue of return of cultural heritage is today mostly related to illegal trafficking in such heritage. It is difficult to condemn the plundering of cultural properties and to condone the illegal movements of such properties at the same time. Here the first matter to be addressed is the only apparently simple question of determining when "illegal" is really "illegal". While such a qualification depends on a given national legislation, in cases of transboundary movements of cultural properties, at least two different domestic legal systems are involved (those of the State of origin and of the State of destination to which sometimes also that of the State of transit can be added).

The starting point is that, under a universally recognized principle of law, the theft, that is the appropriation of properties without the consent of the owner, is a crime subject to criminal sanction and cannot create a valid title for the thief over the stolen objects. The clandestine traffic of stolen

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and individuals who have these items in their possession to return them to Timor-Leste to assist in the conservation, development and diffusion of East Timorese culture in keeping with Article 15 of the International Covenant on Economic, Social and Cultural Rights" (recommendation 3.7.6). Under this provision, States Parties to the Covenant recognize the right of everyone to take part in cultural life and engage themselves to take steps for the conservation, the development and the diffusion of culture.

[77] *A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It,* made on 7 June 1978 by Mr. Amadou-Mahtar M'Bow.

cultural objects has acquired today an impressive dimension and is condemned by all States[78]. However, even in case of theft, the domestic legislation of different countries may vary as to whether the rights of a good faith purchaser should be protected[79] and as to whether the statute of limitation (called also acquisitive prescription) could apply in favour of the possessor after the passing of a certain number of years from the crime. In the case of cultural objects fortuitously found and subsequently removed, national legislation may vary also as to who is the owner of them, either the private owner of the land or the State as the trustee of a public interest[80].

Illegal movements may be the result not only of thefts but also of the violation of a domestic legislation which prohibits or limits the export of cultural properties from the national territory. Legislation for this purpose has been adopted by a number of States, especially those that are rich in cultural heritage (one of the first instances is a decision taken in 1602 by the grand duke of Tuscany, subjecting to a licence the export of "good paintings" and prohibiting altogether the export of the works of nineteen selected masters[81]). This kind of legislation can be violated irrespective of a theft and even by the owner himself, for instance if he delivers the object to a buyer abroad or takes the object with him when moving abroad. However, other States may consider the import of cultural properties as allowed under their domestic legislation, rejecting any difference between such properties and any other commercial goods, and may refuse to apply a foreign legislation that prohibits or limits their export. The definition of cultural property and the list of the kinds of objects belonging to this category may also vary depending on the national legislation.

It is evident that only a generally accepted regime adopted at the international level could overcome the problems posed by the differences in domestic legislation as regards international movements of cultural properties. To achieve this objective two treaties of a universal scope of application have been concluded and are today in force, namely the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural properties (Paris, 1970)[82] and the UNIDROIT (International Institute for the Unification of Private Law) Convention on stolen or illegally exported cultural objects (Rome, 1995)[83]. It is not the case to elaborate hereunder in detail on the two conventions and their complementary role in addressing the question of illegal traffic in cultural properties. More important is to emphasize some general principles that inspire the two treaties.

Taking into account the importance of cultural properties, the 1970 Convention sets forth the duty of every State to respect both its own cultural heritage and that of other countries:

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[78] See in general Prott & O'Keefe P., *National Legal Control of Illicit Traffic in Cultural Property*, Paris, 1983; Carducci, *La restitution internationale des biens culturels et des objets d'art*, Paris, 1997; O'Keefe P., *Trade in Antiquities: Reducing Destruction and Theft*, London, 1997; Palmer (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, 1998; Frigo, *La circolazione dei beni culturali*, Milano, 2007. As pointed out by Hoffman, *Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, in Hoffman (ed.), *Art and Cultural Heritage - Law, Policy and Practice*, New York, 2006, p. 3, "today, thefts of art and antiquities are reported to join drugs, money laundering, and the illegal arms trade as one of the largest areas of international criminal activity". For particular cases, see, in the ICOM (International Council of Museums) series *One Hundred Missing Objects*, the following issues: *Looting in Angkor*, Paris, 1997; *Looting in Africa*, Paris, 1997; *Looting in Latin America*, Paris, 1997; *Looting in Europe*, Paris, 2001. For Italy, see the series of cards *Wanted* published by the association "Extroart" of Palermo showing several cultural properties stolen or illicitly excavated, such as, to give only the most notorious example, the "Nativity" by Caravaggio, stolen in 1969 from the church of San Lorenzo in Palermo and never found so far.

[79] Here two maxims taken from Roman law (*beati possidentes* and *nemo plus iuris transferre potest quam ipse habet*) play one against the other.

[80] In the case of objects found on the seabed the alternative is between the finder and the State.

[81] Text in Parpagliolo, *Codice delle antichità e degli oggetti d'arte*, I, Roma, 1932, p. 51. Here is the list of the "non-exportable" artists: "Michelangelo Buonarroti, Raffaello Sanzio, Andrea del Sarto, Mecherino, Rosso Fiorentino, Leonardo da Vinci, Franciabigio, Pierino del Vaga, Jacopo da Puntormo, Tiziano, Francesco Salviati, Bronzino, Daniele da Volterra, Fra Bartolomeo, Sebastiano del Piombo, Filippino Lippi, Correggio, Parmigianino, Perugino".

[82] Hereinafter: the 1970 Convention. 116 States are today parties to the Convention. Some States have made reservations which considerably restrict the application of the convention in their respect.

[83] Hereinafter: the UNIDROIT Convention. However, only 29 States are today parties to the Convention.

> "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,
> Considering that it is incumbent upon every State to protect the cultural heritage existing within its territory against the dangers of theft, clandestine excavation, and illicit export,
> Considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations (...)" (preamble).

The basic principle of the 1970 Convention is the non-impoverishment of the cultural heritage of the States of origin:

> "The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural heritage is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from" (Art. 2, para. 1).

