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THE VALUE OF CULTURAL PROPERTY

THE 1995 UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS AS AN EXAMPLE OF A VALUE-BASED APPROACH TO CULTURAL PROPERTY RESTITUTION

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INTRODUCTION

Cultural property restitution is a multi-fold, interdisciplinary process based on values. These differ depending not only on the parties involved but also on the object concerned. To approach the struggle of determining where and with whom a given object should belong, one may begin with a question on how cultural property restitution claims are justified. On the one hand, we can point to legal grounds and rest on the concept of property rights, on the other, noting the exceptional character of cultural goods and the limits of the law, other arguments may need to be considered, mostly those of moral nature. How to achieve a balance between moral and legal norms?

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects emphasises the "fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation" – in this way, its principles encourage a value-based approach to restitution and align with the sustainable development goals specified by the United Nations.

The main assumption of the thesis is that restitution of cultural property is a hard case in law and the only legitimate way to manage it is to apply the value-based approach. However, the characteristics and significance of cultural objects are defined differently in various legal systems and, often depending on the culture from which the terms used originate, they have different connotations. Starting from the linguistic analysis of the connotative layer of the terms used with reference to cultural property restitution law, a uniform, low-level definition scheme needs to be applied in order to establish common grounds for understanding the value of cultural goods. The 1995 UNIDROIT Convention is a solid point of reference in this case.

Nowadays, ratifying this instrument is necessary to create a value-based restitution model respecting the principles of sustainable development at an international level. Moreover, it advances cross-border cooperation in the field of art trade by proposing a clear yet flexible due diligence framework involving all actors of the art market, thus changing the

approach of buyers and sellers with regard to respecting the overall value of cultural property.

METHODOLOGY AND CONCEPT OF THE DISSERTATION

The aim of this work is to indicate the values assigned to cultural property in order to propose a reference framework for their value-based restitution. For it is evident that, following the conclusion of such scholars as Zeidler (2016), cultural property restitution is a typical "hard case" - a term later developed in the work, based on the theory of Ronald Dworkin accounting for those instances "in which the result is not clearly dictated by statute or precedent" (1975), further promoted by Zajadło.

According to Zajadło (2021, p.7), "at times, the term 'hard cases' is applied intuitively, in reference to cases of particular complexity, often disturbing public opinion." The difference between hard and easy cases depends on three aspects: level, time (or duration), and the certainty of the solution adopted (Bix, as in Zajadło, 2021). Cultural property restitution, due to the complex nature of the objects concerned, values assigned to them by various parties involved in a dispute, and the context of the dispute itself, all these aspects are dynamic, and the solution depends on emotional or political factors, therefore, is a hard case.

Culture is a living "organism" in the sense that its impact is overwhelming, it drives the development of humanity, enriches our lives, and, thus, evokes strong emotions. This is one of the reasons why judges and other actors present in restitution disputes should have the ability to access extra-legal arguments to satisfy the need to restore looted, illegally exported, and/or transferred property of highly emotional value whenever legal grounds are insufficient. Each culture develops an individual approach to its property, be it state or private, and the understanding of terminology including its connotative layer, relating to the values assigned to the objects in question, needs to be analysed to provide specific value examples. This view is a result of an empirical research, however, legal texts and their respective linguistic varieties also account for this view.

The analysis is often based on the linguistic choices applied to legal texts translated into other languages, the doctrine from various countries representing different or similar legal systems, and empirical research based on both available materials and new qualitative

research carried out by the author with the contribution of focus groups. The main assumption of the research is to indicate a relatively broad understanding of each term in order to list as many values as possible, therefore each term will be analysed based on both legal and dictionary definitions, whenever possible, tracing back its etymology and implied values. The legal acts selected for this purpose are of international, EU, and national nature. The qualitative research carried out by the author in line with this approach included in-depth interviews. The focus groups involved: cultural heritage lawyers, economists, and managers representing different nationalities and sectors.[1] Qualitative interviews were carried out based on a script and recorded, however, neither the recordings nor the transcript of the them have been published so far. The methodology for conducting this qualitative research was based on techniques explained by, *inter alia*, Steinar Kvale (2011).

The thesis is based on both theoretical and normative descriptions in reference to the notion of cultural property and restitution. For the purpose of illustrating particular examples, the thesis includes empirical descriptions. Those examples are based on case studies aiming to clarify when the theoretical assumptions developed in the first part of the thesis can be set in a more tangible context, in particular, what values assigned to cultural property play a significant role in forming restitution arguments by the parties involved in disputes.

Due to the unique nature of the objects concerned in the research, the type of reasoning fundamental to forming the approach was deductive inference beginning with the general assumption that restitution arguments are rooted in values, with its evaluation in the form of case studies. For the purpose of forming the value-based model, inductive analysis was performed, where the assumption of the usability of a general, universal model was the final stage of the value analysis backed by enumerative induction.

Due to the main subject of the thesis, value judgments, and evaluative arguments were crucial for isolating the specific values and ordering them in a way that would permit their

[1] The study conducted in 2019, included recorded interviews with such experts as Manlio Frigo, Marina Schneider, Katalin Andreides, and Jerzy Hausner.

application in the arguments described in the case studies, hence the implementation of the evaluative statements in the final part of the thesis. These statements were, however, not intended to provide a final conclusion about whether a particular argument should prevail in a dispute (actual or hypothetic), but rather provide an extension of value-led paths being formulated simultaneously by selected parties involved to draw a line between the values assumed as the right ones for a given party and the theoretical model developed in the earlier part of the thesis.

In the first chapter, the thesis presents the definition scope applicable to the field of cultural property restitution, outlining the main terminological similarities and differences in the field of cultural property law in selected legal systems. The aim of this part is to draw attention to the connotative layer of terms depending on their cultural context to demonstrate the significance of linguistics in establishing common grounds for dispute resolution based on the value of goods. In the conclusion formulated in this part, I suggest working on a multi-language cultural property dictionary to support the parties of inter-state claims. The chapter also outlines what values can be assigned to cultural property.

In the second chapter, the thesis discusses the framework proposed in the 1995 UNIDROIT Convention, including its scope of application and effect on state and private collections, export and import restrictions, and the art market.

The third chapter explores the significance of the Convention in building a sustainable restitution model respecting the values assigned to cultural property with regard to their designates specific for a given culture.

Finally, based on a selection of case studies, the thesis seeks to answer the question whether a value-based approach can be formulated at an international level and to provide an opinion on whether the aim of the model to foster international cooperation in the effort to protect cultural property and to increase the number of cultural objects returned to the country of origin can be achieved. Moreover, the study suggests that a similar value

approach could be used in other fields of research and application, including cultural management and marketing.

This thesis, despite of its strong focus on legal theory and practice, is an inter-disciplinary study drawing from such other fields as art theory, archaeology, philosophy, and sociology. The aim of this thesis is not only to formulate grounds for the categorisation of values assigned to cultural property for the purpose of applying restitution arguments but also for the overall study of cultural heritage and property.

Chapter 1
VALUES ASSIGNED TO CULTURAL PROPERTY

Introduction

Legal terminology, despite its precision, is not free from subjective elements. Connotation reflects the cultural background of participants in discourse, be it doctrine, legislation, or day-to-day use. Even professionals representing the same area of expertise disagree when it comes to a specific branch and inherent terms. This certainly is the case with cultural property law.

It touches upon two main branches: cultural (heritage/property) protection (including restitution) and intellectual property law, as well as other fields regulating the circulation of goods, e.g. tax law. The first approach emphasises the object and its significance for the society, while the second is preoccupied with the rights of the creator of the object. These two perspectives are reflected in the connotative layer of terms used in legal instruments and doctrine. Moreover, certain terms require an in-depth analysis of other complementary fields, e.g. art theory or cultural economics, to justify their application.

The terms operating under cultural property restitution law are not uniform. Even at the international level, they originate from various cultural and historical contexts. Cultural objects have always served as determinants of identity, reflecting and evoking strong emotions, therefore establishing a single definition scope applicable to any and all objects is a rather hard, if not impossible, task. Nonetheless, certain international legal instruments, such as the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (34 ILM 1322), hereinafter referred to as the "1995 UNIDROIT Convention," aimed at introducing a more universal and flexible approach. This proposition is a result of a long process that started in the late 19th century.

Along the way, numerous conventions and other instruments have greatly contributed to the development of heritage protection and restitution provisions, however, their linguistic layer still requires adjustments to provide for a wider scope of application. A

step forward in this direction is the UNESCO Database of National Cultural Heritage Laws Glossary, however, the list is incomplete and it often does not go beyond limited definitions provided in dictionaries or single legal documents. This chapter aims to provide a more extensive approach to providing equivalents of certain terms existing in the realm of cultural property law, both at the international and community level as well as in selected countries.

1.1. Object definition scope

The cultural property paradigm is established upon two potentially conflicting components: "culture," encapsulating collective values, and "property" viewed as an individual right (Gerstenblith, as cited in Vadi and Schneider, 2014, p. 567). Moreover, the very term "cultural property" is not applied in every legal context, therefore establishing a definition scope for the purpose of this research is essential in order to identify the value system referring to particular items.

While terms such as "cultural heritage," "cultural property," "cultural objects," "monuments," "works of art" or even "antiquities" are often used interchangeably, they all have their specific meaning that can only be retrieved if seen through the values they represent and the function they perform. One approach is to assign them to categories in a hierarchical structure, another is to establish their location in a network. It may be assumed that all terms listed above share the same basic principle: they all refer to culture. Other than that, their significance is measured on various grounds and to present a hierarchy or a network, the next level of values needs to be established. For the purpose of this study, the terms "cultural objects" as well as "cultural goods" and "items" will be used interchangeably when referring to movable cultural property, however, it is well noted that they often have a different connotation, depending on the context, as it is later explained in the study.

According to Zeidler (2016, p. 58), cultural heritage is the most universally utilised term concerning the field of movable and immovable cultural objects and notions, it is the broadest category present in the literature. However, the term "heritage" implies that the

object named as such represents collective values while cultural “property” may but does not need to possess that quality. In a broad sense, cultural property does not need to form part of cultural heritage. Objects labelled as “cultural property” do not need to possess as many features as “heritage” – the same applies to the distinction between “monuments” and “works of art” in certain cases - not all works of art need to possess historical value, nor do monuments need to be of artistic importance.

The relationship between the concepts of cultural “heritage” and “property” is complex. In international instruments and legal literature, the term “cultural heritage” applies to a broad group of elements, including intangible heritage, while property is rather limited to the tangible dimension. However, this is not always the case. Frigo (2004) stresses that in civil law countries applying the term of cultural property, corresponding terms e.g. *beni culturali* in Italy, certainly include both movables and immovables as well intangible or “non-material” elements (p. 369).

According to Gaweł (2016, pp. 20-23), cultural objects in general include any and all property possessing cultural features while only some of them are significant enough to be thought of as “heritage” - according to this view, “heritage” is a subgroup of “cultural goods” and it emerges when its emotional value is asserted in a community, therefore it may be claimed that the term “property” as compared to “tangible heritage” is much wider and free from most value-making factors necessary in the latter case. These two opposing views may both be correct, the approach depends on the context.

1.1.1. Cultural heritage

The very term “heritage” originates from the Latin *heres* i.e. “heir.” Its current meaning is “condition or state transmitted from ancestors" (Online Etymology Dictionary). This definition indicates the key value behind items belonging to this category: the collective social significance of objects and notions transmitted from generation to generation, also with the aim to shape identity.

The term “cultural patrimony*”* is synonymous with “cultural heritage” in the sense that they both refer to material and immaterial notions passed from generation to generation.

The origin of "patrimony" is traced back to the Latin *patrimonium* "a paternal estate, inheritance from a father," from *pater* "father" - it literally indicated estate inherited from a male ancestor, later, in mid-14c., *patrimoine*, meant "property of the Church," also "spiritual legacy of Christ," from Old French *patremoine* "heritage, patrimony" (12th century) (Online Etymology Dictionary). The main difference between the two, i.e. that heritage is more general than patrimony (it does not need to be inherited from male ancestors nor does it need to belong to the Church), is no longer applicable, therefore the terms may be used interchangeably, however, international and most common law acts use the term "heritage."

Under the broader category of cultural heritage protection law, the following sub-categories may be specified: intangible cultural heritage, tangible cultural heritage (later divided into movable, immovable, and underwater cultural heritage), mixed cultural and natural heritage as well as cultural landscape.

It may be claimed that intangible cultural heritage is a broader category than tangible heritage as it includes both artefacts and practices, however, it is the latter that is the primary subject regulated under the applicable legal provisions. Pursuant to Art.2 (1) of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, referred to as the "2003 UNESCO Convention" (2368 UNTS 1), the intangible cultural heritage as defined in Art. 2(1), stands for "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."

The intangible heritage is also named as "living" heritage as it is "transmitted from generation to generation" and "constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity" (Art. 2). While the "living" heritage requires the element of "practice" that deserves protection, "tangible" heritage is narrowed down to stand-alone objects and/or groups of objects.

The tangible representations of heritage form a hierarchical structure and the first distinction is made at the level of cultural and natural phenomena. Pursuant to Article 1 of the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1037 UNTS 151), hereinafter: the "1972 UNESCO Convention," cultural heritage indicates "monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view." Under Art. 2 of that same convention, natural heritage includes "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation, or natural beauty."

The valuation elements present in both categories are fundamental to subsequent analysis: both categories are subject to the aesthetic judgement and are assessed on the basis of "outstanding universal value" (OUV). This correlation marks the difference between "artistic" and "aesthetic" valuation and the vagueness of the OUV examined in next chapters. The aim of this study is to investigate the relationship between the terms used in the context of cultural property law and to verify the applicability of evaluation measures.

"Mixed" cultural and natural heritage is identified if its elements satisfy, in whole or in part, the definitions of both cultural and natural heritage laid out in Articles 1 and 2 of the

Convention (World Heritage Centre, 2019, p. 20). The "cultural landscape" is an inter-category encompassing human activity and natural environment. It is also defined as "mixed" cultural and natural heritage. Cultural landscapes constitute a proof of sustainable use of land, i.e. reflecting such considerations as the barriers of the natural environment and the spiritual function of nature (UNESCO-ICOMOS Documentation Centre, 2011).

Cultural landscapes are divided into two main categories: designed and created intentionally by humans (e.g. gardens and parks created for aesthetic purposes, also associated with religious and/or other monumental buildings and groups of buildings) and the "organically evolved landscape" the creation of which was originally triggered by certain human activity (e.g. economic, administrative, and/or religious) and later shaped by the surrounding natural environment, sub-divided into: "relict" or "fossil" landscapes (in which an evolutionary process came to an end at some time in the past, either abruptly or over a period), "continuing landscapes" (retaining an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress, at the same time exhibiting significant material evidence of its evolution over time) and the "associative cultural landscape" recognised and inscribed on the the World Heritage List due to its powerful religious, artistic or cultural link to the natural element, not necessarily tangible cultural evidence (UNESCO-ICOMOS Documentation Centre, 2011). The term of "cultural landscape" was adopted by the World Heritage Committee in 1992 in order to provide conditions for the creation of a balanced and representative World Heritage List (Mitchell et al., 2009). This category is also subject to evaluation based on the OUV. In addition, the ICOMOS evaluations for World Heritage List proposals include such requirements as: integrity and authenticity, assessment of the adequacy of legislative protection, management, and the state of conservation (World Heritage Centre, 2019, p. 110).

Another distinctive category is underwater cultural heritage. Pursuant to Art. 1(1) of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNTS 2562), hereinafter referred to as the "2001 UNESCO Convention," underwater cultural heritage indicates "all traces of human existence having a cultural, historical or

archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and objects of prehistoric character." The main evaluative criterion in the case of cultural objects located underwater is their age. This exclusive definition allows only for partial protection, e.g. in the case of military vessels and aircraft, it protects only WWI underwater cultural heritage (sunken more than 100 years ago), while leaving aside all WWII underwater cultural objects, submerged less than 100 years ago (Argyropoulos and Stratigea, 2019, p. 1590). Another emphasis is placed on the character of objects, as opposed to other cultural heritage items specified in the aforementioned conventions, their value is irrespective of artistic or aesthetic qualities, moreover, the level of their social significance is not the most important determinant.

Certain legal instruments created by the Council of Europe specify other more detailed categories of heritage, e.g. the 1992 European Convention on the Protection of the Archaeological Heritage (Revised) and the 1985 Convention for the Protection of the Architectural Heritage of Europe. The equivalents of the English term "cultural heritage" in other languages depending on the scope of application and legal culture.

In France, in spite of the existence of the term *héritage culturel,* the term *patrimoine* is used more often, e.g. *Code du patrimoine* (legislative part promulgated by the ordonnance no. 2004-178 of 20 February 2004). The Italian literal equivalent of "heritage" - i.e. *patrimonio culturale* is a broad category encompassing both cultural property (*beni culturali*) and "landscape assets" (*beni paesaggistici),* it is more frequently used than *retaggio culturale,* e.g. the *Codice dei beni culturali e del paesaggio* (Legislative Decree no. 42 of 22 January 2004 Code of the Cultural and Landscape Heritage) refers to *patrimonio culturale.* In Poland, the term *dziedzictwo* (literal for "heritage") is used as a broad category, mostly for establishing cultural policies, it is not the direct subject of regulation - the terms "monument" *zabytek, e.g.* in the Law of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2022, item 840), or cultural goods/property, e.g. *dobra kultury*, e.g. in the Law of 25 May 2017

on restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591) are used in the context of precise provisions, an exception is the "heritage treasures list" (*Lista Skarbów Dziedzictwa*) literally referring to heritage items.

Linguistic discrepancies at the level of EU law result from national linguistic and legal traditions. As Frigo points out (2004, p. 370), the Treaty establishing the European Community (2002/C 325/01), not only uses two different concepts in general: "national heritage" and "national treasures" (a concept discussed later in the study) but also different linguistic version of that same text (e.g. Italian, Spanish, and Portuguese) provide for a broader discretionary power of national authorities in deciding on the categories of goods to be included, specifically in the case of movement limitations, at the national level than in other versions, where the power seems much more restricted. For instance, the German equivalent used in Art. 30 refers to *Kulturgut*, i.e. cultural good (or property) rather than "heritage" or "treasure."

The discrepancies in legal terminology in the field of cultural heritage was apparent in certain U.S. cases, e.g. United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) as the objects concerned had not been clearly defined under the Antiquities Act of 1906 and did not allow for a conviction of an individual who was not able to know with "reasonable certainity" which objects are protected (Phelan 1998, p. 40).

To conclude, the term "cultural heritage" is interchangeable with other concepts, however, it is the most commonly used inclusive category encapsulating other items relating to objects and practices of cultural nature. Importantly, not all cultural items need to possess the universal values attributed to heritage, therefore it may also be claimed that cultural property (also named "objects" or "goods") include more elements than heritage. Even the most literal linguistic equivalents do not guarantee that same scope of application, therefore, the concept used should reflect the values that are to be protected (e.g. artistic or scientific) as single terms not always encompass the objective.

The terminology concerning cultural heritage may be hierarchised based on e.g. the 1970 UNESCO Convention and the 1972 UNESCO Convention, the below summary serves as

an example of a map depicting the relationship between selected terms, with a view to specifying the category chain leading to elements of cultural property, e.g. “property of artistic interest”:

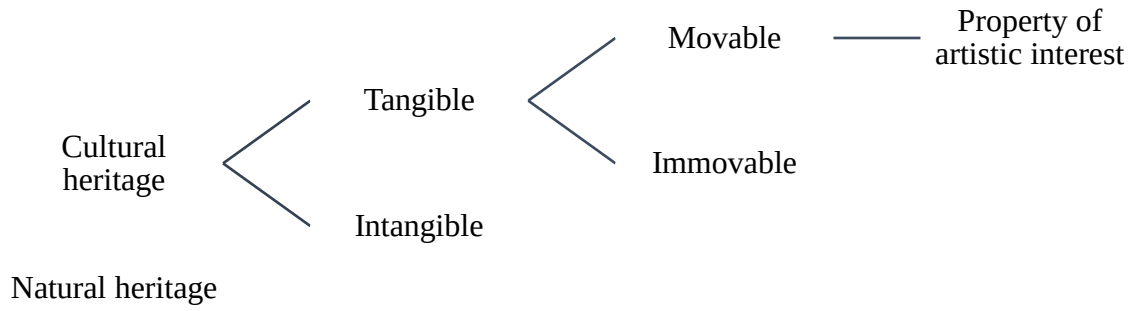

Figure 1. Art as movable cultural property under UNESCO Conventions

Source: Own elaboration.

1.1.2. Cultural property, objects, and goods

Under international law, tangible cultural heritage is formed of several types of objects: immovables, movables, and underwater, while cultural landscape consists of both cultural and natural heritage simultaneously. Tangible cultural heritage may also be defined as “cultural property.” As later referred to in this research, the terms “property,” “objects,” and “goods” will be used interchangeably.

The term “property” derives from the Ancient Greek προπάτωρ (*propátōr*, “forefather” loan-translated into Latin as *proprietatem* meaning "ownership, a property, propriety, quality." The literal meaning is "special character" and the adjective *proprius* stands for "one's own, special" subsequently used in Old French as *propriete* "individuality, peculiarity; property." The Middle English term *proper goods* was also used to indicate "possessions, private property." The term “property” was more often associated with the current meaning of “possession, thing owned” only after the 17th century.

Under international law, the term "cultural property" is both part of a hierarchy and a network, depending on the scope of protection. Under the UNESCO framework, cultural property falls under the category of "tangible" cultural heritage, however, the relationship between these terms is not one dimensional. Cultural property may share some of the "heritage" values but does not need to. According to Prott and O'Keefe (1992, p. 307) "property does not incorporate concepts of duty to preserve and protect," therefore property law should rather focus on the object itself, rather than try to assess its significance (unlike cultural heritage law). Tangible property is divided into immovable and movable objects. Immovables are subject to property rights changing under *inter alia* political circumstances, movables are often illicitly exported and trafficked.

Under intellectual property law, it is primarily viewed as a result of the creative process regardless of its form and social or historical significance – in this way, it is part of a terminological network between these two (and other, e.g. tax law) areas of law. From a literal point of view, the definition applied depends on the perspective of whose interest should be protected: assuming that the term "cultural" refers to a collective (social) aspect of the object in question, it is the interest of humanity that drives the protection of its "heritage," and the "intellectual" nature of the "property" in question places the author's individual rights first.

The introduction of instruments related to cultural property restitution was motivated by the fact that cultural property is a unique category due to its emotional load and strategic role, and – most importantly - values. International cultural property restitution law is based on the following instruments: the Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 1899 (187 CTS 429), Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 1907 (205 CTS 277), and the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols (249 UNTS 240), hereinafter the "1954 Hague Convention," the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of

cultural property (823 UNTS 231), hereinafter the "1970 UNESCO Convention," and the UNIDROIT Convention of 1995. However, the definition scope in all these instruments is not uniform, moreover, the level of protection depends on the valuation of objects.

The two first Hague Conventions did not define the subject of protection in a greater detail. The legal definition of "cultural property" was first formulated under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, hereinafter referred to as the "1954 Hague Convention," which is a core instrument with regard to cultural property at risk caused by an armed conflict at an international level.

The 1954 Convention specifies the term of "cultural property" regardless of its origin and ownership status as "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as 'centres containing monuments'" (Art. 1).

This convention refers to the universal social value of cultural property, along with its adjacent architectural, artistic, historical, archaeological, or scientific properties. The convention utilises the following related terms: monuments and works of art. Under this instrument, these terms form a hierarchy: cultural property includes such elements as monuments and works of art, individual objects and collections. The terminological scheme proposed under this instrument is a waterfall: cultural property > movable and immovable > monuments, archaeological sites, groups of buildings, works of art, manuscripts, books and other objects. On the one hand, the categories of property

identified under the 1954 Hague Convention are broad, however, the criterion of "great importance to the cultural heritage of every people" excludes objects that are not recognised as possessing such value from a universal point of view. It is important to stress at the very beginning that such terms as "universal" in reference to cultural values cannot be treated literally as they not only differ from culture to culture but also change over time (cf. Jokilehto 2006).

Pursuant to the 1970 UNESCO Convention, cultural property refers to items "specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" (Art. 1 of the Convention), therefore the role of the state is primary in setting the application scope. The 1970 UNESCO Convention indicates a list of objects classified as such and may serve as an (incomplete) toolbox for identification – it lists the following categories of cultural property: "rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; elements of artistic or historical monuments or archaeological sites which have been dismembered; antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; property of artistic interest, such as: pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); original works of statuary art and sculpture in any material; original engravings, prints and lithographs; original artistic assemblages and montages in any material; rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments."

According to Zeidler (2016, p. 79), object categories presented in the 1954 and 1970 conventions are "aggregate" and their catalogue is "closed" if analysed from a linguistic

point of view, however, it refers to a wide range of objects, therefore these definitions include a vast number of referents.

The distinction provided under the 1970 UNESCO Convention requires states to designate objects possessing necessary values and limits certain categories with additional conditions such as age or method of production. On the one hand, such restrictions may prove workable and grant "special" objects maximum protection, on the other, they exclude many valuable objects that are not part of public collections or that have never been inventoried. This is where the 1995 UNIDROIT Convention comes in. The 1995 UNIDROIT Convention is a model document for value-based restitution, therefore its principles are discussed in Chapter 2 in a greater detail.

Even more ambiguities arise in the field of community and national legislation, due to long traditions and cultural specificities. Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (hereinafter referred to as the "Council Regulation 116/2009") uses the term "cultural goods," "national treasures" (within the meaning of Article 30 of the Treaty on the Functioning of the European Union (OJ L C 326/49), hereinafter referred to as the "TFEU"), "archaeological objects," "monuments," "antique items" and other specific categories presented in Annex 1.

In Annex 1 to that regulation, the following groups of objects identified as of cultural interest are listed: archaeological objects more than 100 years old which are the products of: excavations and finds on land or under water, archaeological sites, archaeological collections; elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years; pictures and paintings, other than those included in categories 4 or 5, executed entirely by hand in any medium and on any material: watercolours, gouaches and pastels executed entirely by hand on any material; mosaics in any material executed entirely by hand, other than those falling in categories 1 or 2, and drawings in any medium executed entirely by hand on any material; original engravings, prints, serigraphs and lithographs with their respective plates and original posters; original sculptures or statuary and copies produced by the same process as the original, other than those in category 1; photographs, films and

negatives thereof; incunabula and manuscripts, including maps and musical scores, singly or in collections; books more than 100 years old, singly or in collections; printed maps more than 200 years old; archives, and any elements thereof, of any kind or any medium which are more than 50 years old; collections and specimens from zoological, botanical, mineralogical or anatomical collections; collections of historical, palaeontological, ethnographic or numismatic interest; means of transport more than 75 years old; any other antique items not included in categories A.1 to A.14 between 50 and 100 years old: e.g. glassware, articles of goldsmiths' or silversmiths' wares, furniture; musical instruments articles of wood; more than 100 years old (selected items specified in the previous category).

The Regulation specifies the following criteria for export rules: age, financial value, and particular e.g. artistic qualities, it also refers to such basic principles as originality and method of production. The applicability of financial thresholds for certain categories of objects may cause practical issues such as lowering the market value of objects to export without obtaining a license. The applicability of all criteria also involves specialists from different fields and the value assessment is not based on uniform standards, therefore the subjectivity of opinion may also cause discrepancies and result in illegal actions. Illicit export is not always intentional - it may be caused by misinformation, therefore it is crucial to work towards a standard procedure of value assessment available to the general public. Such instructions could be made available both at international and national levels by such organisations as UNESCO or UNIDROIT and local authorities, e.g. ministries of culture, respectively (cf. unpublished study by the author, 2019).

Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 159, 2014), hereinafter referred to as the "2014 Directive" was implemented at the national level using different equivalents. Under Art. 2(1) "cultural objects" mean items "classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures

within the meaning of Article 36 TFEU." As stated by Frigo (2016), the main term of "national treasures" is further discussed in the next sub-chapter.

Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (OJ L 151, 7.6.2019, pp. 1–14) aims at ensuring the "effective protection against illicit trade in cultural goods and against their loss or destruction, the preservation of humanity's cultural heritage and the prevention of terrorist financing and money laundering through the sale of pillaged cultural goods to buyers in the Union" and specifies the goods under Art. 2. Pursuant to this regulation, "cultural goods" stand for "any items of importance for archaeology, prehistory, history, literature, art or science" listed in the Annex. It specifies the same categories present in the 1970 UNESCO Convention including a further explanation "elements of artistic or historical monuments or archaeological sites which have been dismembered" as including "liturgical icons and statues, even free-standing." The document does not provide additional conditions to be met in order to grant protection.

The Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (C-16, AG/RES. 210 (VI-O/76)), hereinafter referred to as the "Convention of San Salvador" responding to "the continuous looting and plundering of the native cultural heritage suffered by the countries of the hemisphere, particularly the Latin American countries" identifies the following items are included as "cultural property" - monuments, objects, fragments of ruined buildings, and archeological materials belonging to American cultures existing prior to contact with European culture, as well as remains of human beings, fauna, and flora related to such cultures; monuments, buildings, objects of an artistic, utilitarian, and ethno-logical nature, whole or in fragments, from the colonial era and the Nineteenth Century; libraries and archives; incunabula and manuscripts; books end other publications, iconographies, maps and documents published before 1850; all objects originating after 1850 that the States Parties have recorded as cultural property, provided that they have given notice of such registration to the other parties to the treaty; all cultural property that any of the States Parties specifically declares to be included within the scope of this convention. The Convention of San Salvador applied almost all term categories related to the field of

cultural heritage and property, i.e. “heritage,” “property,” “monuments” and other objects, thus proposing a scheme related to historical and identity-building items, for it results from the main goal of the act, i.e. to protect “national” heritage corresponding to universal social values present at the national level.

It is clearly visible that linguistic discrepancies arise even within one document. In most cases, a hierarchical structure dominates and the category of “heritage” encompasses other elements, including “cultural property,” “monuments,” and “artistic” objects. The key value-category in such instances, therefore, relates primarily to the collective social aspect rooted in historical contexts.

1.1.3. National treasures

The identification of “national treasures” involves the interpretation of national cultural policies and the EU internal market (Ferrazzi, 2019, p. 59). The EU, in accordance with its supporting competence in the realm of culture, may only back up Member States’ actions. Pursuant to Art. 6. TFEU “the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States,” therefore the determination of the object as a national treasure is the domain of Member States.

Moreover, pursuant to Article 167 TFEU, the EU should promote the national and regional diversity of states, thus the notable goods guaranteeing such conditions should be excluded from the market and granted special protection under the “national treasure” category. In spite of the fact that it is up to member states to define objects derogated from the free movement within the EU, a “framework” definition could prove useful. In spite of the authority of the European Commission to purpose such a reference, it has not yet suggested an interpretation of “national treasures” (Ferrazzi, 2019, p. 63). Within the scope of application of the 2014 Directive, again, several terms are utilised simultaneously, therefore the definition scope is rather vague.

This statement results not only from the fact that one linguistic version relies on different concepts (such as “objects” in general and “treasures” in particular) but also from discrepancies between the translated versions of the 2014 Directive and Art. 36 TFEU as

the directive intends to guarantee the application of the TFEU provision to return illegally removed cultural objects: "the provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States" (Art. 36 TFEU).

The term "national treasure" is present, but not always defined, in certain national instruments. *Le trésor national* in the French code of patrimony (*Code du patrimoine*), is primarily an object that is not granted an export certificate due to its cultural significance (Chapter 1, Articles L121-1-L121-4). The term is defined as: Property belonging to the collections of French museums; Public archives resulting from the selection provided for in Articles L. 212-2 and L. 212-3, as well as property classified as historical archives pursuant to Book II; Property classified as historical monuments pursuant to Book VI; Other property forming part of the movable public domain, within the meaning of article L. 2112-1 of the general code of the property of public persons, with the exception of those of the public archives mentioned in 2° of the same article L 2112-1 which are not from the selection provided for in Articles L. 212-2 and L. 212-3 of this code; Other assets of major interest for the national heritage from the point of view of history, art, archaeology or knowledge of the French language and regional languages.

As Frigo (2016) points out, various language versions of the TFEU need to be analysed to showcase the significant discrepancies between the definitions of the objects to be covered by the scope of Article 36: "a comparison between the various (equally authentic) language versions of the TFEU (as well as of the former EEC Rome Treaty, i.e. Treaty establishing the European Economic Community**,** 25 March 1957, 294 UNTS. 3) shows some significant differences among them as to the scope of Article 36. At first glance, the margin of discretion of Member States appears wider under the Italian, Spanish and Portuguese versions, in that Articles 34 and 35 do not preclude prohibitions or restrictions

on imports or exports of goods on the grounds of protecting a Member State's artistic, historic or archaeological heritage. Conversely, the French and English versions refer to the more restrictive notion of national treasures of artistic, historic or archaeological value. In this respect, one should not forget that Article 36 contains a limited number of derogations to the general rules under Articles 34 and 35 TFEU and that, by virtue of its nature as a derogation from the ordinarily applicable rules, it cannot be interpreted broadly" (Frigo, 2016, p. 75). Moreover, the German text refers to "cultural assets of artistic or archaeological value" ("*Kulturguts von künstlerichem oder archäologischem Wert*"). When it comes to the interpretation of the term on the EU level, as Ferrazzi points out, "the definition of the term 'national treasures' is de facto open to determination by each Member State" (2019, p. 57).

Certain cases of the European Court of Justice, hereinafter referred to as the "ECJ," involving cultural property illustrate how the term "national treasures" was clearly differentiated from other cultural "goods." The Commission v. Italy case on the "application for a declaration that the Italian republic has failed to fulfil the obligations imposed on it by article 16 of the Treaty Establishing the European Economic Community by continuing to levy, after 1 January 1962, the progressive tax provided for by law no 1089 of 1 January 1939 on exports to other member states of the community of objects of artistic, historic, archaeological or ethnographic interest" (Case 7/68 [1968] E.C.R. 423) was brought up by Chechi (2004) to show how the perspective of the ECJ has evolved in terms of the values assigned to these terms.

As Chechi points out, in the Commission v. Italy case, at first, the ECJ "stressed that, with the exception of 'national treasures', i.e. artefacts having a significant correlation with the nation, every moveable work of art falls within the definition of 'goods', that it defined as 'products having a monetary value which, as such, may be the object of commercial transaction'" (2004, p. 287). Only after the ECJ managed to turn down this approach and began to accept the significance of cultural value as equal to national value.

1.1.4. Monuments

The inclusion of the term "monument" in the 1954 Hague Convention raises a question on the applicability of this classification to cases of cultural property not bearing the features of monuments. According to Pruszyński (2001, p. 66), "cultural goods" are not interchangeable with the term "monuments" – international law acts refer to any and all objects relevant to the field of culture, regardless of their protection in national law – the term "monument" may refer to the time of creation, while the term "cultural good" is an abstract valuation term with no referent.

The distinction between art and a monument at a national level causes even more issues as both terms may be used interchangeably while not every work of art is a monument and vice versa. Other legal instruments at an international level, such as the 1970 UNESCO and 1995 UNIDROIT Conventions, utilise the terms "cultural property", "monument," and "property of artistic interest" – therefore, it is crucial to investigate the definition scope and the distinction between these terms present in these acts in a greater detail to, subsequently, draw parallels and detect gaps between the definition scope present in international, EU, and national law.

Under Polish law, the equivalent term for "monuments" is *zabytki*. The Polish Act of 23 July 2003 on the protection and guardianship of monuments (UNESCO translation), also translated as the Act of 23 July 2003 on the protection and guardianship of monuments (UNESCO translation), the following categories are specified: monuments (immovable or movable), later divided into, e.g.: archaeological monuments, elements constituting integral parts of architectural monuments, paintings, sculptures, manuscripts, collections of objects. They are valued on the basis of their significance for the society due to their historical, artistic, or scientific features. For the purpose of issuing an export permit, these are additionally subject to assessment based on the following criteria: age, authenticity, originality, artistic or other (e.g. purely historical) value, and financial value.

The very title of the act has been translated in many different ways. The original terms *ochrona* and *opieka* (literally: "protection" and "care," respectively) are not always consistently applied. UNESCO translates the term *opieka* as "guardianship" while the

European Commission uses “care” as the equivalent. The act on the restitution of national cultural property implementing the 2014 Directive applies the term “national cultural goods” (*narodowe dobra kultury*), instead of “objects” (*obiekty, przedmioty*). Subsequently, the “goods” are defined as “monuments” (*zabytki*) under the Act of 2003, archival materials, “non-monumental” objects as long as they are inventoried by museums being cultural institutions under the act on organising and running cultural activity (The Act of 25 October 1991 on organising and conducting cultural activity, consolidated text: *Journal of Laws* of 2020, item 194), non-monumental library materials as long as they are included in the national library stock (the Act of 27 June 1997 on libraries, consolidated text: Journal of Laws of 2022, item 2393), foreign national cultural good (or property) categorised or defined by an EU Member State other than the Republic of Poland, based on the legal regime of that state or applicable administrative procedures, as a national cultural good possessing artistic, historical, or archaeological value within the meaning of Art. 36 TFEU.

Importantly, from the perspective of Polish national law, and the 2003 Act on the protection and guardianship of monuments, the legislator emphasised the historical, scientific and artistic value. Values characterizing a monument may occur jointly or individually, but for recognition as a monument, it is enough that an item represents at least one of these values to a sufficient extent, if it is in the public interest. However, as pointed out by Węgrzak (2020, p. 60), time and history re-evaluate and change the established axiological orders, and the authority applying the law should reassess each time, because monuments do not have a unique and absolute value, and their perception changes over time, just as their value in use changes. The protection of historic monuments is therefore based on valuation referring to the subjective assessments of the person making this valuation.

The adjective “monumental,” indicating “very big or very great,” is misleading in this case. The Latin *monumentum* meant "a monument, memorial structure, statue; votive offering; tomb; memorial record," the Old French *monument* indicated "grave, tomb, monument," and since c. 1600, the meaning has been strongly connected to the "structure or edifice to commemorate a notable person, action, period, or event" (Online Etymology Dictionary). Therefore, the adjectival derivative is not related to the size only, in this

context, it is primarily linked to the commemorative function of the object, at the same time, the definition requires the object to be of certain age in order to represent a bygone era, therefore it may be claimed that age and historical significance is a primary reference for classifying an object as "monument." Although the term "monument" is often defined as "a structure or building that is built to honour a special person or event" (Cambridge Dictionary), under its Polish literal translation, it can refer to both movable and immovable objects.

1.1.5. Artworks and other objects

Referring to other branches of law, such as intellectual property law, is necessary to assess the value (especially, creative or "artistic") of objects referred to in cultural heritage protection law. In this case, however, the focus is directed more at the creator of the object than the recipient (as in the case of heritage). Under international intellectual property law, cultural property is not necessarily treated as part of cultural heritage but a result of a creative process that does not need to be acclaimed by the society or governments.