The properties to which the 1970 Convention applies are specifically indicated as regards both the categories of objects (see the detailed list provided by Art. 1) and their link with the State concerned (Art. 4[84]). The Parties recognize the "indefeasible right" of each of them "to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported" (Art. 13, *d*). They are bound to introduce a specific certificate in which the exporting State specifies that the export of the cultural property in question is authorized and to prohibit the exportation of such property unless accompanied by it. They undertake to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported (Art. 7, *a*). They also undertake to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party (Art. 7, *b*, i), as well as, at the request of the State Party of origin, to recover and return any such cultural property, provided that the requesting State pays just compensation to an innocent purchaser or to a person who has valid title to such property (Art. 7, *b*, ii).

Although very important to foster international cooperation in the fight against illicit trafficking, the 1970 Convention has some limits. It does not have a retroactive character, applying to properties involved in illicit movements after the entry into force of the Convention for both the States Parties concerned. It covers only certain kinds of illicit movements. For instance, the interdiction to acquire cultural properties illicitly imported is limited to museums and the obligation to return is limited to cultural properties stolen from museums or similar institutions, without extending to cases where private individuals have been the victims or where the objects have been illegally excavated.

While the 1970 Convention envisages diplomatic action at the interstate level to achieve the return of cultural properties, the UNIDROIT Convention aims at providing individual victims with the right to bring an action before domestic courts for the return of stolen or illegally exported cultural objects. For the UNIDROIT Convention, the illicit trade in cultural objects causes an irreparable damage which also affects the heritage of all peoples. It follows that the return of such objects to the States of origin serves the interest of all. In fact, the States Parties declare themselves:

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

> "deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information,
>
> Determined to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all" (preamble).

The UNIDROIT Convention clearly provides that "the possessor of a cultural object which has been stolen shall return it" (Art. 3, para. 1) and that a State Party may request the court or another competent authority of another State Party "to order the return of a cultural object illegally exported from the territory of the requesting State" (Art. 5, para. 1). Specific provisions, which are subject to certain exceptions, apply as regard the time limitation of claims for restitution or return. Another provision specifies the cases where the return of illegally exported objects must be ordered:

> "The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:
> (a) the physical preservation of the object or of its context;
> (b) the integrity of a complex object;
> (c) the preservation of information of, for example, a scientific or historical character;
> (d) the traditional or ritual use of the object by a tribal or indigenous community,
> or establishes that the object is of significant cultural importance for the requesting State" (Art. 5, para. 3).

Under certain conditions, the good faith possessor of a stolen cultural object or of an illegally exported object is entitled to a fair and reasonable compensation (Art. 4, para. 1, and Art. 6, para. 1). Also the UNIDROIT Convention has no retroactive application.

In all cases where the 1970 Convention or the UNIDROIT Convention are not applicable, for *ratione materiae*, *ratione personae* or *ratione temporis* reasons, use can be made of the consultative services of the ICPRCP, provided that the property has "a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO" and "has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation" (Art. 3, para. 2, of the Statutes). Here not only States, but also peoples within States of origin are taken into consideration. The Committee is entrusted with the responsibility to seek ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin and to promote multilateral and bilateral co-operation with a view to this aim (Art. 4, paras. 1 and 2, of the Statutes).

Another multilateral instrument that can be included among those that aim at fighting against the illegal traffic in cultural properties is the Convention on the protection of the underwater cultural heritage (Paris, 2001)[85]. The parties to the Convention declare themselves "deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage" (preamble). The Convention provides that States Parties must take measures for the seizure of underwater cultural heritage in their territory that has been recovered in a manner not in conformity with the Convention (Art. 18, para. 1). Due to the particular legal condition of marine waters under international law[86], the

[85] 24 States are so far parties to the Convention.
[86] See Garabello & Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage - Before and after the 2001 UNESCO Convention*, Leiden, 2001.

seized cultural properties are subject to a special regime, based on the concept of public benefit, and the interests of States having "a verifiable link" with the object are taken in special consideration[87].

B. The Regional or Bilateral Treaties

Both the 1970 Convention (Art. 15) and the UNIDROIT Convention (Art. 13, para. 1) allow for the conclusion of regional or bilateral treaties aiming at the return of cultural properties.

At the regional level, the member States of the Organization of American States have adopted the Convention on the protection of the archaeological, historical and artistic heritage of the American Nations (San Salvador, 1976). The preamble of this treaty states that the parties, "having seen the continuous looting and plundering of the native cultural heritage suffered by the countries of the hemisphere, particularly the Latin American countries", consider "that such acts of pillage have damaged and reduced the archaeological, historical, and artistic wealth, through which the national character of their peoples is expressed". Under Art. 3 of the Convention, the cultural property that constitutes "the cultural heritage of the American nations" (as belonging to the categories specified in Art. 2),

> "shall receive maximum protection at the international level, and its exportation and importation shall be considered unlawful, except when the State owing it authorizes its exportation for purposes of promoting knowledge of national cultures".

Under Art. 10, each State Party is bound to:

> "take whatever measures it may consider effective to prevent and curb the unlawful exportation, importation, and removal of cultural property, as well as those necessary for the return of such property to the State to which it belongs in the event of its removal".

The Convention provides for a procedure to ensure the return of cultural properties unlawfully exported through diplomatic or judicial means (Arts. 11 and 12). An issue that often complicates the question of the return of cultural properties is clearly addressed in the Convention, which provides that

> "the control exercised by each State over its cultural heritage and any actions that may be taken to reclaim items belonging to it are imprescriptible" (Art. 6).

At the sub-regional level, the Centro-American Convention for the restitution and the return of archaeological, historical and artistic objects (Guatemala City, 1995) binds the States Parties to co-operate for the restitution or return of illegally removed objects (Art. 1) and to coordinate their action in this regard with respect to third States[88].

At the bilateral level, several treaties have been concluded with the purpose of regulating the relationship between States of origin and States of destination of cultural properties on the basis of the objectives of the 1970 UNESCO Convention.

The United States, one of the main States of destination, has concluded a number of bilateral agreements to prevent the importation of designated objects from other countries, such as Mexico (1970)[89], Guatemala, (1984)[90], Canada (1997)[91], Peru (1997)[92] and Italy (2001) For example, the

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[87] "A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for the reassembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned" (Art. 18, para. 4).

[88] "Convienen los Estados Partes que, a petición de cualquiera de ellos, deberán emplear les medios legales a su alcance para restituir y retornar al país de origen los bienes arqueológicos, históricos o artísticos que hubieron sido substraídos o exportados ilícitamente. El estado interesado facilitará la documentación y las pruebas necesarias para establecer la procedencia de su reclamación" (Art. 2).