The Berne Convention for the Protection of Literary and Artistic Works, concluded on September 9, 1886 (S. Treaty Doc. No. 99-27, 1986), hereinafter referred to as the "Berne Convention," is the first major international treaty on copyright and provides authors with a comprehensive toolbox for exercising their rights as well as ensures that, in every country it applies to, works of a foreign origin enjoy equal treatment as local creations. The Berne Convention deals with the right to protection with no need of a formal registration and its primary aim is to grant artists the right to receive remuneration for their works at an international level, including the resale right (*droit de suite*).

The Berne Convention, as revised in Paris on July 24, 1971, as amended on September 28, 1979, specifies "literary and artistic works" as "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression" and lists particular examples including: books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed

by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

The Convention specifies that it is a matter of each member of the "Union" (the parties to the convention), "to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form" – as in the case of other international instruments, international law redirects to national legislation for exclusion or inclusion of certain elements to leave space for culturally-specific items or notions.

According to a qualitative study conducted by the author (2019, unpublished), even professionals in the field of art tend to link specific terms to their own connotative categories. For instance, cultural heritage lawyers identify the term "artworks" as contemporary art rather than other cultural objects possessing artistic qualities and often focus on antiquities in their research and expertise leaving the field of art, understood as contemporary, to art dealers and economists. The study aimed at identifying patterns in cultural property financial appraisal and, according to its results, most cultural heritage lawyers can easily list value-making factors for antiquities (e.g. well-documented provenance) as opposed to the value components for artworks. However, cultural economists tend to leave antiquities aside and focus on the contemporary art market and its investment potential, mostly due to its speculative character.

Other terms utilised interchangeably with artworks or cultural objects, e.g. antiquities, not always encompass the same ideas. The main indicator in the case of antiquities is their age. The artistic value is not largely applicable as many antiquities are products of traditional craftsmanship that do not need to be judged on the basis of such criteria as their innovative value or author's individual expression (unlike artworks).

The Latin term *antiquitatem* (nominative *antiquitas*) “ancient times, antiquity, venerableness,” is reflected in the current used of this concept. The reference to ancient Greece and Rome from mid-15c., at that time, also the "quality of being old" was already used. *Antiquities* as “relics of ancient days” have been used since the 1510s. Following this idea, under Art. 1 (e) of the 1970 UNESCO Convention, “antiquities” are objects defined on the basis of their age, i.e. “more than one hundred years old, such as inscriptions, coins and engraved seals.” However, certain national regimes provide a wider scope of application under this seemingly limited term. Interestingly, under the US Antiquity Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431-4330, antiquities refer to a large group of objects, i.e. “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” that can be defined as “national monuments.”

To summarise, linguistic discrepancies in the field of cultural property are inevitable. The main point of reference for the specification of the object in question is its value and role. For the purpose of this assessment, the values present in legal acts may be linked to other fields in order to provide a wider view at the factors constituting value, e.g. art theory or economics. The next sub-chapter aims at establishing a value summary based both on legal instruments mentioned before and additional literature from other complementary fields.

Both cultural heritage and intellectual property law refers to the scope of cultural property and its value covered by this research. The below tables list selected terms used in international and EU law sources in order to illustrate the similarities and differences in this scope:

Table 1. Cultural property terminology in selected international law sources

Source	Term	Examples (movable property)
1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict	Cultural Property	• works of art • manuscripts, books and other objects of artistic, historical or archaeological interest • as well as scientific collections and important collections of books or archives or of reproductions of the property defined above
1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property	Cultural Property	• rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest • property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance • products of archaeological excavations (including regular and clandestine) or of archaeological discoveries • elements of artistic or historical monuments or archaeological sites which have been dismembered • antiquities more than one hundred years old, such as inscriptions, coins and engraved seals • objects of ethnological interest • property of artistic interest, such as – pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand) – original works of statuary art and sculpture in any material – original engravings, prints and lithographs – original artistic assemblages and montages in any material • rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections • postage, revenue and similar stamps, singly or in collections • archives, including sound, photographic and cinematographic archives • articles of furniture more than one hundred years old and old musical instruments
1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects	Cultural Objects	

Source: Own elaboration.

The below table presents national treasures and cultural object and goods with respective EU law sources and examples:

Table 2. EU law terminology

Source	**Term**	**Examples**
2009 Regulation on the export of cultural goods	• Cultural Goods • Cultural Objects	• archaeological objects more than 100 years old which are the products of: – excavations and finds on land or under water – archaeological sites – archaeological collections • elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years • pictures, paintings, and drawings executed entirely by hand in any medium and on any material • mosaics in any material executed entirely by hand • original engravings, prints, serigraphs and lithographs with their respective plates and original posters • original sculptures or statuary and copies produced by the same process as the original • photographs, films and negatives thereof • incunabula and manuscripts, including maps and musical scores, singly or in collections • books more than 100 years old, singly or in collections • printed maps more than 200 years old • archives, and any elements thereof, of any kind or any medium which are more than 50 years old
2014 Directive on the return of cultural objects unlawfully removed from the territory of a Member State	• Cultural Objects • National Treasures	• objects of historical, paleontological, ethnographic, numismatic interest or scientific value, whether or not they form part of public or other collections or are single items, and whether they originate from regular or clandestine excavations, provided that they are classified or defined as national treasures

Source: Own elaboration.

1.2. Value summary

At first, values were examined through ethics, aesthetics or religion, therefore the very nature of values as such was not analysed separately (Hart, 1971, p. 30). In a moral and social sense, the term "value" may be understood as a "principle indicating that which is preferable, that which most deserves the approval of all" (Perrotta, 2004, p.16) and "valuation denotes (…) any social practice where the value or values of something are established, assessed, negotiated, provoked, maintained, constructed and/or contested" (Helgesson et al., 2014, p. 87). Mooya distinguishes three kinds of value: spiritual, moral, and economic, indicating that they all "link subjects and objects via an assessment of goodness or worth" (2016, p. 23).

For instance, in aesthetics, the idea of what is valuable has evolved from "that which is preferable" i.e. "the beautiful" into that which evokes feelings, be it positive or negative. The concept of the "aesthetic experience" stretches far beyond the judgement of beauty (i.e. positive value) or the philosophy of art, as it applies to any and all objects that evoke emotions, regardless of their artistic value and their nature. As Pękala summarised, "aesthetics has had and ought to continue to have the task of elucidating basic concepts and of providing insight into the fundamental and vital connections and dependencies between certain experiences, objects, and their values" (as cited in Zeidler, 2020, p.28). On the one hand, aesthetics can be defined as the philosophy of experience and the feelings evoked by the experience of an object, on the other, it is also related to the inner value of the object itself, e.g. the style in which an object (e.g. a work of art) is created. An example of the latter may also be synonymous with the artistic value, e.g. in regards to the "aesthetic" of artistic movements, e.g. "the aesthetic of De Stijl, developed in 1917, at the peak of the European cataclysm of World War I, reflected a longing for peace" (Walther, 2010, p. 168). The term "aesthetic" was introduced into the "philosophical lexicon" in the 18th century and indicated *inter alia* "a kind of object, a kind of judgment, a kind of attitude, a kind of experience, and a kind of value" (Stanford Encyclopedia of Philosophy). The differentiation between aesthetic and artistic value is developed later in this chapter.

The very term “value” possesses as many definitions as there are categories of value. Following Helgesson (2014, p. 87) “Valuation denotes […] any social practice where the value or values of something are established, assessed, negotiated, provoked, maintained, constructed and/or contested.” However, the study of value resonates far beyond sociology. From a philosophical view, although the term “axiology” as field is relatively new, the question of what value is has attracted attention for centuries. The judgement of right and wrong or beautiful and ugly is not dispensable, we not only value but also see the “scale of values” reflecting the degree of satisfaction (Hart, 1971, p. 29).

The classification and assessment of values and their objectivity has been discussed by philosophers ever since ancient times. In *Truth*, Protagoras claimed that “Man is the measure of all things,” thus assuming that judgements are utile for our purposes, therefore, subjective (Gillespie, 1910, p. 470). Plato’s view is radically different. In his *Republic*, he argues that there is an “absolute beauty” and “absolute good” (Chambers 1936, p. 596). Following this rhetoric, he advocated the concept of universal values that are “eternal” and “known but not seen,” therefore they are not dependent on our perception or belief. Plato specified the following hierarchy of goods: goods of the spirit (the highest); goods of the body; and external (economic) goods (of the lowest rank) (Perrota, p. 18).

Following values, in spite of their “absolute” and “external” nature, in our lives serves a certain purpose. In Book I of the *Nicomachean Ethics*, Aristotle asserted that “every art, and every science (…), and in like manner every action and moral choice, aims, it is thought, at some good” (Book I, p. 1). The “good” he refers to equals the state of *eudaimonia* which may be translated as “happiness” or “living well and doing well” (Book I, p.11) achieved thanks to virtuous activity. He asserted that happiness is the “chief good” that is “final” (chosen for its own sake) and “self-sufficient” (“being the end of all things which are and may be done”) (Aristotle, Book I, p. 8-9).

Achieving happiness requires the application of other goods (Book I, p. 8). divided into the categories of “external” and the “goods of the soul,” following Plato. The highest external good is honour (Book IV, p. 64), others include, wealth or power. Goods of the

soul are: virtue, education, friendship or artistic creativity and appreciation. The goods of the body include: life, health, or physical strength. Aristotle used a hierarchy of goods assuming that some are necessary for happiness (e.g. health) while others (e.g. wealth) only fulfil one's life if virtue is exercised – this statement is clear in Book VII of the *Nicomachean Ethics* (p. 135): "[T]he happy life is pleasant and interweave pleasure with happiness. Reasonably enough: because happiness is perfect, but no impeded active working is perfect; and therefore, the happy man needs as an addition the goods of the body and the goods external and fortune that in these points he may not be fettered."

In other words, a virtuous person can never be miserable even if the conditions over which we have no control are not favourable. Aristotle pointed out that pleasure is "contained within the life of excellent activity" and distinguished the "lovers-of-the-fine" as people taking pleasure in performing "fine actions" (Halim 2011, p. 2).

Aristotle differentiated between virtuous and vile activity depending on the class of the person performing it (either citizen or slave) – in this way, he gave rise to the economic assessment of "productivity" described at a later stage of this chapter. The morality of economic value seems to be a crucial point in the work of Aristotle as well. He may be seen as the creator of economic value who, at the same time, questioned its legitimacy (Perrotta, 2004, p. 17). In *Politics*, he made a division of two possible uses of goods – the primary (proper) and the secondary (improper) use, i.e. exchange. This distinction does not equal the modern division between use value and exchange value – Aristotle simply aimed at stressing the fact that exchange is not "natural" – it is "improper" as in his view, economic value understood as the "principle of self-interest" is legitimate only if it serves to satisfy needs, i.e. not for commercial trade (Perrota, 2004, p. 18).

The moral assessment of commercial activity is also clearly present in the teachings of the Church in the middle ages when moneylenders and merchants were considered vile (Mazzucato, 2019, p. 23). St Thomas Aquinas in his *Summa Theologica* followed Aristotle in asserting that the judgement of activity depends on its contribution to or deterrence from the *telos* or "final goal" identified as *eudaimonia*. In this sense, "happiness" is understood as "completion," "perfection," or "well-being." In his view,

achieving this state demands the application of a set of intellectual and moral virtues. Essentially, he hinged all virtues on the so-called "cardinal virtues," e.g. justice, temperance, and fortitude

Descartes specified three types of psychological phenomena, the second and third dependent from the first: thinking or having ideas, judging, and willing or feeling (Chisholm, 1986, p. 2). In this way, he referred to the condition of "inner perception" present in the work of the first major philosopher distinguishing the study of value as a separate branch – Franz Brentano. Brentano follows the division of Descartes and affirms that judgements of value are "contingent upon the cognitive intuition" (Hart 1971, p. 30).

Rudolph Hermann Lotze, unlike many earlier thinkers, insisted that reality and values are independent from one another claiming that we are able to analyse reality through understanding values (Milkov, *Internet Encyclopedia of Philosophy*). In Friedrich Nietzsche's *Genealogy of Morals*, the following question is brought to our attention: "Under what conditions did Man invent for himself those judgments of values, 'Good' and 'Evil?' And what intrinsic value do they possess in themselves? Have they up to the present hindered or advanced human well-being?" (Nietzsche, 1913, p. 5).

Christian von Ehrenfels in his *System der Wertlehre* presents the idea that value is contingent upon desire, in other words, that we "ascribe value" to certain things because we desire them (Rollinger and Carlo), However, valuing may be perceived as a process involving "an element of objectivity absent in desiring" (Lanier) as it should concern external conditions present in the world causing us to re-value depending on the circumstances, not only be based on a subjective desire. According to Ehrenfels, the notion of "absolute beauty" is unified to all, i.e. it is not relative and it is our apprehension of art, for instance, that causes us to find relativity in taste.

Axiology as a domain emerged at the beginning of the 20th century and appeared in Paul Lapie's *Logique de la volonté* and Edouard von Hartmann's *Grundriss der Axiologie*. Ralph Barton Perry in his *General Theory of Value* proposes a new definition of value, i.e. "any object of any interest" meaning that an object "acquires value when any interest,

whatever it be, is taken in it" (Perry, 1950, pp. 115-16). In other words, the value of an object relies on the one interested in its qualities. Perry also explored eight "realms" referring to values: morality, art, religion, science, economics, politics, law, and custom. William Herbert Sheldon suggested that valuable objects (good or bad) may be grouped under the following categories: those which "satisfy immediately any fundamental instinctive sense-tendency" (1914, p. 114) of a living organism, economic commodities, aesthetic or beautiful objects, moral conduct, religious objects, intellectual values.

The first category refers to objects of sensual pleasure and their value lies in satisfying the needs of living organisms. The value of economic goods lies in their capacity of being exchanged for other goods, not merely its utility – as such, the utility of certain objects is rather linked to the first set of objects as it is the satisfaction of a need that assigns value to them. Aside from exchangeability, Sheldon points to the "function of scarcity" (1914, p. 116) as a value assigned to an object, i.e. the existence of value depends on the availability of a good. To conclude, he states that "economic values tend to do two things: they tend to enhance the life of the prospective buyer by ministering to his wants, and they tend to enrich the economic life of the community by promoting trade" (1914, p. 116).

Sheldon understands "aesthetic or beautiful" objects as a uniform category of objects considered beautiful in a "classic" and "romantic" sense – the beauty of the former lies in the harmony of form and structure while this quality of the latter relies on the expression, therefore, "classic" beauty is independent of the observer, i.e. objective, and "romantic" beauty exists upon the creation of an emotional response (1914, pp. 117-118). Moral values refer to the "welfare of society and the individual" (Sheldon, 1914, p. 120). According to Rashdall Hastings, moral value designates "the particular kind of value which we assign to a good character" (1907, p. 138). In Sheldon's opinion, religious values may be identified with moral values, however, to a devotee, religious values appear to be the highest of all values as they contribute to the "maintenance of all the values, whether in this life or another one" and such values are a matter of more than human will – a higher power (1914, p. 120).

The concept of intellectual values promotes the idea that "truth about things is valuable" (Sheldon, 1914, p. 120), therefore it may be understood as the endeavour to discover the truth through critical thinking. All of the above values may be found in the study of culture. Apart from the obvious aesthetic values, cultural heritage requires acting in line with e.g. intellectual values and cultural property in particular has economic value ascribed to it as a result of presenting or involving the existence of other values. The assumption of the two distinct types of beauty presented by Sheldon may seem dated, however, it provides grounds for further analysis of the distinction between artistic and aesthetic values conducted in this study.

According to the phenomenologist point of view, i.e. a first-person experience approach, values can be grouped into the following types: vital values, cultural values, moral values. According to Ingarden (1966, p. 85), the "vital" values relate to features of utility and pleasure. Cultural values may be sub-divided into cognitive, aesthetic and social. Moral and aesthetic values are, in certain cases, hard to differentiate. The catalogue of values is insufficiently specified and sub-groups constituting it differ in quality. As in the case of aesthetic values, the idea of beauty is not a single concept defining them, as such notions as "grace" or "sublimeness" appear as an integral form of the aesthetic value and depend on the perception of a given epoch, therefore the quality of beauty is highly relative. Such is the case of moral values, the subset of features constituting this group is heterogenous and apart from the primary notion of "good," this category is defined through the ideas of "responsibility" or "justice" (Ingarden, 1966, pp. 86-87).

Moreover, every value group is constituted by juxtapositions such as "beauty" and "ugliness" or "courage" and "cowardship" Certain values may appear upon meeting particular criteria, e.g. moral values depend on the existence of freedom of will or sanity permitting for taking responsibility for one's actions (Ingarden, 1966, p. 87). The subjectivity of perception plays a role in asserting values. However, following Shalom H. Schwartz, certain features of values are treated as universal.

In psychology, the concept of "basic human values" distinguishes ten personal values visible across cultures. These are classified as: self-direction: independent thought and

action – choosing, creating, exploring; stimulation: excitement, novelty, and challenge in life; hedonism: pleasure or sensuous gratification for oneself; achievement: personal success through demonstrating competence according to social standards; power: social status and prestige, control or dominance over people and resources; security: safety, harmony, and stability of society, of relationships, and of self; conformity: restraint of actions, inclinations, and impulses likely to upset or harm others and violate social expectations or norms; tradition: respect, commitment, and acceptance of the customs and ideas that one's culture or religion provides. Groups everywhere develop practices, symbols, ideas, and beliefs that represent their shared experience and fate; benevolence: preserving and enhancing the welfare of those with whom one is in frequent personal contact (the 'in-group'). Benevolence values derive from the basic requirement for smooth group functioning; universalism: understanding, appreciation, tolerance, and protection for the welfare of all people and for nature. This contrasts with the in-group focus of benevolence values. Universalism values derive from survival needs of individuals and groups (Schwartz, 2012, pp. 5-7).

At this point, is worth to look into the relationship between the "cognitive value" and "aesthetic value" as they both form a vital part of cultural value significant in this study. According to Aumann (2014) aesthetic value refers to "that which makes an object worthy or unworthy of being perceived, contemplated, or otherwise appreciated for its own sake" (p. 117). The features related to aesthetic value presented by Carroll (1999, p. 190) include expressive properties (e.g. melancholic or pompous), taste properties (e.g. vulgar or kitschy), reaction properties (e.g. beautiful or comic), and Gestalt properties (e.g. balanced or chaotic).

It is also vital to look into the aesthetic value properties of cognitive nature. As Aumann points out, these could be "being profound, insightful, true, or misleading" (2014, p. 117). As far as cognitive values are concerned, their general category involves such notions as "instructional, educational, and pedagogical value" (Aumann, 2014, p. 118). Aesthetic value can constitute cognitive values, especially in the sense that if a work has aesthetic values they could affect the assessment of the work's "cognitive merit" (Aumann, 2014, p. 118).

In the case of cultural property, the process of axiological valuation is focused on positive values in order for the object to be classified as such (Zeidler, 2011, p. 87). It is wrongful, however, to discuss the value of cultural heritage only on the grounds of, e.g. positive aesthetic experience, or in line with the existing beauty canon as it stretches far beyond the perception of its physical representation. Value is related to both objectively attained features and individual perception.

The overall value of cultural property results from a set of factors. When assessing the emotional value of property, one needs to analyse what factors cause the object to be significant either for an individual or a wider group of individuals. The considerations taken into account when approaching the financial estimate of an item may also be rooted in other value categories, including the emotional.

Cultural value is constructed by the society, it is accessible to observation and is expressed through mutual, collective judgment procedures (Hutter and Frey, 2010). According to Throsby (2001) "people form judgments about cultural value not just by introspection but by a process of exchange with others" (p. 35). In the context of the art world, cultural value emerges in the process of a mutual judgement assigned by experts and spectators (Klamer, 1996). It is evidenced by reviews, prizes, and the attention dedicated to a work by the media (Hutter and Frey, 2010).

Kono points out that culture is a fundamental element of sustainable development. Seeing culture as a "constitutive part or dimension of development rejects the perception that development is limited to economic growth, a rapid and sustained expansion of production, productivity and income per head" (2007, p. 244). In this view of development, described as "human development," the quality of life is the central part and culture is a desirable outcome itself as it gives value to our lives, "development is only the instrument through which to achieve it" (2007, p. 255).

Apart from the overall economic development fostered by culture (or the other way around), it is vital to point out how culture affects the way we behave and, thus, change the way the society is organised. Hausner (2019) points out that it is clearly visible how

the experience of art changes people's behavior and approach to one another: "when we were running an art gallery at the university, the students would behave differently when walking down that hall. They, all of a sudden, would behave more seriously, as if art had some influence on them."

For the purpose of this study, the relationship between cultural value and social value of cultural property is the following: cultural value encapsulates all values listed (apart from the financial), while social refers to the means of establishing certain values through the experience of spectators and the influence it has on the general public - it can either be universal for all mankind due to a number of certain features that translate into its significance (e.g. aesthetic value) or specific (e.g. religious) that affects a selected social group. The social value of cultural property also results from the relevant historical context, therefore, this category also belongs to the overall "social" category. The relationship with the "applied" values specified at the end of this chapter are also strongly related to the social aspect.

According to Throsby (2001, pp. 34-35) cultural goods may be private or public, however, the majority of items in question are of mixed nature, e.g. a van Gogh painting may be bought or sold as a work of art, i.e. a private good, simultaneously, it presents qualities of a public good to art historians, amateurs of paining, and the whole of the society. The analysis of social significance of cultural property is fundamental to establishing whether it forms part of common heritage or whether it relates to a narrower group of individuals, and to what extent it affects identity and social behaviours.

The dual nature of cultural property, i.e. private-public, is the subject of the ongoing debate on the ideals of liberalism and communitarianism in cultural heritage law and other disciplines concerning cultural assets. As stated by Zeidler and Łągiewska "liberalism advocates for the principle of priority of individual rights and freedoms over the common good (the so-called *in dubio pro libertate*). This also has the impact on liberal scepticism towards any group rights or collective rights" (2020, p. 658). In turn, communitarianism, as opposed to liberalism "postulates the principle of the priority of common good over the individual rights, namely the so-called *in dubio pro communitate*.

(…) from the communitarian perspective, the state has an obligation to ensure the protection of common good. (…) the main duty of the state is to defend those values that will contribute to the respect of both identity and integrity of the community" (Zeidler and Łągiewska, 2020, p. 659).

The debate whether certain cultural objects should be classified as private or public, is clearly visible in the case of Vincent Van Gogh's *Portait of Dr. Gachet*. In 1990, the painting had been sold for $ 82.5 million, breaking the auction record at the time, to the Japanese millionaire and art collector Ryoei Saito who later announced that after his death, "it was to be burnt together with his corpse" (Zeidler and Guss, 2021). After causing a storm in the art world, no information on the fate and the whereabouts of the paining has been disclosed ever since. The vocal objection of the public, deprived of such an important work of art, proved that the debate of whether liberalism or communitarism should prevail, especially in regard to well-established artworks, is still valid and the universal v. individual importance of culture needs to be analysed case-by-case.

According to ICCROM's report presenting the results of a survey on the social importance of cultural heritage collections, ⅔ of respondents said that devoting the world of "libraries, archives, museums, treasured artefacts in temples, cultural centres and communities" would make a huge difference in their lives, while more than 90% of the participants replied that it would have at least a large effect (ICCROM, 2020). Other empirical studies, especially those carried out under the aegis of the Arts and Humanities Research Council (AHRC), have confirmed that the social value of culture, including cultural objects, is wide-spreading and affects other value components presented in later sub-chapters.

In the field of cultural heritage law, two key points of reference require attention as regards the universal social values of cultural property: "the outstanding universal value" specified in the 1972 UNESCO Convention, and the idea of "common" heritage as specified in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No.199), hereinafter referred to as the "Faro Convention."

The criterion of "outstanding universal value" (OUV) is highly subjective. Regardless of the authority of certain bodies to establish whether a given object possesses such value or not, the assessment is performed case-by-case, therefore there is no universal standard adopted at an international level. The interpretation of OUV present in UNESCO conventions has been a subject of expert debate and still requires adjustments. The ICOMOS thematic framework for property valuation establishes an order of themes serving as a starting point for asserting value. The study identifies "outstanding" as values "that in comparison with the generally documented cultural heritage they belong to the very best" while "universal" designates these outstanding values as such "in general and worldwide" simultaneously meaning that "not only a region or a country looks after the protection of this heritage, but that instead, (…) 'mankind as a whole' feels responsible for its protection and conservation" (Jokilehto et al., 2008, p. 8).

The ICCROM refers to the values present in UNESCO conventions, i.e. historical value (interestingly, the simple criterion of old age is treated as valuable), also identified as "commemorative value"; artistic value, also (erroneously) defined as "aesthetic" value, scientific value), and ethnological and anthropological values that are also seen as scientific values (Jokilehto, 2008, p. 7). The criteria for their assessment were grouped into sections: originality and uniqueness, "universally recognised by competent specialists"; historic value: rarity, novelty or importance of the influence exercised in time and/or in space by the work concerned; (2008, p. 11).

The Operational Guidelines for the Implementation of the World Heritage Convention develop the criteria for assessing OUV in reference to nominated properties. The OUV can be attributed to objects that: represent a masterpiece of human creative genius (2008, p. 18); exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative

of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.

The Committee considers that this criterion should preferably be used in conjunction with other criteria: contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation.

If the OUV serves as a general marker of the historical value, the criteria for asserting such may be treated as a way of establishing a general framework for the assessment of the historical value present in legal acts. The examples of criteria of historical relevance for establishing OUV, according to the ICOMOS study, refer to the following elements: masterpiece of human creative genius ("is also a piece of the history of humankind"); interchange of human values ("happens 'over a span of time or within a cultural area,' therefore within the framework of history and certain historical epochs"); testimony to a cultural tradition or to a civilisation which is living or which has disappeared ("concerns cultural history or the history of civilization"); significant stages in human history (are "the outstanding examples of the different types and categories of monuments, ensembles and sites"); example of a traditional human settlement, land-use or sea-use etc. ("represents a piece of human history"); association with events ("is mainly referring to historical events or traditions, which are part of the history of a place"); major stages of earth's history ("history also plays a role with regard to natural heritage, in the case of

this criterion, the biological processes in the evolution and the development of … ecosystems "are a part of the history of the earth" (Jokilehto et al., 2008, pp. 8-9).

The Faro Convention introduced a narrower category of the "common heritage of Europe," thus applying values shared by a group of states rather than universal values for all mankind as in the case of the OUV. It stresses "the need to involve everyone in society in the ongoing process of defining and managing cultural heritage" and aims at raising awareness of the social significance of cultural heritage, however, its principles apply only to European heritage. Officially, the Faro Convention was a result of the Council of Europe's initiative Heritage, Identity and Diversity, started in 1996, and it was drafted in response to the destruction of cultural heritage during the conflicts within Europe in the 1990s.

The Faro Convention is crucial in the process of establishing common values applied to the cultural heritage of Europe. Pursuant to Article 3 of this document, the common heritage of Europe consists of: all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law. Following this logic, it assumes that both tangible and intangible elements form this category. The evaluation of what should be included in this group is a rather complex task given the cultural diversity of Europe. Pursuant to Art. 7(b), the Parties to the Faro Convention, are responsible for the establishment of processes for "conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities" and for the promotion of "mutual understanding with a view to resolution and prevention of conflicts." This ideal applies to conflicts caused by historical and political changes that are still echoing in the cultural discourse between certain states.

Another approach is proposed in the field of art theory. It may be assumed that there is a biological basis for the existence of art and in this case, art can be referred to as a figment of evolution. According to Davies (2016, pp. 1-4), there are certain features related to art

that prove this point, i.e.: art is universal – it exists in every community (most human beings express the need to decorate their environments, possessions, and bodies); art is a source of pleasure and value (the sense of "pleasure" might amount to the creation of the "aesthetic experience" as defined in the next paragraphs, whereas the "value" Davies refers to may be defined as in the value scheme discussed in the next chapter); art defines our identity; art may be treated as a source of pleasure motivating people to pass on their genes to future generations; art is a way of intensifying and enriching our lives; art unifies communities, it brings us together both as creators and spectators, which results in the creation of an environment for appreciation of shared values.

Davies claims that art-making and artistic performance (since they often require extraordinary skills and dedication and are not directly linked to the survival) can be perceived as a way of bringing sexual attention. It can be argued that such account relates to rituals rather than art in the sense that it exists for its own sake, however, nothing exists without a social context, therefore, any kind of art always serves a particular function, be it the creation of the, so-called, aesthetic experience, or the unifying function in a community.

The terms of "aesthetic" and "artistic" value are often used interchangeably, however, aesthetic value is not limited to the realm of art - it can apply to natural phenomena and objects other than works of art, therefore the two should be analysed separately. While aesthetic value may occur in the case of any cultural objects, e.g. works of craftsmanship, one may argue that the artistic one is only attained to works classified as works of art.

The case of *Brancusi v. U.S.,* 1928, is a fine example of an object identification issue related to the differentiation between these values. Constantin Brâncuși's series entitled *L'Oiseau dans l'espace* (*Bird in Space*) was supposed to represent its [bird's] very essence, its flight, its élan. . ." (Brezianu, 1965, p. 15). The series of sixteen brass sculptures, dating from 1923 to 1940, are "stripped of individualizing features," (Flint) therefore the very object can hardly be identified as a form of a bird. Upon the shipping of one of the "birds" to the United States, a customs official did not consider the 'bird' as

an artwork but a “kitchen utensil” (Mann, 2011). The result of the classification was imposing a 40% value duty upon its import (Vadi and Schneider, 2014). Had the object been classified as a work of art, it would have been exempt from customs duty. This decision repelled an international group of artists who named the pieces as “quintessential examples of a new kind of art” (Mann, 2011). At trial in 1928, however, Judges Young and Waite concluded in their ruling that the item was “beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it [was], nevertheless, pleasing to look at and highly ornamental [. . .]” and the object was entitled to enter freely (Vadi and Schneider, 2014), therefore referred to both the artistic acclaim of the new school at the time and their own (subjective) aesthetic experience.

With regard to the aesthetic or artistic value, it also appears in certain OUV criteria. The very term “masterpiece of human creative genius” or the idea of “areas of exceptional natural beauty and aesthetic importance”, require the assessment of artistic and aesthetic values. The artistic and aesthetic value are usually used interchangeably in a legal or economic sense, however, they differ substantially when discussed from a philosophical point of view.

In general, aesthetics touches upon a larger scope than art and the aesthetic experience may occur when perceiving both natural and cultural goods. Aesthetics concerns not only the philosophy behind art but also the very idea of beauty and its experience regardless of the area it refers to, therefore these two notions, i.e. aesthetics and the philosophy of art need not be synonymous. According to Tatarkiewicz (1960, p. 9) some periods in history were reluctant to make a connection between beauty and art, however it is the study of art that gave rise to a view that art and beauty are synonymous. The positive significance of the notion of beauty rejects the view that an aesthetic experience may be a feeling of pain or discomfort, which certainly is the case of certain works of art, therefore the link between art and beauty is rather shifted to art and an aesthetic experience (pleasurable or painful). It is, therefore, the emotional reaction towards a creation that constitutes its aesthetic value, positive or negative, thus pertaining to an artistic value of a work of individual character. In other words, the triggering of a subjective emotional reaction towards and object intentionally created by a human for a

social appreciation (with no utilitarian aim), may be perceived as a condition constituting artistic value.

The separation of artistic and aesthetic values is a key view present in the work of Roman Ingarden. In his opinion, "the structure of artistic values comprises an objective scale of the reception of a work of art, while the aesthetic values and experiences are in the subjective sphere" (Szmelter, 2013). According to Gołaszewska (1984, p. 68), an "aesthetic attitude" is spontaneous, it is a subjective, emotional response to the word and objects surrounding us, regardless of their nature, be it artistic (human-created) or natural. An artistic object, as pre-defined for the purpose of this study, is an intentional creation aiming at triggering our "aesthetic attitude," therefore its value lies both in the objective and subjective sphere. According to Witkiewicz, if we are not mentioning composition in the theory of art, we have no criterion to differentiate a work of art and a "pile of rubbish" or a "stain on the tablecloth" (Witkiewicz, 1922, p. 9).

For the purpose of the current debate over the aesthetic properties of contemporary art, it is crucial to reiterate that the "evaluative component" of the aesthetic properties present in a given object may be both negative or positive (Davies, 2016, p. 51). Conversely to the aesthetic value, the perception of the "artistic value" requires subject-matter knowledge and is not subjective. The artistic value may consider such elements as the history behind the work of art, its relevance in the overall art history, or the meaning it conveys rather that its emotional impact on the viewer. According to Dziemidok, (1993, p. 186) a formalist approach to art assumes that "the value of a work of art consists exclusively in the *manner* of presenting and expressing the meanings contained." In this view, one of the definitions of the "form" indicates that it is an "arrangement" of elements of an artwork, i.e. the composition, while the "content" indicates "all elements" of a work and the correlation between the two is that the "form" is the "means and ways of representing and expressing that something."

The formalist approach rejects the significance of the so-called "non-formal" elements such as "emotion" or "thought," therefore such a distinction is object-oriented and may correspond to the "internal" valuation factors discussed in the next sub-chapter. In certain

approaches, the "artistic value" understood as the intentional, knowledge-based properties included by authors in their works and acclaimed by the critics, is instrumental and that particular artistic values may be present in some works of art but not in others, hence the impossibility of a fair judgement with regards to the valuation process (Stecker, 1997, p. 52). Budd proposed an "essentialist" concept assuming that the value of an artwork is determined by experiencing and understanding its artistic features (as cited in Stecker, 1997), therefore it differs from the aesthetic experience and is concerned with intrinsic art properties.

The "instrumental" value of art, as opposed to the intrinsic one, is the "actual effects, good or bad, of a work on those who experience it or effects that would be produced if people were to experience it," (Stecker, 1997, p. 53) which could be identified as the aesthetic value. According to some scholars, the artistic value of a work is a "composite of all the types of value – including aesthetic value – which it attains" (Zangwill, 1995, p. 318), hence the commonly assumed equality of the two terms.

The artistic value of objects classified as "works of art" according to legal or art-theoretical definitions is often assigned based on both intrinsic and external aspects related to the work. According to the functionalist definition of art, art satisfies a particular need, it has a 'function' in the environment. On the one hand, the functional definition implies that art may possess a financial value, hence meet a certain "need" in our lives, however, it predominantly concerns the "aesthetic experience" art provides, therefore the main "need" that art might satisfy in the given context is the enjoyment or appreciation of beauty. It may be claimed that the output of a creative activity in the form of an artistic object causes various impressions, including the most important – the feeling of "immersion in a new, unknown dimension" (Zaniewski, 2014, p. 15-16).

Contrarily to the functional view, the procedural definition of art refers to the authority of a given person or institution as a whole to name a particular object or notion as art. It is only the appreciation of the "art world" that grants an aesthetically potent object the status of a work of art, therefore the latter definition relies on the external factors, not the functionality of a given object. The viewer plays a key role in the procedural definition –

as stated by Zaniewski (2014, p. 84), the perception of a work of art needs a learned audience, i.e. accustomed to a particular cultural context.

Davies raises a question of the complementarity of both definitions, for art can be both functional, in the sense that it satisfies a particular need, and procedural (institutional), however, if an artwork fails to meet the aesthetic experience condition, it may only be judged on the basis of its contextual presence, therefore from the procedural angle. Davies provides the example of "readymades" such as brooms or snow shovels, where the aesthetic value is rather impossible to be associated to the object of interest. Certain elements of the functional definition of art, among the representational and expressivist are present in Kant's theory of aesthetic judgement, however, his interest in art is only present in the broader context of the beautiful, the sublime, and nature (Adajian, 2018).

The procedural definition concerns the following factors to determine the artistic characteristics of an object: such an object can be defined as art by an artist or "others who have earned the authority to confer art status" (Davies, 2016, p. 100); it is discussed by critics and art historians; it is presented in the "context of the art world" as items of "aesthetic appreciation." As stressed by Davies, such an object might not have been an artwork in the past but can become one under particular circumstances such as the above. According to Gaut (as cited in in Adajian, 2018), an object identified as a "work of art" should: possess positive aesthetic properties; be expressive of emotion; be intellectually challenging; be formally complex and coherent; have the capacity to convey complex meanings; exhibit an individual point of view; be original; be an artifact or performance which is the product of a high degree of skill; belong to an established artistic form; be the product of an intention to make a work of art. Following this view, it may be stated that only when all these features exist, a particular item can be identified as an artwork, as opposed to other goods present on the market, e.g. objects of everyday use and designer items in general. The value of cultural property is assessed for a variety of reasons, e.g. to satisfy the requirements imposed by cultural heritage law or policy and market positioning. Prescribing social significance and estimating the financial value are often treated as two separate domains, however, the two are inseparable.

The specificity of cultural products, as opposed to other goods or services, derives from the following criteria: they require creativity; they generate and transmit symbolic meanings; their effects are subject to copyright (Throsby, 2001, p. 20). As Ilczuk states (2012, p. 32), these goods may also be classified as the so-called "merit goods" i.e. the development of which is accepted by the society, regardless of the demand, and the "positive external effects" of these goods signify their influence on the development of, *inter alia*, national identity, creativity, or social skills. The objective economic theory assumes that values are the costs incurred in the process of producing the good, while the subjective theory associates the value with the benefits the good has for the customers (Białynicka-Birula, 2003). Both approaches are understandably linked to the art world, however, it is the ephemeral aspect of art that affects is special pricing methods.

All the above considerations may affect the commercial value of a given object. Be it movable (e.g. fine art available on the market) or immovable (e.g. architectural monuments whose commercial value may be represented by entrance fees, however, it should not determine whether the object is valuable or not, cf. Przybylska, 2004), the price paid for experiencing or owning cultural property is a reflection of its significance measured through the lens of other factors, e.g. artistic and/or historical value.

The process of fine art appraisal requires the consideration of some of the above presented values. In order to see the mechanism of translating the intangible elements into financial value, one must realise how cultural goods are positioned on the market and fine art may be utilised as an example. According to Moulin (2008, p. 2), "the art market is the place where, by some secret alchemy, the cultural good becomes a commodity" and appraisal is the process transforming cultural property into a commodity. The assumption that art may exist purely, independently from the market, is dismissed by certain researchers. According to Boll (2011, p. 52), the intention behind every work of art is its "distribution and reception" and every artist relies on the proceeds, therefore "the work of art and the market from an interconnected whole."

The same price determinants as in the case of the stock market are present in art appraisal, i.e.: marketability, availability and the "insider knowledge of interested parties" (Boll,

2011, p. 56). The idea of marketability is significant in the ideologically multi-faceted term "cultural property" – as Blake pointed out (in Vadi and Schneider, 2014, p. 7), "Implicit [...] in the use of the term 'cultural property' is the idea of assigning to it a market value, in other words the 'commodification' of cultural artefacts and related elements by treating them as commodities to be bought and sold." However, the specificity of cultural goods, including works of art as defined in Chapter I, implies that their value lies in their non-functional qualities, therefore this "transformation" into a mere market product requires an in-depth analysis of more circumstances pertaining to the final result, as opposed to other goods. According to Carpenter, "classic economic theories of property are based on the assumption of fungibility," however, "cultural phenomena may present unique features that cannot be replaced" (as cited in Vadi and Schneider, 2014, p. 6), therefore it may be argued that classic pricing strategies do not apply as, on the art market, there is no "price ceiling."