[89] The Treaty of cooperation for the recovery and return of stolen archaeological, historical and cultural properties, signed on 17 July 1970, provides as follows: "1. Each Party agrees, at the request of the other Party, to employ the legal means at its disposal to recover and return from its territory stolen archaeological, historical and cultural properties that are removed after the date of entry into force of the Treaty from the territory of the requesting Party. 2. Requests for the

memorandum of understanding concerning the imposition of import restrictions on categories of archaeological materials representing the pre-classical, classical and imperial Roman periods of Italy, concluded on 19 January 2001 by Italy and the United States provides as follows:

> "A. The Government of the United States of America, in accordance with its legislation entitled the Convention on Cultural Property Implementation Act, shall restrict the importation into the United States of the archaeological materials ranging in date from approximately the 9th century B.C. to approximately the 4th century A.D., including categories of stone, metal, ceramic and glass artifacts, and wall paintings identified on a list to be promulgated by the United States Government (hereinafter known as the 'Designated List'), unless the Government of the Republic of Italy issues a license or other documentation which certifies that such exportation was not in violation of its laws.
>
> B. The Government of the United States of America shall offer for return to the Government of the Republic of Italy any material on the Designated List forfeited to the Government of the United States of America.
>
> C. Such import restrictions shall become effective on the date the Designated List is published by the U.S. Customs Service in the U.S. Federal Register, the official United States Government publication providing fair public notice" (Art. I)[93].

The scope of the memorandum, which was concluded "desiring to reduce the incentive for pillage of irreplaceable archaeological material", is not confined to the return of cultural objects illegally exported, but also encompasses the establishment of a broader cooperation between the two parties in the cultural field through loans, exhibitions, joint research programmes and excavation campaigns. In particular, Italy agrees to use its best efforts to encourage further interchange through:

> "1. promoting agreements for long-term loans of objects of archaeological or artistic interest, for as long as necessary, for research and education, agreed upon, on a case by case basis, by American and Italian museums or similar institutions, to include: scientific and technological analysis of materials and their conservation; comparison for study purposes in the field of art history and other humanistic and academic disciplines with material already held in American museums or institutions; or educational presentations of special themes between various museums or academic institutions;
>
> 2. encouraging American museums and universities jointly to propose and participate in excavation projects authorized by the Ministry of Culture, with the understanding that certain of

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recovery and return of designated archaeological, historical and cultural properties shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, documentation and other evidence necessary to establish its claim to the archaeological, historical or cultural property. 3. If the requested Party cannot otherwise effect the recovery and return of a stolen archaeological, historical or cultural property located in its territory, the appropriate authority of the requested Party shall institute judicial proceedings to this end. (…)" (Art. III).

[90] The Agreement for the recovery and return of stolen archaeological, historical and cultural properties, signed on 21 may 1984, is based on the desire of the parties "to increase the cooperation between their respective law enforcement authorities for the recovery and return of objects of outstanding artistic or historic merit when stolen" (preamble).

[91] Agreement concerning the imposition of import restrictions on certain categories of archaeological and ethnological material, signed on 10 April 1997.

[92] Memorandum of understanding concerning the imposition of import restrictions on archaeological material from the Prehispanic cultures and certain ethnological material from the colonial period of Peru, signed on 9 June 1997.

[93] Text in *International Legal Materials*, 2001, p. 1031. After its expiration, the agreement has been renewed on 13 January 2006 (see *American Journal of International Law*, 2006, p. 460). The State of origin pledges itself to ensure an appropriate protection of its cultural heritage: "Both Governments agree that in order for United States import restrictions to be fully successful in deterring pillage, the Government of the Republic of Italy shall use its best efforts to increase scientific research and protection of archaeological patrimony and protective measures for archaeological excavations at known sites, particularly in areas of great risk from looters. The Government of the United States of America acknowledges the efforts of the Government of the Republic of Italy in recent years to devote more public funds to guard archaeological sites and museums and to develop Italian tax incentives for private support of legitimate excavation. The Government of the Republic of Italy agrees to pursue these efforts" (Art. II, para. B)".

the scientifically excavated objects from such projects could be given as a loan to the American participants through specific agreements with the Ministry of Culture; and
3. promoting agreements for academic exchanges and specific study programs agreed upon by Italian and American institutions" (Art. II, para. E)".

Another example of this kind of treaties is the agreement signed on 20 October 2006 by Italy and Switzerland. It is based on the premises that the theft, pillage and illegal export and import destroy the context to which the cultural properties belong and cause a prejudice to the cultural heritage of mankind[94]. In the same direction goes the agreement to fight against the theft, illicit excavations and illegal import and export of cultural properties, signed on 20 January 2006 by China and Italy[95].

B. Agreements between States and Foreign Cultural Institutions

Other avenues are also followed to ensure the return of cultural objects to the State of origin. A notable practice is presently being developed of concluding understandings between some States, represented by State ministries or other public entities, on the one side, and foreign museums or cultural institutions, on the other. The instruments in question, usually called "agreements", cannot be considered as international treaties, but properly belong to the category of contracts between States and foreign nationals. This category of legal instruments, which has an important background in the field of exploitation of natural resources (for example, concessions for oil exploration and exploitation), is now used also to pursue a completely different purpose.

The agreements on the return of cultural properties allow the State of origin to overcome the obstacle posed by the fact that, in several cases, a State of destination has little legal means to compel its nationals to return objects which are claimed by another State, as well as the obstacle posed by the uncertain outcome of a litigation before a foreign court on the ownership of the claimed objects. These agreements also allow the foreign museums to preserve their reputation as truthful cultural institutions that do not encourage the pillage of the heritage of foreign countries and do participate in the fight against the destruction of cultural contexts and the illegal traffic resulting there from. Both parties count on the possibility to strengthen their relationship through future cooperative activities.

Agreements of this kind have reportedly been concluded by some States, such as Peru (with the Yale University, United States), Greece (with the University of Heidelberg, Germany) and Italy (with four institutions located in the United States, namely the Metropolitan Museum of Art of New York, the Princeton University Art Museum, the Paul Getty Museum of Los Angeles, the Museum of Fine Arts of Boston). The texts of the agreements are in most cases confidential.

An exception to the confidentiality practice is the agreement signed on 21 February 2006 by the Italian Ministry for Cultural Properties and Activities and the Commission for Cultural Assets of the Region of Sicily[96], on the one side, and the Metropolitan Museum of Art, on the other[97]. In the premises, the

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[94] As stated in the preamble, the agreement is concluded in view of the fact that the illegal removal of works of art destroys the context to which they belong ("in considerazione del fatto che il furto, il saccheggio e l'importazione ed esportazione illecite di beni culturali determinano la distruzione dei contesti di appartenenza"). The parties are aware that the dispersion of cultural properties and the loss of their contexts represent a damage for the cultural heritage of mankind ("consapevoli che la dispersione dei beni culturali e la perdita dei contesti rappresentano un danno per il patrimonio culturale dell'umanità").

[95] The parties point out that they will apply Italian law for objects relating to Italy, Chinese law for objects relating to China and the 1970 UNESCO Convention for objects relating to third States: "riguardo ai beni culturali soggetti a furto, scavo illecito, importazione ed esportazione illegali cui fa riferimento il presente Accordo, quando si tratta di oggetti relativi all'Italia verrà applicata la legislazione italiana, quando si tratta di oggetti relativi alla Cina verrà applicata la legislazione cinese, quando si tratta di oggetti relativi a Paesi terzi si deciderà sulla base della Convenzione UNESCO sulle misure per interdire e impedire l'illecita importazione, esportazione e trasferimento di proprietà di beni culturali" (Art. 1, para. II).

[96] Under the Italian constitutional system, Sicily is the only region entitled to an exclusive competence in the field of cultural properties existing in the region.

Italian Ministry recalls that the Italian archaeological heritage "is the source of the national collective memory and a resource for historical and scientific research" and that

> "the archaeological heritage includes the structures, constructions, architectural complex, archaeological sites, movable objects and monuments of other types as well as their contexts, whether they are located underground, on the surface or under water" (preambular para. B);
>
> "to preserve the archaeological heritage and guarantee the scientific character of archaeological research and exploration operations, Italian law sets forth procedures for the authorization and control of excavations and archaeological activities to prevent all illegal excavations or theft of items of the archaeological heritage and to ensure that all archaeological excavations and explorations are undertaken in a scientific manner by qualified and specially trained personnel, with the provision that non-destructive exploration methods will be used whenever possible" (preambular para. C).

On its side, the Museum

> "believes that the artistic achievements of all civilizations should be preserved and represented in art museums, which, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve and interpret our shared cultural heritage" (preambular para. F);
>
> "(…) deplores the illicit and unscientific excavation of archaeological materials and ancient art from archaeological sites, the destruction or defacing of ancient monuments, and the theft of works of art from individuals, museums, or other repositories" (preambular para. G);
>
> "(…) is committed to the responsible acquisition of archaeological materials and ancient art according to the principle that all collecting be done with the highest criteria of ethical and professional practice" (preambular para. H).

The first subject matter of the agreement is the return of a number of archaeological items that the Ministry has requested, because it affirms that the items "were illegally excavated in Italian territory and sold clandestinely in and outside the Italian territory" (preambular para. E). On its side, the Museum, "rejecting any accusation that it had knowledge of the alleged illegal provenance in Italian territory of the assets claimed by Italy, has resolved to transfer the requested items in the context of this Agreement" (preambular para. I). This decision does not constitute an acknowledgment on the part of the Museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the requested items. The Ministry and the Region of Sicily waive any legal action in relation to the requested items.

The returned items magnificently document the spreading of old Greek civilization in Southern Italy. They are the Euphronious krater[98], four vases (namely, a Laconian kylix, a red-figured Apulian dinos attributed to the Darius painter, a red-figured psykter decorated with horsemen and a red-figured Attic amphora by the Berlin painter), a set of fifteen Hellenistic silver items and a pyxis. After their return, they have been displayed, together with other objects recovered from abroad, at an exhibition held

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[97] "The Metropolitan Museum decision in February 2006 to give up title and return a 2,500 year old vase known as the Euphronious Krater as well as 19 other objects to Italy in exchange for long-term loans of other antiquities and treasures from Italian collections and future collaborations on excavations and exhibitions represents a watershed and suggested a new model for thinking about cultural property that moves beyond notions of title and ownership to the development of enhanced benefits by identifying mutuality of interests" (Hoffman, *Beyond the Adversarial Model: Using Mediation to Create Value in the Resolution of Disputes in the Art and Heritage Sector*, paper to be published and received by the courtesy of the author).

[98] The krater was painted and signed by the Athenian artist Euphronious, active between 520 and 470 b.C. It represents the transport of the corpse of Sarpedon by *Hypnos* (Sleep) and *Thanatos* (Death).

from December 2007 to March 2008 at the Quirinale Palace in Rome (the residence of the President of the Republic)[99].

The second, but not secondary, subject matter of the agreement is to promote cultural co-operation between the parties. "To make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and cultural significance so that of the Euphronious Krater", the Ministry agrees to make four-year loans to the Museum of archaeological objects of equivalent beauty and historical and artistic significance selected from a list of twelve artifacts specified in the agreement (Art. 4, para. 1). In exchange for the transfer of the four above mentioned vases, the Ministry agrees to "loan a first-quality Laconian artifact to the Museum for a period of four years and renewable thereafter" (Art. 3, para. 2). In exchange for the Hellenistic silvers, the Ministry agrees to make to the Museum loans of cultural properties "of equal beauty and historical and artistic significance (…) on an agreed, continuing and rotating sequential basis" (Art. 5, para. 3)[100]. The mutual co-operation extends, during the term of forty years of duration of the agreement (Art. 8, para. 1), to excavations, loans and restorations of cultural objects:

> "1. The Ministry and the Commission for Cultural Assets of the Region of Sicily agree, on the basis of an appropriate agreement which shall define the procedures for the loan, to allow archaeological items originating from authorized excavations conducted on the initiative and at the expense of the Museum to leave Italy for the time necessary for their study and restoration.
> 2. The archaeological assets returned after their study and restoration, the times for which shall be agreed upon between the parties, shall be loaned to the Museum for exhibition for a period of four years, or for the maximum period that may be permitted by Italian law at the time the loan begins.
> 3. The Ministry and the Commission for Cultural Assets of the Region of Sicily, on the basis of appropriate contracts written for each individual case that will define the procedures for the individual loans of objects, shall permit the temporary transfer from Italian territory of archaeological artifacts selected by the Ministry and the Commission for Cultural Assets of the Region of Sicily and accepted by the Museum to allow their restoration by the Museum's personnel, and their successive exhibition to the public in the galleries of the Museum, which shall bear the costs of transfer and restoration" (Art. 7).