When compared to other markets, there are some price-making factors specific to art only, i.e.: emotional attachment and individual perception of the "utility" of the pieces (Boll, 2011, p. 56). The "utility" of art may be understood as the potential function it serves to a given individual or the society as a whole. These functions mirror the value art has. It relies on the importance of cultural property, in general, for the creation of identity and art, and in particular, as a source of the aesthetic experience. The former is realized through the financial effect art has as a commodity. These values are, however, resulting from one another and cannot be distinctly separated at any stage due to the effect of "reverse valuation" – i.e. it is not only about the impact of intrinsic artistic qualities on the market value of a work, "viewing habits and aesthetic ideas are influenced by record prices," (Boll, 2011, p. 53) therefore the visibility of certain trends "acclaimed" by high prices has a direct effect on the reception of culture and the understanding or even creation of its intangible value. The factors influencing value are based on a specific psychological reaction to the art world. Thorstein Veblen described the rise in demand of luxurious goods as a response to their rising prices (*cf.* Veblen, T. (2012). *The Theory of the Leisure Class*. *An Economic Study of Institutions*). It is clearly visible that the demand for unique or limited goods, even if the only limitation is the price threshold, is a result of the need

to prove a certain status of the owner, granting their prestigious position in the society. In this context, the status-setting value can be attributed to cultural property.

The emotional response of the society towards art is, therefore, fuelled by various factors and drives their expectations towards art. Pierre Bourdieau referred to the "ritual," a term coined by Walter Benjamin, as a utility value behind art. The so-called "ritual" refers to the cult function of works of art had at the very beginning of art history. Benjamin, in his work entitled *The Work of Art in the Age of Mechanical Reproduction* states: "we know that the earliest artworks originated in the service of a ritual – first the magical, then the religious kind. It is significant that the existence of the work of art with reference to its aura is never entirely separated from its ritual function. In other words, the unique value of the 'authentic' work of art has its basis in ritual, the location of its original use value (2005)." This cult function precedes the financial significance of art and shows the importance of authenticity in a pure, non-commercial, response to art. The values within the overall value of art are authenticity and uniqueness. Walter Benjamin referred to these two features as the condition behind the so-called "aura" of a work of art. These values are, among other factors, the necessary determinants of the price of art.

Art investment is driven by either emotional and financial or purely financial motivation. The duality of art value, i.e. its aesthetic and financial aspects, is reflected by the exceptional figures present on the art market. The motivation to acquire art results from individual needs and these can be grouped into categories. Theodor Adorno saw the "pleasure of reception" as an "increase in prestige" – the possession of a work of art is undoubtedly perceived as a status symbol. Art acquisition is also driven by the need of self-realisation and self-expression, the mere need to decorate one's home or to invest capital (Boll, 2011, p. 54).

The price of art relies on its versatile functions. The basic aesthetic-financial distinction may be extended to the historical or political significance of certain works. These conditions influence the difficulty in judging the tangible value of art. In ancient Rome, merchants dealing in art would estimate the price of their commodity per weight or size unit (Hook, 2018, p. 22), however, along with the development of the role of

intermediaries (i.e. professional art dealers), the importance of the "artistic value" or the esteem of the artist, in other words, the "internal" and "external factors," grows – not to mention the additional fees resulting from the involvement of a third party.

The fundamental paradigm in cultural property law, i.e. the "artistic, historic and archaeological value" may serve as a foundation for constructing the valuation "toolbox" presented at the end of this section. The "artistic value" present in certain cultural objects may comprise of the "intrinsic" and "extrinsic" factors – as specified by Davies (193), the first account claims that art is valuable in and for its own sake, therefore it may be assumed that its value lies in its features, and according to the latter, the value of art lies in the experience it creates. According to Findlay (2014, p. 13), however, there is no objective value in art and its commercial value emerges due to "collective intentionality" of people agreeing on it. The social factor in the establishment of art value plays a role in the very establishment of art as such, therefore the perceptiveness criterion is inevitably a subsequent financial value marker – as summarized by Golka (2008, p. 171) perceiving art is not only "decoding meanings" but also "experiencing value" in the act of perception.

Despite the opposing views in this matter, it may be assumed that both conditions influence the overall value of a work and are complementary. Secondly, the "historic and archaeological value" present in works of art accounts for their high value due to their presence in the overall "cultural tradition" that, according to Szyszkowska, "binds the present generations with those that have passed away" (as cited in Zeidler, 2016, p. 57), therefore the emotional dimension in the process of conceiving the overall cultural identity plays a key role in establishing the value of art. As summarized by Szafrański (2016, pp. 301-302), cultural heritage (in this case, monuments rather than artworks in general) has been valued through the lens of its timeless utility e.g. religious artifacts, age (i.e. having significance for the development of culture), and significance for future generations. Given the intangible factors pertaining to the value of art, a question which arises is how to translate the intangible into tangible (i.e. financial). The concept of quantifiable measures governing cultural products is controversial (Gołuchowski and Spyra, 2014, p. 26), however, according to Nölling, in an economic sense, culture is "merely" a commodity – it is produced and consumed – therefore the idea of assigning

its financial value is inevitable to satisfy the demand (Nölling, 2008, as cited in Gołuchowski and Spyra, 2014, p. 26).

According to Throsby (2001, pp. 41-49), the economic and cultural values need to be asserted as two separate phenomena to retain the significance of cultural values in the omnipresent economization. As it may be true for public property representing universal values for the society, the function of private property in the hands of collectors may satisfy the need to earn a certain reputation in a community, therefore the term "luxury good" may become applicable, and in this case, price prevails over the cultural significance of a work. The general, antonymous, principle of the separation of the "world of objects" and the "world of values" (Gołaszewska, 1984, p. 63) seems to be inadequate when discussing works of art, as they belong to both of them. Works of art constitute value in themselves. The inalienability of both, artistic and financial values in art, as one affects the other, leads to the conclusion that art appraisal encompasses a broader range of factors than in the case of other goods, therefore the cost of production approach to estimate the value of the work of living authors can be rejected (Bandle, 2014). However, the amount of work devoted to the creation of art pieces and the overall quality of execution do play a role in value asserting its value, both in the subjective experience of any viewer and assessing the artistic value.

The method of valuation varies from one category of the art market to another. According to Ilczuk (2012, p. 140), the art market comprises of, in general terms, two main segments: "old master" – stable, not highly speculative, the price reflects the value, the renown of the author, (…) more regional; contemporary – less stable, highly speculative, prone to the inclusion of new phenomena, less regional. The categories of artworks as in auction results present in the 2017 TEFAF report (Pownall, 2017) indicate a stronger distinction of "Paintings" applicable solely to the "Old Master," "Impressionists, and Post Impressionists," "Drawings pre-1875," and "Installation" and other media, paintings included, from the "Modern" and "Post-war and Contemporary" categories.

The distinction between these main segments is necessary to establish a framework for valuation due to a variety of factors, e.g. the substantial difference in supply – i.e.

Contemporary works of a living artist are more likely to emerge on the market than a yet another newly discovered da Vinci. The death factor is not equally applied to all cases – according to Ursprung and Wiermann (2008, p. 2), "the death of an old artist, moreover, causes a relatively small reduction in the anticipated size of her oeuvre which, again, translates into a relatively small price increase when her death is made public." The criterion of scarcity, or rarity, is, however, not the only factor differing the appraisal process of Contemporary and "Old Master" works.

As summarised by Andreides, "the main difference between contemporary and old master art prices is that, in the case of contemporary, the artist is still working. They are putting more and more works on the market and this is what changes the artist's prices – this is an economic thing – not a legal question as far as contemporary art is concerned. There are so many art fairs and art advisors and art galleries and they are really active to influence artist's price – but the main thing is that the artist is still working" (2019).

Despite the varying factors pertaining to the overall value of works by emerging and well-established artists, the distinction between both internal and external factors bear significance in the way valuation is concluded, therefore the next paragraphs present these subgroups in a greater detail. Despite the various art valuation methods, two types of value need to be recognized: "benchmark value," i.e. the comparable value in relation to other artworks of the same artist or, in their absence works of comparable artists based on available sale data, e.g. auction records; and "appraisal value," i.e. professional appraisal based on a more advanced analysis of individual artworks, including provenance research or catalogue entries (Ernst & Young, 2017).

Provenance and authenticity play a crucial role in establishing the market value of cultural property. According to Schneider (2019, transcript), it is clear that "objects without provenance have a lower price nowadays, not in contemporary but in antiquities, the buyer should himself, and ask 'has it been exhibited, has it been in a collection, a well-known collection?' – so, it gives the price, of course, there are not subjective but objective criteria. (…) It's (then considered to be) a 'safe' object (…). Aside provenance research,

as exemplified by the questions listed above, authenticity should not be presumed, even if the provenance record is impeccable:

> "(…) We've had a number of cases professionally of people who are collectors and buy contemporary art or not contemporary but I'm thinking about Fontana, who's dead but […] [it is] not antiquities and we have cases of people who are collectors and have more paintings by Fontana and they discover that one out of three is a fake. From the same dealer whom they knew very well who was very [close] to Lucio Fontana at the time but still, you see" (Frigo, 2019).

In the case of the so-called "orphan works," the topic of provenance research is especially complex. The topic of "orphan works" has a special place in the work carried out by UNIDROIT under the 1995 UNIDROIT Convention Academic Project (UCAP). During meetings under this initiative, the term "orphan" has been widely discussed. It has been decided that due to its confusing meaning, as it is used in copyright law when referring to "works that have no identifiable copyright holder" and could also refer to "fragments of an antiquity" (UNIDROIT, 2022, p. 3). As a result, an alternative term of "unprovenanced" has been coined, however, it was also pointed out that the proposed term "was too specific – meaning that there is no information on the origins of the object – while the concern was that 'orphan' may also include a certain 'black hole' in time or in geography that might indicate theft or illicit exportation" (UNIDROIT, 2007, p. 3).

Provenance record is essential for the statement of authenticity. Authenticity can be determined by a given culture and, in that way, cause different "preservationist values" to arise. For instance, "instead of the Western priority given to fixity of physical material, other cultures might place value on the significance of a site, the ritual associated with it, or the periodic renewal or replenishment of its architectural fabric" (Silverman and Ruggles, 2007, p. 4). The value of authenticity can be also seen differently in the context of architectural works. These are also in the scope of this research provided its elements are isolated, thus becoming movable, with a view to be placed on the market.

According to Szafrański and Wilk, an art market can be recognised as “healthy” depending on two elements: authenticity of objects and credibility prices (2017, p. 116). More importantly, from the perspective of this research, both of these factors are simultaneously at the core of art valuation. On the one hand, the authenticity of a particular artwork is the fundamental component of its evaluation and, on the other the credibility of prices is an important component of art evaluation, therefore, valuation is the beginning stage after assessing the work of art, i.e. determining authenticity of the object and any other research, including provenance, conservation assessment, etc. (Szafrański and Wilk, 2017, p. 116).

In financial terms, there are, primarily two types of cultural property value, i.e. Fair Market Value (FMV) and Replacement Value (RV). Marketable Cash Value is also distinguished. The type of valuation depends on its aim. FMV is required for the secondary, i.e. auction, market. FMV is a legal term defined as “the price a buyer will pay. All parties are willing and aware of the property and its value” (Black’s Law Dictionary). The essence of FMV is expressed in the wording of the term published by the Internal Revenue Service (IRS) and followed by appraiser organisations in the United States (e.g. Appraisers Association of America and American Society of Appraisers). IRS Publication 561: Determining the Value of Donated Property defines FMV as “the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts,” therefore the key factors pertaining to FMV may be summarised as follows: the price is placed between a buyer’s “willingness to pay” and a seller’s willingness to accept, there are no external factors causing pressure, and the nature of the knowledge on the item is equal on both parts (which is rarely the case in the context of artworks).

Moreover, the following factors are listed when establishing FMV: the cost or selling price of the item; sales of comparable properties; replacement cost; and opinions of experts. RV is mostly used for insurance appraisals. It is the amount required to replace a property with another similar object taking its age, quality, origin, appearance accessible in a similar market into account. Since most works of art are unique, their "replacement

value" has to be based on the current retail value of similar works and this task should be performed by a reliable appraiser demonstrating the required connoisseurship. As reiterated by Warwick-Ching, insurance providers “use different sources to help determine the value of the art. For example, modern art may be valued differently to works by old masters” (2012).

For significant collections of fine art, it is important to discuss with the insurance provider whether the value of the collection has changed at each year policy renewal. Moreover, it is crucial to point out that art valuation of private collections for the purpose of estimating the value of insurance and/or in the case of art banking is not equally common in every country. As Szafrański and Wilk point out, insurance agents specialising in works of art, art banking experts, and property appraisers, are currently of marginal importance in Poland (as opposed to, for example, Great Britain, Switzerland, or the USA), due to fundamental reasons: little accessibility of individualised insurance of works of art (collections) by private collectors, the insignificant development of real services of art banking in Poland, no need for specialised asset appraisers in the field of works of art due to the scarcity of needs in this area (2017, p. 120). In addition, as pointed out by Witkowska-Mrozek (2019), “many professionals dealing with art banking in Poland have no expertise in the field of art market valuation,” therefore, price estimation is, again, a matter of particular circumstances in a particular context that affect, on a larger or smaller scale, the subsequent valuation of cultural property, not only in financial terms.

Marketable Cash Value is mostly required in the case of equitable distribution of personal property, e.g. in the case of a divorce. It is defined as “the value realized, net of expenses, by a willing seller disposing of property in a competitive and open market to a willing buyer, both being reasonably knowledgeable of all relevant facts and neither being under constraint to buy or sell. This type of value can be used for appraisals for family division and art as collateral” (Winston Art Group). In this case, appraisal is based on the fair market value of an item and, subsequently, possible costs are deduced. This topic is deeply linked with the so-called “d” exigencies – death, divorce, and debt – the factors that often lead to consigning cultural items in private collections to auction houses (Hook, 2018, p. 207).

Despite the different kinds of value and the changes on the art market, there are some ground rules for identifying the value of art. Appraisers often refer to the so-called "wall power" of a piece, i.e. how much impact it has at first sight.

It goes without saying that authenticity of an object is crucial for establishing its value, however it is listed as an independent factor in appraisal of art both in the literature and in practice. The main source of information when verifying authenticity is a *catalogue raisonné*. Despite its undisputed importance, many emerging markets, e.g. in Poland, are devoid of such tools, even for the most celebrated artists, therefore fake objects often enter the market easily. Art appraisal concerns the factors that are linked directly to the object (for the purpose of this study, the "internal" factors) and the circumstances that surround its creation and presence on the market ("external" factors, respectively). According to Bryl (2016, pp. 141-170), the value of a work of art derives from the following object-oriented factors: artistic value; period in the oeuvre of a given artist; subject; material and technique; size and complexity of composition; condition; patina; signature and markings; age and time of creation.

The artistic value of a work is based on subject-matter knowledge and the examination of the quality of a work. The study of the object itself includes the research on the time of creation and the period it represents in the author's oeuvre (whether it was created during the early period of the activity of a given artist or the "flamboyant," representative period), however the rest is a matter of a pure physical examination. The condition of the work, be it "Old Master" or Contemporary, always plays a role in its valuation. The subject is crucial to private collectors as some artistically impressive works would not play a decorative role in the space the object is intended for, and the very message carried by a work should suit private needs or reflect the outlook of the buyer. Such criteria as the material and technique play a more vital role in establishing the value of the works of living artists as the price paid in the primary market should cover the expenses incurred by the artist when creating the work.

In the primary market, the size of a work plays a key role in establishing its value – it often reflects the time and the cost of materials needed to produce it. An exception in this case may be a work that is too large for domestic exposition, therefore, harder to sell to

individual buyers and not institutions. The cost of material itself incurred by the artist needs to be covered in a way when bought directly. For instance, casting sculptures in bronze requires the cooperation with foundries. In the case of painting or drawing, works requiring safety measures in their maintenance, e.g. pastel works on paper, are often priced lower than more resistant pieces, e.g. oil paintings. Moreover, works in colour are generally priced higher than other compositions – this may account for the fact that psychologically, people are more attracted to vivid objects rather than monochrome. However, these conditions would rather apply to the primary market for similar works as such factors tend to play a less vital role in the secondary market, especially, when the external factors come into play.

The "external" value factors play a key role in both segments of the market, however, are more likely to appear on the secondary market. The ratings play a key role as a tool of reference – in the case of "Old Masters" – they constitute the primary source of information for past results, therefore constitute a certain benchmark, for emerging authors – a valid point of reference with regard to peer creations, therefore an aid in establishing value of their own work. The following "external factors" may constitute the additional value of a work (Bryl, 2016, pp. 170-179): auction records; provenance and history of the object; "artistic life;" trends and aesthetics; uniqueness.

Auction records of a given artist are the primary source of information in the process of appraising artworks. In the case of the same creative period of a given artist and similar renderings of the same theme, the appraisal of objects is called "surrogate competition" (Boll 54). In the case of two distinctly different objects by the same artist, analyzing auction records is not enough is asserting value and other factors need to be taken into account, i.e. the maturity of the work in question as compared to other by the same artist, size, etc. Art indices refer to a fraction of sale records, i.e. public auction records, excluding galleries and dealers, therefore this source of information presents only fragmentary data.

Another issue in valuation is caused by the inability to track all prices present on the market. While some auctions are public and the price made available, there are many

cases of "hidden" prices. An example was pointed out in the empirical research conducted in the form of interviews for the purpose of this very study:

> "when you see at auction, when they put prices, the only thing that I know is, what we now see is that it will become very difficult to know the prices of things because at least in France, unfortunately, they permitted what they call *la vente de gré à gré* (private sales) so the objects do not even appear on sales anymore, on public sales, so you just don't know neither the object that is sold nor the price at which it's sold, so it has become an issue because you just don't know" (Schneider, 2019).

Another aspect playing a crucial role in valuation is provenance, mostly on the secondary market. A patchy record implies a problematic history and potential legal issues, therefore the value of objects that do not present well preserved documentation may decrease. Similarly, the value of objects supported with impeccable documentation, especially when including prestigious ownership and exhibition history rises. The provenance and exhibition history of a work of art may often be marked at the back of a piece, therefore the labels placed at the back (as an "internal" factor) are a significant marker of its "external" value. The same applies to the signature of the author.

The "artistic life" – i.e. the visibility of an artist in the art world, as well as current trends, play a key role in establishing value – the presence of the author at solo shows, the overall exhibition history, prizes awarded are key factors pertaining to the financial vlaue of their works. As trends, or "bubbles" in an economic sense, change rapidly and strongly affect the prices, especially in the case of contemporary artists. The presence in the "artistic life" is a vital point of reference when establishing a definition for a professional artist as opposed to occasional and amateur creators. Ilczuk et al. (2015, pp. 21-22), assume that, such artists must have been actively creating in the past 5 years (following a distinction by Throsby), gained a prize for their artistic work, taking part in shows, be "acclaimed" by the "artistic community," be a member of a union of artists. The distinction between emerging artists and the blue chip works is essential as far as the selected valuation method is concerned.

Artists entering the market need to find a point of reference in works representing similar "internal" qualities already present at auctions or in galleries. Moreover, "finding comparables" (Grant, 2015, p. 7) results it growing visibility as it requires the presence at art fairs, auctions, gallery openings, therefore, entering the "artistic life" in person. The wealth of the society is a crucial "external factor" as well (Borowski, 2013, p. 53) – the larger the middle class, the greater the demand for art. The uniqueness of works in this model is synonymous with rarity. On the one hand, a significant number of works by an artist in general, not only on the market but also in museums or other exhibition spaces, is a prerequisite for building their popularity in the first place. On the other, if there are very few works of an already recognized author available for sale, their price raises.

Another "art pricing chain" is presented by Bandle (2014, pp. 32-39). This approach to valuation relies on available auction records as the primary source of subsequent valuation. The perception of the artwork forms another factor in valuation in this case and such sub-factors as provenance, attribution and dating contribute to its overall estimate. The "cultural arbiters of pricing" (Bandle, 2014, p. 36) correspond to the "artistic life" presented by Bryl and bring the role of art dealers in establishing prices to the fore.

These factors do not preclude the essential authenticity criterion and do not include the additional costs included in the overall price index. These "additional costs" include: buyer's premium (when acquired through an auction house) or gallery markup, *droit de suite*, other (e.g. frame). The buyer's premium is the additional fee incurred by the buyer and it covers services performed by the auction house, such as hosting the auction, taxes included. The fees differ from country to country and may depend on the value of an object. The fee covers services performed by the auction house, e.g. listing and depicting an object in an auction catalogue, insuring the work, carrying out an initial appraisal etc. – the amount is a derivative of such factors as the value and type of a work. Contrarily to the buyer's premium, art gallery commission is not transparent and depends on whether the works for sale were bought by the gallery or consigned to it.

Another payment that may be included in the total price of an object is the cost resulting from the *droit de suite* (artist resale right). The right is regulated by the 2001 Directive on the EU level and by national laws. It is the payment of a royalty for the benefit of the author for every professional resale or their heirs within the period of 70 years after the author's death. The rates are specified in Article 4 of the 2001 Directive: 4% for the portion of the sale price up to EUR 50,000; 3% for the portion of the sale price from EUR 50,000.01 to EUR 200,000; 1% for the portion of the sale price from EUR 200,000.01 to EUR 350,000; 0,5% for the portion of the sale price from EUR 350,000.01 to EUR 500,000; 0,25% for the portion of the sale price exceeding EUR 500,000.

The limit of the royalty is 12,500 EUR. The 2001 Directive permits the Member States to apply a rate of 5% for the portion of the sale price up to EUR 50,000. In the majority of cases, frames are customarily assembled for a particular work to best exhibit the piece, and, as a matter of fact, in some cases, the frame may be worth more than the work of art itself when acquired from the primary market and valued by the artist's studio.

The conditions listed above are by no means rigid. The value of artworks is subject to change over time. The value-making factors reflect the characteristics of the periods in art history. Moreover, prices are highly dependent on the date and the place of sale. Buyers are encouraged or discouraged by the circumstances of the sale, and not only the professional "channel" of acquisition, i.e. through a gallery or at auction, but also the country where the works are presented.

Given the above valuation criteria and additional costs included in the total price of a work, the following assumption may be made: art is about its "artistic value," however, almost every piece is marketable and its value is subject to the internal and external conditions described in this section.

The "internal" and "external" factors constitute the value of a work while the overall price paid includes the value and the "additional costs." Nonetheless, there are numerous approaches to the valuation and pricing of art. For instance, if one assumes that the term value is much broader than the overall price and, in some instances, "one can buy

something at a discounted price X, but it might actually be much more valuable even in pure financial (or market) terms (say, X times 3)" (Boicova-Wynants), the price of an artwork is not necessarily driven by its intrinsic value. One may approach the value of art from the angle when the commercial value forms part of the overall value. Such an approach is present in the following equation: Value of Art = (Artistic value + Social value + Commercial value) ^Artist's brand (Ernst & Young, 2017). Such a solution includes versatile factors pertaining to the "standalone value of an artwork," including the "quality and significance," and value enhancers lying in the "brand" of an artist (Ernst & Young, 2017).

While valuation models differ in the approach to the factors that need to be included in the calculation and the order in which they should appear, similar components are present in almost every model. The model presented in this chapter is a summary of most models present in the literature and assumes a flexible approach to which "internal" and "external" factors and additional costs are to be considered as relevant, therefore, its application is universal. The economic value of cultural property may (but not always does) result from other values. In certain cases, such as the sales of contemporary art (i.e. highly speculative) the price dictates value.

The subjectivity of art valuation is a crucial element affecting the price, and, simultaneously, value of particular cultural objects, especially because cultural property valuation is performed by various actors and each time, the approach may differ, also depending on the cultural awareness of the specialist, e.g. in certain countries, the valuation of foreign art may not be placed at the same level as in other, more or less mature markets, with access to more or less appropriate data and expertise. According to Szafrański and Wilk,

> "entities professionally involved in the trade in works of art determine different types of price on the auction and antique/gallery market (starting prices, estimated prices, etc.), using the valuations at its discretion, previous sales results and more or less strictly interpreting past historical results in relation to new sales or art market trends. This is a classic system, known in

> mature black box markets, particularly noticeable in the auction market, where the 'values' of works of art are created by experts commissioned by auction houses. This system is that since the initial value of the object is created by specialized entity, its sale (real or not) creates data for next valuation, and the price is always equal or higher. It is difficult to find significant discounts in estimated valuations in Poland, so it seems that participants of the domestic market are convinced of its good condition and profitability of investments in works of art. And because the antiquarian/gallery market in Poland follows the auction market, therefore the valuation of a work of art is based on the hitherto published auction results, they become determinants for establishing the value of works of art, and, therefore, prices in galleries and antique shops (the exception is the primary market of galleries, which have their own policies price - independent of the auction in the case of representing a given artist). The force of this black box is large enough, with the simultaneous lower power of the valuation message carried out by other groups that even the above-mentioned post-inspection performed by experts of the Ministry of Culture and National Heritage, market experts in the programmes Ministry of Culture and National Heritage or experts, although it often changes the valuation of specific objects, it has almost no influence on subsequent valuations, e.g. of a given artist's work on the market" (2017, p. 122)

Most considerations discussed in this chapter affect the branding value of culture for other (non-cultural) businesses. Culture as a driver of creativity plays a key function in boosting innovative thinking generating pure business value (innovative value). Introducing art in the workplace or enhancing the exposure of employees to other cultural expressions (e.g. concerts, craft workshops etc.) is a proven tool for achieving well-being, expanding socially-aware initiatives and, as a result, building a positive image of a company. Companies also invest in art to enhance their portfolio with alternative means. Most of all, cultural goods are not only an effect of creativity but also boost innovation within all sectors.

Culture is also a powerful political (and/or strategic) tool. Directing the attention of the public towards culture serves various functions, e.g. in an armed conflict, the destruction of cultural heritage of one state is an act of power demonstration, during peacetime, using certain cultural patterns may be incorporated into a cultural policy to achieve particular ideological goals. The term "strategy" in the context of cultural property not always needs to be identified as a wartime concept. When it comes to sustainable development and the strategy of, for instance, the European Union, the social, environmental, and marketing value of cultural property has been underlined extensively in the Framework for Action on Cultural Heritage, aiming to "enhance social capital, boost economic growth and secure environmental sustainability" (European Commission). It has been concluded that culture and cultural heritage can help to achieve inclusive and sustainable development" through three "clusters of actions," i.e. "regenerate cities and regions through cultural heritage, promote adaptive re-use of heritage buildings, balance access to cultural heritage with sustainable cultural tourism and natural heritage" (European Commission).

Moreover, the marketing value of cultural property should also be underlined in this context, especially in the context of promoting European historic cities. Apart from the marketing use of cultural heritage as a tourist attraction, thus, pertaining to the overall economic growth of a city, cultural heritage marketing often has a vital role in attracting investment to the city. As pointed out by Karmowska, "this economical aspect is especially vital in industrial places, but also historic cities cannot resign from basing city development on industry, although for environmental reasons (for the preservation of material and non-material cultural heritage) they cannot be considered good locations for industry. This is not entirely true, however, because in some ways they can be very well-equipped for economic and industrial development. Rich in history and tradition, European historic cities with an accumulation of historic knowledge usually play the role of educational centres on a regional or – in most cases – European scale. This gives them the opportunity to be a location for a high-tech and knowledge industry" (2003, p. 140). The above statement is not only liked to immovable heritage, but can also be related to local art collections and overall cultural landscape of a region.

The value of movable cultural property also lies in its collectability. Collecting may be viewed as a form of cultural activity and it is motivated by many factors, *inter alia* the need to control, mark one's individuality, and compensation. Pierre Bourdieu's idea of social "distinction" is also reflected in the collectors' motivation: cultural objects matching our taste distinguish us from others (1984). It may be claimed that, above all, experiencing and owning cultural objects has the function of aesthetic satisfaction.

The above values, in conclusion, may be roughly divided into "primary" or "basic" values and others, such as specific "use" values. However, the relationship between these categories is so close, that it may prove impossible to clearly specify when the realm of one consideration ends and where the other begins. The below chain of inter-relations depicts the inseparability of values and their effect on one another.

For instance, the so-called "source" value exists both in the realm of "historical" and "scientific" value, as well as "social" – both for the general public as well as individual viewers. It is understood as the capacity to deliver information in the course of research and, simultaneously, the emotional impact on the viewer caused by the ability to convey a "true story" (*cf.* Zeidler, 2011). Moreover, this is directly linked to authenticity as a value in itself. Authenticity, subsequently, affects the financial value, also as "market value" and, in combination with this feature, the social and emotional values are established, the same mechanism is also observed the other way around. At the same time, already these two may form an inseparable unity. It is also important to pint out how criminal activities change the values assigned to cultural property. For instance, the scientific value of an object excavated illicitly is lost in the process and only the economic value remains (*cf.* INTERPOL, The issues – cultural property).

Kono (2014) points out that the Nara Document on Authenticity (1994), relating to the conservation of cultural heritage, has affected the notion of authenticity linking it to the concept of "authenticity as credibility of information sources" (p. 436). This idea can be also applied in the context of movable cultural property, underlining other values attributed to it, both in the social context but also its composition. It is noteworthy that even well-established values change over time. In some cases, time affects the market

value, in others it diminishes it. This is the reason why the preservation of objects in their best condition possible is treated as a fundamental work necessary to maintain value, both in its tangible dimension, as well as the intangible meaning and effect such items convey and cause, respectively.

There are various aspects that can affect the change of value. For instance, the legal framework, varying from country to country, can affect the change of prices. Frigo (2019) mentions the example of Italian law:

> "that (Italy) is a country where you have very restrictive provisions of law once an item is declared of cultural importance, which is not based on the price. (…) Its art market value lowers inevitably because you cannot export it, which makes that the prices in the Italian art market are probably lower, much lower, as compared to Switzerland, which is very close. And it explains of course why collectors or not collectors, owners of artworks or antiquities would prefer to sell an item (…) abroad because prices can really raise considerably (…). You can imagine, for instance, we had an example of an old manuscript of the 13th century which was sold to a foreign collector for 2 million euros and I think that in Italy nobody would pay that amount because if you want to resell it once it's declared of cultural importance you'll never get that amount of money you see so that's an interesting example of how law may influence the market."

Another factor affecting the value of cultural property, especially that available on the market, is the artificial reselling simply to raise the price in a short period of time:

> "I was at a meeting, a conference in Belgium, by Mrs. Guggenheim, and this (collection management) is exactly what she does, she is an advice to buyers and she tells them who are the artists going up or down, why, and she explains some of the criteria and sometimes she says where the object was shown, what kind of galleries, how many times, was it in an exhibition and sometimes

they say that they sell several times the same object for the price to rise, so it's also artificial" (Schneider, 2019).

The above examples serve as a point of reference for what additional factors cause the market value of cultural property to alter. When it comes to the "intangible" value like aesthetic value, for instance, on the one hand, it should not change depending on these factors, however, on the other, it is not clearly visible whether it never does.

The below graph illustrates the elements that may form cultural value. It is worth to mention that this is not a closed catalogue and the boundaries between these values are often blurred and, as mentioned above, the value can change depending on various external factors. However, for the purpose of this study, the below summary serves as a useful tool for simplified categorisation of values assigned to cultural property:

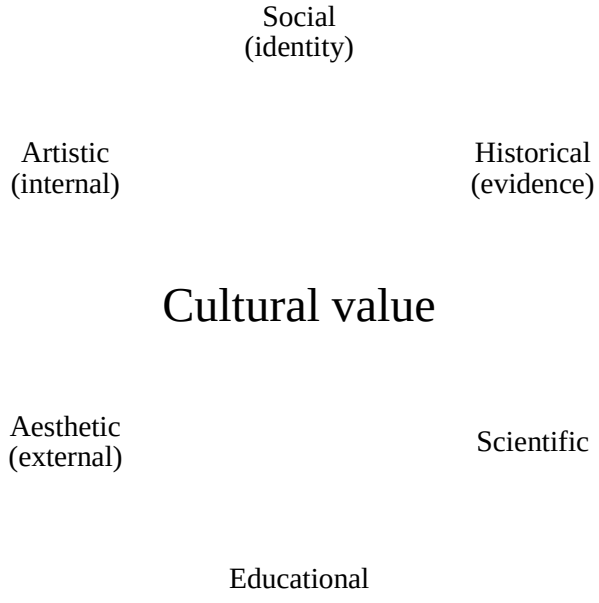

Figure 2. Elements of cultural value

Source: Own elaboration.

The above summary serves as a point of reference for the value summary. As the set of values is developed in Chapter 3, a longer list of values is provided in that part of the thesis. Looking at this simplified summary presented above, one may dive into the conclusion that assigning value to cultural property, regardless of the context in which it is analysed, is an individual right and that the richness of this ground permits for a further reflection on our existence. As Stanisław Ignacy Witkiewicz[2] explicitly put it, "I understand creativity not as the production of this idiotic, useless so-called 'pure form' and not as playing around with reality, but as creating a new reality to which you can escape from the one that we have enough up to our throats" (2019).

In this view, culture as such helps individuals escape from reality and, in this way, experiencing art and other forms of creativity creates a comfort zone for many of us going through hard times. This individual value assigned to cultural property has gained a new dimension in the post-COVID-19 era when many digital platforms granting remote access to cultural heritage have helped individuals and communities to "soothe the anxieties of people living through COVID-19 and increasing their sense of happiness" (Kono *et al*., 2020, p. 3). On the one hand, the effects of the pandemic on social life, including the direct experience of art and culture in general, are negative, however, on the other, the possibilities to view exhibitions and other forms of artistic expressions previously only available on-site have opened the doors to the art world and, thus, allowing larger groups of people to experience culture, regardless of their location. The same applies to knowledge-sharing platforms, such as conferences and seminars carried out online. When it comes to examples, the Council of Europe and its Culture and Cultural Heritage Division has published a list of activities and places to visit remotely.

Overall, as far as this study is concerned, the term "cultural property" already contains the values assigned in the "constitutive process" as the very "intended creation of a good by humans and the declarative character of the act, i.e. assuming that the one who speaks about cultural property assigns or states that there is value in it" (Kociołek-Pęksa and Menkes, 2018, pp. 198-199).

[2] S. I. Witkiewicz "Witkacy" (1885 -1939) was a Polish painter, photographer, playwright and novelist, philosopher, theoretician, and art critic.

Conclusion

Following the linguistic analysis of cultural terms adopted in legal acts and their respective translations, as well as those discussed in the doctrine, it may be claimed that, on the one hand, a number of concepts are used interchangeably in spite of their differing connotation. On the other hand, the set of referents applied to all these items is so vast that their dimension is, as a matter of fact, very similar. Moreover, the limits of particular categories and their referents is impossible to be firmly established.

Bearing in mind the legal and doctrinal grounds presented above, the following conclusion can be made: decoding the meaning of concepts in the realm of cultural law, as the broadest category, may occur at two levels: hierarchical or connection-based. If viewed from the point of view of one organisation establishing ground rules for protection, e.g. UNESCO, the concept of cultural heritage refers to universal social values measured primarily with historical significance, while other elements, e.g. cultural property constitute a sub-category belonging to the wider concept of "heritage." However, if seen through the lens of individual rights, e.g. copyright or physical property right to a given cultural product, a more object-based approach may be applied, where it is not so much about its general social effect but rather the intrinsic features and personal emotional attachment to the object. Due to the fact that cultural property is a broad category of meanings and connotations, depending on individual perspectives, the linguistic equivalents utilised even in reference to the same approach, e.g. hierarchical, does not guarantee the same understanding of values assigned to the object, e.g. "heritage" v. "*Kulturgut*."

The value of cultural property incorporated in legal acts is a starting point for proposing their catalogue. Main international instruments relating to heritage and other terms in this realm form a network. While typical "heritage" instruments refer to artistic values, they are devoid of any in-depth assessment methods. This is where different branches of law and fields of study could prove to be of complementary nature. Intellectual property law refers to financial thresholds established in order to grant particular rights, e.g. resale

right, however, it is also not providing any insights into the methods of valuation. The analysis presented in this dissertation aims to shed some light on this issue.

In spite of the inevitable linguistic discrepancies between various equivalents of legal terms both under international, EU, or national law examples, the definition scope applicable to the realms of cultural property can still find a bottom line: it is the value and interest determined for the purpose of regulation. The above analysis proves that it would be valuable to create a multi-language cultural property law dictionary including an in-depth term analysis to support researchers, parties involved in a dispute and cultural institutions to provide for an inclusive interpretation of object categories and, above all, to improve communication among scholars and professionals in the field of culture. The value summary used to propose such a dictionary is an open-ended list. This chapter aimed at connecting terms with their respective values in order to decode the true meaning of certain terms used as broad, sometimes contradictory, categories.

Chapter 2
THE 1995 UNIDROIT CONVENTION AS A MODEL INSTRUMENT

Introduction

Cultural property is, primarily, the subject of protection laws. The main aim of such instruments is to prevent the destruction and/or illicit movement and change of possession. Such offences may not harm the object itself, i.e. have a physical effect on its substance, but also have a significant social impact. Be it state or private, the historical, emotional, or economical value of property is crucial for the owner: in the case of "heritage" items, it is the collectiveness of a cultural community, in other instances, it may be the individual interest only. Due to the emotional impact involved in establishing overall value of cultural property, such items may also be significant for a group or an individual depending on many factors, regardless of the formal status. Recalling Throsby (2001, pp. 34-35), the majority of cultural objects are of "mixed" nature (i.e. their significance reaches beyond fixed categories of private and public property).

The restitution of cultural property as a process is not directly identified as a means of protection, however, it may be claimed that if protection includes both prevention and pursuit, restitution is the latter. The terms "restitution" or "return" as well as "repatriation," "restoration," and "revindication" are often used interchangeably, however this approach results in ambiguity. "Restoration" may be viewed as the most open term including other concepts, e.g. restitution, however, specific legal regimes require a categorical distinction of these terms. According to Kowalski (2004), "restitution" is a response to cases of "violation of the prohibition of theft and pillage imposed by the binding law" (p. 33).

The trade in looted or illegally moved property is not a new phenomenon, however, the *modus operandi* of looters and art traffickers changes over time and the response to such acts needs to be adjusted to new needs. Moreover, currently crimes against cultural property are often directly linked to organized crime (*cf.* Jakubowski and Trzciński, 2019; United Nations Security Council, 2017, S/RES/2347). Although the development of

technology affects both sides of the issue – the looters use it to map and remove property, while the task forces recovering the objects use new tools to return them to original locations, the problem stretches far beyond physical methods. It requires the assistance of organisations and governments built upon an effective legal framework and, above all, good will.