D. Domestic Litigations and Other Means to Achieve the Return of Cultural Properties

Irrespective of the existence of instruments adopted at the international level, the return of cultural properties illegally removed and found abroad can be the result of judgments of domestic courts that, although not in all cases, decide in favour of the original owner on the basis of the applicable national legislation and, sometimes, take into account also the principles that are being developed at the international level. The practice of courts in the Unites States or the United Kingdom is particularly rich in this kind of cases which may involve not only civil, but also criminal aspects[101].

In certain countries the practice has been established to immediately seize cultural properties of likely illegal provenance and, after due investigation, to return them to the foreign countries from which they have been removed. For instance, in Italy the special unit for the protection of cultural heritage of the Carabineers corps has developed the practice of asking the competent tribunal for the judicial seizure of the properties found during controls as imported without the required certificates. After having determined through experts and competent institutions the area of provenance of the artifacts, the

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[99] See the catalogue of the exhibition: *Nostoi – Capolavori ritrovati*, Roma, 2007. *Nostoi* means "returns" in Greek.

[100] "The Museum shall arrange and bear the costs of packing, insurance and shipment of the requested and loaned items for transit to and from Italy" (Art. 6, para. 4).

[101] For the relevant cases see Hoffman, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, in Hoffman, *op. cit. supra* note 78 , p. 159; DeAngelis, *How Much Provenance Is Enough? Post-Schultz Guidelines for Art Museum Acquisition of Archaeological Materials and Ancient Art*, *ibidem*, p. 398; Frigo, *Il divieto di esportare i beni culturali da un territorio occupato e gli obblighi di restituzione*, in Benvenuti & Sapienza (a cura di), *La tutela internazionale dei beni culturali nei conflitti armati*, Milano, 2007, p. 123.

corps informs of the finding the likely State of origin, asking it to confirm the theft or the illicit export of the objects and, if so, to address through diplomatic channels a request for their return. On the basis of the request, the judicial authority authorizes the restitution of the objects to the owner. They are usually delivered to the ambassador in Rome of the States concerned (for example, Ecuador, Peru, Iraq, Iran, Afghanistan, Pakistan, China, Egypt, Ukraine).

Non-binding codes of conduct have been elaborated within the framework of institutions and individuals involved in the acquisition and sale of cultural properties. This is the case of the ICOM (International Council of Museums) Code of Ethics for Museums, adopted in 1986 and revised in 2001 and 2004, or of the guidelines and policies developed at domestic or international level by professional associations, such as the art dealers (International Code of ethics for dealers in cultural property, adopted by the ICPRCP and endorsed in 1999 by the UNESCO General Conference). Also these instruments can serve to deter doubtful trade in cultural objects, even if their effectiveness is open to discussion[102].

E. The Principle of Co-operation against Illegal Movements of Cultural Properties

Besides the principle of non exploitation of the weakness of another subject to get a cultural gain which applies in some peculiar situations[103], the practice under review here shows the formation of another principle, relating to co-operation in the fight against illegal movements of cultural properties[104].

In this regard, the United Nations General Assembly, by the already mentioned Resolution 3187 (XXVIII) of 18 December 1973 (Restitution of Works of Art to Countries Victims of Expropriation)[105], has affirmed that

> "the prompt restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts and documents by another country, without charge, is calculated to strengthen international cooperation inasmuch as it constitutes just reparation for damage done" (para. 1).

In the same year the General Assembly, by resolution 3148 (XXVIII) of 14 December 1973 (Preservation and further development of cultural values), affirmed "the sovereign right of each State to formulate and implement, in accordance with its own conditions and national requirements, the policies and measures conducive to the enhancement of its cultural values and national heritage" and considered that "the value and dignity of each culture as well as the ability to preserve and develop its distinctive character is a basic right of all countries and peoples". It made an appeal

> "to all Member States to respect national legislation for the protection of the artistic heritage" (para. 3).

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[102] As pointed out by Brodie, *An Archaeological View of the Trade in Unprovenanced Antiquities*, in Hoffman, *op. cit. supra* note 78, p. 61, "several associations have been established to represent the interests of the trade, and they state publicly that their members are required to adhere to certain standards of behaviour, which are sometimes formulated as codes of ethics or practice. The existence of these codes allows the trade to argue that it is self-regulating and that therefore statutory control is unnecessary, an argument with political resonance in the ostensively free-trade jurisdictions of North America and Europe, where most of the end trading goes on. Unfortunately, it is questionable to what extent the codes are respected or enforced".

[103] *Supra*, para. 4.E.

[104] An obligation to co-operate is nothing new in international law. It is recurrent in the field of environmental law. For example, Art. 197 of the United Nations Convention on the law of the sea (Montego Bay, 1982) provides that "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

[105] *Supra*, para. 4.E.

Similar statements were reiterated, with some notable additions, in subsequent instruments, such as General Assembly Resolutions 3391 (XXX) of 19 November 1975, 31/40 of 30 November 1976 (where restitution of cultural properties is qualified as "a step forward towards the strengthening of international cooperation and the preservation and future development of cultural values", 32/12 of 11 November 1977, 33/50 of 14 December 1978 (where States are also invited to establish bilateral arrangements for the restitution and return), 34/64 of 29 November 1979, 35/128 of 11 December 1980 (where States are also invited to draw up systematic inventories of cultural property existing in their territories and abroad), 36/64 of 27 November 1981 (where an appeal is made to museums and public and private collectors to return the items totally or partially, or make them available to the countries of origin, particularly those kept in storehouses), 38/34 of 25 November 1983 (where the opinion is expressed that the return of cultural property to its country of origin should be accompanied by the training of key personnel and technicians and by the provision of the necessary facilities for the satisfactory conservation and presentation of the property restored), 40/19 of 21 November 1985, 42/7 of 22 October 1987, 44/18 of 6 November 1989, 46/10 of 22 October 1991, 48/15 of 2 November 1993, 50/56 of 11 December 1995, 52/24 of 25 November 1997, 54/190 of 17 December 1999 (where efforts are commended to link existing databases and identification systems to allow for electronic transmission of information in order to reduce illicit trafficking in cultural property), 56/97 of 14 December 2001, 58/17 of 3 December 2003 and 61/52 of 4 December 2006. In the last resolution, the General Assembly declared itself "aware of the importance attached by some countries of origin to the return of cultural property that is of fundamental spiritual and cultural value to them, so that they may constitute collections representative of their cultural heritage" and expressed concern "about the illicit traffic in cultural property and its damage to the cultural heritage of nations"[106].