Despite complex cultural property laws, cultural objects are constantly looted or moved illegally and trafficked. During this process, a significant shift in their character occurs: from heritage immersed in its original setting and social context, to commodities in the hands of new possessors. Therefore, two conflicting legal perspectives occur: ownership under private law applicable in the territory where the object is located and international cultural heritage law principles and rules. Cultural property restitution may be a response to looted, damaged, and/or illegally moved objects, not only wartime losses. International law instruments approach this topic from various angles. The below summary includes both hard and soft law instruments encouraging the restitution and/or return of cultural objects.

2.1. Context definition scope

2.1.1. Restitution

The term “restitution” stems from the Latin *restituere* "set up again, restore, rebuild, replace, revive, reinstate, re-establish" (Online Etymology Dictionary). This concept originates from Roman private law where its basic form, *restitutio in integrum* indicated the restoration of the previous condition in general (Kowalski, 2009, p. 326). Although the term “restitution” most often refers to recovering objects seized during wartime pillage, it also responds to any other kind of illicit removal, movement, and transfer of ownership, during peacetime, as well as “appropriation or trades between dealers in times of colonization or occupation” (Cornu and Renold, 2010, p. 1).

In spite of the existence of the right of loot for many centuries up to the early 19th century, already in the 17th century certain legal acts assumed the obligation to return looted property, e.g. the Treaty of Munster (1648) or the Treaty of Oliva (1660). Since 1815, it

has been customary to spare cultural property during wartime (Kowalski, 2010) and from that moment onwards, peace agreements would often contain provisions regulating cultural heritage reconstruction, in the case of immovables, and restitution of movables (Vrdoljak, 2013, p. 22). As for these pre-Hague[3] grounds for restitution, the 1660 Treaty of Oliva already granted the restoration of looted heritage. Moreover, as per the Memoir of Lord Castlereagh to Allied Ministers of 1815, restitution was already then possible despite any political changes that might have resulted in border alterations (Kowalski and Kuhnke, 2011).

The Hague Conventions of 1899 and 1907 were one of the first international treaties concerning the protection of cultural heritage under an armed conflict. The 1899 Convention states that "all seizure of and [religious, charitable, and educational] destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings." The 1907 Convention granted special status to cultural property during wartime and occupation. These acts did not cover all aspects of the process of restitution. Since their application, however, it has been more common to promote other solutions such as conditional restitution. The Treaty of Versailles introduced the so-called "in kind" restitution to compensate for the irreplaceable loss incurred by an opponent in an armed conflict. The object transferred would reflect the value and amount of the original lost heritage (Forrest, 2012, p. 141).

The United Nations has played a key role in establishing a high-level framework for international cultural heritage protection. Its predecessor, the League of Nations had approached the question of restitution already before WWII and proposed a draft Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest, which have been Lost, Stolen or Unlawfully Alienated or Exported (International Museums Office 1933). The text, however, did not distinguish between private and public heritage, moreover, it left out objects from archaeological excavations and omitted intra-State claims regarding minority or indigenous community property moved to national

[3] In reference to the first international treaties on cultural property protection, i.e. the Hague Conventions of 1899 and 1907.

collections (Vrdoljak, 2006, p. 113). After WWII, the work on cultural property restitution instruments was resumed.

The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (249 U.N.T.S. 240), hereinafter referred to as "the Hague Convention," and its First Protocol regarding the export and seizure of cultural property were adopted in 1954. Nonetheless, numerous subsequent armed conflicts, including the outbreak of the Yugoslav Wars, required adopting reinforced measures (Auwera, 2013). In 1999, the Second Protocol to the 1954 Convention was adopted to address the issue of offences against cultural property during non-international armed conflicts and to enhance individual criminal liability. As summarised by O'Keefe, one of the rationales of the Hague Convention was "the mandatory punishment of individuals responsible for the willful destruction, damage or plunder of cultural property in the course of armed conflict" (2010, p. 21). Prior to drafting the Hague Convention, UNESCO's Secretariat formulated the statement that there is no need to underline "that the possibility of civil reparations is of very minor interest when we are concerned with property which is essentially irreplaceable" (Measures for Ensuring the Co-operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historical Sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration (UNESCO Doc 5 C/PRG/6, UNESCO, 27 March 1950) annex I, "Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict" as cited in O'Keefe, 2010, p. 21). Pursuant to Article 28, "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."

Drafting the next major international instrument in the field of cultural property protection, i.e. the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (823 UNTS 231), hereinafter referred to as the "1970 UNESCO Convention," was triggered by, *inter alia*, the expansion of illicit trade in cultural objects caused by the rise in art prices in the 1950s

and 1960s (Kowalski, 2015, p. 70). The 1970 UNESCO Convention is the first international instrument for the protection of cultural heritage during peacetime (Delepierre and Schneider, 2015, p. 130). The objective was to recover the cultural heritage of formerly colonised states and to respond to the ongoing problem of looting and illicit trafficking in cultural objects (Prott 2012, p. 2). The 1970 UNESCO Convention was built on three "pillars" – preventive measures at the national level, restitution of stolen cultural property, and the promotion of international cooperation (Delepierre and Schneider 2015). Its universal application allowed for a large number of ratifications, however, due to the public nature of this instrument, it left out questions of private law that had to be answered in order to provide a comprehensive tool for restitution and return of any and all cultural property.

UNESCO Member States approached the International Institute for the Unification of Private Law (UNIDROIT) to address the problem of privately-owned property restitution or return and loopholes in national laws (especially with regards to the protection of bona fide purchasers). UNIDROIT was formed in 1926 as an auxiliary organ of the League of Nations. After the dissolution of the League of Nations, the Institute was re-established in 1940. The main mission of UNIDROIT is to "study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives" (UNIDROIT). Its primary operations include preparing drafts of laws, conventions, and agreements to establish uniform internal law and facilitate international relations in the field of private law, studies in comparative private law, promoting existing projects managed by other institutions, and organising conferences and other awareness-raising events.

According to UNIDROIT's current Statute, incorporating the amendment to Article 6(1) which entered into force on 26 March 1993, the Institute's aim is to "harmonise" and "coordinate" the "private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law." In this aspect, it needs to be stressed that "UNIDROIT has played a critical role as a facilitator of cross-national legal framework for the field of e.g. cultural property, international sales, or international will. The main work of the Institute concerning the area of cultural property

is the 1995 Convention on Stolen or Illegally Exported Cultural Objects" (Stepnowska. 2018, p. 378).

UNDROIT proposed an instrument aiming at harmonizing private law in respect to the possessors of cultural goods stolen (and/or illegally exported) from source countries, transferred across the border and "laundered," thus considered to be "in good faith" at a national level in some countries (Delepierre and Schneider 2015, pp. 132-133). The primary aim of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects is to alter the behaviour and raise the awareness of cultural property market actors in order to reduce illicit trafficking. The primary measure is to provide feasible due diligence rules (Schneider, 2016). Introducing the rule of an "absolute duty" to return and restitute cultural objects and the clear distinction between the return of illegally exported goods and the restitution of looted cultural objects is a way of unifying the provisions referring to restitution in its broadest sense. The issue of unifying the notion of a *bona fide* purchaser is regulated thanks to providing an outline of means for exercising due diligence in a practical sense (Stepnowska, 2018).

The United Nations have adopted numerous resolutions to respond to the expansion of organised crime against cultural property in the 21st century. Their primary function is to encourage and strengthen international cooperation in addressing the issue of return or restitution of cultural property to the countries of their origin (United Nations General Assembly 2002, A/RES/56/97) and to prevent and prosecute crimes against movable property (United Nations Economic and Social Council 2004). The UN Convention against Transnational Organized Crime (United Nations General Assembly 2000, A/RES/55/25), a key tool to this end, aims at establishing "the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes."

Soft law instruments complement international conventions and serve as a valuable point of reference in restitution disputes due to their co-operational approach (Taşdelen, 2016).

Certain declarations are dedicated to specific issues related to historical injustice and its effects such as racial or minority discrimination and aggression or post-colonial trauma, some of them continue to improve the regime established by major conventions in a more general sense to face 21st century threats to cultural property and implement new technology and other developments to prevent and combat them.

United Nations declarations address the issue of restitution and preservation of living heritage and aim at integrating crime prevention and criminal justice measures. For instance, the main objective of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, is to recover from the traumatic experience of colonialism (Simpson 2009). The Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation (United Nations General Assembly 2015, A/RES/70/174) responds to offences involving cultural property and aims at strengthening and implementing comprehensive crime prevention and criminal justice measures, e.g., examining and adjusting national laws, managing intelligence and data, as well as improving the model treaty for the prevention of heritage-related crimes.

Other major declarations include the Holocaust era assets-related Washington Declaration, hereinafter referred to as the "Washington Principles," and the Terezin Declaration (*cf.* Zeilder and Plata, 2019). The former was published as a result of the Washington Conference on Holocaust-Era Assets in 1998. It serves as a list of non-binding principles to foster the resolution of Nazi-confiscated art. The document acknowledges the differing legal systems observed in the countries attending the conference, therefore its role is limited to guidance on the general approach implemented locally. As stated by Murphy, "The UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects created private causes of action and harmonized substantive rules governing claims. But it is almost useless for Nazi-era claims, because it was written with a fifty-year statute of limitations, precluding any claims from 1945 and earlier. Binding agreements have failed to gain traction, so the international community has turned toward nonbinding resolutions" (2010, p.12). That is why the Washington

Principles are one of the primary and well-known sources on shared-value settlement in the context of German war spoils.

The Washington Principles are based on moral rules to be applied in consistency with national and international laws to achieve "just and fair solutions." The main value added by the document is its specialized scope limited to the issue of Nazi-confiscated goods. Its measures are operational and have already been implemented: the introduction of looted art catalogs and databases being an example. The Washington Principles refer to specific social values, i.e. limited to Holocaust victims, however the advancements made as a result of implementing its guidelines have affected the research into other kinds of looted property as well. Due to its soft-law character, the guidelines included in the Washington Principles are only applied in the practice of states and organisations, not implemented in the legal sense.

The Terezin Declaration continued the pursuit of solutions for recovering Nazi-confiscated cultural property. Its principles refer to both immovable and movable property. It specifies the following categories of heritage: communal and religious immovable property, cemeteries and burial sites, Nazi-confiscated and looted art, Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, archival materials, memorial sites. It lists measures to facilitate the restitution of Nazi-looted art. First and foremost, it specifies that "art that had been confiscated by the Nazis and not subsequently restituted should be identified, relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives, resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted, in establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era."

The Terezin Declaration refers not only to pre-war owners but also their heirs: "every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-war owners or their heirs, efforts should be made to establish a central registry of such information, pre-war owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted, if the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case, if the pre-war owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution."

Moreover, it underlines that "commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership, nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms applicable to ownership issues." Reaffirming the Washington Conference Principles, the Terezin Declaration stresses the importance of continuing and improving provenance research and the availability of its results, it also recommends "the establishment of mechanisms to assist claimants and others in their efforts." Accoring to the Terezin Declaration, governments should consider all relevant issues when applying various legal provisions that may hinder the restitution of cultural property. Following this statement, it may be asserted that these "issues" refer primarily to the respect of the interest of the parties involved and the preservation of the object itself, i.e. the values mentioned in the previous chapter.

Zeidler and Plata (2019) stress that the Terezin Declaration, in spite of its non-binding nature, is a significant development in the open international negotiation of historical injustices. Reaffirming the "international intentions to address the trauma of Holocaust survivors and other victims of the Nazi regime – after the efforts of the 1997 London Nazi Gold Conference, the 1998 Washington Conference on Holocaust-Era Assets, the 2000

Stockholm Declaration, and the October 2000 Vilnius Conference on Holocaust-Era Looted Cultural Assets" (Zeidler and Plata, 2019, p. 25), the Terezin Declaration develops a number of arguments that stress the need to protect not only the welfare of Holocaust survivors but also their movable and immovable cultural properties, e.g. Jewish cemeteries and Nazi-confiscated and looted art (Zeidler and Plata, 2019).

The most visible argument in the Declaration is the argument from justice that appears in the form of "just and fair" solution regarding displaced or looted property. It is understood as solutions resulting from the "set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs" included in the Washington Principles, also in line with "national laws and regulations as well as international obligations" (Terezin Declaration).

Although the term "restitution" is often associated with the displacement of cultural property looted or otherwise moved during or as a result of World War II (*cf.* popular publications such *The Rape of Europa* by Lynn Nicholas), it covers a much larger scope. To showcase this scope, this research is referring to works of varying status, attributed to creators of different origin, and created both before and after WWII.

2.1.2. Return and repatriation

The terms used in the above instruments refer to restitution *sensu largo*. Such terms as "repatriation" and "return" are often used interchangeably in this context, however, each has its own meaning. The term "repatriation" was coined to protect the integrity of national cultural heritage during territorial cession or the disintegration of multinational states (Kowalski, 2001), therefore repatriation is most often sought after by indigenous social groups. The main criterion for repatriation is the territorial bond of the object. In the process of repatriation, the recipient may be identified either as a country where the object belongs or the ethnic group owning it (Cornu and Renold 2010, p. 2).

The term "return" was introduced by UNESCO in reference to objects illicitly exported from their original location, it is also preferred for property displaced by the colonial rule.

In the latter case, the return is not so much concerned with issues related to legislation as with the need to give unique objects back to their creators, thus the mere question of ownership remains irrelevant (Cornu and Renold, 2010, p. 2). The notion of "return" as opposed to "restitution" concerns the idea of territory (i.e. country of origin), while restitution is focused on a physical recipient (owner). Moreover, it can be added that "cultural property removed during colonialism should be governed under the rather vague *ex gratia* regime of 'return,' based more on moral considerations – adequate for cases where objects left their countries of origin prior to the crystallization of national and international law on the protection of cultural property" (Jakubowski, 2011, pp. 42-43).

The UNIDROIT Convention of 1995 differentiates between the term "restitution" and "return." Its provisions continue to expand the scope of protection and recovery. The fundamental purpose of the 1995 UNIDROIT Convention is to complete the provisions of the 1970 UNESCO Convention by providing uniform legal rules regarding the return and restitution of cultural objects to limit the illicit trafficking in cultural objects (UNESCO 2018, p. 39). This instrument is considered, by far, to be one of the most universal and complete international restitution acts, therefore, the next subchapter is devoted to the analysis of its content and effect.

Restitution *sensu largo* may also refer to other means of recovery, be it monetary means or conditional restitution. Cornu and Renold (2010, pp. 1-30) specify the following categories of alternative solutions to "simple" restituion: restitution with consideration, conditional restitution, restitution accompanied by cultural cooperation measures, formal recognition of the importance to cultural identity, loans (long-term, temporary and others), donations, setting up special ownership regimes (joint ownership, trusts andothers), the production of replicas, withdrawal of the claim for restitution in exchange for financial compensation, transfering ownership to a third party, purchasing the object on the market, archaeological permits granted for return.

Such a distinction is a result of pure practice, these means are rarely foreseen in legal sources. Alternative Means of Dispute Resolution (ADR), including mediation and arbitration (see: Chechi, 2014), in the context of cultural property restitution claims

permits for a broader scope of solutions, most of which prove to focus on the values behind the object. Be it collective social values (e.g. as in the case of religious heritage of indigenous peoples) or individual emotional attachment (e.g. an individual owner of family heritage), these methods allow for a number of solutions that are unavailable under court proceedings.

The distinction provided above may be complemented with a broader category of "voluntary restitution" – regardless of the exact solution adopted. The idea of voluntarity is crucial in the "vale-based restitution process" identified at later stages of the research. Solutions focused on the significance of objects is not limited by legal grounds regulating ownership issues – it stretches beyond international conventions and national laws, however, similar principles may be observed in both cases, i.e. cultural heritage law principles.

2.2. The 1995 UNIDROIT Convention

The Convention on Stolen or Illegally Exported Cultural Objects was drafted by UNIDROIT to fill the gaps between private law systems regarding the provisions regulating the movement and ownership of cultural property, especially with a view toward establishing minimal due diligence measures and a uniform definition of a *bona fide* purchaser, protected in many legal systems (Stepnowska, 2018, pp. 377-391).

Although the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 aimed at regulating the issue of illicit movement and transfer of ownership, including such issues as illicit trafficking, it failed to establish common understanding of good faith acquisition and due diligence required to resolve restitution disputes. Under Article 7 b. (ii) of the 1970 UNESCO Convention "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. (…) The requesting Party shall furnish, at its expense, the documentation

and other evidence necessary to establish its claim for recovery and return. (…) All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party." The issue of compensation under this article raised a number of questions.

In the case of stolen cultural objects, the main unregulated issues were related to the transfer of title and conflicting interests between the original owner and the good faith buyer on the other side of the dispute (Schneider 2001, p. 480). The problem of acquisition *a non domino* varies from system to system. Under common law, the *nemo dat quod non habet* rule applies, while many civil law countries grant more protection to the acquirer in good faith of stolen property (e.g. France and Italy) and such cases as the 1980 Winkworth v. Christie, Manson & Woods Ltd. case also triggered the adoption of a new instrument (Kowalski 2015, p. 76. Since UNESCO does not hold authority in the instance of private law, the task of harmonising laws regulating the notions of *bona fide* purchase, along with establishing due diligence measures, was relegated to UNIDROIT.

The problem of acquiring value of movables *a non domino* was adressed by UNIDROIT in the 1960s draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables (hereinafter referred to as "LUAB"), however, the proposal has never been adopted. Moreover, in the context of cultural property, LUAB could not have possibly reflected the unique nature of the objects in question. Since the 1970 UNESCO Convention failed to provide "specific mechanism for the return of illegally exported objects to their country of origin" (Schneider 2001, p. 480), the new instrument was supposed to "supplement" the 1970 UNESCO Convention with such a provision. The new solution was supposed to achieve a balance between the market and the countries of origin, bearing in mind the simultaneous works on EU regulations of 1992 and 1993.

2.2.1. Title and preamble

The title of the 1995 Convention, i.e. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects reflects the key aspects regulated in the instrument. Although the terms "restitution" and "return" are omited in the title, the dual nature of the context is still highlighted. The term "cultural objects" was chosen over "cultural property" in the

English version of the text due to the relative novelty of the latter in common law at the time (Schneider 2001, p. 488). The equivalents in other languages, however, are not literal. The French version adopted the concept of *biens culturels* (literally, "goods") due to its firm stance under the UNESCO legal framework (the French version of the 1970 UNESCO Convention also uses the term *biens culturels*), the same applies to the Italian and Polish translations, i.e. *beni culturali* and *dobra kultury* (unofficial translation to Polish by Kowalski, 1996). The term "cultural object" is rarely translated literally, neither in legal acts, nor in the literature.

The Preamble expresses the collective intention of the States Parties and synopsises the background behind the need to draft this instrument. It recalls the fundamental measures assuring the well-being and development of humanity as well as understanding between people, i.e. the protection of cultural heritage and fostering cultural exchange. It raises concerns provoked by crimes against cultural objects, such as illicit trafficking, destruction, pillage of archaeological sites and the effect of such offences on the society at different levels, e.g. global, regional, state, or ethnical. Bearing in mind the "interest of all," it sets out the objective to preserve and protect cultural heritage through combatting illicit trade in cultural objects. To this end, it foresees the establishment of "minimal legal rules for the restitution and return of cultural objects." The text continues with a link to the question of compensation for objects returned in the case of good faith acquisition, i.e. it stresses that the instrument aims at facilitating the restitution and return and that even if compensation is applicable in certain states does not mean that it has to be a standard practice.

It affirms that in spite of its adoption in the future, the Convention does not approve nor legitimise any illegal activities that have occured prior to enforcing it. The principle of non-retroactivity plays a vital role in the Convention and its position in the Preamble already stresses this fact from the very beginning, as it enables those states "enshrining" this principle in their constitution to become parties to the Convention (Schneider, 2001, p. 492). The Preamble makes it clear that the Convention is unable to solve all issues related to illicit trafficking, however, it is a starting point for enhancing international

cooperation focused on combating such offences, assuring legal trade, and maintaing agreements permitting cultural exchange.

One of the key practical aspects mentioned in the Preamble to the Convention is the need to implement and improve measures for the protection of cultural objects, including registers (primarily, lost art registers), the physical safeguarding of archaeological sites, and technical cooperation. In its final paragraph, the Preamble recognises the fundamental importance of the 1970 UNESCO Convention on illicit traffic and the codes of conduct in the private sector, e.g. the ICOM Code of Ethics for Museums and the International Code of Ethics for Dealers in Cultural Property (CLT/CH/INS.06/25 Rev) or the Society for American Archaeology's ("SAA") Code of Ethics. UNESCO is referred to only once in the text of the UNIDROIT Convention for the consideration of several states that were not Parties to the 1970 Convention, however the role of the Organisation could not have been overlooked in the new instrument.

2.2.2. Scope of application and definitions

Chapter I of the 1995 convention defines the scope of application of the instrument and provides the key definitions applicable in its context. Article 1 makes it clear that the Convention applies to international claims, therefore intra-state claims are excluded, although, initially, the group of experts drafting the Convention wanted to include domestic instances as well (Schneider, 2001, p. 492). In Articles 8 and 10, the instrument specifies the links between international cases and the application of specific provisions listed in the Convention.

The Convention specifies two instances: the restitution of stolen cultural objects and the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects"). The conjunction “or” in the title of the Convention clarifies that the provisions apply to either stolen or illegally exported cultural objects, however, it may also have been both stolen and illegally exported. In order for both instances to be covered by the scope of the convention, the condition of “international character” had to be implied.

While in the case of export it always refers to claims of cross-border character, the instance of stolen object required a more detailed background. Although no additional description is provided in the text of the instrument, the attempted use of the sentence "moved across an international frontier" in reference to stolen objects serves as a way of additional explanation present in the Explanatory Report (Schneider 2001, p. 494). Even in cases where the stolen object is found again in the same state from which it was stolen, the provisions apply if it had crossed other frontiers in the meantime, prior to its finding (e.g. Winkworth v. Christie case). The choice of the term "stolen" was motivated by the fact that the act of theft is punished in every legal system, while other offences, e.g. fraud, may result in acquiring title in good faith. In determining whether the case is theft, the court has the authority to decide on whether to apply its own law directly or the law selected by the conflict of law rules (Schneider 2001, p. 494).

The difference between the case of stolen as opposed to illegally exported objects is that the former refers only to the export laws of the Contracting State from which an item had been exported, therefore other States need to recognise the validity of such provisions and return objects found within their borders. The idea that parties to the Convention need to respect foreign laws is further developed in Chapter 3.

Pursuant to Article 2, the term "cultural objects" applies to items satisfying two main conditions: they must be of importance from the point of view of archaeology, prehistory, history, literature, art or science, either on religious or secular grounds, and they must match the categories of objects listed in the Annex. This mixed definition system was inspired by the 1970 UNESCO Convention and Directive 93/7/EEC. Although the catalogue is open-ended, e.g. it provides examples of objects, the main limit of the definition scope refers to the general value categories of the object listed in Article 2. Although the drafting committee had suggested the addition of another evaluative element such as "exceptional" value, in the end it was decided to include less valuable items in order to regulate all transactions involving objects of cultural character as these form the majority of the market and to apply due diligence measures provided in the Convention to any and all practices (Schneider 2001, p. 498). The idea of additional

restrictions, such as the category of financial value or age were also rejected bearing in mind the possible limitations for certain claims and the personal attachment of the parties concerned.

2.2.3. Restitution of stolen cultural objects

Chapter II of the Convention formulates the simple and "absolute" duty of restitution in the case of stolen objects, i.e. "the possessor of a cultural object which has been stolen shall return it" (Article 3). The process of formulating the provisions regulating the restitution of stolen property had always been concerned with the interests of the original owner and the purchaser in good faith. It is important to point out that often the interests of the original owner and the purchaser, even in good faith, are most often contradicting one another. Therefore, it has to stressed that, and in the face of growing illicit art trade, the only solution was to place the right of the dispossessed owner first. Importantly, instead of forcing a subjective moral judgement of good faith and the need to choose a given legal system that could penalise one of the two, since both the original, dispossessed owner, and the buyer in good faith, the solution was to "compel the buyer, on pains of having to return the object, to check that the object was being lawfully traded. This principle, coupled with the possibility of compensation for the buyer who can prove that he acted 'with due diligence' (Article 4(1))" (UNIDROIT). It is also important to point out that this approach was intended to affect the art market and break the chain of illegal trafficking by forcing its actors to unveil the provenance trail of cultural objects.

The provision constructed in Article 3 of the Convention, however, does not determine whether it applies only to bad faith purchase or to public or private property. The good faith consideration is later developed in the context of compensation. The favoured position of the claimant is reflected by the fact that the stolen good must be returned based only on the evidence that it has been stolen. The claimant does not need to provide the court with factual or legal data to support the claim for restitution.

The terminological debate concerning the use of "possessor" over "holder" arose from the fact that under certain legal systems differentiate between possession and holding. However, due to the uniform nature of the instrument, the term "possessor" was used in

its broad meaning (Schneider, 2001, p. 502). Another issue was related to the other party, i.e. the dispossessed person, named as the "owner" in the Convention. The potential ambiguity resulting from such choice is easily solved due to the applicability of the *nemo dat* principle, i.e. the holder of a stolen object can never be the proper owner. However, it is not limited to the dispossessed owner, it may also be returned to a third party, e.g. a bank, museum, or an art gallery, depending on the situation.

In this chapter, the Convention also specifies the case of illicit excavation as an instance of theft, whenever it is deemed as unlawful or lawful but with the exception that the object has been illicitly retained under local law. The case of pillage of archaeological excavation sites formed a significant part of the considerations that lead to the adoption of this new instrument as the 1970 Convention included only inventoried objects (especially from museum collections). However, the objects referred to in Art. 9 of the 1970 Convention "any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected.

The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State" may also be covered by its provisions, however, the provenance and the date of discovery has to be proved and, in some cases, even this is insufficient to request for restitution (Schneider, 2001, p. 506)

The provisions regulating restitution are mostly concerned with time limitation to bring a claim. The provisions related to restitution do not specify who the claimant may be. It may refer to either private persons or a Member State. The consideration of the two differing perspectives, of the "exporting" and "importing" countries, caused significant doubts about whether to include any time limits to bring a claim and if so what it should be.

The source countries opted for maximising the period and the importers for shortening it as much as possible. Therefore, two main limitations were introduced. The first restriction is a general limit of, respectively, “a period within three years from the time when the claimant knew the location of the cultural object and the identity of its possessor,” and a period within fifty years from the time of the theft in any case. In reference to objects forming an integral part of identified monuments or archaeological sites, or public collections, there is no other limitation than three years from the moment when the location and the identity of the possessor is known to the claimant. However, it is fundamental to underline that these provisions are irrelevant whenever a state declares that according to its law, a claim is only limited by the period of 75 years or a longer period defined in its law. Moreover, in the case of objects removed from a monument, archaeological site or public collection in a country making a declaration, they are also subject to that time limitation.

The Convention also specifies the notion of a “public collection.” Under Article 3(7), such a collection includes objects inventoried or identified in a different way and owned by: a Contracting State, a regional or local authority of a Contracting State; a religious institution in a Contracting State; or an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest. Moreover, a specific provision applies to “sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use” that is treated as a public collection for the purpose of this Convention, therefore, the same time limitation applies.

The condition marking the start of the time period includes both: the knowledge of the location and the current possessor’s identity. This dual factor was introduced in order to protect the claimant as discovering only the identity of the possessor could lead to hiding the object away (Schneider, 2001, p. 508). The period applicable in the case of theft is the same as in the case of illegal export not to affect the choice of the grounds on which a claim is brought, whenever it is unclear e.g. as in the case of illicit excavation.

In spite of the wide scope of application of the UNIDROIT Convention, other provisions as specified in other main instruments are available to claimants due to the complimentary nature of the 1995 Convention in relation previous solutions, namely the 1954 Hague Convention and the 1970 UNESCO Convention.

Article 4 of the 1995 UNIDROIT Convention contains provisions on compensation, including due diligence measures recognised as one of the most significant advancements provided in the instrument. Article 4(1) uses the category of "fair and reasonable" compensation in reference to a situation when the possessor of a stolen cultural object "neither knew nor ought reasonably to have known that the object was stolen" and is able to demonstrate that due diligence was exercised during the acquisition. This condition is crucial in assessing good faith and, thus, the right to compensation. The Convention, at this point, involves other actors, not only the possessor and the owner, i.e. "the person who transferred the cultural object to the possessor, or any prior transferor." It is asserted that such a party should pay the compensation as well whenever it is in line with the law of the State where the claim is brought. Compensation may also be claimed from any other person.

The Convention specifies particular conditions serving as due diligence measures. The circumstance of the acquisition that are of great importance to this end may include: the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken under the circumstances. These requirements also include such actions as examining the existence of an export certificate as specified by national laws of the requesting state (Article 6(2)).

In spite of the existence of many registers that could be consulted in order to obtain information necessary to satisfy the condition of due diligence mentioned above, there is a large group of object categories that are unlikely to appear in such sources. First, objects

that have never been photographed and/or inventoried e.g. tribal cultural property or other objects in private hands) and objects restored and/or repainted several times or simply in a manner that would not allow for the immediate recognition of the object. Moreover, certain databases are paid and uneasy to use, therefore obtaining the results of the search may not be accessible to every possessor. Moreover, there is no single database tracking all other sources, however, efforts have been made to consolidate the systems. Diligence is assessed differently for art market professionals who are "expected to have knowledge of and consult the most authoritative sources" and regardless of the status of the party, diligence is assessed based on the number of registers consulted, one source is not sufficient (Schneider, 2001, p. 522).

Due diligence assessment requires taking the circumstances of the acquisition into consideration. The circumstances, the character of the parties, and the price paid may all cumulate to give a specific impression that allows for a judgement. For instance, the court may investigate whether the object comes from a typical "source" country which should have already alerted the buyer at the time of the transaction, e.g. objects coming from the Middle East or Southeast Asia. Another condition may refer to the place of the acquisition, e.g. a flea market as opposed to a reputed auction house, however, the prestige of such institutions does not guarantee full legitimacy, cf. e.g. China and Pierre Berge case (Wallace, Bandle, and Renold, 2013). The price of the object at time of the acquisition also plays a vital role in establishing the behaviour of the buyer. Whenever the price is suspiciously low, it should raise red flags, however, the market value is not always easily verifiable, either due to the lack of experience of the buyer or no accessible market information on the creator or similar objects.

The Convention applies the term "reasonable" to the behaviour of the parties. This notion hinges on national case law and leaves the decision on what it means to be made by authorised entities. However, in addition to the uniform conditions proposed by the 1995 UNIDROIT Convention, professional codes of ethics may also serve as a solid point of reference in this case, along with solutions presented by specialised bodies and initiatives, e.g. UNESCO's International Code of Ethics for Dealers in Cultural Property or the codes adopted by the Council for the Prevention of Art Theft (CoPAT) in the United Kingdom.

Due diligence is difficult to be executed especially when the object is acquired by inheritance or in another way but still gratuitously. In many cases of this nature, the provenance may not have been known to the possessor in spite of its unlawful past known to the transferor. This is not only limited to individual transfers of ownership but also a practice of certain cultural institutions whenever they receive a donation (Schneider 2001, p. 524).

2.2.4. Return of illegally exported cultural objects

While the provisions regulating illicit theft refer to a case equally condemned in every legal system, the instance of returning illegally exported objects is a more complex issue. Certain legal systems do not require additional conditions to be met for exporting certain categories of objects. Since illicit export as identified in Art. 1(b) refers to objects protected by states as their heritage, certain countries that do not apply particular provisions to this end cannot request them to be returned under the provisions of the 1995 Convention. As in the case of theft, the Convention does not identify the addressee of the return.

Pursuant to Article 5(2), illegal export also applies to objects exported under a temporary permit (e.g. exhibition or restoration) but not returned when due according to national legislation. Such objects are protected in line with the rules of the UNIDROIT Convention. This provision corresponds to Directive 93/7/EEC (Article 1(2)), comparing such case to "unlawful removal." This situation refers to items remaining on the territory after the expiry of the permit, however, it is not related to cases when the object is moved to a third country within the timeframe of the license. The ICOM Code of Ethics also requires museums to refrain from exhibiting illegally exported objects or items of unclear provenance (Article 3(6) of the Code).

Pursuant to Art. 5(3) explicitly refers to return based on value criteria. The return of an object can be ordered whenever the requesting state determines its removal from the original territory has a direct effect on the physical preservation of the object or of its context, the integrity of a complex object, the preservation of information of, for example,

a scientific or historical character, the traditional or ritual use of the object by a tribal or indigenous community, or whenever the state determines that this object is of great significance from its perspective. The claim may be supported by one or more of these factors.

The provisions relating to the return of illegally exported objects include the same limitation periods as in the case of restitution. As far as compensation is concerned, the payer is the requesting state, as specified in Article 6(1) of the Convention. The amount of compensation is only roughly described as "fair and reasonable" (Art. 6(1)) since the exact number is to be determined case by case by the court or other authorised institution, however, the possessor of the object may come to the agreement with the requesting state to either "retain the ownership of the object" or "transfer ownership against payment or gratuitously to a person of his/her choice residing in the requesting State who provides the necessary guarantees" (Art. 6(3)) instead of claiming compensation.

This possibility was an effect of the discussion that an illegally exported item can be physically returned to the country from which it was illicitly removed without giving back ownership (Kowalski 2016, p. 174). However, there are exceptions to this rule. It does not apply whenever the export is no longer illicit at the time of the request or when the export of the object took place during the lifetime of its creator, or within the period of fifty years following the author's death. Again, this last condition does not apply to property made by tribal or indigenous community used for traditional or ritual purposes since such an object must be returned to that community (As stated in Art. 7(1) and 7(2)).

2.2.5. General provisions

The general provisions of the 1995 UNIDROIT Convention indicate that the claim and request for restitution and return, respectively, mat be brought either before a court or other competent authority or to arbitration. The authority needs to be located where the cultural object remains (Article 8). Protective and other provisional measures under the law of the state where the object is located are applicable even if the claim is brought before other courts located in other states (As per Art. 8(3)).

Article 9 underlines the complimentary, benchmark, role of the 1995 Convention since it explicitly refers to any kind of a more favourable solution available under other instruments in order to allow for restitution or return (Article 9(1)), however, it should not be understood as an obligation "to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention" (Art. 9(2).

The question of non-retroactivity is addressed in Article 10(1), i.e. "the provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought" under the condition that: the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or the object is located in a Contracting State after the entry into force of the Convention for that State. The same principle applies in the case of return. The return of illegally exported objects can be ordered only when the Convention enters into force both in the country requesting for the return and the state where the request is brought.

At the same time, the provision of non-retroactivity does not imply that illegal acts committed before the entry into force of the Convention or not covered by its regulations are legitimised. Again, the Convention does not exist as the one and only instrument regulating restitution and return and it point to other instruments for solutions relating to cases not governed by the principles available under the framework of the 1995 Convention as long as they permit for the recovery of cultural objects to their original location or owner.

2.2.6. Final provisions

Chapter V, i.e. the final provisions of the Convention refer to accepting and implementing the instrument. Since most international conventions of private law are open for signature for about twelve months from their adoption, the 1995 Convention was open for signatories until 30 June 1996 (UNIDROIT, 1995, p. 2). Other, non-signatory states may accede to the Convention and it requires the deposit of a formal instrument with the depositary, i.e. the Italian Government.

Entry into force is dependent on the date of the fifth instrument of ratification, acceptance, approval or accession, i.e. the first day of the sixth month following the date of deposit (Article 12), and, indeed, the Convention entered into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, i.e. on 1 July 1998, since Romania deposited its instrument of ratification on 21 January 1998 (Schneider 2001, p. 554).

As throughout the whole act, Article 13(1) reiterates that "this Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument."

As for the cooperational approach of the Convention, under Artilce 13(2), it encourages to enter into multilateral agreements with other contracting states in order to improve the application of instrument for the benefit of their relations in respect of protective measures in respect of cultural heritage laws. An example of such an agreement, concluded after the entry into force of the 1995 UNIDROIT Convention, however, independently since both parties are only bound by the 1970 UNESCO Convention as regards their mutual relations, is the 2001 Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy (2001, 40 ILM 1031). Under this instrument, the US authorities have limited the import of archaeological elements dated from the 9th century BC to the 4th century AD, excluding certain objects imported on the grounds of relevant documents authorizing their legal export from Italy (Kowalski 2016, p. 176). Another agreement of this kind was signed directly between Italy and the Metropolitan Museum of Art in New York in 2006 to order to return specific objects (Nafziger and Nicgorski, 2009, p. 380).

The Convention is also dependent on internal regulations of particular organisations or systems, e.g. the European Union, and instruments governing their cooperation in the

field of cultural heritage protection. Coinciding provisions under such instruments as Directives, e.g. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, are not overridden, to this end, certain states may declare the application of the so-called "disconnection clause."

Under Article 16, at the time of signature, ratification, acceptance, approval or accession, the contracting states may declare that requests for return or restitution may be made in the following ways: directly to the courts or other competent authorities of the declaring State, through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State, through diplomatic or consular channels. Following the chapters regulating restitution and return, each contracting state may as well designate the courts or other authorities competent to order the restitution or return of cultural objects.

Again, the provisions have no impact on other, bilateral or multilateral agreements referring to civil and commercial judicial assistance that may be in place between contracting states. Some of the following countries have designated an intermediate authority, e.g. Finland, Hungary, Lithuania, and Romania, while Italy, Hungary, Paraguay, and Peru have decided to designate diplomatic or consular channels, some countries have combined different solutions (Schneider, 2001, p. 558).

2.2.7. Model provisions

The 1995 UNIDROIT Convention is supplemented with additional documents facilitating the implementation of the instrument in regard to specific aspects. The UNESCO - UNIDROIT Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects (2011) contain model legislative provisions regarding the establishment and recognition of state ownership of undiscovered cultural objects. The objective of the provisions is to support the restitution in case of unlawful removal. The provisions were established by a group of experts convened by the UNESCO and UNIDROIT Secretariats.

The document contains 6 main provisions. The first refers to the "general duty" of each state to protect **"**undiscovered cultural objects and to preserve them for present and future generations" in line with e.g. the UNESCO Convention on the Protection of Underwater Cultural Heritage of 2001 since underwater cultural heritage is often discovered by unauthorised means, including activities involving the use of **"**advanced technology that enhances discovery of and access to underwater cultural heritage," (UNESCO, 2001). The Preamble of the 1995 UNIDROIT Convention, referring to archaeological sites and clandestine excavations, also concerns the need of protecting undiscovered material.

After a debate over specific means to this end, the provision is limited to a general reference to necessary measures in accordance with the national practice of every state and international standards set out in, e.g. the 1976 UNESCO Recommendation concerning the International Exchange of Cultural Property or the Preambles of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, as well as professional codes of conduct. The general duty to preserve cultural heritage for future generations is treated as a "significant factor for sustainable development of all communities" (UNIDROIT, 2011).

The second provision refers to the definition of undiscovered cultural objects. It follows a similar pattern present in all international conventions in terms of values listed: "undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater." The scheme mirrors the definitions present in 1970 UNESCO and 1995 UNIDROIT instruments in order to stress that these provisions are intended to facilitate the implementation of these two instruments due to the fact that over 140 countries are already bound by the 1970 UNESCO Convention. The object definition in the case of Provisions incorporate both underground and underwater heritage, therefore direct reference should be made to the 1992 Council of Europe Convention on the Protection of the Archaeological Heritage (Council of Europe 1992a), known as the Valletta Convention and the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001. Since the list of objects under the Model Provisions is not

closed, every state is authorised to add objects to the list or limit its reach according to its internal law.

The main rule set out in the document is provision 3 that regulates the issue of ownership of undiscovered objects if there is no prior existing ownership. According to this provision, such objects are by default treated as "owned by the state" and this linguistic variant was selected over "state property" in order to clarify the nature of the right of ownership. Importantly, this provision does not serve as a means of enriching state collections – it is rather to underline the social or even moral obligation of the state to guard heritage for collective interest. In case original third-party ownership can be established, it mostly refers to persons aware of the location of the object as they may have buried it to protect the object in the case of a conflict or any other threat, however, the exact circumstances under which the prior existing ownership is established is not directly specified by the principles and rely on local "understandings or traditions." It is, however, recommended to verify the effect of human rights laws on such ownership regime.

Provision 4 considers the question of items discovered in the course of illicit excavation or illicitly retained, even if the excavation was licit. Such objects, although not exactly "stolen" are defined as such under the provisions of this Convention, whenever consistent with the law of the state where the excavation took place (art. 3(2) of the 1995 UNIDROIT Convention). The purpose of such a broad scope of application is to protect property whenever possible, for instance, it allows for domestic laws, e.g. the National Stolen Property Act in the United States of America to be applied. The wording "are deemed to be stolen" was selected instead of "are stolen" to provide for cases when the object is not yet in the possession of the state. The same broad approach applies to objects lawfully excavated and lawfully exported for a fixed period of time but not returned when due.

Provision 5 refers to the transfer of ownership of a cultural object deemed to be stolen. Whenever it can be established that the transferor had a valid title to the object at the time of the transfer, the previous provision does not apply. For instance, museums may sell items from their collections to private persons by deaccession prior to the entering into

force of the model provision, thus they are considered as actual owners. In the case of transferring objects abroad, the nullity of provision 4 is possible only when provision 5 is adopted by both states concerned.

Provision 6 considers international enforcement. This provision ensures the return or the restitution of stolen objects, i.e. excavated illicitly, or licitly but not legally retained. If objects are defined as "stolen," the international criminal judicial cooperation shall enable the return of such items to the country where they were discovered, both on the basis of national and international law, especially when the 1995 UNIDROIT Convention has been ratified by the countries concerned.

In spite of the extensive reach of this document, the Model Provisions do not tackle the issue of "treasure troves" or due diligence. The latter is clearly specified in the text of the 1995 UNIDROIT Convention already. At this point, it is important to note the facilitating role of model laws in the proces of ammending existing legislation and adopting new solutions.

2.2.8. Effect

The main aim of the 1995 UNIDROIT Convention is to propose minimal uniform legal rules on the return and restitution of cultural property as well as due diligence measures. Due to this practical approach, the instrument has a major impact on the art world, mostly the buyers and sellers, but also on state cultural policies and public cultural institutions.

In spite of its undoubtful positive impact on the behaviour of buyers and professionals, as well as the value-based approach to restitution, the Convention is not free from certain shortcomings. One major obstacle refers to the scope of application. Since the 1995 UNIDROIT Convention includes any and all cultural property, i.e. any kind of objects, not limited to national heritage, "importing states" have not yet ratified the instrument fearing the effect on their collections. Since theft is recognised as a crime in all systems, the Convention applies to all stolen cultural property. However, the definition of objects in question is limited in the case of illegally exported cultural objects as law differs to that end and, therefore, it is the court where the suit is brought that applies a particular

definition (Prott, 2009). The enumeration following the object categories under the 1970 UNESCO Convention was selected as the model list since already many states were parties to this instrument at the time of drafting the 1995 UNIDROIT Convention.

Moreover, following the general principle stated in Article 28 of the 1969 Vienna Convention on the Law of Treaties, the 1995 UNIDROIT Convention (as well as the 1970 UNESCO Convention) is not retroactive and can have direct impact only on objects stolen or illegally exported after the entry into force of the Convention for both countries involved in a dispute (*cf.* Prott, 2009). As far as museum collections are concerned, the fear of limits to exhibitions is also faulty. Due to the fact that major museuums already observe professional codes of conduct, mainly the ICOM Code, the provenance check is already a standard regardless of the provisions of the Convention (Prott, 2009).

The 1995 UNIDROIT Convention is by no means directed at limiting trade, i.e. it sets standards that guarantee the preservation of property and aims at balancing the interests of both source and importing countries as well as buyers, sellers, and original owners as the same due diligence priniples apply to all categories. However, certain local and community laws may require art businesses to demonstrate additional sources to guarantee their credibility, e.g. records (*księgi ewidencyjne*) in Poland aimed at registering objects valued at more than 10,000 PLN categorised as a movable monument (*zabytek ruchomy*) required at art galleries since 2017. However, such mechanisms are not only related to sellers, buyers need to enter their personal data into the record, therefore, the transaction requires full transparency from both sides. Nonetheless, such financial and categorisation requirements may cause distortion for the benefit of illicit transactions whenever the value or the identity of the buyer is not true.

The number of ratifications is crucial in order for the 1995 UNIDROIT Convention to be fully effective. Poland, despite the active participation of the Polish delegation during drafting the 1995 UNIDROIT Convention, has not yet ratified it. The reason for such a situation is not clear, however, due to the fact that Poland itself has suffered major losses in cultural property throughout the centuries, its government should consider every instrument setting a good example for the protection of heritage and other cultural items.

In the case of the 1995 UNIDROIT Convention, the main benefit of its ratification is the possibility to establish connections with other international stakeholders, maintain diligent measures at a necessary level and be a role model for other states considering ratification. As summarised by Łągiewska, "despite the supportive attitude of academic experts, the Polish Government has not taken decisive measures to achieve such a goal. However, there is certainly a consensus among the majority of scholars concerning the necessity to ratify this Convention. Besides, such a ratification would ensure a holistic approach to protecting cultural heritage in Poland. Unfortunately, no actions have been taken this far to make ratification possible" (2021, pp. 130-131).

Although the number of Contracting States is smaller than in the case of the 1970 UNESCO Convention, it is evident that the 1995 UNIDROIT Convention has had an indirect effect on the domestic law of states that have not yet ratified it (Yatsunami, 2021, p.31). The 1995 UNIDROIT Convention has drawn more attention to the development of stolen goods registers and databases. The possessor is obliged to consult any accessible register of stolen cultural objects. This provision is listed as one of the measures of exercising due diligence, thus the role and the method of maintenance of such registers has become an inherent element of academic and professional disputes after the adoption of this instrument. The growing visibility of diligent trade in the post 1995 art world has led to the development of new and more complex databases, specialised institutions, and legal frameworks to foster the satisfaction of legal obligations arising from such instruments as the 1970 UNESCO and 1995 UNIDROIT Conventions and, more specifically, the later adopted Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, drawing direct inspiration from the 1995 instrument (*cf.* Frigo, 2016). To mention only a few of stolen cultural property databases, the ICOM Red Lists Database or the Emergency Red Lists published by ICOM provide authorised reference (Yatsunami, 2021, p. 32). INTERPOL's database was developed in 1990s, after more than 50 years of the organisation's involvement in controlling art theft and trafficking. The establishment of other specialised institutions e.g. The Art Loss Register, is also crucial for the development of a reinforced preventive and recovery international structure for the protection of cultural property.

The activity of these organisations and the development of digital tools supporting the protection and recovery of cultural property are in line with the provisions of the 1995 UNIDROIT Convention. Even if their creation or evolution is not a direct effect of this instrument, the Convention has played a crucial role in the process of raising awareness and placing a stress on the importance of a further growth in this direction, most importantly, the direction towards a more diligent trade.

As pointed out by Schneider, "the Convention does not by itself provide a solution to all the problems raised by illicit trade in cultural property, but has initiated a process that will enhance international cultural co-operation while safeguarding a proper role for legal trading and inter-state agreements for cultural exchanges. It is therefore crucial that the private sector take an active role. The application of international conventions, especially the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, is the keystone to an effective international campaign against illicit trafficking in cultural property. It is essential to encourage states to become parties to them and to universalize these Conventions in order to create the common foundation that has proved so difficult to achieve" (2016, p. 162). In spite of the fact that following the adoption of the 1995 UNIDROIT Convention, the art trade successfully pressured some governments not to ratify it and many art market states became parties to the 1970 UNESCO Convention instead "this process would not have occurred without the 1995 UNIDROIT Convention" (Schneider, 2016, p. 162).

The 1995 UNIDROIT Convention serves as a crucial point of reference in mentioned in a number of judicial decisions as a model instrument for limiting international trafficking of cultural goods. For instance, as quoted by Annes (2017), in the criminal case involving an attempt of illicit export of cultural goods from Brazil to Uruguay and referring to the decision from the 7th Judging Panel of the Federal Tribunal of the 4th Region (Habeas Corpus No. 2006.04.00.004416-9/RS Issued on April 11, 2006 Published on May 10, 2006),

> "the federal judge-rapporteur of a decision on a 'habeas corpus' request to the Court of Appeals by the defendants mentioned the importance of the 1995 UNIDROIT Convention on the matter of the international trafficking of cultural goods: 'For its part, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, concluded in Rome, in June 24, 1995, was promulgated by the Decree n. 3166, of September 24, 1999, which determined its execution and fulfilment in all its terms. The referred Convention aimed at, among other objectives, facilitating the restitution and the return of cultural objects between Member-States, with the objective of favouring the preservation and protection of cultural heritage in the interest of all'" (Annes, 2017, p. 3).

Other judicial decisions (available on the page of the 1995 UNIDROIT Convention Academic Project "UCAP") include the Italian cases of Cass. pen. Sez. III, Sent., 10/06/2015, n. 42458 and Cass. pen. Sez II, Sent., 21/06/2012, n. 28653, as well as the Spanish case of Auto no 28/2008 de AP Barcelona, Sección 13a, 21 de Julio de 2008. For instance, the Italian decision regarding archaeological finds mentioned above underlines that it needs to be in line with the

> "obligations of protection of cultural heritage undertaken, internationally, by the Italian State with the signature and the ratification of the UNESCO convention, (…), concerning measures to prohibit and prevent any illicit import, export and transfer of property concerning cultural heritage as well as with the signing of the UNIDROIT Convention, (…), concerning precisely the return of stolen or illegally exported cultural assets" as "the first convention constitutes the most intransigent form of international protection and its importance is constituted by the fact that it is extended to as many as 86 member states; the second is complementary to the first, concerning the sector of the return of stolen goods" (Cass. pen. Sez. III, Sent., 10/06/2015, n. 42458, author's translation).

It would be valuable to conduct further research into the topic of judicial decisions quoting the 1995 UNIDROIT Convention to complete the list of cases concerning value-based restitution models of argumentation.

2.3. The 1995 UNIDROIT Convention v. other instruments

2.3.1. The 1995 UNIDROIT v. other international law instruments

The 1970 UNESCO Convention is a leading act of international law in the field of fighting illicit traffic in cultural property. As of May 26, 2023, it has been ratified by 143 states. It provides three types of legal tools: preventive measures, restitution provisions, and an international cooperation framework.

In a greater detail, it offers preventive measures through the use of inventories, export certificates, trade monitoring, imposing penal or administrative sanctions and educational campaigns; restitution provisions under which state parties are to assist requesting states in recovering cultural property items inventoried on payment of just compensations to an innocent purchaser or a person having valid title to the property (such requests being made through diplomatic offices); and an international cooperation framework: strengthening cooperation among and between State Parties pervades the Convention. Article 9 protects heritage in danger by engaging import and export controls. For instance, United States has used this provision as a basis for bilateral treaties (UNESCO, 2006).

This recovery, however, excludes objects of illicit excavations or objects stolen from private places. Under the object definition scope established by the 1970 UNESCO, States have the authority to define the level of significance of the cultural object according to its national laws, while the 1995 Convention offers a universal approach to this issue, having regard to private property or such belonging to minorities that could otherwise have been underestimated by the State.

In other words, the 1970 UNESCO Convention refers solely to objects designated by state institutions. What is of great importance at this stage is that the qualification requirements under the UNESCO Convention is favorable to such states that designate large amounts

of cultural property but many states do not designate large amounts of cultural property. For instance, The United States and The United Kingdom lack the classification system that could be operational for classifying movables, while the French and similar systems offer such possibilities. Therefore, under such circumstances, the category of cultural property protected under the 1970 UNESCO Convention is significantly smaller. The 1995 UNIDROIT Convention excluded the requirement of designation to permit individuals to bring an action for their stolen objects not designated by the state.

The 1995 UNIDROIT Convention applies to both public and private property, since there is a significant difference in cultural administration between countries where a considerable amount of cultural property belongs to the state and states where the protection of cultural property is more often a matter of private interest, as government ownership of cultural property is less common.

While under the 1970 UNESCO Convention, only administrative procedures and state action are the means to fight the issue of illicit traffic in cultural property, as it operates on a State to State level, under the 1995 UNIDROIT Convention also individuals can bring action, as it operates on the basis of private law. The UNIDROIT Convention grants the owner of a stolen cultural object or a state from which it has been illicitly exported direct access to the courts of a state.

The 1970 UNESCO Convention does not include provisions related to cultural goods that are not listed in public inventories. The 1995 UNIDROIT Convention is, to this end, an extension of the scope of protection and complements the selective approach of the former act with an open-ended catalogue of objects to be protected or claimed under international cultural heritage law.

The 1995 UNIDROIT Convention, contrarily to the 1970 UNESCO Convention, focuses on a uniform approach to the restitution of stolen or return of illegally exported cultural objects. It also allows for processing claims directly through national courts or authorities competent in ths field, located within the territory of the state parties. Claimant in case of

theft “cuts across” individuals, entities or State Parties, and when it comes to illicit export, claimants are exclusively State Parties.

Restitution claims are time bound, however, all stolen or illicitly exported objects, regardless of being inventoried or not, are covered by the 1995 UNIDROIT Convention and must be returned under relevant provisions. Unlawful excavation of cultural objects is to be considered stolen and to be restituted if in line with the law of the State where excavation took place.

When it comes to the similarities between these two instruments, it must be pointed out that both exclude the applicability of the *possession vaut titre* rule to not only stolen cultural property, but also extended to goods illegally exported or originating from illegal archaeological excavations (Magri, 2021, p. 111). However, the 1970 UNESCO Convention never provided a definition of a good faith possessor, thus limiting the application of the provision to compensate an “innocent” purchaser.

The main advancement provided by the 1995 Convention was synchronising the rules on the protection of a good faith purchaser across different domestic legal systems. Another change related to the adoption of *lex originis*, as opposed to *lex rei sitae* referred to in the 1970 UNESCO Convention.

In conclusion, the provisions set forth in the 1995 UNIDROIT Convention, as opposed to those of the 1970 UNESCO Convention, are far more flexible and inclusive as far as the object scope is concerned. Furthermore, the former offers a more comprehensive and practical approach to the determining the notion of the *bona fide* purchaser and due diligence, thus strengthening the means of protection of the cultural object in question. In the UNIDROIT convention, it may be observed, the approach is by all means more value-oriented. As opposed to the 1970 instrument, the provisions of the 1995 act relate to any and all property, assessed only on the ground of its cultural significance, regardless of its public acclaim and status, their presence in an inventory of cultural goods, and stretches further protection to undiscovered objects.

However, the 1970 and 1995 Conventions act as a tandem. The latter could not have been drafted without the former, and, furthermore, the activities aimed at promoting both instruments can only be sucessful when both are taken under consideration simultaneously. “The UNIDROIT Convention is strongly promoted by the UNESCO Convention and as such complements the UNESCO Convention from a Private Law Perspective on its restitution mandate.”

It may be concluded that, from a communication perspective, although the 1995 UNIDROIT Convention is often described as an improvement to the 1970 UNESCO Convention, it should benefit from the strong position of the latter, a pioneer international law instrument fighting illicit traffic in cultural property, and, importantly, ratified by the largest group of states. As pointed out by Frigo,

> “the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – i.e., the most important international co-operation tool in terms of the number of States Parties – is considered by legal doctrine as not immediately applicable. On the other hand, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, i.e., the other side ‘of the same coin’, even though it contains more appropriate provisions to secure the successful outcome of legal claims for restitution or return before a foreign jurisdiction, has unfortunately not yet achieved the same degree of international acceptance” (2011, p. 1030).

Ratifying the 1995 Convention may be viewed as a “second step” in the process of reinforcing the legal framework adopted by a Member State to protect and recover cultural property. The 1995 UNIDROIT Convention strengthens the provisions of the 1970 UNESCO Convention and supplements them by formulating minimum rules of restitution and return of cultural objects. The 1995 UNIDROIT Convention guarantees the rules of private international law and of international procedure that allow the principles embodied in the 1970 UNESCO Convention to be applied (UNIDROIT). The

two Conventions fill the gaps that had made it impossible to successfully combat illicit trafficking of cultural property.

The 1995 UNIDROIT Convention acts as a bridge between international conventions in the field of cultural heritage protection, European Union law and soft law instruments. While it is commonly underlined that the 1995 UNIDROIT Convention complements the 1970 UNESCO Convention, it is not that often pointed out that other instruments, e.g. the Council of Europe Convention on Offences relating to Cultural Property, 19 May 2017, CETS 221, referred to as the "Nicosia Convention" complement the 1995 UNIDROIT Convention. The Nicosia Convention is linked to the 1995 UNIDROIT Convention in the sense that they both are concerned with the same objectives to prevent the damage and trafficking of cultural property, strengthen the prevention of crimes in the field of cultural property and promote international cooperation to this end, as well as to implement common standards in relation to cultural property. Moreover, the Nicosia Convention lists specific offences in reference to cultural property, both movable and immovable, thus providing a valid point of reference for the scope referred to in the 1995 UNIDROIT Convention.

2.3.2. The 1995 UNIDROIT Convention v. European Union Law

As pointed out by Frigo, "the influence of the 1995 UNIDROIT Convention on EU legislation with respect to the circulation of cultural property is quite astonishing and reaches back to at least the implementation of Council Directive 93/7/EEC" (2016, p. 77). Currently, the main EU law instrument regulating the return of cultural objects is Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State. It amended the previously operating Directive 93/7/EEC and an even clearer influence of the 1995 UNIDROIT Convention is visible in the recast Directive. As summarised by Frigo

> "here some of the former differences between the two texts were abandoned in favour of a solution identical to or consistent with the UNIDROIT text. For example, the scope of the recast Directive covers all cultural objects identified as national treasures possessing artistic, historic or archaeological value,

> under national legislation or administrative procedures; it does not include the list of categories annexed to the former Directive – thus enlarging the scope of the rules. Member states have three years from the discovery of the location of the cultural object/identity of possessor to initiate return proceedings and the possessor, in order to obtain compensation, must prove that he/she exercised due care and attention to ascertain the legal origin of the cultural object at the time of purchase. In this respect, it is remarkable that Directive 2014/60/EU – unlike Council Directive 93/7/EEC – contains a definition of the elements of due diligence (Article 10) almost identical in form to Article 4(4) of the 1995 UNIDROIT Convention" (2016, p. 77).

The main modifications introduced by the 2014 Directive included the elimination of the annex specifying the age and financial value of objects covered by the provisions of the 1993 Directive, extending time limits for offences, strengthening administrative cooperation through the Internal Market Information System, as well as placing the burden of proof on the possessor (Art. 10 para. 1 of Directive2014/60; Yatsunami, 2021, p. 31).

Thanks to the adoption of the 2014 Directive, the gaps between the previously operating 1993 Directive and the 1995 UNIDROIT Convention were filled, providing a less contradictory legal framework for EU claimants. The 2014 Directive was strongly inspired by the 1995 UNIDROIT Convention. The provisions echoing the solutions provided in the Convention are, e.g. adjusting the limitation period to bring an action, introducing due diligence measures, and the shift of the burden of proof to the possessor.

However, when it comes to differences, European legislation does not explicitly tackle the issue of stolen goods and goods removed during illicit archaeological excavations (Magri, 2021, p. 116). "The differences between the Convention and EU legislation is that the former covers a significantly broader scope. The Convention regulates both the restitution of stolen cultural goods and the return of illegally exported objects. The Convention also recognises the legitimacy of private individuals to take action to obtain the restitution" (Magri, 2021, p. 118).

The fundamental difference between the Convention an EU law is that in the former, both the Contracting State and the private individual dispossessed of the property are entitled to bring an action for restitution. It is also important to point out that "the 1995 Convention is much stricter when it comes to ordering states to demonstrate to the state requested which the primary interests are to be satisfied by the restitution of the cultural object involved, by providing proof of the damage caused by the loss of the object" (Magri, 2021, p. 118).

2.3.3. The 1995 UNIDROIT Convention v. soft law instruments

According to Francioni, "enforcement of the law in the area of cultural property entails a continuous interaction and hybridization of different legal orders, private and public, domestic and international, national and regional, and soft and mandatory law. These different legal orders coexist, interact, and collide especially when their driving agents - courts and tribunals - are called to enforce standards on the protection of cultural property and heritage" (2013, p. 9).

Declarations, codes of ethics, and other soft law instruments have played a significant standard-setting role in the realm of cultural property protection. The 1995 UNIDROIT Convention stresses the importance of soft law instruments, literally in the preamble "RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector."

Among soft law instruments forming an integral part of the international legal scheme concerning cultural heritage protection, one is of particular importance, i.e. the 2012 Model Provisions on State Ownership of Undiscovered Cultural Objects. This tool assists domestic bodies in adopting effective legal means for identifying the State's ownership of undiscovered cultural goods in order to foster the process of restitution in cases of unlawful removal.

In 2008, the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation noted that national legislation on undiscovered antiquities is often too vague and, in effect, States face legal obstacles in the course of placing a restitution request for items discovered in a different country, especially in cases when no inventories or provenance tracks is available from the archaeological sites. To protect such cultural objects against illicit trafficking, UNESCO and UNIDROIT jointly drafted the Model Provisions to respond to these problems. The Provisions, available to all UNESCO and UNIDROIT States, are not only intended to support the adoption of necessary legal principles to ensure State ownership but also to facilitate the application of the 1995 UNIDROIT Convention and the 1970 UNESCO Convention.

It is worth to mention other codes of ethics adopted after 1995 playing a vital role in the protection of both tangible and intangible heritage as both categories concern objects that can be of artistic significance, therefore in the scope of this study. These methods for safeguarding cultural heritage are interdisciplinary, therefore more than one group of stakeholders taking actions for the development of their comprehensive framework needs to be taken into account, regardless of their country of origin.

The code of ethics of the Association of American Anthropologists (hereinafter referred to as the AAA) was first constructed in 1971, during the Vietnam War. Its 2009/2012 version owas a result of the engagement of the USA in the "War on Terror" i.e. armed conflicts in Iraq and Afganistan (Jacobs, 2016). The AAA formulated its code as a "flexible blog for its *Statement on Ethics. Principles of Professional Responsibility*" (Jacobs, 2016, p. 75). The principles developed by the Association are: do no harm, be open and honest regarding your work, obtain informed consent and necessary permissions, weigh competing ethical obligations due collaborators and affected parties, make your results accessible, protect and preserve your records, maintain respectful and ethical professional relationships. These seven principles are further discussed and it is in the explanation of each one of them that the values assigned to heritage can be discovered. For instance, the "do no harm" principle is related to the social significance of preserving the objects of anthropological work, not only for individuals, communities, and identities

but also environments: “Anthropological work must similarly reflect deliberate and thoughtful consideration of potential unintended consequences and long-term impacts on individuals, communities, identities, tangible [and] intangible heritage and environments” (Association of American Anthropologists, 2012).

Probably the most common and important code of professional ethics in the area of cultural property is the ICOM Code of Ethics for Museums. It “expresses a more traditional museum ethics, in which responsibilities for collections take a more prominent place than obligations to society” (Besterman, 2011), thus illustrating the challenge of adopting a code of ethics representing an international consensus as to what the primary values behind the safeguarding of cultural representations should be. The ICOM Code of Ethics, after being first adopted in 1986, it was revised in 2004, and, so far, has been officially translated into 38 languages (ICOM). The role of the ICOM Code of Ethics for museums is indisputably significant in the context of cultural property restitution and return. As pointed out by Schärer:

> “nationally and internationally, questions concerning ethics in the museum world have grown in importance during recent years. Worldwide interest has sharpened, for example, around topics related to the impact of colonization, repatriation claims by indigenous peoples, looted art, unauthorized excavations, trophy art, and illicit trafficking, also in relationship with armed conflicts. Furthermore, the discussion on deaccessioning of museum objects gains in importance” (ICOM NATHIST).

It is important to note the ICOM Code of Ethics in reference to the 1995 UNIDROIT Convention as they both describe the notion of due diligence in the context of acquiring cultural property. The mission of the International Council of Museums (ICOM), an international organisation gathering museums and museum professionals, created in Paris in 1946, is “the conservation and transmission of natural and cultural heritage, present and future, material and immaterial. This mission demands the acceptance of the Ethical Code, for the museums and the professional members of the ICOM, which was adopted during the organization’s 15th General Assembly in Buenos Aires, Argentina on

November 4th, 1986" (Camara, 2014, p. 3966). As far as the topic of this research is concerned, it is vital to note that the ICOM Code sets out common values and principles of the ICOM museum community, establishing professional standards and conduct (Camara, 2014).

Since the ICOM Code concerns only museum collections, its scope is significantly smaller, however the measures of establishing due diligence in the ICOM Code are also a valid point of reference in the overall topic of cultural property protection. Pursuant to Chapter II, Article 2(3) of the ICOM Code, "every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production." In this way, the Code refers to the same measures as the 1995 UNIDROIT Convention.

As pointed out by Zeidler, the ICOM Code of Ethics „uses a concept close to that of good faith, that of valid title, which it defines as the undisputed ownership of property, supported by an exhaustive description of the provenance of an object from the time of its creation or discovery" (2016, p. 152). The two terms that are identified in the ICOM code, i.e. "legal title" and "valid title" can be further analysed to stress the importance of due diligence in the context of ownership. While "legal title" is defined as "legal right to ownership of property in the country concerned. In certain countries this may be a conferred right and insufficient to meet the requirements of a due diligence search," the term "valid title" means "indisputable right to ownership of property, supported by full provenance of the item since discovery or production." As summarised by Zeidler, "the ICOM Code understands legal title as an entitlement stemming from the ownership of property in a given country. In some countries, it may be a matter of an entitlement whereby it is not sufficient to accept that the duty has been fulfilled of due diligence in the establishment of the law" (2016, p. 152).

To conclude, the ICOM Code of Ethics is a valid point of reference illustrating the effects of the 1995 UNIDROIT Convention, as it is also noted that „museums must conform fully to international, regional, national and local legislation and treaty obligations. In addition, the governing body should comply with any legally binding trusts or conditions relating to any aspect of the museum, its collections and operations" (Principle expressed in Chapter VII of the Code) and it also lists the 1995 UNIDROIT Convention as one of the international instruments that "the Museum policy should acknowledge (…) as a standard in interpreting the ICOM Code of Ethics for Museums" (Chapter VII, Article 7(2)).

Conclusion

The 1995 UNIDROIT Convention was drafted to respond to loopholes in national legislation in the field of cultural property restitution. First, by extending the scope of the 1970 UNESCO Convention, secondly by providing clear measures for establishing due diligence on the part of the buyer of the good.

The 1995 UNIDROIT Convention, thanks to its uniform, minimal character, forms provisions that are easily applicable to a wide range of problems, thus their relationship with other instruments is of symbiotic nature. When it comes to the ties between the 1995 UNIDROIT and the 1970 UNESCO Conventions, the former offers a wider scope of application and addresses issues on a private law level, that are not addressed by the latter. However, they are intertwined and act as a complex framework for the protection and restitution of cultural property.

In comparison to EU law, the 1995 Convention concerns a much broader scope of cases, however, the current EU legislation in the field of cultural property restitution was strongly inspired by the Convention and significant changes would not have been implemented if it was not for the advancements made by the UNIDROIT instrument.

Soft law forms an integral part of the broader cultural heritage law. Professional codes of ethics, notably in the field of art trade and museums, drafted by, e.g. ICOM, as well as declarations and recommendations given by such organisations as UNESCO, together

with model provisions facilitating the application of the 1995 UNIDROIT Convention are a strong pillar of cultural property law enforcement.

The 1995 UNIDROIT Convention serves as a fairly simple yet comprehensive response to issues concerning due diligence on the art market, influences the way community and national laws are amended and drafted, and acts as an international, uniform set of guidelines for restitution and return, including the formerly omitted case of undiscovered cultural objects.

Chapter 3
VALUE-BASED RESTITUTION

Introduction

Cultural heritage law is primarily concerned with preserving moral value. The main effect of such instruments as international conventions is, therefore, to raise the level of awareness in respect to what moral responses to illicit practices could and should be. Cultural property restitution is a matter of "social justice." As opposed to mere ownership rights, the notion of cultural heritage protection in its broad sense refers to maintaining equality as opposed to the Western idea of "individuality, linear time, development, competition and progres" (Gnecco and Ireland, 2015, p. v).

3.1. Introduction of model components

Cultural property restitution is usually related to strict legal instruments regulating the scope towards which a claim may be brought and what rules apply to the solution. In the value-based model, what is taken to the fore is not whether a claim can be legally brought and what ownership rules can be applied in a given legal concept but rather what values can prevail in a given dispute even if the law states otherwise.

What solution is the most beneficial to the society that the property is significant for? What is the best way possible to preserve it for future generations? These questions act as an opening of the discussion on what the model components of the model could be. The most vital elements that could be utilised in the forming of such a toolbox can be those relating to universal principles behind cultural heritage law, even if the law itself is not always on the side of the source country or whether an instrument was not binding at the time of the violation of cultural property.

Another element valid for the construction of the model are restitution arguments. One may point out that these arguments also derive from particular legal instruments, however, what solutions are available in the case when an object was legally (at the time)

moved from its original location but the effect of this action still causes harm to the collective or individual interest of the social group affected by its loss? These arguments are, therefore, a list of categories referring to e.g. moral and social values that should not be overlooked in the case of a cultural property restitution dispute, be it actual or hypothetical, as this study refers to both scenarios.

When it comes to legal elements crucial for the verification of the workability of the model, the 1995 UNIDROIT Convention comes to the fore. Its universal approach to safeguarding cultural property, but at the same time, understanding the interest of the parties involved, also regardless of whether the object is private or public, proves to be the most comprehensive tool for linking legal rules to general principles, arguments, and the values that act as an umbrella over all these elements.

It is valid to see the role of soft law instruments such as codes of ethics and recommendations in shaping the value-based model. At its core, soft law acts as a standard-setting agent referring to the values behind not only the objects in question but the ways of working of various but still related professional groups (in the case of codes of ethics) and general approach to safeguarding cultural property in the interest of future generations (e.g. recommendations).

The model is, in fact, a set of existing sources across various disciplines that are collected and categorized under the values defined in the first chapter of the thesis. It is an attempt to structure the aspects of cultural property restitution, not only understood as a legal process but as a moral and diplomatic issue, not only involving states parties to international conventions, but also e.g. communities, individual owners, and private companies. At this point, one may ask a question: what is the purpose of forming the model? It is weighing the interests of all these parties through providing a structured approach to assigning values to cultural property.

3.1.1. Cultural heritage law principles

Cultural heritage law is based on certain general rules. They are either present in particular legal instruments or serve as a point of reference in theoretical considerations

regarding the preservation of property. Cultural heritage law principles can be found both at international, community or national levels. In general, they serve the same overall goal: the preservation of heritage for future generations, however, every legislative framework describes it using different language and uses different methods of application. There have been numerous attempts at identifying values serving a “universal public good” and, simultaneously, values indicated by specific groups and individuals.

Merryman's triad of regulatory imperatives: preservation, truth, and access are neither universal nor value-neutral, therefore some scholars have raised doubts concerning their utility in the evaluation of different perspectives concerning a heritage-related dispute (Bauer, 2008, p. 701). In his 2008 study, Bauer raises the question of particular goods to which these values cannot be applied, e.g. the "war gods" figures made by the Native American Zuni that are supposed to “disintegrate among the elements in order to maintain balance in their lives” (Bauer 2008, p. 701), a case in which the value of “preservation” does not apply, and objects access to which is restricted in particular cultures as their immanent feature. In this instance, while the idea of “preservation, truth, and access” seem understandable and universally applicable, one might raise the following questions: who and why should have access to them, is the purpose and method of their preservation adequate in terms of their overall context, and how to assess whether they are “true” – or, in other words, whose account of truth do they represent?

Different groups specified by Bauer (2008) perceive these notions differently, depending on the nature of their activities and, thus, overall interest. He exemplifies archaeologists, museums, collectors and dealers, governments of “source countries”, and local communities to present different values taken into consideration in terms of cultural heritage protection, therefore this example can serve as a starting point for the formulation of a value-based restitution model.

According to this view, first of all, “archaeologists, regardless of disciplinary specialty, are first and foremost interested in the preservation of the archaeological record” (Bauer, 2008, p. 701). Secondly, depending on the sub-discipline, the idea of preservation may be more “scientific” or “humanistic” – e.g. “field” archaeologists are treated as those who

are stricter when it comes to the importance of preserving and recording archaeological context, including not only the features of the objects discovered but also the features of the soil. Nevertheless, all archaeologists focus their activities on preserving artifacts and the information about the past that they contain, in order to gain a full understanding of the past and "safeguard" those materials for future generations – a fundamental goal codified in ethics statements (e.g. the code of the Society for American Archaeology).

Achieving this goal is facilitated by such measures as "CRM" – i.e. cultural resource management in the U.S. The idea behind CRM is to preserve or document cultural material in danger of damage caused by e.g. public construction works (Bauer, 2008, p. 702). Drawing from the study of national and some examples of EU law by Węgrzak (2020), the following general principles can be specified under international law: the principle of cultural heritage protection, the principle of sustainable development, the principle of property protection, the principle of social utility of cultural heritage and other. Above all, the principle of good faith and equity can be applied by courts whenever the universally acclaimed values are brough to the fore (Wegrzak 2018, p. 180).

Indicating values worth protecting and preserving and the means towards this end is the fundamental cognitive and educational function of cultural heritage law principles (Węgrzak, 2020, p. 109). The common features of these principles permit for comparative legal analysis as the general legal principles are applicable to all legal systems of a given culture (Węgrzak, 2020, p. 109). This study draws from different legal tradition and aims at proving exactly that.

The elements of the value-based restitution model are based on common values present in different legal sources, thus permitting for a wide scope of application.

3.1.2. Restitution arguments

Cultural property restitution cases often raise highly emotional issues. The unique nature of such goods requires "sustainable and creative solutions" (Bandle, 2011, p. 30) that would satisfy not only the needs of individual parties involved in a dispute but also the general public and the conservation needs of such item.

The specificity of this material in comparison to other commodities is the "intangible" value associated with the object at different levels that cannot be fully compensated for in the case where simple restitution is not possible. Restitution of cultural property is not limited to drawing from legal tools, primarily, it should aim at preserving cultural heritage for present and future generations, assuring its availability to the public, for research purposes, and, in the case of some private collections, also other considerations like the direct emotional bond between the owner and the work. Following this reasoning, restitution arguments should reflect as many factors related to the object in question as possible. Following the argumentative aspects present in legal philosophy, it becomes evident that the discourse stretches far beyond legal considerations and involves such fields as ethics, politics, economy, as well as art history, and research needs in general.

The argumentation list created by Zeidler (2016, pp. 136-202) is based on moral, social, and economic aspects of past and ongoing restitution cases: the argument from justice; the argument from ownership; the argument from acquisition in good faith; the argument from place of production; the argument from place of allocation; the argument from right of loot; the argument from illegal export; the argument from national affiliation; the argument from cultural affiliation; the argument from historical affiliation; the argument from territorial affiliation; the argument from personal affiliation; the argument from social utility; the argument from most secure location; the argument from historical eventuation; the argument from passage of time; the argument from prescription; the argument from time limitation; the argument from discovery; the argument from investments undertaken; the argument from possession; the argument from obligation; the argument from reciprocity.

This tool allows for an in-depth analysis of restitution cases, which are very often hard cases in law. In such disputes, the argumentation on both parts should maintain balance between individual interests and sustainable development goals. Such a balance is explicit in such arguments as those referring to cultural affiliation, social utility, and the most secure location.

The argument from cultural affiliation is directly linked to ethnic and/or national linkages to the object itself, therefore it remains in close relationship with the argument from national affiliation (Zeidler 2016). This argument is directly linked to the place of production (country of origin) in a geographical rather than political sense as it is within a particular natural environment that cultural heritage is created and utilised (e.g. "indigenous heritage"), therefore this argument is also linked to the argument from the place of production. The argument from cultural affiliation is also related to its particular social significance, e.g. ritual/religious use, therefore the argument from social utility. Cultural affiliation is especially hard to be assessed in heterogeneous societies, e.g. whenever there is a cultural clash between native and incoming settlers (Blake 2015, p. 20) and the change of political order resulting in the change of borders. In such cases, the argumentation model should be based not only on historical, political, and territorial factors, but also, more importantly, the level of social (cultural) attachment to a particular object or its creator.

The above considerations refer to the argument from social utility, both in a general sense (universal social values) but also in a specific dimension (e.g. religious or scientific use). According to Zeidler (2016), this argument aims at levelling the needs of a larger social group with the interest of a more specified group (e.g. religious community). The social value of cultural heritage refers to the "sense of identity, belonging and place, as well as forms of memory and spiritual association" (Jones 2016, p. 21), therefore this argument is a result of the assessment of its purpose in various groups (including scientist if the argument is to be identified as a means of granting access to the object for scientific, and, subsequently, educational purposes.

As far as the identity-forming value of property is concerned, the "authorised" discourse "identifies the symbolic importance of heritage for representing social and cultural identity, it pays scant recognition to the dynamics of how identity is actively constructed or created in association with heritage" (Smith, 2007, p. 164). In reference to this statement, it needs to be stressed how identity and social needs change over time, depending on the historical and political eventuation.

The argument from the most secure location, as opposed to the argument from cultural affiliation and social utility, is, at first sight, a less contextual argument. In other words, it refers, primarily, to maintain the object in its best shape. However, if we consider the purpose of such a practice, it is not only the conservation and security of the object – it is the conservation and the security of the object for future generations, i.e. it is motivated by cultural, political, educational, and emotional needs, therefore, although the division of arguments proposed by Zeidler (2016) permits for employing an extensive list of argumentative methods, they are, in fact, inseparably linked to one another.