While the principle of non-exploitation of the weakness of another subject to get a cultural gain is linked to situations of war, colonial domination, foreign occupation or involving indigenous peoples, the principle of co-operation against illegal movements of cultural properties has a general scope of application, covering all kinds of situations.

For instance, after 6 August 1990, Iraq underwent periods of war, periods of peace and periods of military occupation. The United Nations Security Council, by Resolution 1483 of 22 May 2003, decided, *inter alia*, on measures to facilitate the return of cultural properties illegally removed from Iraq after the said date. These measures are applicable irrespective of the legal condition existing in a certain period. According to the resolution,

> "(…) all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph" (para. 7)[107].

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[106] At the moment of the adoption of the resolution, the representative of Greece combined a note of pessimism with one of optimism: "Illegal trading in antiquities falls into the same category as the illegal trade in arms or drugs or trafficking in human beings. It constitutes a form of organized crime directly associated with money laundering and corruption. It is a crime committed against every one of us. It is not directed only against those nations whose cultural heritage is looted, but against the whole of mankind. (…) Yet, in recent years, a new wind of optimism has appeared on the horizon. Increasingly, museums recognize the moral obligation to conform with ethical codes in their acquisition policies. In the international scientific community, including archaeologists, voices have been raised for the protection of cultural heritage worldwide. Demands have been expressed that the looting of archaeological sites and the illicit trafficking in antiquities must stop. (…)" (statement by Mr. Voulgarakis, in U.N. General Assembly, *Official Records*, 61st Session, doc. A/61/PV.65 of 4 December 2006, p. 9).

[107] In the preamble of resolution 1546 of 8 June 2004, the Security Council stresses "the need for all parties to respect and protect Iraq's archaeological, historical, cultural, and religious heritage".

This decision, which is binding on every State, has been instrumental in promoting international cooperation and has ensured the return of several, even if not all, objects illegally removed from Iraqi institutions and excavations.

As regards the legal aspects, a number of corollaries can be inferred from the principle to co-operate against illegal movements of cultural properties, namely: the deference due to the legislation adopted by other States to protect their own cultural heritage, including not only the criminal provisions against theft, but also the rules on illegal export of artifacts; the placing on the possessor of the burden of proof of good faith in the acquisition of stolen or illegally exported artifacts[108]; the broad interpretation of the notion of "stolen objects" by including in it artifacts which have been illegally excavated or artifacts acquired through a transaction vitiated for reasons of fraud or threat; the exclusion of statutes of limitation in case of stolen objects. As far as enforcement is concerned, the principle aims at encouraging the closest co-operation between customs, police and judicial authorities[109]. Museums and public institutions should be prevented from acquiring, through purchases or donations, cultural properties whose provenance is not certified. The same should apply to dealers in cultural properties who should also be required to maintain a register recording the origin of each item[110].

Very little merit has the assumption of those who, in the name of an alleged principle of "cultural internationalism", plead for an uncontrolled movement of cultural properties[111]. It is not by chance that such a movement is intended to go always in the same directions, following the rules of the market, to the benefit of those who can invest huge amounts of money in purchasing foreign cultural properties and to the detriment of the countries of origin[112]. The reading of Quatrèmere[113] is largely sufficient to understand why to entrust alleged divinities, such as Saint Market and Saint Investment, with the responsibility to protect the cultural heritage can only lead to very disappointing results. Even the international instruments which have been concluded to promote

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[108] For instance, good faith acquisition cannot be presumed if the possessor or his successor in title cannot prove that, at the moment of the export, the possessor had notified the State of origin of his intention to export the object and had obtained the required certificate.

[109] For the activities carried out by the Interpol General Secretariat against cultural property crime see the report presented by Kindt at the 30th Extraordinary Session of the ICPRCP (Seoul, 2008).

[110] This obligation is already provided for by Art. 10, *a*, of the 1970 UNESCO Convention.

[111] See Merryman, *Two Ways of Thinking about Cultural Property*, in *American Journal of International Law*, 1986, p. 847: "The differences between cultural nationalism and internationalism become particularly significant in case of what might be called 'destructive retention' or 'covetous neglect'. For example, Peru retains works of earlier cultures that, according to newspaper reports, it does not adequately conserve or display. If endangered works were moved to some other nation, they might be better preserved, studied, and displayed and more widely viewed and enjoyed. To the cultural nationalist, the destruction of national cultural property through inadequate care is regrettable, but might be preferable to the 'loss' through export. To the cultural internationalist, the export of threatened artifacts from Peru to some safer environment would be clearly preferable to their destruction through neglect if retained. For example, if they were in Switzerland, Germany, the United States or some other relatively wealthy nation with a developed community of museums and collectors knowledgeable about and respectful of such works, they could be better preserved. By preventing the transfer of fragile works to a locus of higher protection while inadequately preserving them at home, Peru endangers mankind's cultural heritage; hence 'destructive retention' or 'covetous neglect'". See also Merryman (ed.), *Imperialism, Art and Restitution*, New York, 2006.