When it comes to the argument from "territorial affiliation" it is vital to point out that the first significant legal reference on the topic of allocating cultural property displaced in a result of an armed conflict was published by Charles de Visscher, triggered dismantling multinational empires after WWI, and the main development of this text was the distinction between the cases of restitution of cultural property "displaced in armed conflicts from those referring to the allocation of such assets as a result of territorial reconfigurations" (Jakubowski, 2011, p. 40). Recalling the dissolution of Austria-Hungary and the distribution of Habsburg collections, he "reaffirmed the emergence of new principles in international law, consisting in unity of art and collections, and reconstruction of artistic and historic patrimony" (Jakubowski, 2011, p. 41). In the context of ordering restitution arguments following De Visscher's statements, it may be claimed that the argument from territorial affiliation is closely related to the argument from unity as the latter is also affected by the dispersal of cultural property as a result of territorial changes. He stated that "destruction of the unity or integrity of a work of art by removing one of its component parts and transferring it to a foreign country and the dispersal of collections, the historical or scientific interest in which rests, at least in part, either on the fact of their constituting a whole or on keeping them together in the region where they were created or to which they relate, are practices condemned by the higher interests of science and art and are in fact being more and more generally abandoned" (De Visscher, 1949, p. 828).

The above statement triggers the consideration of more than just one restitution argument. He brings up the question on whether the target location of cultural property should be

related to the place of its creation, or whether the nationality or the place of birth of the artist should be considered, not to mention the ties of the property with the history of the nation it belonged to or whether the place for which the object was initially created. For instance, the argument from the place of allocation is based on the idea that not every cultural object is created to remain in the place of its production – historically, it is very clear in the case of artworks commissioned by foreign rulers, collectors and other actors of the art market, today, in a world that allows remote ownership of artworks via digital channels this is not even a question of what the place of allocation specifically refers to but rather to whom.

As Zeidler concludes, "the argument from place of allocation usually excludes applying the argument from the place of production, since, if a piece of cultural property was commissioned by a person who intended to transport it abroad legally, and this was then done, such a situation precludes the possibility of appealing to the argument from place of production. Nonetheless, this argument can be employed in the case of restitution claims made by post-colonial countries, and also in claims linked with original ethnic groups inhabiting a given territory (2016, p. 154). It may be assumed that the answer to these questions lies in the intention of the creator and the subsequent buyers, however, it also depends on the attachment to the property created as a result of historical eventuation and the passage of time.

Another distinction between argumentative patterns should be made in reference to arguments from national and cultural affiliation. Although these arguments are closely related, there is a difference in the scope of what notions national and cultural communities include. It is clear that cultural bonds and ideas and often created at a national level, however, it is much more complex in the case of multi-national states and territorial and/or ethnic changes occurring in particular areas. Zeidler provides two examples of situations when given cultural communities left behind specific material goods but no longer exist or no longer inhabit the location where the objects were made.

The first instance refers to "artifacts surviving from early peoples, recovered as a result of archaeological research" and the second, more specifically, to "objects left behind in

the Polish border areas (*Kresy*) by the local Polish population that was forcibly expelled, and surviving objects once belonging to Jews murdered by the Germans during the Second World War. He concludes that "in these situations, there is a dispute concerning both legal and moral succession. The issue raises problems as to who may claim the right to given cultural property: the party exercising authority over the territory on which the object was made (the argument from place of production), or not just the legal successors, but also the heirs of the culture and traditions of those people, which is indicated by the argument from cultural affiliation. All this demonstrates that arguments do not always have to supplement each other, but can at times be in opposition to each other" (2016, p. 168).

In the context of the argumentative layer of the 1995 UNIDROIT Convention, it is of fundamental importance to stress the argument from acquisition in good faith. To reiterate, pursuant to the Convention, acquisition in good faith, understood as acquisition respecting the rules of due diligence, is only possible to be identified if the following factors are taken into account: "circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances" (Chapter II, Article 4(4)).

Overall, as summarised by Zeidler, the argument from acquisition in good faith "consists in the appeal on the part of the purchaser/transferee to having acted in good faith, which takes place in the refutation of restitution claims, raised by a person who usually, indeed, appeals to the argument from ownership (…). However, the opposite situation may occur, when the content of the allegation raised in the restitution claim is the fact that the purchaser/transferee acted in bad faith. This issue is, thus, connected with the effectiveness of the acquisition of the ownership of a given piece of cultural property. It is very clear here that the argument from acquisition in good faith is, in fact, one of the basic methods of defense against a restitution claim (2016, p. 151).

Regardless of the possible use of all the restitution arguments listed and developed by Zeidler (2016), it may be concluded that, above all, the argument from justice plays the primary role in this context as the argument from justice can be brought by two (or more) parties to a dispute as the idea and understanding of justice differs from case to case. As summarised by Plata (2022), "the problem of justice has always been a challenge to the theory and philosophy of law, therefore, over the course of history, several of its basic theories have been developed. The diversity and number of definitions of justice raises the need for their evaluation and, each time when considering a specific restitution case, it makes it difficult to assume that there is one guiding theory of justice, which is the universal basis of the argument from justice" (p. 93). The argument from justice is based on, primarily, moral norms. According to Zeidler, "one of the tasks of the law is to supply tools that serve to restore a state of justice, but justice is a state built, in fact, on moral norms. Every infringement of the moral order naturally demands reparation, that is, a restoration of order" (2016, p. 142).

3.2. The role of international conventions and soft law instruments

International conventions for the protection of cultural heritage, in the broadest sense possible, are universal in their substance thanks to the open-endedness of the value catalogs conveyed in their regulations. From their overall purpose to the root of practical measures – values are the core of international law.

This section deals with the role of the 1995 UNIDROIT Convention and soft-law instruments in the creation of the "value-based restitution model." For the purpose of this study, the 1995 UNIDROIT Convention is analysed further as it is one of more "recent" and complex instruments in this sphere, drawing from the principles of such milestone instruments as the 1970 UNESCO Convention, described in an earlier chapter. Selected soft-law instruments include relatively recent declarations referring to universal values: The Namur Call: Declaration of the Council of Europe "Cultural heritage in the 21st century for living better together. Towards a common strategy for Europe" (22 to 24 April 2015) and the Declaration on Culture as an Instrument of Dialogue among Peoples (1 August 2015) as well as codes of ethics: ICOM's Code of Ethics for Museums,

UNESCO's International Code of Ethics for Dealers in Cultural Property, and the Society for American Archaeology's ("SAA") Code of Ethics. Moreover, UNESCO's 2030 Agenda for Sustainable Development, placing "culture as a driver and enabler for sustainable development" as one of its goals, should also be included in the bigger picture of value-based cultural property protection and the model itself. It mentions the role of culture in, *enter alia*, enhancing "access to education and ensures more locally relevant curricula, textbooks and teaching methods" as well as fostering gender equality, limiting poverty, and supporting environment protection.

This section aims at pointing out values referred to in the legal instruments selected for the formulation of the "value-based restitution model." The model is a collection of values, principles, and arguments resulting from one another. The idea behind creating the model is to facilitate the formulation of argumentation for restitution cases that can be labelled as "hard" as the legal grounds for the return or restitution of cultural property, especially for claims that are international in their nature, are often insufficient and may cause harm for the sense of identity and well-being of nations, communities, and individuals, and/or the object itself.

3.2.1. The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention not only reflects cultural heritage law principles but also lists practical solutions to specific issues. The purpose of incorporating this instrument into the value-based restitution model is to exemplify how theoretical principles and restitution arguments are applied in a legal text. The aim of this subchapter is to find links between the principles, arguments, and values present in this instrument, along with a linguistic analysis of the solutions used to emphasize the importance of the subject.

The very Preamble refers to the "fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation," distinguishing between three main actions ensured by the Convention: protection, exchange, and dissemination of culture for social development, thus incorporating the

issue of illicit trafficking and other offences into a bigger picture. Another paragraph in the Preamble links the damage caused to cultural objects to the general impoverishment of communities and all peoples in all aspects of their existence, referring to the loss of "irreplaceable archaeological, historical and scientific information," necessary for the overall progress of civilisation, at the same time noticing the uniqueness of cultural material that cannot be exchanged for monetary or any other kind of compensation. Subsequently, the Preamble of the 1995 Convention refers to the universal value of cultural heritage that is to be protected by its regulations "in the interest of all." The considerations listed above are, primarily, resulting from the principle of social utility of cultural heritage and the general rule of preservation in the interest of future generations (*cf*. Węgrzak, 2020).

Article 1 refers to a more detailed set of values as it specifies that the goods considered to be included in the scope of the Convention are classified on the basis of their archaeological, prehistorical, historical, literary, artistic, or scientific value and further specified in the Annex. It is worth noting, however, that these values are, on the one hand, interrelated and, on the other, not limited to their direct designates.

Special attention is given to excavated objects. Since the State Parties to the 1970 UNESCO Convention, implement the provisions relating to archaeological objects differently, for instance, some countries regulate only the recovery of registered objects, therefore not relating to clandestine excavations, the aim of the 1995 UNIDROIT Convention was to clearly establish a framework regulating cultural objects that have been unlawfully excavated or lawfully excavated but unlawfully retained. Whenever in line with the law of the country where the excavation takes place, such objects are considered to be stolen. This provision is also value-focused. As long as the illegal export of an object from the source country significantly impairs the preservation and integrity of the object, or the preservation of the scientific or historical data, Article 5(3) requires the competent authority of the State where it is held to order the return of the object. From this point, it can be understood that cultural objects are treated as, above other considerations, transmitters of scientific, historical, and, as a result, educational, information. These values are to be preserved also in line with the principle of social

utility of heritage and the principle of the preservation of integrity of heritage (*cf.* Węgrzak 2020).

Article 4 of the Convention deals with due diligence, however, as seen from a value-focused approach, it refers to artistic and financial factors. In order to assess due diligence, the following factors are analysed: the price paid, if the possessor "consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances." The question of price is relevant in this case as it signals whether the object is accurately valued as sometimes, the price is lowered in order to sell it more easily without raising suspicion. The accuracy of value, however, is only assessible if the possessor is able to collect market information, therefore, for some niche objects this is not a sufficient argument.

The Convention refers to values impaired by the illicit activity concerned. Article 5(3) specifies such considerations as the state of physical conservation of the object and its "context." This could refer to the value arising from the fact that an item is placed in a particular location that itself has its associated values (e.g. in regards to religious items) and without the surroundings would not possess its significance alone. Another factor pertaining to the overall value of objects is its "integrity." This term indicates the balance between elements that form an interconnected whole. It is not only related to objects but also collections that form a specific category of cultural property and such instances draw their subsequent values from their integrity. This provision is a consequence of the general principle of integrity of cultural heritage.

Moreover, this article refers to cultural objects as transmitters of scientific or historical information and these categories are also treated as stand-alone values in terms of methods of preservation. This consideration is directly linked to the principle of the preservation of cultural heritage.

Next, the Convention specifies the traditional or ritual use of objects by a particular social group or the whole nation. As it is clearly visible in the above considerations, the 1995 UNIDROIT Convention promotes a balanced approach to restitution. The main requirement indicated by this instrument is the respect of values assigned to cultural property, especially those related to their social role. One of the main developments of this act is the measure of due diligence. These factors refer to such considerations as the financial value or provenance.

The 1995 UNIDROIT Convention is a direct response to both cultural heritage principles and restitution arguments discussed in this chapter. The provisions of the intrument can be treated as a substantial toolkit for the creation of the value-based restitution model.

The model is based on values, principles, arguments, and practical provisions presented in the 1995 UNIDROIT Convention. The below summary presents an example of the "value chain" that could serve as a starting point for an argumentative model in the case of religious or ritual heritage:

Table 3. Value matrix for social utility

Value	Social (specific)
Principle	Social utility of cultural heritage
Argument	Social utility
Provision	3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (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.

Source: own elaboration.

That same logic may apply to the value if integrity:

Table 4. Value matrix for integrity

Value	Integrity
Principle	The protection of integrity
Argument	The protection of integrity
Provision	3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (b) the integrity of a complex object.

Source: Own elaboration.

This assessment aims at proposing a flow for argumentation in restitution disputes. The case studies presented in the next chapter illustrate the possible application of a value-based model.

3.2.2. Other instruments

Soft law instruments, e.g. recommendations and declarations, as well as codes of ethics in a similar way refer to the values, principles, and arguments reflected in the 1995 UNIDROIT Convention.

The Declaration on Culture as an Instrument of Dialogue among Peoples from 1 August 2015 was adopted by more than 80 Ministers of Culture from around the world on the occasion of the 2015 Milan Expo, at the International Conference of the Ministers of Culture. The declaration is a result of the discussion between the ministers on the means for the preservation of heritage in the event of both natural disasters as well as armed conflicts and terrorist attacks.

The declaration reaffirms the need to protect both tangible and intangible cultural heritage anywhere in the world. Pursuant to the declaration, cultural heritage is the “mirror of

history, civilization and of the society which is expected to protect it," and also the "essence of identity, the memory of peoples and their past and present civilizations." The values that can be drawn from this instrument are: the universal values of tolerance, dialogue and mutual understanding; solidarity, growth, sustainable development. In the context of this declaration, the above listed values serve the purpose of reinforcing the dialogue among peoples and arguments in favour of the work towards the protection and recovery of cultural heritage of the international community.

Another instrument drawing from similar values is the Namur Call: Declaration of the Council of Europe "Cultural heritage in the 21st century for living better together. Towards a common strategy for Europe" was adopted during the 6th Conference of Ministers responsible for cultural heritage of the Council of Europe, which took place from 22 to 24 April 2015. The Call draws from the European Cultural Convention of 1954, and recalls the importance to preserve cultural heritage. Ministers condemn the destruction and other abuses to cultural heritage and reaffirm their efforts for reinforcing European cooperation to combat illicit acts against cultural heritage.

The declaration asserts that "cultural heritage is a common asset of the peoples which should be preserved in all circumstances" – thus positioning the universal social significance of cultural heritage at the centre of all endeavours aiming at its protection. The declaration further refers to Recommendation No. R (96) 6 of the Committee of Ministers to Member States on the Protection of thee Cultural Heritage against Unlawful Acts. Following the recommendation, "cultural heritage constitutes an irreplaceable expression of the wealth and diversity of Europe's cultural tradition" – one may also draw from the value of diversity of cultural heritage to formulate the basis for protection and/or restitution.

Diversity is a basis of wealth of a given culture. The protection of cultural property results in maintaining this value through a value-based approach:

Table 5. Value matrix for diversity

Value	Diversity
Principle	The protection of diversity
Argument	The protection of diversity
Provision/statement	Recognising that the cultural heritage constitutes an irreplaceable expression of the wealth and diversity of Europe's cultural tradition

Source: Own elaboration.

Another relevant soft-law instrument tackling the sbject of diversity and social significance of cultural property, in this case – in the context of museums and collections, is the Recommendation concerning the Protection and Promotion of Museums and Collections, their Diversity and their Role in Society, adopted by the General Conference at its 38th Session in Paris, 17 November 2015.

Within the scope of the recommendation, a "collection" is defined as "an assemblage of natural and cultural properties, tangible and intangible, past and present" and Every Member State is free to interpret what it is defined as in practice, in line with individual legal frameworks. The term "heritage" refers to both tangible and intangible values, and "expressions that people select and identify, independently of ownership, as a reflection and expression of their identities, beliefs, knowledge and traditions, and living environments, deserving of protection and enhancement by contemporary generations and transmission to future generations" – under this recommendation, heritage is synonymous with the definitions of both cultural and natural heritage, as well as cultural property and cultural objects present under UNESCO Conventions.

The recommendation points to the role of museums as transmitters of the education of humanity to achieve justice, liberty and peace, and the foundation of the intellectual and moral solidarity of humanity, full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, as well as museums' intrinsic value as "custodians of heritage" and their "ever-increasing

role in stimulating creativity, providing opportunities for creative and cultural industries, and for enjoyment, thus contributing to the material and spiritual well-being of citizens across the world." The values attributed to culture itself are: diversity, social development and reinforcing intercultural dialogue among peoples, for social cohesion, and sustainable development. The recommendation, therefore refers to such values as, *inter alia*, justice, liberty and peace, moral and intellectual solidarity, truth and freedom of exchange of ideas and knowledge, creativity, material and spiritual well-being, that can be collectively labeled as universal social utility deriving from the value of diversity.

Another instrument playing a vital role in establishing values of cultural property is the Cultural Resource Management (CRM) policy, processes, and legislation. CRM is a "term used in North America for the legal and technical processes of preserving, protecting and managing 'cultural resources' or tangible heritage items. In other regions of the world, this process is referred to as Cultural Heritage Management or Archaeological Heritage Management" (Smith, 2007, p. 162). CRM is a tool regulating the "use, value and meaning given to a range of cultural objects and places, and provides clear procedures and processes through which archaeological knowledge and expertise may be called upon and deployed" (Smith, 2007, p. 162). In this way, the CRM may be incorporated to the value-based restitution model in order to diversify the approach to cultural value seen through the lens of the wider context of the management of cultural resources.

From a more tangible point of view, the values of cultural property listed in the ICOM Code of Ethics form the conditions relating to the preservation of particular objects. For instance, the category of "Culturally Sensitive Material" – i.e. human remains or items of sacred significance – require other storage, transport, or exhibition conditions than more resistant materials. Moreover, the purpose and mission of museums, pursuant to the ICOM Code, are itself a reflection of the values of cultural property. For instance, the Code mentions the value of cultural property as "primary evidence" – regardless of the "current intellectual trends or present museum usage" (Chapter III, Article 3(1)). The same logic can be applied to the the next principle listed in the Code, i.e. the research value of cultural property, not only reflected in the very material analysis of the objects

but also their role in knowledge-sharing practices between museum professionals. In this way, soft law instruments are a significant point of reference for the process of fostering cross-border awareness-raising practices in the area of cultural property studies, also included in the 1995 UNIDROIT Convention as a valid factor for provenance research necessary both for restitution and return and for further protection of cultural property in many spheres.

The value-based restitution model incorporates all relevant hard and soft law instruments that point to the values of cultural property as argument-making bases, regardless of ownership rights. The aim of the model is to balance restitution arguments and move closer to a balanced solution. Even if unworkable in many cases, this view may serve as a toolbox for complex issues exemplifying the application of value-based arguments reflecting particular legal principles for the sake of cataloguing possible lines of reference when needed in a dispute.

3.3. Modes of application

The value-based restitution model is visible in the activity of particular bodies operating via diplomatic channels. The model is reflected in particular cases and this thesis aims at connecting values, principles and arguments, along with an exemplification to clearly demonstrate this interconnected whole for the benefit for future disputes, whenever parties search for a balanced settlement.

Specialised bodies acting as intermediaries in restitution disputes play a significant operational and standard-setting role. With the support of inter-organisational cooperation and digital solutions, e.g. ever-expanding art loss databases and archaeological discovery monitoring, their activity is crucial in every dispute, regardless of the solution. Alternatively to traditional restitution, a number of solutions available in restitution disputes are a reflection of value-based argumentation, also utilised in cases facilitated by such organisations. The modes of application of this model are exemplified by the activity of specialised bodies and alternative solutions to restitution further discussed in this section.

Alongside the activity of organisations facilitating the process of restitution and the scope to alternative methods of restitution, the model can be applied in various fields of research, including cultural property as such, cultural heritage protection, theory of art. The model, acting as a summary of values, principles, and arguments can be also useful for the promotion of art and culture in different contexts.

3.3.1. The activity of specialised bodies

The application of the value-based restitution model is the domain of organisations involved in dispute resolution, operating either between individuals or between states via diplomatic channels. Such bodies may be part of larger institutions, e.g. the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation or operate as private initiatives, e.g. Art Recovery International.

Moreover, the cooperation between such institutions and dedicated task forces within such bodies as INTERPOL or UNODC (United Nations Office on Drugs and Crime) play a crucial role both in active recovery of objects but also in introducing new tools for monitoring and drafting new soft law instruments considering best practices, principles, and criminal liability, respectively.

The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) may be engaged in cases that cannot be resolved on the grounds of international conventions alone. The Committee acts as a facilitator in bilateral negotiations aiming at the restitution or return of objects to their countries of origin. It also raises public awareness of the issue of restitution or return of cultural property, encourages the development of conservational institutions and professional training to this end, and promotes cultural property exchange under the Recommendation on the International Exchange of Cultural Property.

The ICPRCP has successfully facilitated the return of several objects. Following the recommendation made in 2010 (CLT-2010/CONF.203/COM.16/5) addressing the return of the Sphinx of Boğazköy, which had been on display in the Berlin Museum at the time. The title of the sculpture was transferred to the Turkish Government in 2011. Another case, the United Republic of Tanzania and the Barbier-Mueller Museum in Geneva, concerned the Makondé Mask robbed from the National Museum in Tanzania in 1984 and returned as a donation in 2010 with the help of, *inter alia*, ICPRCP and ICOM.

Governments also cooperate with dedicated companies supporting the efforts to recover lost cultural property, an example being the Art Recovery International (formerly: the Art Recovery Group). Other institutions facilitating the return of looted or otherwise misappropriated items are those managing lost art registers and databases, tools necessary for successful recovery, operated in line with international guidelines concerning cultural property restitution and return, as well as diligent operations on the market. An example of such an initiative is the UK-based Art Loss Register. Such databases are also run by INTERPOL and national institutions, especially the ministries of culture.

Chechi (2019) identifies the following characteristics of "non-state actors" fostering the protection of cultural heritage: "(1) largely or entirely autonomous from government funding and interference; (2) emanating from civil society, the market economy, or political impulses beyond state control; (3) participating in networks which extend across the boundaries of two or more states; and (4) acting in ways which affect political outcomes (…) (5) organized (as they have an internal structure and rules to pursue the professed objectives) and (6) collective entities (as they are composed of individual human beings)" (p. 461-462).

One of UNESCO's strategic aims is to foster the cooperation with such actors, especially within the World Heritage Center's activity promoting a "system of international co-operation and assistance in the context of which Contracting States adhere to the global commitment of ensuring "the identification, protection, conservation, presentation and transmission to future generations" of the cultural heritage of "outstanding universal value" located within their territories (Chechi, 2019, p. 463). Therefore, it is evident that

UNESCO recognises the significance of a bottom-up approach to achieve the overall goal of heritage protection.

For instance, non-governmental organisations are crucial partners for intergovernmental organizations, e.g. UNESCO. The International Council of Museums is an NGO dealing with "museum concerns ranging from security to illegal trafficking in cultural goods. Regarding the fight against illicit trafficking, ICOM has established an International Observatory on Illicit Traffic in Cultural Goods, and resorts to various awareness-raising tools" (Chechi, 2019, p. 469). ICOM's role in the restitution of cultural property is not limited by its focus on museums, it acts as a standard-setting and awareness-raising source of data and research projects.

The same applies to other organisations such as the Alliance for the Restoration of Cultural Heritage (hereinafter referred to as ARCH). ARCH is a non-profit organization contributing to the protection of cultural property in danger and cooperates with activists and creators "to encourage historical narratives that emphasize creative cultural achievements and universal values of civilization, and to launch action campaigns to raise awareness and mobilize the public against threats to cultural heritage" (Chechi, 2019, pp. 469-470).

As it is often the case, NGOs represent the interests of marginalised groups and otherwise underrepresented views, thus acting either as a line of activism promoting the link between culture and identity complimentary or contradictory to the narrative promoted by governments, permitting for a broader view of values of the same object or categories of objects and notions.

3.3.2. Alternative solutions to restitution

Restitution is, traditionally, a legal matter. However, in most cases concerning the return or restitution of cultural property, litigation "does not offer realistic possibilities for an assessment of a dispute on its merits" (Campfens, 2014, p. 61). In this context, Campfens also points out that "the non-retroactivity of conventional norms and specific limitation periods feature among a number of other legal obstacles that stand in the way of efficient

litigation" (2014, p.61) and Alternative Dispute Resolution (ADR) often proves to be the only solution in which the assessment of a claim can be done based on its merits. ADR, as a process, plays a crucial role in disputes related to cultural property explicitly due to the legal limitations listed above. As a result of bridging the gaps permitting for effective restitution in the process of litigation, several countries in Europe have adopted advisory panels supporting ADR for restitution disputes, however, their scope is usually limited to state property only.

For instance, in the Netherlands, parties of a dispute can submit their cases to the Dutch Restitutions Committee, which, "apart from its advisory role relating to claims on the Dutch State collection, the committee can also be asked for a Binding Expert Opinion where other (private or institutional) parties are involved" (Campfens, 2014, p. 62). In such a process, active research is one of the most critical elements. What the research primarily aims for is the "neutral assessment of the circumstances of the loss," and "to a certain extent, this activity appears to be important as it adds a level of procedural justice to the procedure by acknowledging the historical course of events and past injustices, irrespective of the outcome on the claim for restitution" (Campfens, 2014, p. 62).

The advantage of ADR is also visible in the case of establishing satisfying compensation. As stated by Andreides:

> "art value needs to be established for compensation – it is always a problem for dealers and collectors who need to give back their works and these international agreements always are about compensation but it is a problem actually because there is an objective price (what the artwork really costs) and there is the subjective value (what this particular artwork means for the owner or collector because sometimes collectors are eager to pay a much higher price just because a particular artwork is important for them. When there is a judge to stablish the level of compensation and a regular judge cannot do it [properly] – alternative dispute resolution can help to reach a much fairer compensation because, first of all, compensation is not only an amount of money (…). I think compensation is a problem and if there can be an out of

court agreement, it is convenient for everyone – in a court it is very difficult to reach an agreement convenient to everyone" (2019).

The value-based model is an essential element of seeking alternative solutions whenever regular restitution is not possible. This concerns conditional restitution, monetary compensation or in-kind exchange, and other forms of indemnification for both physical and moral loss. As far as the process is concerned, Alternative Dispute Resolution permits for a wider application of morally-driven argumentation. What is the central point in this form of dispute resolution is consensuality, thus respecting the interest of both parties. ADR takes such forms as unilateral decisions or agreements that may include different intermediaries, e.g. mediation, conciliation, or arbitration (Cornu and Renold, 2010). The application of ADR proves a shift in the way restitution of cultural property is perceived. The process in this case is morally-driven and aims at the compensation of not only objects themselves but also, especially in the case of colonised property or otherwise appropriated by force, regaining lost identity. It must be emphasised that financial compensation is not fully adequate.

According to Urbinati (2014, p. 93), "cultural diplomacy" – an umbrella term embracing such dispute settlement measures as "negotiation, mediation, conciliation, good offices and inquiry" seem to be the most promising and adopted solution, taking into account "ethical, social, and humanitarian factors" (Urbinati, 2014, p. 94). However, ADR in this scope and as practiced by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Its Restitution in Case of Illicit Appropriation is only limited to public property, i.e. objects identified as those possessing "fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or a result of illicit appropriation" (Statutes of the Intergovernmental Committee for promoting the Return of Cultural Property to Its countries of Origin or Its Restitution in Case of Illicit Appropriation, UNESCO, doc. CTL/CH/INS-2005/21, Art. 3. para. 2.), thus excluding a vast number of property not identified as such. The valuation process for the purpose of restitution in the process of ADR conducted by such organisations usually involves the

evaluation of social, religious or other "intangible" values, not necessarily monetary value.

Valuation for the purpose of restitution or other methods of dispute resolution in the case of cultural property is needed not only to determine purely financial aspects such as establishing compensation in case restitution is not possible but also for marketing purposes. A highly priced item subject to a restitution claim is more likely to attract public attention putting moral pressure on the parties to find a means towards a just and fair solution. Before further elaboration, the various methods available in this case need to be discussed to adjust the purpose of valuation accordingly. According to Cornu and Renold (2010, p. 1) "alternative methods of dispute resolution enable consideration of non-legal factors, which might be emotional considerations or a sense of 'moral obligation,' and this can help the parties find a path to consensus."

Apart from "simple restitution" or "return" as defined in e.g. the 1995 UNIDROIT Convention, the idea of "conditional" restitution or such "accompanied by cultural cooperation measures" (Cornu and Renold, 2010, p. 19), there are other agreements developed in past cases. By way of example, forms of fostering cultural cooperation come to the fore – e.g.: a "formal recognition of the importance of cultural identity," loans, donations or the creation of replicas. While in these instances valuation is of secondary importance, in the case of substitute restitution or establishing compensation, it plays a key role. Compensation in a restitution dispute is not always a reasonable amount, especially given the development of value in a given work. A notable example dates back to 1930s when Italy claimed the return of a work by Francesco Paolo Michetoti, *Iorio's daughter* (1895) and, in the end, paid a compensation of 36,000 Reichsmark to the Nationalgalerie. In exchange, the museum invested the amount to purchase works of Modigliani or De Chirico (Coccolo, 2017, p. 197).

At an international level, restitution and return are governed by the 1970 UNESCO and 1995 UNIDROIT Conventions. The 1970 UNESCO Convention utilizes the concept of "just compensation" and pursuant to Article 7, "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after

the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property," however, it does not elaborate on this topic in detail – this flaw has been classified as one of the main "formal limitations" of this convention (Mackenzie, 2009, p. 8). The 1995 UNIDROIT Convention introduces the term of "fair and reasonable" compensation dependent on the assessment of due diligence. The analysis of the conditions pertaining to the identification of due diligence in the process of acquisition under the 1995 UNIDROIT Convention includes the question of the "price paid" along with other circumstances. The question of the "price paid" as a condition listed in assessing due diligence remains fairly open as to how the financial and artistic value impact the review of due diligence measures since the 1995 UNIDROIT Convention does not justify the selection of circumstances assessed.

According to Schneider (2001, p. 518) "the concepts of 'fair' and 'reasonable' are well established in domestic case law, it was felt to be preferable to rely on the discretion of the courts rather than refer to any specific criterion such as the price paid or the commercial value, as had been advocated by some." On the one hand, the financial value obtained in the transaction may influence the perception of the parties, i.e. if the value is significantly lower or higher than respective market thresholds for similar works, this may be an alarming fact and may raise questions whether the transaction is legal, therefore due diligence measures require market research. On the other hand, it may influence the priority of a given case, i.e. if the financial value of a work is high, it may prove to attract more attention of lawyers, media and other parties, regardless of its factual cultural value, therefore it may be dangerously misleading and obscure the true cause behind a restitution claim.

Art valuation is required when establishing compensation in a restitution dispute, however, only in the case of a bona fide purchase properly proved by the possessor before the court and the amount of the compensation is defined by the court. For instance, pursuant to Article 33 of the Polish Act on the restitution of national cultural property of 2017, the compensation applies to foreign cultural goods and is established considering the principles of equity, including the right to a foreign cultural good and the costs

incurred by the previous owner. This amount includes the cost of protection, research, and conservation of the item. This provision also echoes the due diligence measures listed in the 1995 UNIDROIT Convention: "in a judgment ordering the return of a foreign national cultural property, (…) the court at the request of the defendant, submitted to the hearing in the first instance, decides on compensation from the state of the European Union to the defendant who proves that when acquiring this good due diligence was exercised. (...) When assessing due diligence, the court takes into account all the circumstances of the acquisition, in particular documentation regarding the foreign origin of the national cultural asset in question (…) the existence of an export license for this good required under the provisions of the law applicable for the European Union state filing the claim, parties involved in the transaction, the price paid, verification of available register of stolen cultural goods and all other necessary information and documents which the holder could reasonably have obtained, due diligence, and any other action that would be reasonable in the circumstances of the case."

However, in the case of restitution claims addressed to the state (e.g. reprivatisation), the problem of funds available comes to the fore and it needs to be asserted that despite the market valuation, not every estimated amount can be satisfied, therefore valuation plays a secondary role in such disputes, therefore the price that "can be paid" needs to be estimated.

"In the event of a decision to detain them (cultural goods), justified with an important public interest which in a given case wins over the interest of individuals, there arises a situation in which the state cannot afford to pay compensation in the full amount of the market value of cultural property. This will, in turn, create a need to calculate the extent to which this compensation can be paid, an extent which at the same time will meet the principle of justice" (Zeidler, 2016, pp. 126-127). Therefore, the prevalence of a moral cause behind restitution over satisfying a financial demand based on market value needs to be assumed. This case reverts us back to the issue of personal and social significance of cultural assets. The case of reprivatisation of certain goods seized by the government is a question of justice, however, the impact of such a decision needs to be assessed at a national level as far as the value of cultural heritage is concerned.

Moreover, valuation is required for substitute restitution when the object(s) provided in return should be of similar financial value. Such a solution may be adopted in the case of destruction of the original good or when there is not information of the existence and location of the item (Zeidler 2016, p. 28). The issue of asserting similar value is linked to the cultural association of an object – despite the equality of the financial value of both items, the question of whether the object in return would equally fill the void at a cultural level in a given context needs to be developed.

The main problem of valuation in a restitution dispute is the dualism of the value of cultural assets against the applicability of legal instruments available. The compensation calculated in the case of art as a specific commodity, evoking strongly emotional attachment of the owner or the society as a whole, with its role in the creation of identity and historical significance, cannot be measured against available compensation criteria as it is not only a question of material (market) value but also a question of compensation for "harms done to people at an earlier period" (Zajadło 2008, p. 154). Therefore, even if an amount of compensation is possible to be established, the final solution needs to be satisfactory to the party harmed, and the market value may not suffice as the loss of culturally relevant resources may not only be of tangible nature (financial) but also cause emotional harm to individuals.

Cultural property itself plays a greater role in restitution disputes and their political and moral significance – the value of the so-called "reparation art" i.e. the spoils of war recovered in the present context serving as "compensation for the harm suffered because of the war" (Bandle and Contel, 2015, p. 27), cannot be established based solely on market factors, therefore its significance in the overall context and the amount of the void to be filled needs to be taken into account and it may rarely be satisfactory to either of the parties.

The subject of valuation in alternative solutions to restitution claims is crucial as it involves the balance of all values described in a greater detail in previous chapters. The basis for alternative dispute resolution is the understanding of what values are crucial for

each party and the attempt to balance them should be the main goal of formulating argumentation.

3.4. Summary of model categories

The value-based restitution model acts not only as a summary of values, principles, and arguments that can be used in the context of analysing individual restitution disputes but also as a basis for a further reflection on the scope of cultural heritage protection, restitution, and the promotion of the overall value of culture in the society.

3.4.1. Values assigned to cultural property

Taking a deeper dive into the overall value categories presented in Chapter 1, it is possible to list various detailed values that can be seen in restitution disputes and restitution arguments listed by Zeidler (2016). The below summary lists the scope of the model and is an easy-to-use set of elements that can be incorporated in part or in whole depending on the needs. The first set of elements that can be used for a value-based argumentation refers to what values assigned to the cultural property in question could be: aesthetic, anthropological, archaeological, artistic, diversity, diversification, educational, emotional, ethnological, financial, historical, identity-building, integrity, political, propagandist, religious, scientific, status-setting, strategic, and other.

While many of the abovementioned values may be synonymous, they can also be separated from one another depending on the context. For instance, the aesthetic and artistic values may often result from one another, it is important to point out that the aesthetic or emotional value may be more crucial and easier to determine in the case of exercising human rights, e.g. the right to enjoyment of one's possessions, while the artistic value is assigned in a more structured approach and plays a vital role in both individual and collective cases. Moreover, as far as aesthetic and emotional values are concerned, they may often appear simultaneously, however, the emotional value of a cultural object does not always need to be associated with its physical appearance (as in

the case of the aesthetic value) but the role the item has played, for instance, in somebody's family history.

While culture and cultural property is often associated with positive values, it not always is the case. As pointed out by Silverman and Ruggles, "heritage is also intertwined with identity and territory, where individuals and communities are often in competition or outright conflict. Conflicts may occur over issues of indigenous land and cultural property rights, or between ethnic minorities and dominant majorities disputing the right to define and manage the cultural heritage of the minority. At stake is the question of who defines cultural heritage and who should control stewardship and the benefits of cultural heritage. Thus, while heritage can unite, it can also divide. These contestations, when unresolved, can lead to resistance, violence, and war" (2007, p. 3). At this point it is valid to mention that the individual and/or local rights to cultural property are almost always in conflict with broader categories of world or national heritage. Following the statement by Silverman and Ruggles, "heritage is by no means a neutral category of self-definition nor an inherently positive thing: It is a concept that can promote self-knowledge, facilitate communication and learning, and guide the stewardship of the present culture and its historic past. But it can also be a tool for oppression. For this reason, heritage has an uneasy place in the United Nations' call for universal human rights and it merits examination as an urgent contemporary problem" (2007, p.3).

Article 27 of the United Nation's Universal Declaration of Human Rights states that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" and that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" As summarised by Silverman and Ruggles, "this article, in particular, introduced the idea that culture was an aspect of human rights, although it did not elucidate the specific relationship between individuals, communities, and nations, and did not clarify how conflicts among these three entities could or should be resolved" (2007, p. 4). The conflicts between individual rights to cultural property and national heritage is clearly visible in the case of propaganda and other forms of culturally oppressive mechanisms. For instance, communist and other

oppressive regimes deprive individuals of the right to their own idea of what is valuable in the context of culture, and, even more explicitly, what truly belongs to communities as their own product.

The strategic value of cultural property not always has to be associated with politics or propaganda, however, it often appears simultaneously with these notions. When it comes to the values of diversity and diversification, in the case of the former, the diversity of creative expressions is a much broader term referring to the overall cultural value of property belonging to, e.g. a given state or ethnic group, while the value of diversification is a purely financial term referring to the value cultural property has in the case of diversifying one's investment portfolio. However, it is also important to note that the value of diversity may often have a direct impact on the financial value of, e.g. an art collection.

The ideas of anthropological, scientific, ethnological, as well as archaeological and historical values may seem to be interchangeable, however, it not always is the case. For instance, the anthropological value of cultural property, from the perspective of its overall concern with the development of human culture is different than the scientific value cultural objects have for art history or conservation studies, e.g. in the case of material and process-related research. Historical value may be related to identity-building values, however, it not always applies to every social group, e.g. to ethnic groups that no longer exist. The status-setting value can also be related to the identity-building value, however, the former can be also resulting from the purely financial value of the objects in question, unlike the broader value of identity-setting that can be more often related to a larger group of cultural values.

When it comes to the value of integrity, it works both ways: on the one hand, an object's value results from the value of the collection to which it belongs, and, on the other hand, a collection's value relies on the individual value of the objects that constitute the whole. For instance, the collections of cultural institutions are valuable thanks to their composition, and, thus, some individual objects that belong to it are not always that valuable if removed from this context. However, if looking at the other side of this value

"chain", it can be stated that a certain collection can benefit from one highly valuable object that belongs to it, thus the item in question could by itself constitute the value of the whole. To better illustrate this equation, we may look at a regional museum with only one highly recognized object, e.g. the National Museum in Gdansk and *The Last Judgement* by Hans Memling (this case is later described in Chapter 4). The overall value of the collection is highly dependent on this one item, thus, the value of integrity of this collection is not resulting from the balance of values assigned to all objects that are included in the stock. Coming back to the first equation, we may look at a situation when the collection is composed of objects of similar value, then, the value of the collection is truly dependent on the collectiveness of the objects included, hence the uneven weight of arguments related to integrity.