[112] "Some nations with strongly retentive policies clearly lack the resources or the present inclination to care adequately for their extensive stocks of cultural objects. To the cultural internationalist (and to many cultural nationalists), this is tragic. Such objects could be sold to museums, dealers or collectors able and willing to care for them. One way that cultural objects can move to the locus of highest probable protection is through the market. The plausible assumption is that those who are prepared to pay the most are the most likely to do whatever is needed to protect their investment. Yet the UNESCO Convention and national retentive laws prevent the market from working in this way. They impede or directly oppose the market and thus endanger cultural property" (Merryman, *Two Ways* etc. quoted *supra*, note 112,, p. 849). In fact, it is not fully clear whether, according to the theory of cultural internationalism, also the international trade in stolen cultural properties should be protected, if the stolen properties find their way to a place where they are taken care of.

[113] *Supra*, para. 2.

the free trade of goods, such as the Treaty establishing the European Community (Rome, 1957)[114] or the General Agreement on tariffs and trade (GATT 1994)[115], allow for exceptions in the case of cultural properties. If cultural internationalists start from the objective of preventing "retention" by the countries of origin and reach the result of blessing "retention" by the States of import, in particular the States where are located those people and institutions that are prepared to pay the most and to best protect their investments, they make a doubtful exercise of logic, to say the least[116]. On the contrary, in the field of cultural heritage, the word "internationalism", which instinctively implies a positive meaning[117], should be understood not in the sense of unbridled international trade, but in the sense of international cooperation with countries of origin to prevent and sanction illegal trade, as well as in the sense of international financial and technical assistance to developing countries of origin to allow them to protect their cultural heritage in the place where it has been created[118]. After all, nothing prevents those who are interested in cultural internationalism to move, to cross a boundary and to admire the cultural heritage in its most appropriate context.

It is not too paradoxical to think that great progress could in the future be achieved if the international regime of transboundary movements of cultural properties were improved to follow, but in an opposite perspective, the example of the present regime of hazardous wastes, as set forth in Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 1989). Also as regards hazardous wastes there were international movements going mostly in one direction - in that case from developed to developing States - taking advantage of the weakness of the latter. To tackle the scandals and the damage determined by such a practice, the Basel Convention established a new regime, based on:
- the prohibition of covert movements;
- the prohibition of movements without the previous explicit consent of the potentially affected State (the State of import in the case of wastes);
- the prohibition of movements if the State of import cannot manage the wastes in an environmentally sound manner (that is the prohibition of taking advantage of the weakness of another State);
- the obligation of the State of export to take back the wastes if the movement is illegal.

The application of similar concepts to movements of cultural properties, which also mostly go in the same direction, would result, *mutatis mutandis*, in the following consequences:
- the prohibition of covert movements;
- the prohibition of movements without the previous explicit consent of the potentially affected State (the State of export in the case of cultural properties);
- the prohibition of movements if they exploit the political or economic weakness of the State of export;

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[114] "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (…) the protection of national treasures possessing artistic, historic or archaeological value (…). Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States" (Art. 30). See also Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (*Official Journal of the European Communities* No. L 74 of 27 March 1993).

[115] "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (…) imposed for the protection of national treasures of artistic, historic or archaeological value" (Art. 20, para. *f*).

[116] "At the intergovernmental level, ironically, this interpretation of internationalism turns out to be fundamentally a disguised form of nationalism to protect a country's own collectors and collections. What is more, the rationale for 'cultural property internationalism' turns out to be essentially commercial" (Nafziger, *op. cit. supra* note 4, p. 203).

[117] "The term 'cultural internationalism', then, cleverly pirates a commonly understood and venerated term – internationalism – to justify practices that actually defy the fundamental requirements of co-operation and collaboration underlying internationalism in the normal sense of the term" (*ibidem*, p. 203).

[118] See Scovazzi, *La notion de patrimoine culturel de l'humanité dans les instruments internationaux,* in Nafziger & Scovazzi, *op. cit. supra*, note 4, p. 75.

- the obligation of the State of import to send back the cultural properties if the movement was illegal.

5. The Principle of the Preservation of the Integrity of Cultural Contexts

The return of cultural properties is not only the consequence of the duty to refrain from exploiting the weakness of another subject to get a cultural gain and of the duty to co-operate against illegal activities. It is also the manifestation of the need to preserve the integrity of cultural contexts, which is deeply rooted in the nature of cultural properties and can be seen as the subject matter of another principle applying in this field of international law.

The concept of integrity is to be referred both to a single monument and to a cultural site which constitutes the context of several monuments and artifacts. Objects removed from their context to be traded for commercial gain can provide little information about the history and culture of the often unknown places from where they have been taken and the civilizations to which they belonged[119]. Art and culture are always associated with a geographical and historical milieu. Archaeological evidence should be preserved *in situ*.

Integrity, intended as a measure of the wholeness and intactness of the heritage, is a condition for a property to be inscribed on the World Heritage List[120], as established under the Convention concerning the protection of the world cultural and natural heritage[121]. The UNIDROIT Convention provides that a court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs, *inter alia*, the interest in "the integrity of a complex object" (Art. 5, para. 3). The Annex to the Convention on the protection of the underwater cultural heritage provides that "the protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option" (Rule 1) and that "the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage" (Rule 2).

As stated in the conclusions of the international Conference on the return of cultural objects to their countries of origin (Athens, 17-18 Match 2008),

> "certain categories of cultural property are irrevocably identified by reference to the cultural context in which they were created (unique and exceptional artworks and monuments, ritual objects, national symbols, ancestral remains, dismembered pieces of outstanding works of art). It is their original context that gives them their authenticity and unique value".

The same concept is affirmed in the recommendation adopted by the extraordinary session of the ICPRCP commemorating its 30th anniversary (Seoul, 25-28 November 2008):

> "Certain categories of cultural property fully reveal their authenticity and unique value only in the cultural context in which they were created".

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[119] "Most antiquities offered for sale on the international market have no provenance, which is to say that they have no accompanying information about findspot or previous ownership history. Most of these unprovenanced antiquities have probably been removed destructively and illegally from archaeological sites and monuments, so that their contexts have been destroyed, too. As a result, historical information is lost, and the reliability of any subsequent historical reconstructions is unavoidably reduced. (…) Local communities may find their sacred monuments or statues defaced or their ancestral relics removed. But for archaeologists, an irreplaceable source of historical information is lost forever" (Brodie, *op. cit. supra* note 78, p. 52).

[120] As stated in para. 88 of the Operational Guidelines for the implementation of the Convention, "integrity is a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes. Examining the conditions of integrity therefore requires assessing the extent to which the property: (a) includes all elements necessary to express its outstanding universal value; (b) is of adequate size to ensure the complete representation of the features and process which convey the property's significance; (c) suffers from the adverse effects of development and/or neglect".

[121] As already remarked (*supra*, para. 3.B), the UNESCO World Heritage Committee applauded the return of the obelisk of Axum, which can enhance the value of a property inscribed on the World Heritage List.

The preservation of the integrity of cultural contexts can also be seen as a mean to ensure cultural diversity. The parties to the Convention on the protection and promotion of the diversity of cultural expressions (Paris, 2005) recognize "the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment" (preamble). They reaffirm "the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions in their territory" (Art. 1, *h*).

As stated in the conclusions of the non-governmental expert Meeting held in commemoration of the 30th anniversary of the ICPRCP (Seoul, 26 November 2008),

> "it is an indissociable attribute of the sovereignty of every people that it should have access to, and enjoyment of, the irreplaceable symbols of its heritage".

6. The Principle of Co-operation in Settling Disputes on the Return of Cultural Properties

Substantive principles, such as those on non exploitation of the weakness of another subject to get a cultural gain, on co-operation against illegal movements of cultural properties and on the preservation of the integrity cultural contexts, provide a general guidance in cases relating to the return of cultural properties. These principles, which play in favour of the State of origin of cultural properties, should be given more deference than other considerations.

However, in dealing with each peculiar case, other considerations may also be relevant in reaching an equitable solution. The position of the State of destination should also be taken into account to have a complete and balanced picture of the issue. It may happen that the acquisition of the cultural objects was formally legal, at the time when they were removed, even if the removal appears now in conflict with the principles prevailing today. It may happen that the State of destination has preserved for centuries, under the best circumstances, objects that could have run the risk of being destroyed or deteriorated if they had been left in the State of origin. It may also happen that, due to the passing of hundreds and even thousands of years, the objects have acquired with the State of destination a link which is closer than that which exists with the State of origin. How should the time factor be assessed in balancing the positions of the State of origin, on the one side, and the position of the State of destination, on the other? Taking for granted that, in principle, the State of origin has a better position[122], how many years should have elapsed since the removal of the objects to reach a point in time when the position of the State of destination could balance or even overcome that of the State of origin? It is impossible to give a precise answer to such complex questions. In each specific case, the answer may vary according to a number of relevant factors, such as the importance of the property for the cultural heritage of the State of origin and the special condition of objects which are considered as "irreplaceable".

What is important, in dealing with each specific case, is that the States concerned abide by a further principle, having a procedural nature, that is the principle of international co-operation in settling disputes on the return of cultural properties. This kind of disputes should be solved by the negotiation of an agreement or by the acceptance of forms of amicable or judicial settlement on the basis of the relevant principles and circumstances, in order to achieve an equitable solution[123]. In co-operating to find a solution, the States concerned are bound to behave in good faith, which will not be the case when either of them insists upon its own position, without contemplating any modification of it[124], or relies exclusively on the provisions of its own legislation, without considering

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[122] For example, if a solution can be facilitated by making copies of the cultural properties in question, the copies should be retained by the State of destination and the originals should be returned to the State of origin.

[123] For a similar wording in present international law, see Arts. 74 and 83 of the United Nations Convention on the law of the sea, relating respectively to the delimitation of the exclusive economic zone and of the continental shelf.

[124] As stated by the International Court of Justice in the judgment of 20 February 1969 on the cases of the *North Sea Continental Shelf*, "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement,

rules and principles of international law. The achievement of a settlement could be facilitated by resort to cooperative solutions that can establish a close relationship between the parties and strengthen the dialogue between different cultures, such as loans, exhibitions, joint excavation campaigns[125]. As recalled in the already mentioned conclusions of the 2008 Seoul non-governmental expert Meeting,

> "returning displaced cultural heritage constitutes a fundamental means to restore and reconstruct a people's heritage as well as its identity and creates dialogue between civilizations in an atmosphere of mutual respect".

The intensification of the efforts by States and non-State actors concerned to solve disputes on the return of cultural properties through a range of collaborative and amicable means[126], such as mediation and conciliation or a more active use of the ICPRCP[127], could be the most effective way to co-operate in addressing disputes on the return of cultural properties.

7. Conclusions

The answer to the questions posed at the beginning of this study[128] seems to be that a core of principles can be inferred from the evolutionary trend in present international practice in the field of cultural heritage and can be useful in addressing some limits of the international treaties in force as regards the return of cultural properties (in particular, their non-retroactive character and the fact that they can create rights and obligations only for the parties). The first two principles are the **principle of non exploitation of the weakness of another subject to get a cultural gain**, which applies to situations of war, colonial domination, foreign occupation or involving indigenous peoples, and the **principle of co-operation against illegal movements of cultural properties**, which has a general scope of application. They are strictly linked to the **principle of the preservation of the integrity of cultural contexts**, which is deeply rooted in the nature of cultural heritage. A fourth principle, having a procedural nature, is the **principle of international co-operation in settling disputes on the return of cultural properties**, that should govern the relationship between the States of origin and the States of destination of cultural properties and may involve, if it is the case, also non-State actors. The achievement of a settlement could be facilitated by resort to amicable means and cooperative solutions that can establish a close relationship between the parties and strengthen the dialogue between different cultures.

In fact, all the above mentioned legal principles are based on the same moral assumption: *diviser c'est détruire*.

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and not merely to go through a formal process of negotiation (...); they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (para. 85).

[125] See *supra*, para. 4.C.

[126] See Resolution No. 4, adopted in 2006 in Toronto by the International Law Association and formulating Principles for cooperation in the mutual protection and transfer of cultural material (I.L.A., *Report of the Seventy-second Session*, London, 2006, p. 32 and 337). The principles are based on "the need for a collaborative approach to requests for transfer of cultural material, in order to establish a more productive relationship between and among parties" and on "the need for a spirit of partnership among private and public actors through international cooperation".

[127] For the time being, there have been no more than eight requests lodged with the ICPRCP (see Prott, *The UNESCO ICPRCP – Origin, Developments, Accomplishments and Challenges*, report presented at the 30th Extraordinary Session of the ICPRCP (Seoul, 2008).

[128] *Supra*, para. 1.