The specific values of social utility can be divided into two main categories: collective and individual. The religious value may be referring to both cases concerned, depending on the level other values assigned to the object in question. It is important to note that religious value is not only an individual value but also inherent to collective values such as identity-building, e.g. of a nation or an ethnic group, and tightly connected to the historical context. Therefore, it may be concluded that religious value is not only related to objects of direct religious purpose, e.g. objects of ritual use (especially if still in active use), but also a reference value for historical bonds with a particular object, also depicting the history of a given nation or another social group.

3.4.2. Principles of cultural heritage law

The principles of cultural heritage law are a point of reference for restitution arguments based on values. They constitute a broader category of what cultural property serves for in the context of, primarily, social significance of cultural heritage, regardless of the legal system the principles identified by Węgrzak (2020) stem from. The following principles can be listed: cultural heritage protection, sustainable development, social utility of cultural heritage, and the change of social utility of heritage over time, protection of integrity, protection of diversity, property protection, protection of diversity, social utility of cultural heritage, good faith and equity, as well as the principle of financing monuments from public funds, or financing monuments by the owner.

As summarised by Węgrzak, “some of the principles complement each other and one is a specification of the other, e.g. in the case of the cultural heritage management principle and the principle of the change of social utility of heritage over time, or the principles of access to monuments and principles of social utility of monuments” (2020, p. 276). The principles listed by Węgrzak (2020), refer to, primarily, Polish and EU law, however, their application for the purpose of creating the value-based restitution model serves as a universal point of reference, wherever the legal system permits it.

Moreover, it is valid to point out that there may be also “adversarial rules like the principle of financing monuments by the owner and the principle of financing from public funds, related to the principle of state participation in the protection and care of cultural heritage. In each case, it is necessary to weigh these principles, taking into account applicable laws granting priority. However, the principle of property protection is encountered in the practice of applying the law to limitations resulting from the principle of protection of cultural heritage, as well as manifestations of the implementation of the principle of discretionary power of conservation authorities when it comes to state interference in the rights of the owner in the name of the common good” (Węgrzak, 2020, p. 276).

Cultural heritage law principles serve as a point of reference for cultural property restitution arguments in the case of argumentation focusing on the protection of cultural property viewed as an element of cultural heritage. In the case of objects that are not categorised as cultural heritage, the principles may have a limited scope of application, however, a number of them can have a significant impact on argumentation regarding objects other than those forming part of the broader category of heritage. For instance, the principle of social utility may apply to any objects that have a social function, regardless of their legal status. The principle of protection of diversity or sustainable development are also a vital point for arguments relating to objects that are not necessarily forming part of what is considered as heritage (or, in the case of Poland, “monuments”) in legal terms.

3.4.3. Restitution arguments

The arguments developed by Zeidler (2016) play a fundamental role in the value-based restitution model. To summarise, the arguments from justice, ownership, acquisition in good faith, place of production, place of allocation, right of loot, illegal export, national affiliation, cultural affiliation, historical affiliation, territorial affiliation, personal affiliation, social utility, most secure location, historical eventuation, passage of time, prescription, time limitation, discovery, investments undertaken, possession, obligation, and reciprocity. These arguments constitute a "theoretical model that serves to investigate the issue of restitution, and, indeed, concrete claims and restitution cases in practice, an attempt based on contemporary philosophical-legal thinking, comes down in essence to the examination and verification of successive restitution cases" (Zeidler, 2016, p. 214). It is also valid to point out that other than most value-related arguments, the last argument listed, i.e. the argument from reciprocity, can be also treated as an approach relating to the strategic and/or political value of cultural property since it mostly appears in inter-state negotiations.

As summarised by Zeidler, the argument from reciprocity is among the most frequently used arguments in restitution disputes and "it can have both a positive (motivating) action, and a negative (suspensive) one. Its essence comes down to a situation when both sides in a restitution discourse are mutually in possession of specific pieces of cultural property belonging to the other side. In such circumstances, the position of a party may be as follows: first, I will surrender what I have in exchange if you give me what you have (positive approach); or, second, I will not surrender what I have since you also do not wish to give me what you have (negative approach)" (2016, p. 199).

The elements presented above: the values assigned to cultural property, cultural heritage law principles, and restitution arguments, are not listed in direct reference to one another but in a way permitting to draw the lines between adequate elements depending on the needs. An example of linking these elements can be as follows – value assigned backed by a principle result in the formulation of the argument:

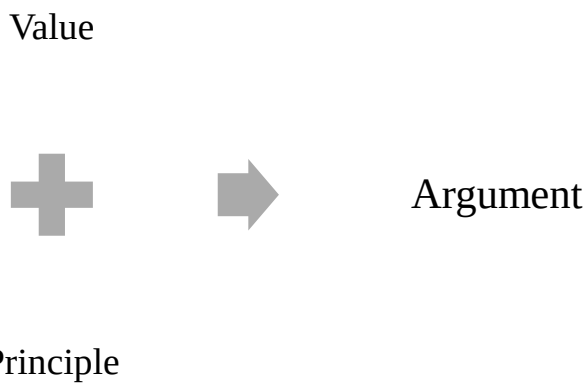

Figure 3. Value-based restitution model components equation

Source: own elaboration.

In this simplified way, it is clearly visible that argumentation in a restitution dispute is not a matter of a single source of law, permitting for a ready-made solution. These elements constitute an equation that can be applied to various examples of reasoning for cases where law, especially law regulating ownership, is not the only answer and, in the case of cultural property, it is rarely sufficient. In spite of this theoretical categorisation, it is mandatory to conduct restitution research case-by-case. As advised by Zeidler, "if one assumes that every hard case is nothing other than a clash of principles, and not just those expressed in legal form, it seems most advisable and appropriate to weigh them up in a concrete case. Whilst one can attempt to settle such a clash *in abstracto*, without anchoring this in any set of factual circumstances, it is more reasonable to conduct such an intellectual exercise *in concreto*" (2016, p. 214), hence the case studies presented in the next chapter.

Conclusion

Restitution arguments reflect the principles of cultural heritage law and the other way around – the principles are based on actual cases involving sustainable restitution arguments. The role of the 1995 UNIDROIT Convention in building the value-based restitution model is, on the one hand, exemplification, as it refers to a particular legal

instrument, and, on the other, also a more universal value-setting standard, as the Convention reflects general principles of international cultural heritage law and its values.

Taking a more detailed look at individual values identified in this chapter, one can point out that they often stem from the same sub-set of values, i.e. social values of cultural property, however, it is necessary to draw boundaries between them as not every social value fits in the same category. For instance, identity can be built (or destroyed) for a nation, a community, or an individual. In the case of an individual, it can be related to status-setting values, but also purely emotional values. In the case of strategic values, cultural property can be used as a political element in the form of long-term propaganda, or yet another tool for demonstrating power, e.g. in an armed conflict.

Scientific value is also tightly connected to historical value but is not necessarily synonymous in every case. The same applies to anthropological and archaeological values, just as the two disciplines of science are usually studied and developed separately. In line with this statement, it is, once again, crucial to mention the interdisciplinarity of the study of cultural property in general and its restitution in particular. The categorisation of these elements, especially the values behind cultural property, is a necessary element to demonstrate this interdisciplinarity.

The arguments presented in the above context serve as a toolkit for approaching restitution disputes, however, one argument may be overridden by other conditions specific to a given object as well as the social or political factors surrounding it. The main conclusion is that restitution as such is not only necessary to achieve sustainable development goals, but also the process itself should respect the principle of sustainability.

Chapter 4
CASE STUDIES

Introduction

Cultural property restitution, in many instances, is a hard case in law, i.e. a case that requires going beyond traditional legal-positivist thinking. The solution of such disputes is not always a matter of applying existing legal provisions in a direct manner. Restitution cases require the weighing up of values behind particular restitution arguments. As pointed out by Zeidler, "where no solution can be found on the basis of the law that is in force, it is vital to call upon extra-systemic arguments, in other words, such as are not confirmed only on the basis of legal norms, but rather, for example, on the basis of moral norms, or another type of evaluation and values" (2017, p. 48). This chapter presents a set of cases studies that illustrate the use of particular values in restitution arguments.

4.1. Problem

Restitution of cultural property, as an example of a hard case in law, requires the weighing of various arguments. These arguments arise from values assigned to the objects in question, and these, are often unnamed or vague. Argumentation models vary from case to case and there is no point of reference available in the literature of the subject that would serve as a set of values that arguments and legal principles can be linked in a direct manner.

4.2. Aim

The aim of this chapter is to illustrate the use of particular values in restitution arguments to complement the value-based restitution model proposed in the previous chapter. Certain cases include multiple value layers and each of them is unfolded depending on the context and the evolution of the dispute. Most of the values, principles, and arguments are only a "tip of the iceberg," however, this simplified way of illustrating restitution argumentation allows us to present examples that can be later developed and categorised

for the purpose of further research in the field of cultural property restitution and evaluation from the perspective of different actors, not only in direct disputes, but also in theoretical considerations of what the argumentation could be in similar cases.

4.3. Selection criteria

Every subchapter includes two return and/or restitution cases. They are diversified on the basis of the solution adopted, the values referred to by all sides of the dispute as well as the timing of the case – i.e. pre- and post-1970. They include both continental and common law systems. Hard cases are much more commonly labeled as such under common law, from which this notion originates, due to the system of legal precedence, however, they occur regardless of the jurisdiction considered (Zajadło and Zeidler, 2021).

The cases selected for this chapter are not only formal debates but also theoretical examples of what the restitution argumentation could be if an object was to be returned to its original location (e.g. *The Last Judgement* by Hans Memling).

4.4. The value of integrity as a driver of the restitution process

4.4.1. Bust of Diana – Poland and Auktionshaus im Kinsky

Spoils of war are always a matter of ripping a nation of its identity and preventing its development and both material and intellectual well-being. The broad category of values referred to in this context is cultural values – understood as both historical, artistic, and social values. The first category of value-based cases refers to this value from the point of view of society as a whole, assessed on the basis of its further development and the formulation of its overall wealth.

Cultural value is the reason for amicable dispute resolution placing moral values at the basis of the discourse. In the case presented in this sub-chapter, it is not only the cultural significance that drove the process but also the integrity of the collection concerned and the bond between the original location and the item itself. The case study is also an example of alternative dispute resolution and it also concerns the assessment of due

diligence and authenticity, the cooperational approach to cultural property restitution, and could be an example of the value-based restitution model.

The *Bust of Diana - Poland and Auktionshaus im Kinsky* case concerns an 18th-century marble bust attributed to Jean Antoine Houdon (1741-1828). The bust by Houdon was one of the most valuable works of contemporary artists acquired by King Stanisław August for his collection, as evidenced by the inventory from 1795, drawn up by the court painter Marcello Bacciarelli. At the end of the 18th century, the sculpture was part of the decor of the Dining Room of the Palace on the Isle (Czarnecka, n.d.).

King Stanislaus Augustus, being a great admirer of Houdon, acquired other works by Houdon in his lifetime, just like other contemporary rulers e.g. Frederick II of Prussia, Catherine the Great, and George Washington (Roger, n.d.). The bust from the Royal Łazienki Palace is one of several versions of Diana depicted by Jean-Antoine Houdon at the end of the 18th century. The French sculptor was one of the most outstanding artists at the turn of the 18th and 19th centuries. He created mythological statues modeled on the ancient ones, with clean lines and a cool expression. He gained the greatest fame and fame thanks to his realistic busts and portrait figures of famous figures of the Age of Enlightenment, including Voltaire, Molière, Denis Diderot, Jean-Jacques Rousseau, Benjamin Franklin, George Washington, Napoleon II, and Catherine II.

The bust of Diana was first removed from Poland in 1915 by the Tsarist administration, and returned to the Łazienki Pavilion in 1922. In 1940, the sculpture was looted by German troops from the Łazienki Palace in Warsaw. Subsequently, a copy of the bust had been placed in the collection of the National Museum in Warsaw, however, importantly from the perspective of the attribution research, “the copy does not have the quiver strap, which may be the cause of confusion in certain more recent publications” (Roger, n.d.).

Image 1. Pre-war photo of Jean Antoine Houdon's Bust of Diana, 1777, white marble bust

Original and current location: The Royal Łazienki Palace, Warsaw.

Source: http://lootedart.gov.pl/en/product-war-losses/object?obid=14002

Circa 1946, the piece was bought by an Austrian collector, the grandfather of the owner. In 2015, the Polish Ministry of Culture was informed that the artwork had appeared on sale at the im Kinsky auction house in Vienna. Subsequently, the Ministry made a request to the Art Recovery Group to support the restitution effort. That same year, the parties had reached an amicable agreement to return the piece and it was indeed moved to its original location at the end of 2015 (cf. Sitavanc, Chechi, Renold 2017; Roger n.d.).

Although the case seems easy, it still touches upon the problematic question of good faith acquisition under national law, as well as due diligence on the part of the auction house. Under Austrian law, any good faith buyer may retain ownership and, especially at the time (i.e. in 1946), no international convention proposed any measures of unifying this notion, therefore, since the owner had inherited the piece from his grandfather, the auction house claimed that the situation was clear. Another question refers to due diligence measures on the part of the owner and the auction house. It remains unclear whether im Kinsky had consulted any register or questioned the provenance before the expert opinion.

In 2015, expert opinion revealed that it was a piece missing from the Royal Łazienki Palace collection. Another expertise conducted by Poland also confirmed that it had been stolen as, above all, the identification number on the back of the sculpture was matching the one in the register of the collection.

Another value referred to in this case is the integrity of a collection. Every item, priceless alone as it may be, may be a vital point of a collection. The idea of collecting is considered as a work of art itself as it involves the application of particular selection criteria to achieve the final result. The value of integrity is crucial for a collection. If one element is missing, the whole idea of a collection is jeopardised – and so is its value, especially from the artistic and financial point of view.

The below value matrix presents what values emerged on both sides of the dispute. Alongside the artistic value related to the integrity of the collection and the financial value for the auction house, one aspect needs to be pointed out: the social value of national

identity formed as a result of the richness of the cultural heritage collections placed in the country. The status of a country on an international level, regardless of the nationality of the creators of the objects, is strictly linked to the quality of art collections at public display. It is not only purely touristic significance – it strongly affects the identity of a nation. While the values present on both sides of the dispute are clear, the activity of the auction house is not related to any of the legal principles as it was only commercially-driven:

Table 6. Argumentative matrix for The Bust of Diana

Party	Poland	Auktionshaus im Kinsky
Value	Artistic (integrity); social (identity)	Financial
Argument	Social utility; from the place of allocation	Artistic significance
Principle	Social utility of cultural heritage; integrity of cultural heritage	-

Source: Own elaboration.

This restitution case showcases the importance of recovering looted cultural objects for both recovering the attachment of the society to its heritage and, thus rebuilding its identity and restoring well-being, and the very idea of mainitaining integrity of a collection for the sake of it transmitting the values that were intended to be represented by its elements in the first place e.g. diversity. The value of diversity in this case is achieved by the international nature of the relationship between the ordering party and the artist, thus proving the wealth and open-mindedness of the former. Such values are crucial for building the sense of belonging of a nation.

4.4.2. Neuchâtel Museum of Ethnography and Egyptian Antiquities Service

The case concerns the exchange of cultural objects of uneven financial value, involving the renowned Egyptologist, Gustave Jéquier, who was a collaborator of the Ethnographic Museum of Neuchâtel in Switzerland, hereinafter referred to as the "MEN," and the Egyptian Antiquities Organisation, established in 1859, currently, The Supreme Council

of Antiquities, the main body of the Ministry of Antiquities, now responsible for overseeing all matters relating to the cultural heritage of Egypt including the safety, administration, protection, conservation and documentation of the cultural heritage as well as research and media representation (Museum with No Frontiers).

Gustave Jéquier was a renowned Swiss Egyptologist, famous for *inter alia* taking part in the 1897 *Délégation scientifique française* to Persia led by Jacques de Morgan, where he excavated antiquities at Susa, the most significant of which was the "third fragment of the Code of Hammurabi, discovered in 1901 during Jéquier's last excavation campaign" (Encyclopaedia Iranica).

In 1924, the Egyptian government invited Jéquier to carry out excavations at Saqqarah (Encyclopaedia Iranica). The excavations were carried out from 1924 to 1936 and, in 1926, after negotiating with the Egyptian Antiquities, Jéquier obtained various precious Egyptian objects in exchange for a fragmentary monumental head he had discovered and brought back from Egypt the same year (Bandle, Contel, Knodel, and Renold, 2017). The head was returned to the Egyptian Museum in Cairo the same year, at Egypt's request, because the body of the statue had been found in the meantime. In exchange for this head, Egypt gave Gustave Jéquier two wooden statues from the 6th dynasty, a "late period mummy cartonnage, with a golden mask" and coins representing "at least ten times the value of the head" (Letter of Gustave Jéquier of 11 December 1926, Saqqarah, probably addressed to Théodore Delachaux, a MEN conservator, as cited in Bandle, Contel, Knodel, and Renold, 2017). The Swiss government did not intervene.

Informal negotiations have taken place between the Antiquities Organization and Gustave Jéquier, representing the MEN in this case, for the return of the Egyptian head and the initiative seems to have come from the Antiquities Service, following of the discovery of the other part (the body) of the statue (Bandle, Contel, Knodel, and Renold, 2017). Legal issues involved in this case include illicit search, however, as the Egyptian public law binding, in this case, did not exist at the time and the organisation had to decide on a case-by-case basis, therefore, the case was not an "illegal search" in the true sense of the term.

The dispute was resolved with the decision on an exchange, based on negotiation, and the fragmentary monumental head was returned to the Egyptian Museum in Cairo and in exchange, Egypt donated two statuettes from the Sixth Dynasty and a mummy box to Gustave Jéquier (Bandle, Contel, Knodel, and Renold, 2017). It is interesting to note the difference in the value of the objects exchanged. According to Gustave Jéquier and other experts, objects obtained from Egypt would be worth 10 times more than the fragmentary head (Bandle, Contel, Knodel, and Renold, 2017). Due to the lack of rules applicable to archaeological excavations at that time and the political situation of colonised countries, it was customary to negotiate lost and found objects with foreigners and foreign governments and it did not appear to pose any major problems, neither from an ethical point of view, nor from a legal perspective (Bandle, Contel, Knodel, and Renold, 2017). In this context, it is interesting to note the transparency of MEN. The institution's policy is to make its collections freely accessible, for instance, its collections have been digitised and are available via the Google Arts and Culture project.

The value-principle-argument matrix for both cases could be summarised as follows:

Table 7. Argumentative matrix for Egyptian antiquities

Value	Artistic (integrity); social (identity)
Principle	The principle of access to cultural property; the protection of integrity (in reference to the object isolated from an immovable site)
Argument	From the place of allocation
Solution	Exchange of cultural objects

Source: Own elaboration.

Other cases showcasing the exchange of cultural objects include: The bell of Shinagawa – City of Geneva and the Temple of Shinagawa (Contel, Bandle, and Renold, 2016) or the Sammlung 101 - City of Bremen, Kunsthalle Bremen and Russia (Bandle, Chechi, and Renold, 2012).

The system of valuation of such objects is complex and such a solution can never be satisfactory enough to both parties. It is of interest for this study to further examine the method of valuation in the case of exchange.

4.5. Social utility as a driver of the restitution process

The cases presented in this subchapter referred to specific social values of cultural property. As opposed to cultural values asserted by a larger group – i.e. a nation as a whole, specific social values further presented in this section are either religious or individual (in this case referring to human rights in relation to the enjoyment of one's possessions).

The first case presented in this section is the hard case of *The Last Judgement* by Hans Memling – a dispute between ta church and a museum – acclaiming different values in their argumentation: religious v. artistic. The second case refers to a painting by Vincent van Gogh, the *Portrait of a Young Peasant*, also known as *The Gardener,* in the context of two opposing stances: the right of an individual to the enjoyment of one's possessions, recognised under Human Rights Law, and the universal artistic value from the point of view of a wider audience.

The cases present in this section illustrate the weighing of arguments derived from different values, trying to find a balanced solution either in terms of finding an alternative location of the object and/or establishing the right level of compensation.

4.5.1. *The Last Judgement* by Hans Memling

Social values assigned to cultural property may be divided into several categories, e.g. universal and specific. Universal social value reflects the interest of a larger group of individuals, regardless of their ethnic or religious background. The latter may be exemplified by religious values. When considering the value of cultural goods occurring in a religious context, not always intended for churches, one should distinguish a few examples of objects. Works on religious themes that do not have a religious function, objects of worship and sacralization, liturgical objects or objects of personal devotion, it

is also worth noting that many objects in churches were withdrawn from their functions over time and remained as equipment.

Each object we discuss in the context of restitution requires individual assessment. On the one hand, in some cases, the religious function will dominate, in others the artistic value - on the other hand, in both cases these values may occur simultaneously. The artistic value may speak in favor of leaving the works in the safest possible place, which is undoubtedly a museum. Placing works in museums also allows for the full educational function. However, there is the availability factor and emotional value. Despite the limitations in the availability of all objects in churches, it should be noted that in some cases the number of visitors to sacred buildings, and therefore admirers of the goods there, is greater than in the case of museums. Apart from taking the artistic layer into account, it should also be assessed in which context the work would have the strongest emotional value for the recipient.

An example of a private commemoration object will be the Last Judgment of Hans Memling, which has never performed a religious function inside St. Mary's Basilica, but placing it in the largest brick temple in Europe could result in enhancing its tone (emotional value) and would allow access to a larger audience.

The Last Judgement triptych by Hans Memling has a complex track record. Commissioned around 1467 by Angelo Tani, an agent of the Medici at Bruges, it was most probably executed in 1472 or 1473 and was meant to be decorating a church in Florence (Walicki, Białostocki, 1990). When the Anglo-Hanseatic War was still ongoing, in 1973, the San Matteo galleon with the triptych on board set sail to Florence from Sluys. When heading towards the banks of England, it was captured at sea by Paul Beneke, a privateer from Gdansk, who led the Peter von Danzig caravelle (*cf.* Możejko, 2019).

It was later placed in St. Mary Church in Gdansk. In 1807, the piece was looted by the Napoleonic army and moved to the Louvre in Paris. In 1815, during the occupation of Paris by the Prussian army, *The Last Judgement* was moved from Paris to Berlin (Walicki, Białostocki, 1990). In 1817, it came back to Gdansk and stayed there only to be looted

by the German troops in 1945. It was subsequently, moved to the Hermitage Museum in Leningrad (Saint Petersburg). Finally, it was returned to Poland in 1956 (it was part of an exhibition of artworks "secured" by the Soviet Union, in Warsaw), and, finally, to Gdansk in 1958. However, it is important to point out that it was not returned to its original location at St. Mary's Church but the Museum in Gdansk (*cf.* Stepnowska, Zeidler, 2018).

The triptych is one of the most outstanding and best-preserved examples of Netherlandish painting in the world, and the fame of the masterpiece was due to both its artistic rank and the extraordinary history that bound the painting with Gdansk for centuries. Apart from the classical scene of the final judgement on the front panels, on the reverses of the wings, the founder of the work, Angelo Tani, and his wife Caterina Tanagli are depicted. Unfortunately, there is no signature of the master on the triptych. Hence, for a long time, the painting was attributed to various Dutch artists (National Museum in Gdańsk). The triptych was first attributed to the van Eyck brother, then Rogier van der Weyden, and, in 1843, to Hans Memling (Szmelter, Ważny, 2019). Following a heated debate over the attribution of the painting in recent years, it has been established that in light of a multi-disciplinary research including an in-depth analysis of the artistic process behind the creation of the work and the materials used, the current approach is that the triptych is a design and composition by Rogier van der Weyden, posthumously completed by Hans Memling" (Szmelter, Ważny, 2019).

Image 2. Hans Memling, *The Last Judgement*, c. 1460–1473, triptych, oil on desk, 242 x 360,8 cm, National Museum in Gdańsk

Source: Wikimedia Commons

Several restitution arguments can be used in the context of the discourse between the church and the museum. The first argument is an argument from destination that might be for bringing the work back to the church. The obvious answer to this argument is from the safest place, which will definitely be the museum. Another argument on the part of the church will be historical affiliation, which can be associated with the time that a given object stayed in a sacred building before changing its place.

At the same time, the argument related to the passage of time the same object was in a museum can be linked to the argument about the integrity of a museum collection, which favors arguments in favor of this institution. According to Art. 6 of the Act on the protection and care of monuments of 2003, protection and care are subject, regardless of their state of preservation, to movable monuments that are, in particular, works of fine arts, artistic craftsmanship and applied arts or collections constituting collections of objects collected and arranged according to the concept of the people who created these collections. Moreover, the collection as a whole most often has a greater value than the total value of its individual objects, so the principle of preserving the integrity of the collection should be crucial for each of the parties. This argument is directly related to the expenditure argument that could be applied to the museum.

There is a number of values behind restitution arguments. Restitution arguments reflect legal principles. On the example of the discourse between a church and a museum, several principles for the protection of cultural heritage can be mentioned. The principle of "social utility of cultural heritage" could speak in favour of placing the object in the church - in this case it would be both a religious and universal function due to the availability of monuments for every visitor to the church. The other side of the discourse is the same principle, but the social function will not be the same as the religious one. Additionally, the principle of the protection of heritage integrity should be recalled, which may appear in the arguments of both parties. Leaving a monument at the museum may result from the principle of protection of cultural heritage, access to cultural heritage and changes in the use value of cultural heritage over time.

By juxtaposing principles, arguments and values, we can compare the perspectives of both sides of the discourse. On the one hand, if we take opposing arguments and the corresponding principles as our starting point, the common values will not be preserved:

Table 8. Argumentative matrix for The Last Judgement (1)

Party	Church	Museum
Principle	Social utility of cultural heritage	Protection of cultural heritage
Argument	Destination	The safest place
Value	Religious	Artistic

Source: Own elaboration.

On the other hand, when common values are taken as a basis, the same arguments and principles can appear on both sides, thus arriving at a mutually acceptable solution:

Table 9. Argumentative matrix for the *The Last Judgement* (2)

Party	Church	Museum
Value	Social (Religious)	Social (universal)
Argument	Social utility	Social utility
Principle	Social utility of cultural heritage	Social utility of cultural heritage
Solution	Shared custody: placing the object in a special building in the vicinity of the church, with a religious function and preserved by an expert team from the museum, available to the public	

Source: Own elaboration.

The above case study presents an opportunity to weigh the significance of arguments presented on both sides of the discourse. It may not provide definite answers to the question on which party to assign ownership to, however, the proposed distribution of

arguments, principles, and values, may serve as a way of labelling and organising seeming intangible concepts and may lead to a more constructive debate on this controversial subject.

4.5.2. Beyeler v. Italy

The dual nature of cultural property, i.e. as a marketable asset and a cultural signifier or a sentimental remnant results in the possibility to seek non-pecuniary damages related to the harm associated with the loss of a work of art or any other act resulting in the loss of enjoyment of one's collection. Pursuant to Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "every natural or legal person is entitled to the peaceful enjoyment of his possessions," therefore the deprivation of possessions resulting in the loss of such enjoyment may be considered a violation.

The award of just satisfaction granted by the European Court of Human Justice (ECtHR) in the case of violations of this kind may be awarded to injured parties, however, the ECtHR "has not disclosed the exact principles guiding its awards made in respect of non-pecuniary damage" (Altwicker-Hàmori, Altwicker, and Peters, 2016, p. 4) and is, therefore, criticized for the inconsistency and obscurity as far as the assessment practice is concerned.

The amount established is calculated on the basis of the equity principles assumed by the Court, i.e. the calculation of the award for a non-pecuniary damage involves "involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage" (*Al-Skeini and Others v. The United Kingdom Judgment*, 2011). In the case of cultural property, the amount of the award may be partly based on the market value, however, it rarely reflects this principle in the final decision.

In the case of *Beyeler v. Italy*, 2000 and 2002, the value of the artwork in question was a significant factor in both, the visibility of the case and the judgement. Vincent van Gogh painted the *Portrait of a Young Peasant*, also known as *The Gardener* (Image 3), in 1889, during the artist's recovery at the asylum of Saint-Paul-de-Mausole after the infamous ear-cutting incident. The completion of this mature work followed his masterpiece, *The Starry Night*, executed that same year, and preceded his death in 1890 (Bailey, 2018, pp. 188-191). Currently, the paining forms part of Rome's Galleria Nazionale d'Arte Moderna e Contemporanea collection.

The work entered the market in 1910 through the French art dealer Paul Rosenberg and, after its sale to an Italian collector, found its way to an Impressionist exhibition in Florence. Upon the death of the owner in 1940, the paining was inherited by his uncle attorney, Giovanni Verusio. The work survived the turmoil of the Second World War hidden in a farmhouse by the owner (Cavalli, 1998, p. 15). After subsequent exhibitions, the paining gained on its public importance and, in 1954, was declared a work of artistic and historical interest pursuant to Law no. 1089 of 1939 (hereinafter, the "1939 Law") by the Italian State (Velioglu, Chechi, and Renold, 2013, p. 2).

The paining constituted not only a valuable asset but also a prestige marker to the family, it was much feared for as thieves were claimed to had been investigating the house on numerous occasions but never managed to take the piece away (Cavalli, 1998, p. 15). Indeed, in addition to the turbulent ownership issues described below, the paining was stolen by armed robbers from the Galleria Nazionale d'Arte Moderna e Contemporanea in Rome in 1998 and found by the carabinieri and Italian police that same year (*Beyeler v. Italy*, 2000, p. 15). This fear caused the family to sell the piece in 1977 to Silvestro Pierangeli for 600,000,000 Italian Lira (ITL) (Velioglu, Chechi, and Renold, 2013, p. 2).

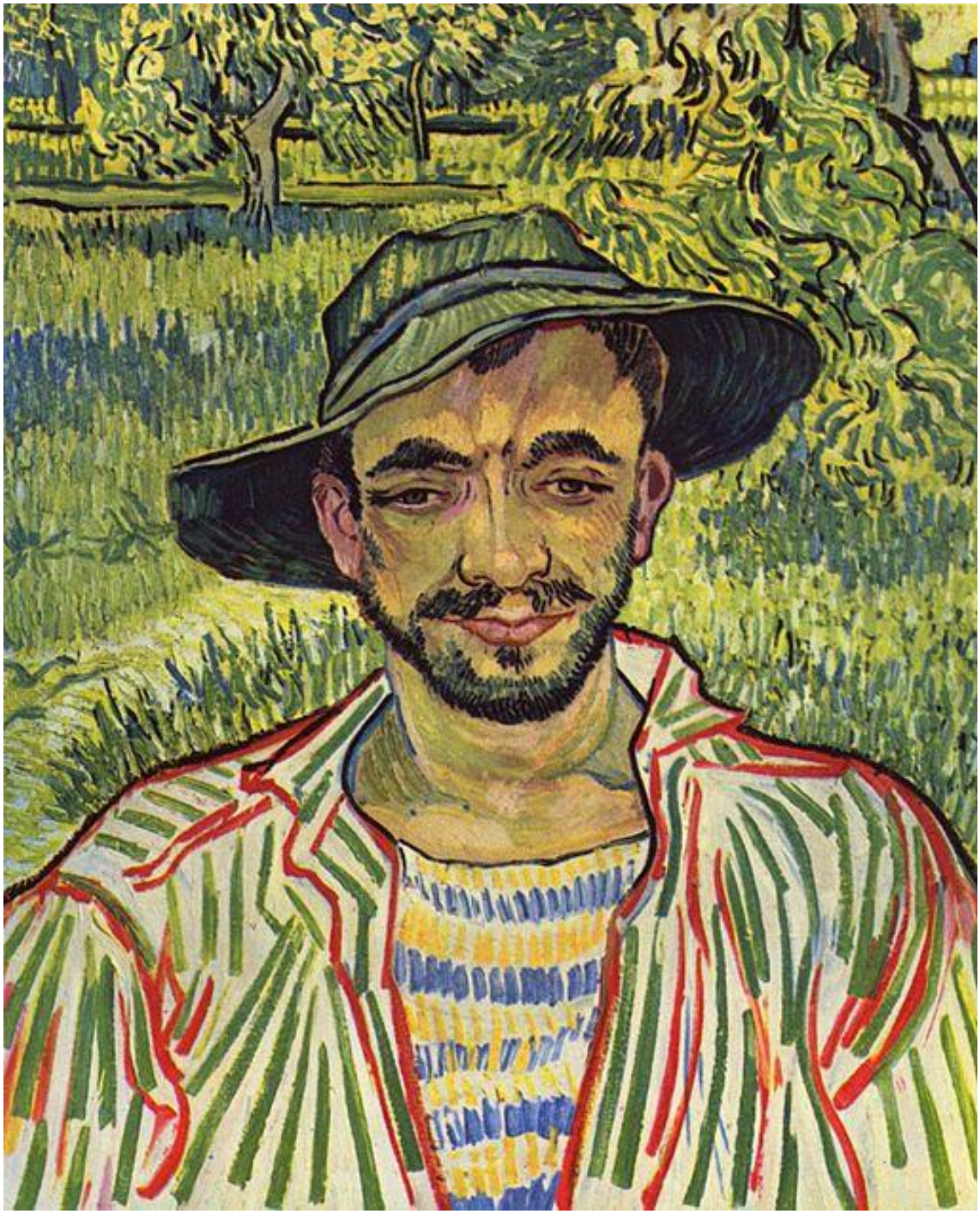

Image 3. Vincent van Gogh, *Portrait of a Young Peasant or The Gardener*, 1889, oil on canvas, 61 × 50 cm, Galleria Nazionale d'Arte Moderna e Contemporanea, Rome

Source: Wikimedia Commons

Pierangeli represented a renowned Swiss collector, Ernst Beyeler, however, when declaring the sale to the Italian Ministry, as required by section 30 of the 1939 Law, Verusio mentioned only Pierangeli as the other party to the contract, omitting the involvement of Beyeler completely (*Beyeler v. Italy*, 2000, p. 3). The Ministry's right of preemption expired after two months, the Ministry decided not to purchase the piece due to the insufficient "interest to justify the State acquiring it," however, paradoxically, when Pierangeli applied for an export license for that same piece, the Ministry refused as it found the export of the piece to be "seriously detrimental to the national cultural heritage" (*Beyeler v. Italy*, 2000, p. 4).

In 1983, Pierangeli clarified to the Ministry that the painting had been purchased on behalf of Beyeler and they both informed the Ministry that the Peggy Guggenheim Collection in Venice expressed interest in acquiring the paining for 2,100,000 United States dollars (USD) (Velioglu, Chechi, and Renold, 2013, p. 2) – that would amount to ca. 3,444,000,000 ITL at the time. In the declaration, Perangeli and Beyeler encouraged the Ministry to indicate its interest in exercising its right of preemption, however, the latter provided a note in which it stated that it "was unable to exercise its right of pre-emption validly since there had been no contract and a mere unilateral declaration of an intention to sell was insufficient" (*Beyeler v. Italy*, 2000, p. 4). After a battle for the export license to transfer the painting for an inspection at the Peggy Guggenheim Collection, the piece was finally moved to Venice in 1985 (Velioglu, Chechi, and Renold, 2013, p. 2).

In 1986, the Ministry expressed "concern about the conditions in which the painting was being kept, particularly in the light of the uncertainty as to who was the real owner and the failure by the Peggy Guggenheim Collection in Venice to comply with its undertakings" (*Beyeler v. Italy*, 2000, p. 5) and upon its order, the piece was moved to Rome for temporary custody in the Galleria Nazionale d'Arte Moderna e Contemporanea – the Peggy Guggenheim Collection had simultaneously renounced the purchase (Velioglu, Chechi, and Renold, 2013, p. 2).

In 1988, the Ministry expressed its interest in the purchase and Beyeler replied that he would accept 11,000,000 USD in return, however, as the Ministry would not reply within the time limit specified by him in the communication, he sold the painting to the Peggy Guggenheim Collection in Venice for 8,500,000 USD supporting the sale with a relevant declaration to the Ministry, however, upon receiving the document, the Ministry informed that "it could not ascribe to the declaration the effects provided for under the aforementioned provisions since the applicant did not have valid title to the painting" (*Beyeler v. Italy*, 2000, p. 6). However, as pointed out by Beyeler's lawyer, the Ministry had treated Beyeler as the lawful owner of the paining from the moment it permitted him to move the piece from Rome to Venice in 1984 and "intimating that it wished to buy it from him," moreover, Beyeler provided the Ministry with bank statements indicating that the purchase had been made on his behalf (*Beyeler v. Italy*, 2000, p. 7).

In 1988, the Ministry exercised its preemption right, however, with regards to the 1977 sale as the subsequent sales were considered void due to the fact that "the true identity of the contracting parties had been uncertain," (Velioglu, Chechi, and Renold, 2013, p. 2) thus the State compensated only for the 600,000,000 ITL sale (Chechi, 2014, p. 50) – that amounted to ca 7,812,000 USD in 1988. Beyeler challenged the decision before Italian courts, however, with no success as, e.g. the Lazio Regional Administrative Tribunal and the Council of State "considered the declaration of 1977 void because it did not contain the identity of the real owner. […] the declaration being void, the two-month time-limit would not apply in the case. This justified the Ministry's use of its right of pre-emption in 1988, eleven years after the actual sale" (Velioglu, Chechi, and Renold, 2013, p. 4).

It was only in 1996 that he started the proceedings before the European Commission of Human Rights stating that the right to "peaceful enjoyment of possessions," to which every natural or legal person is entitled pursuant to Article 1 of Protocol No. 1 of the European Convention of Human Rights, had been violated (Chechi, 2014, p. 50).

As if to prove the value of the masterpiece, *The Gardener* was stolen from the Gallery in 1998. However, after a series of threatening calls to the press, the group was successfully

traced and the painting, along with other seized objects, was returned to the Gallery (Riccardi, 2022).

In 2000, the Court held that Italy had violated the right and unfairly waited several years before exercising the right of preemption (Chechi, 2014, p. 50). The Court gave the parties six month to reach an agreement as to the amount of compensation, however, as they failed to do so, the Court imposed a compensation of 1,355,000 € to be paid by the Italian State to Beyeler in 2002 (Velioglu, Chechi, and Renold, 2013, p. 3).

The question of value and compensation in this case is complex as Beyeler claimed both pecuniary and non-pecuniary damage. His primary claim was the restitution of the paining and compensation for the "damage sustained as a result of the length of time for which he had been deprived of the painting and the consequent loss of use of the amount he would have received had it been possible to perform the contract signed with the Guggenheim Foundation in 1988" (*Beyeler v. Italy*, 2002, p. 3).

Therefore, the amount claimed was quoted at either 8,500,000 USD less the amount paid by the Ministry upon the pre-emption acquisition, i.e. ca 7,812,000 USD plus the interest from 1989 to the day of the judgement (amounting to ca 5,633,000 USD) or "the value of the painting at the time of the 'expropriation' in the same sum as indicated above (price stipulated in the contract signed in 1988, less the ITL 600,000,000 paid by the ministry, the whole sum to bear interest at the aforementioned rate)" (*Beyeler v. Italy*, 2002, p. 3). He also sought compensation for non-pecuniary damage caused by the case and affecting his reputation as an "internationally renowned art dealer" (*Beyeler v. Italy*, 2002, p. 3).

The Government indicated that restitution could not be entitled to Beyeler as "the Court had not called into question the right of pre-emption as such, but had stated that the Italian authorities could have paid the applicant ITL 600,000,000 in 1983, that being the amount he had paid for the purchase of the painting" (*Beyeler v. Italy*, 2002, p. 3), therefore if restitution had been ruled, it would have given rise to an unfair benefit to Beyeler and so would paying out the difference between the price of the work in 1983 and its value in 1988 (*Beyeler v. Italy*, 2002, p. 4).

Therefore, the compensation ruled covered only the "depreciation of the amount invested in the purchase of the painting, calculated from January 1984, when, […], the pre-emption could validly have been exercised, up until the Court's final decision." The only violation found, as a matter of fact, referred to the excessive delay before the pre-emption right was exercised as "under Italian law the right of pre-emption had been lawfully exercised and the Italian State was henceforth the legal owner of the painting" and the government admitted "only the loss caused by the delay and accepted that it could be calculated by adding to the ITL 600,000,000 interest at the rate proposed by the applicant" (*Beyeler v. Italy*, 2002, p. 4). The amount of 1,355,000 €, therefore was supposed to cover both pecuniary and non-pecuniary damage (Velioglu, Chechi, and Renold, 2013, p. 5).

In Italy, courts utilize the market value of works of art as "the measure for calculating the damage caused by States' interference," however, as pointed out by Velioglu, Chechi, and Renold (2013, p. 5), in this particular case, "the Court did not award a full compensation which would equal to the difference in the market values because Mr. Beyeler had failed to 'act openly and honestly' vis-à-vis Italian authorities." As of importance to the general problem of this study, the court's evaluation of compensation lacks transparency, in particular, what measures resulted in the final compensation amount (Velioglu, Chechi, and Renold, 2013, p. 5).

The below summary illustrates the value-principle-argument matrix for the parties involved in this dispute:

Table 10. Argumentative matrix for *The Gardener* (1)

Party	Beyeler	Italy
Principle	Social utility of cultural heritage	Protection of cultural heritage
Argument	Ownership; Personal affiliation	The safest place
Value	Enjoyment of possession	Artistic

Source: Own elaboration.

If applying the value-based restitution model to this case, one may point to the shared value on both sides: the artistic value that can be preserved within the premises of a public institution, while co-owned by the individual and the state:

Table 11. Argumentative matrix for *The Gardener* (2)

Party	Beyeler	Italy
Value	Artistic	Artistic
Principle	The safest place	The safest place
Argument	Protection of cultural heritage	Protection of cultural heritage
Solution	Co-ownership: maintenance within the premises of the museum or by an expert team in an alternative location permitting for the enjoyment of possessions	

Source: Own elaboration.

This mixed-ownership scheme could be beneficial to both the owner and the object itself, as well as the interest of the general public. The only interest that may not be fully satisfied in this setup is the interest of the owner as far as their rights to the complete extent of the "enjoyment of one's possessions" are concerned as the unique emotional value to the owner may be dependent on the fact whether the object is on public display or for their eyes only.

4.6. Preservation as a driver of the restitution process

4.6.1. The Parthenon Marbles

One of the most iconic examples of preservation as an argument for refusing restitution is the case of the Parthenon Marbles, commonly referred to as the Elgin Marbles. The Parthenon Marbles are a group of statuary works constituting the original decoration from the Parthenon temple in Athens. More broadly, they are also referred to as the Parthenon Sculptures:

> "The Parthenon Sculptures are a collection of different types of marble architectural decoration from the temple of Athena (the Parthenon) on the Acropolis in Athens. Made between 447BC and 432BC they consist of: a frieze which shows the procession of the Panathenaic festival (the commemoration of the birthday of the goddess Athena); a series of metopes (sculpted relief panels) depicting the battle between Centaurs and Lapiths at the marriage-feast of Peirithoos; and figures of the gods and legendary heroes from the temple's pediments. The British Museum houses 15 metopes, 17 pedimental figures and 247ft (75m) of the original frieze" (The British Museum).

The complex history of Parthenon itself was a fertile ground not only for the destruction of its structure but also the displacement of its elements. Under the Ottoman rule, since the 15th century, Acropolis had been turned into a garrison and the Parthenon into a mosque. During the war between Venice and the Ottoman Empire fought in the 17th century, Parthenon was used as a gunpowder storage space and its roof was destroyed by an explosion caused by the Venetian mortar. Moreover, during the attempt of a Venetian admiral to move some Parthenon sculptures to later transport them to Venice, the sculptures were smashed (Sánchez, 2017).

In the early 19th century, Thomas Bruce, the Earl of Elgin, a Scottish nobleman who was the British ambassador to the Ottoman Empire controlling Athens, lead the removal of the Parthenon sculptures to bring them to Britain. They have been the crown jewel of the British Museum ever since 1816.

The legal status of this case is controversial as the ruling authority of the time was in favour of the removal, however, most importantly, it is not considered to be the heritage of the Ottoman Empire from a cultural point of view, therefore, the significance of the Parthenon Marbles to the Greek people – from the standpoint of history and identity, as well as, from the "intrinsic" point of view, the integrity of Parthenon as such – should take precedence over the decisions of the Ottoman Empire. The first fragment of Parthenon sculptures was handed over to the Greek Ministry of Culture no sooner than in

2006, when a marble portrayal of a man's foot was returned by the University of Heidelberg, Germany (Stamatoudi, 2011, p. 245). The return of this small element cannot be treated as a great development, however, it certainly has its position in opening the era of an open dialogue in this case.

Image 4. The Parthenon deprived of its marbles

Source: Photo by Elina Moustaira

The government of Greece has been campaigning for the Parthenon Marbles to be returned to Greece ever since 1983, and in 1984, the Parthenon Marbles case was brought before the ICPRCP, however, the Committee is still examining the matter at subsequent meetings and has adopted a number of recommendations expressing concern for mutually satisfactory outcomes for the parties (Plata, 2022). The arguments from integrity and place of production in favour of the return of the Parthenon Marbles to Greece have been reiterated numerous times, and, for the first time, explicitly stated by Yannis Tzedakis, Director of the Department of Antiquities and the Ministry of Culture in Athens in 1983 (Greenfield, p. 67).

On the part of the British Museum, the argument from the safest place and the artistic value can be pointed out as the main aspects justifying Britain's claims to the Marbles. However, the resistance to return is also a result of more subjective factors. As summarised by Greenfield, "sometimes, the objections to return have been little more than subjective vitriol. This appears to be the peculiar aberration of an avowed love and appreciation of art coupled with a contempt for the indigenous people from whom the art in question has sprung. It is an attitude which appears to have been rife amongst many 'collectors' in the past" (1996, p. 73). When it comes to the argument from maintaining the integrity of the collection, the Trustees of the museum have been opposing to the return as the removal of the Parthenon Marbles, in their view, would be detrimental to maintaining the integrity of the museum (Greenfield, 1996, p. 73). Moreover, the argument from the safest place was not only linked to the fact that Greece had no appropriate place to display the Marbles but also that the items would "face the destruction by the pollution of Athens" (Greenfield, 1996, p. 75).

When it comes to the narrative of the British Museum against the return, as illustrated by the way items of the Parthenon Marbles are displayed and described, it is crucial to point out that both the way objects are exhibited and labelled leaves no room for doubting their legitimacy in the Museum. First of all, the Parthenon Marbles are exhibited to showcase the full structure, as if no elements were missing. Second of all, the descriptions include no mention of how the objects found their way to the museum's collection. In many sources, the Parthenon Marbles are often treated as an undefined mass of objects, therefore I would like to bring the example of a caryatid missing from the Erechtheion.

The Erechtheion, an ancient Greek temple from the Acroplis, is best known for its south porch, "whose roof, instead of being supported on columns, rested on the heads of six Korai statues – the famous Karyatids. Five of them are now in the Acropolis Museum, displayed on a special balcony and visible from all sides, while the position of the sixth Kore, still held in the British Museum, has been left empty" (The Acropolis Museum). The website of the British Museum provides the following description of the object:

> "Pentelic marble caryatid from the Erechtheion. This is one of six female figures that supported the architrave in the south porch of the Erechtheion. The woman wears a peplos pinned on each shoulder. Her hair is braided and falls in a thick rope down her back. She probably held a sacrificial vessel in one of the missing hands. The weight she bears is taken on the right leg, hidden by perpendicular folds of the garment. The other leg is bent with the drapery clinging to it. The head is surmounted by a capital with a beed and reel and egg and dart moulding. Part of the abacus also survives."

The provenance trail includes only the information that the object was purchased form Thomas Bruce, 7th Earl of Elgin). The exposition of the Parthenon Marbles is, in itself, a topic for further analysis. Moreover, it is wrongful to assume that the British Museum has always cared for the marbles in the correct way. In early 1930s, the marbles were thoroughly cleaned. As a result of the process, the marbles were white-cleaned, however, as revealed by St. Clair (1998) and summarised by the British Committee for the Reunification of the Parthenon Marbles, an organisation described later in this sub-chapter,

> "the so-called cleaning was never the intention of the curators who knew very well that the sculptures made out of Pentelicon marble would have acquired a mellow honey colour when exposed to the air. Moreover, the sculptures showed clear traces of colour that the scraping destroyed. The cleaning was done at the instruction of Lord Duveen who financed the building of the galleries for exhibiting the Marbles. The cleaning carried out with wire brushes, copper tools and carborundum caused serious and irretrievable damage that was admitted by the authorities of the Museum. However, the British Museum officials kept the full report on the incident carefully under wraps until a Cambridge historian revealed it in his book" (the British Committee for the Reunification of the Parthenon Marbles).

In 2009, the Acropolis Museum was opened. Overlooked by Parthenon, the museum is a hypermodern institution answering Britain's statement that Greece had no institution

matching the needs of the famous Elgin Marbles. The way the exposition is curated leaves no doubt as to what objects exactly are missing from the Parthenon marbles as the statue elements are placed within the original distance from one another, making room for the fragments that are at the British Museum, as if awaiting the return of missing pieces to complete the jigsaw. As Leitzel summarised it, the Acropolis Museum "contains the Greece-residing subset of the Parthenon statuary, along with plaster casts of the Elgin collection: the Museum stands ready to host a reunification of the Athens and London tranches, replacing those plaster reproductions with the originals" (2022). The argument referring to the British Museum as the safest location for the pieces could be, therefore, easily dismissed.

The debate between the British Museum and Greece has to be analysed from both perspectives. As summarised by Stamatoudi (2002), "for the British, the Parthenon Marbles are the jewel of the British Museum, whilst for the Greeks they are the definition of Greekness itself. For both sides, the Parthenon Marbles represent the reflection of a European cultural identity together with the best example of the High Classical period of Greek art. The question at. This stage is how Law fits into such a context?" (2002, p. 513). The argumentative matrix for both parties could be summarised as follows:

Table 12. Argumentative matrix for the Parthenon Marbles

Party	The British Museum	Greece
Principle	Protection of cultural heritage, integrity, change of social utility in time	Social utility of cultural heritage, preservation of heritage in the interest of future generations, integrity
Argument	The safest place, investment undertaken, passage of time	Cultural, national, and historical affiliation, place of production
Value	Artistic, historical, scientific, integrity (in reference to the collection)	Identity-building, artistic, cultural (in reference to the remaining elements)

Source: own elaboration

When it comes to the legal possibilities for the Marbles to return to Greece, a number of subjects and areas needs to be brought to the fore. Although international conventions such as the 1954 Hague Convention, the 1970 UNESCO and 1995 UNIDROIT Conventions are non-retroactive and do not apply to claims dating back more than 200 years, the principles that are "enshrined and codified in the Conventions are thought to go back to the start of the 19th century" and the "rules deriving from those treaties are considered to be general binding rules" (Stamatoudi, 2002, p. 516).

As summarised by Stamatoudi more than twenty years ago (2002), "it is hoped (…), that both Britain and Greece will find ways to solve this problem amicably staying away from any potential litigation, which might ruin the very good relationship of the two countries and the solidarity between the two European Union members" (p. 514). In the light of the recent Brexit, it is hard to relate to this wish, however, an amicable solution to this debate still seems to be the only way to respect the values assigned to the Parthenon Marbles on both ends.

On the British side, the argument of ownership is often underlined as the ultimate response to this debate as the acquisition of the marbles by the museum in 1816 was legal, recommended by the Select Committee attached to the House of Commons and funded by funds approved by the Parliament (Plata, 2022, p. 289). The evidence that the removal of the Marbles was legal is an English translation of an Italian translation of a Turkish document, therefore it can be stated that the significant portions of this agreement could have been "lost in translation." According to Demetriades, "this evidence (…) was presented by Dr Hunt, chaplain to Elgin, to the British Parliamentary Committee formed in 1816 to examine the issue of the marbles' acquisition by Elgin. The Turkish document itself, together with any other written testimony which could confirm that Elgin acted on the legitimate approval of the Ottoman authorities, has been lost." According to the English translation of the Italian translation, it was agreed that only some undefined parts of the marbles were to be removed (Demetriades), therefore a significantly extended interpretation of the provisions was applied. Moreover, the passage of time tends to be the primary argument on the British side, obstructing the analysis of the detailed legal circumstances of the export and acquisition of marbles, however, they are still the subject of research and arguments raised in this restitution dispute (Plata, 2022).

The statement of the Trustees of the museum firmly indicates that the Marbles were not stolen and the legality of the transport and the acquisition is also underlined. However, apart from the ambiguity of the very text of the document permitting the removal, it needs to be stressed that Greece gained independence after the removal of the Marbles, therefore accepting the permit issued by Ottoman authorities as binding in reference to Greek heritage may be regarded as a controversial approach.

From the solution perspective, it has recently been proposed to create perfect replicas of the Marbles to be handed over to the British Museum. The making of the replicas by the Institute for Digital Archaeology could allow a reconstruction of high educational value, as they would resemble what the marbles actually looked like when they were created (including polychrome). However, any value-based solution would need to be agreed on in an amicable way and, unfortunately, it seems that this debate has no potential if both parties in the dispute are biased.

It is false to assume that the British Museum's stance is shared by the whole of Britain. For instance, the British Committee for Reunification of the Parthenon Marbles, established in 1983, is a "group of British people who having considered the case for the reunification of the Parthenon Marbles strongly support it and wish to campaign to achieve it" (The British Committee for Reunification of the Parthenon Marbles). Melina Mericouri, who was a Greek actress, activist, former Minister of Culture and Sports of Greece, whose appeal to foster the return of the marbles to Athens at the 1982 International Conference of Ministers of Culture in Mexico was the inspiration for the creation of the Committee, summarised the argument why the Parthenon Marbles belong in Greece in one sentence:

> "The Parthenon Marbles are our pride, they are our identity, they are today's link with Greek excellence. They are creations synonymous with our concepts of democracy and freedom" (Recording of Melina Mericouri about the Parthenon Marbles).

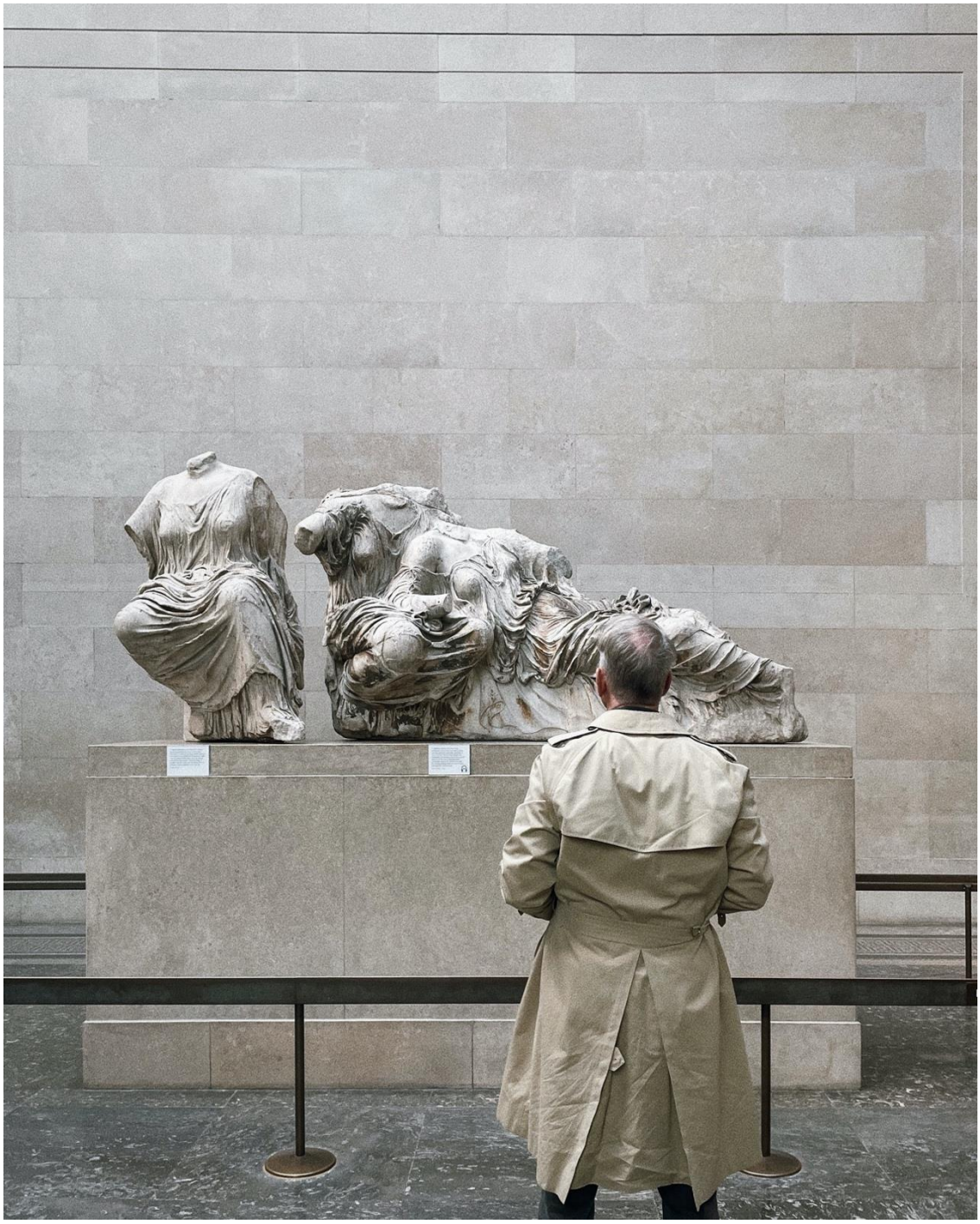

Image 5. The Parthenon Marbles at the British Museum

Source: Photo by Agnieszka Plata

4.6.2. Makondé Mask

The restitution of the Makondé Mask to the United Republic of Tanzania, a case involving UNESCO's intergovernmental Committee (ICPRCP), was made possible upon the condition that the item is correctly preserved (Bandle, Contel, and Renold, 2013), thus achieving a balance between the argument referring to the security of the object and its social utility.

Masks are an essential part of Makondé art. The Makondé people, of Bantu origin, are thought to have migrated from the west into the territory of what today is southern Tanzania and northern Mozambique during the 17th and 18th centuries to escape Arab and colonial slave traders and the plundering other tribes. They were known for their fierce position towards slave traders.

Their cultural tradition encompassed bodily scarification, incising faces, chests and backs with various geometric patterns darkened with rubbed in charcoal and also filing teeth into sharpened points (Blackwood Conservation). Before disbanding these practices after gaining independence, during the colonial period these practices had helped the Makondé create their ethnic identity. Both the Tanzanian and Mozambique Makondé are matrilineal communities with well-established carving traditions, part of boy's initiation rites, later marketed and sold as souvenirs for tourists, thus these objects, e.g. masks, may have not changed in substance but their meaning and use has shifted over time (Saetersdal, 1998, p. 285). During the times preceding the commodification of ritual objects, Makondé artists would create helmet masks called Mapiko (singular Lipiko) used for ritual purposes, as well as sacred initiation ceremony figurines. As part of the process the masks would be burned after the ceremony. These, along with other African masks, were inspirational for such European artists as Pablo Picasso, Amedeo Modigliani and Henri Matisse.

As a result, during the 1st World War and the reinforcement of the Portuguese oppression, the Mozambique Makondé carvers had a chance to market their carvings to European colonialists and, thus, raised international demand for tribal art. The Makondé in Tanganyika (before uniting with Zanzibar after independence, under British rule after

WWII) also had a fruitful art distribution channel, thus fostered the inflow and raised the awareness of the attractiveness of tribal African art abroad.

The restitution case concerned refers to an example of a Makondé mask of ritual use, thus possessing specific social utility. Moreover, it represents a specific art genre recognised internationally, accounting for its artistic value, as well as historical significance to the tribal community it originates from, therefore, representing a historical, identity-forming value. In 1984, the National Museum in Tanzania in Dar es Salaam was robbed – 17 objects, including the Makondé Mask, were stolen. In 1985, the Barbier-Mueller Museum (BM) in Geneva acquired the mask in Paris.

"Lipiko" masks, the most recent style of Makondé Mask, are characterized by its realism and caricature style. Until the 1960s, this type of helmet mask was worn during male initiation parties by dancers who looked through the mouth opening and fastened their costume with a cord tied to a hole drilled on the rim of the mask. This Makondé Mask could represent the caricature of a black Islamized, strong and arrogant (symbol of the conflicting relations between the Makondé, the emissaries of traders and the slave traders of the coast). The character is depicted wearing a hat and with lips prominent, a strong nape, an angular jaw, a moustache and well-drawn. The mask is carved in a soft and light wood, which facilitates its interior hollowing out, its shoe polish and its pigmentation. The height of the mask is 30.5cm, and the hair and moustache are made of human hair (ICOM, 2010, p.5)

In 1990, an Italian professor conducting research on Makondé masks, Enrico Castelli, identified the stolen mask while visiting the Barbier-Mueller Museum (Shyllon, 2011). It was then that the museum informed national and international authorities, e.g. INTERPOL and the International Council of Museums (ICOM) about the fact.

The Barbier-Mueller Museum then took the necessary steps and procedures to facilitate a possible return of the Makondé Mask to Tanzania. In 2002, the Barbier-Mueller Museum officially communicated the conditions under which it would agree to transfer ownership of the Makondé Mask to the United Republic of Tanzania. Although the

Director General of the National Museum of Tanzania greatly appreciated the way the Barbier-Mueller Museum handled this case, the parties concerned failed to an agreement on the question of the ownership of the object (ICOM, 2010, p. 4).

In 2006, Tanzania formally appealed to the Secretariat of the Intergovernmental Committee of UNESCO for the Promotion and Return of Cultural Property to their Country of Origin or of its Restitution in the Event of Illegitimate Appropriation (UNESCO Intergovernmental Committee) which lead to the BM Museum officially filing a complaint against the United Republic of Tanzania. It was transmitted to the Intergovernmental Committee of UNESCO by the Federal Office of Culture.

In 2009, Tanzania declared that it could ensure the protection of the mask should it be returned to it. Further, the Ministry of Natural Resources and Tourism of Tanzania announced its intention to the BM Museum to accept the terms proposed by the BM Museum in February 2002. This led to Tanzania and the BM museum meet in Geneva to negotiate the return of the mask (Bandle, Contel, and Renold, 2013).

Finally, in 2010, Tanzania and the BM Museum entered into an agreement for the donation of the mask by the BM Museum to Tanzania. ICOM facilitated the donation. Importantly, it was only a year after that ICOM and WIPO launched the Art and Cultural Heritage Mediation Programme in order to offer a model for dispute resolution regarding innovative solutions and remedies for cases involving the origin, ownership and custodianship of cultural property that may not be available in the case of court litigation (Chechi, 2014, p. 56).

The restitution process in this case was based on “conditional restitution,” the main condition being proper conservation. This was reflected during the handing-back ceremony, as the then ICOM Director General, Julien Anfruns, reiterated the importance of ICOM’s Code of Ethics, concerning, primarily, its standard-setting role in the area of conservation and documentation, as well as providing public access to heritage. In the

case concerned, the primary values – social, historical, and artistic were preserved upon the adoption of the solution i.e. donation to the original owner.

The below table presents a selection of concepts on both sides of the dispute. Varying principles linked to arguments touching upon different notions result in assigning opposing values:

Table 13. Argumentative matrix for Makondé Mask (1)

Party	United Republic of Tanzania	Barbier-Mueller Museum
Principle	Particular (ritual) social utility of cultural heritage	Universal social utility of cultural heritage; Protection of cultural heritage
Argument	Social utility; Cultural affiliation; Place of production;	The safest place
Value	Particular (ritual) social utility of cultural heritage	Artistic

Source: Own elaboration.

If applying corresponding values, the principles and arguments follow a different pattern, finally resulting in the adopted solution:

Table 14. Argumentative matrix for Makondé Mask (2)

Party	United Republic of Tanzania	Barbier-Mueller Museum
Value	Social utility	Social utility
Principle	The safest place	The safest place
Argument	Protection of cultural heritage	Protection of cultural heritage
Solution	Conditional restitution (donation): donation to the original owner, under the condition of proper conservation	

Source: Own elaboration.

The Barbier-Mueller Museum is a "private family cultural enterprise (…), which neither municipal nor state funding" (Mattet, 2002, p. 31). Its collection was established by Josef

Mueller, a Swiss collector, who had started his collecting career by acquiring works by Cezanne, Matisse, and Picasso between 1907 and 1929 and then shifted his focus to African art in the 1930s (Mattet, 2002). The institution has played a fundamental role in the shift placing the arts of not only Africa but also Oceania and the New World that, at the turn of the 19th century would be categorised as ethnographic pieces and collected by museums of science and anthropology rather than those of art (Kan, 2002).

The un-anonymization of such items, e.g. masks and various carved objects from these source areas, started only at the turn of the 20th century, when the art world devoted more attention to the stylistic study of such works, resulting in, for instance, publishing catalogues related to the masters who created them, e.g. the Yoruba carver Olowe of Ise (Kan, 2002), placing them on the shelf of "artworks" rather than "artifacts."

In this way, the role of artistic institutions is also relevant for the value shift not only for indidual objects, but the overall category they belong to. In the case described above, the possibility of overlooking the artistic value represented by the object narrowed down to the category of a purely ritual object in its source location can be assumed as high. Therefore, the dispute itself has granted a higher status to the object and, in a way, boosted its overall value.

4.6.3. Banksy Mural – Bioresource, Inc. and 555 Nonprofit Studio/Gallery

The case of street art being subject to restitution is particularly hard – due to its ambiguous nature, representing both tangible and intangible features simultaneously. In the case of the Banksy Mural – Bioresource, Inc. and 555 Nonprofit Studio/Gallery, the values in question derive from the prestige of the author, the context of the location of the work and the ephemeral nature of street art. The interests at stake are both private and public.

Banksy, a British street artist, most probably born c. 1974/1975, in spite of remaining anonymous, is one of the most well-known street artists alive. He initially gained fame for his graffitti, "combining spray paint and stenciling techniques with commercial, political, and contemporary imagery, infused with ironic social commentary and humor" (Artnet, n.d.). The presented case refers to a mural entitled *I remember when all this was*

trees executed by Banksy in Detroit, within the premises of the Packard Motor Company Plant, today, a symbol of Detroit's decline after crossing the peak of the city's vibrant automobile period.

Image 6. Banksy, *I remember when all this was trees*, 2010, four-color aerosol stencil and freehand figural work with text on a wall, 213 x 213 cm
Source: https://www.julienslive.com/lot-details/index/catalog/160/lot/68098

In 2010, artists from the 555 Nonprofit Studio/Gallery removed the endangered mural painting from the "wall art" at the site, then owned by Bioresource, Inc. Their action was motivated by the will to protect the artwork from destruction caused by the upcoming demolition of the building. Importantly, the artwork was later placed on public display at the Gallery. The owner subsequently filed suit with the Wayne County Circuit Court requesting the wall art's restitution. The parties finally settled their dispute as the Company agreed to donate the mural to the Gallery, who paid the Company a symbolic amount.

Later that year, Bioresource, Inc.**,** a technology company owning the Packard site (hereafter the Company), asked the Gallery to return the artwork as it had been removed without the Company's consent. As the request proved unsuccessful, the Company sued the Gallery at the Wayne County Circuit Court to reclaim possession of the artwork (Bandle, Wallace, and Renold, 2013). The Court ruled that the mural should remain with the Gallery, and regardless of the fact that the Company claimed the value of the work to exceeded $100,000, the Gallery and the Company settled for $2,500, which was provided by the Gallery. After returning to the Gallery, the work was displayed publicly.

The court, respecting the need to secure the artwork, allowed the Gallery's temporary possession of the work to secure it from being destroyed or sold at the Gallery, pending its decision (Bandle, Wallace, and Renold, 2013). Nonetheless, the parties managed to settle before going to trial.

The interests presented by the parties during the negotiations are many-fold. While on the part of the Gallery, the intention was to protect the work and place it on public display, the Company was concerned that the other party had intended to sell the work, mindful of the significant value of the artist's work.

The main legal issue this case focused on was the question of ownership. The Company brought a conversion (deprivation) claim, as the work had been located on the property belonging to the Company before the wrongful removal of the work. The tortious removal of property attached to a freehold (property and land) is considered to be an act of

conversion. The artists' and the Gallery's good faith, have not constituted a significant defence to conversion. However, due to the fact that the owner had not, allegedly, expressed any interest in using or retaining the ownership of the property to which the mural was annexed, the defendants may have pointed to the doctrine of abandonment (Bandle, Wallace, and Renold, 2013).

The mural was annexed to one of the last standing walls of the building. Additionally, bearing in mind that the city officials were pressing for the levelling of the construction, it could have been assumed that the plant owner was not expressing any clear intentions to retain the ownership, not to mention the use of the property. It is also presumed that the Gallery was given the consent to remove the work by scrap metal removal workers' foreman who had been working for the Company owner on the site, however, the lawyer for the plant later said that that same person was not a representative of the Company (Dolan, 2011).

The solution adopted by the parties was a settlement for 2,500 $ paid by the Gallery to the Company. The former received clear title to the mural. Right after this controversy, the Company discovered a second mural by Banksy of a yellow canary in a cage, also on the Packard Plant. The work, annexed to the building, was also removed, however, in this case, by the plant owner's agents. After being put up for sale on eBay, no bid reached the reserve price, therefore it was not sold at auction on that occasion. The current location and state of the work are unknown. Another issue in question when street art comes into play is its authenticity after being removed from its intended location as it no longer maintains the original form and context.

The value-related arguments in this dispute include the argument from the place of destination, but also from the safest location. Looking at the intention of the Gallery, their decision was clearly motivated by the argument from the safest location, but at the same time, what needs to be borne in mind is that the intention of the Company was not known to the public – what if the Company had planned to extract the work and place it in the surroundings of the venue to maintain the original context of the work? Importantly, preservation of works is usually not sought after by street artists – as Banksy once said,

street art, unlike sculptures cast in bronze, are not meant to last – they have a relatively short "life span" (Dolan, 2011). Moreover, quoting Ben Eine, a long-time collaborator of Banksy street art is "not made to be sold, but to be enjoyed" (Shaw, 2012), therefore, the removal of street art from public display is a violation of the intention of the artist and the social values it entails.

The argument from the place of destination may have been present on the other side of the dispute. The context of the location where the artwork is executed and displayed is essential in the work of street artists. Another case involving a work attributed to Banksy is *Slave Labour*, in Wood Green, North London is a clear example of the importance of the location of street art. The work in question was etched on the side of a Poundland retail shop. The circumstances of its removal and transport to an auction house in Miami, Florida, were not known. The sale was eventually ceased thanks to the efforts of the fans of the work in London, who managed to condemn the auctioneer for "unjustly stripping the art from its proper home" (Elias and Ghajar, 2015).

Another issue arising in this case is related to the very execution of the mural. Street art, by definition, is executed without the knowledge and/or consent of the owner of the property it is Pursuant to N.Y. Penal Law § 145.60, making an "etching, painting, covering, drawing upon or otherwise placing of a mark upon public or private property with intent to damage such property . . . on any building, public or private, or any other property real or personal owned by any person, firm or corporation or any public agency or instrumentality, without the express permission of the owner or operator of said property" is a Class A misdemeanour. However, the plant had not been guarded or protected from any visitors, therefore, the owner could have, theoretically agreed to a "public easement" allowing for public access and excluding trespassing (Bandle, Wallace, and Renold, 2013).

The case of street art is equally complex from the point of view of copyright. Under United States copyright law, a work is protected if it satisfies the following criteria – whenever it is an original work of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102. A work is considered "original" if it was "independently

created" and possesses "at least some minimal degree of creativity;" and "'fixed" in a tangible way of expression when its embodiment in a copy is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17_U.S.C. § 101. In line with these provisions, the owner is entitled to set exclusive rights, including the right to reproduce the work, prepare derivative works, distribute copies, and, for certain types of works, display the work 17 U.S.C. § 106. Courts have not yet established a legal framework in which street artists can fully protect their works due to the fact that such claims have mostly ended in private settlements (Hughes, Hubbard, and Reed, 2017).

Whenever possible, the copyright holder in the case of a mural, could also bring forward the argument that the sale and display of their work violates their "exclusive rights" under 17 U.S.C. § 106(3) and (5). Pursuant to the first sale doctrine, "the owner of a work may validly sell or exhibit a work after its initial sale by the copyright owner," however, the situation is less clear in the case of works "abandoned" by their copyright owners.

If this doctrine was extended to all transfers of ownership, it would allow the artist to control the abandonment of ownership as the means of the first public distribution of the work (Karmel, 2012). In the above case, Banksy would have exercised the right of first distribution by giving up ownership of the artworks, clearly showing an intention release them to others. In this way, he would not be able to "subsequently place additional restrictions on what may be done with them" (Karmel, 2012, p. 377).

The table below presents opposing principles and, subsequently, arguments and values that could have been present at the beginning of the dispute:

Table 15. Argumentative matrix for Banksy Mural (1)

Party	Bioresource, Inc.	555 Nonprofit Studio/Gallery
Principle	Ownership	Social utility of cultural heritage; Protection of cultural heritage
Argument	Place of production	The safest place
Value	Artistic (financial)	Artistic; Social utility

Source: own elaboration.

The following set of concepts could have been applied towards the end of the dispute:

Table 16. Argumentative matrix for Banksy Mural (2)

Party	Bioresource, Inc.	555 Nonprofit Studio/Gallery
Value	Social utility	Social utility
Principle	The safest place	The safest place
Argument	Protection of cultural heritage	Protection of cultural heritage
Solution	Conditional restitution (donation): donation to the original owner, under the condition of proper conservation	

Source: Own elaboration.

Street art present in art galleries is not a well-known phenomenon. The switch of the context from the "street" to the premises of a curated collection causes different values to arise. As far as the artistic value of street art in its original context is evident, its financial value is only present when placed on the market. It is not, however, assumed that the financial value per se is greater after the object is placed in the art-market context, as the uniqueness of the piece is highly dependent on the original setting in which it was intended to be made available to the public, therefore assigning the market value to such objects is by no means a standard task. It can be assumed that the value of the property on which an artwork is placed may be higher after it is done, therefore both situations need to be taken into consideration when weighing the overall monetary value in both scenarios.

4.7. Strategic value of cultural property as a driver of the restitution process

Cultural property – as well as its destruction, looting, and restitution – is often a tool to reach strategic goals – long term: to build or crash the identity of a given nation, community or individuals, or short-term: to gain an advantage in an armed conflict, prove one's moral or financial status as a State or as an individual in a given context, or demonstrate power.

When it comes to the restitution of objects placed in the strategic or political context, the values behind the argumentation of parties can be multi-fold, also related to other values, such as artistic and historical, proving its significance in the context of strategic actions. The cases presented in this section refer to those values, however, placing the strategic component at the top of the hierarchy in order to illustrate what shapes the strategic value.

As Silverman and Ruggles accurately put it, "heritage is a concept to which most people would assign a positive value. The preservation of material culture […] and intangible culture […] are generally regarded as a shared common good by which everyone benefits. […] But heritage is also intertwined with identity and territory, where individuals and communities are often in competition or outright conflict. […] Thus, while heritage can unite, it can also divide" (2007, p. 3). The values of cultural property can, therefore, be used as a "tool for oppression" (Silverman and Ruggles, 2007, p. 3), depending on what the strategic aim is.

The above statement does not, by any means, imply that strategic value is a negative value. In cases when it is not used as a tool for oppression but creating a certain image of a nation for a purely promotional purpose, it can be labelled as "positive value," the application of which can result in building a positive image of a community, an institution, or an individual a wider group of the society can identify with, thus forming or strengthening their own identity and position.

Looking at the relatively recent example of the Bamiyan Buddhas, blown up in 2001 by the Taliban, it is clear that what is considered cultural heritage by UNESCO or, more

broadly, the art world, does not need to be approved by the culture present in the region where the object is placed. This act, identified as "cultural iconoclasm, political assertion, and religious fervour" (Silverman and Ruggles, 2007, p. 13), aiming at wiping the Buddhist past of Afghanistan away, was a clear example of the strategic value of cultural heritage in the sense that it was an ultimate act of disapproval of what "belonged to history, not the lives of the present inhabitants" (Silverman and Ruggles, 2007, p. 13).

While illustrating the strategic value of cultural property, it is crucial to point out other cases of deliberate destruction of heritage aimed at demonstrating power and undermining the legitimacy of another culture and/or ethnic group. To this day, the effects of harm done to European cultural heritage by the Germans during WWII and the Russians not only during the conflict but also later have a strategic effect on politics and forming public opinion. The complete bombardment of Warsaw by the Germans during the Second World War and subsequent devastation of Poland and its movable and immovable heritage by the Russian army in the "salvation" process are one of the most explicit examples of heritage destruction in the 20th century. Still, interestingly, in the process of transferring responsibility for these actions, especially in the context of Holocaust, many scholars and public persons place Poland (!) in the category of its "willing supporters" (Silverman and Ruggles, 2007, p. 13) – such an approach draws much attention as Poland was the invaded and harmed party in this conflict.

In fact, it is vital to point out Poland's involvement in the protection of Jews during the Second World War, not to mention the fact that the majority of this social group were "Polish Jews," therefore the judgement that Poland was supposedly a "willing supporter" of Holocaust is, to say the least, an oxymoron.

In the context of more recent events, the devastation of Palmyra can also be clearly categorized as strategic. The destruction of this ancient city in 2015 was a symbolic act carried out in line with "ISIS's broader strategy towards local communities in Syria and Iraq" (Cunliffe and Culini, 2018, p. 1094). The site had been inscribed on the World Heritage List in 1980. Its Outstanding Universal Value relies on three main criteria: it represents a masterpiece of human creative genius, it exhibits an important interchange

of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design, and is an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history (UNESCO, 2021).

In fact, Palmyra is an example of the "crossroads of several civilizations, married Graeco-Roman techniques with local traditions and Persian influences," therefore of social and historical value to many nationalities and artistic significance to the development of art and architecture. When it comes to the restitution process, the involvement of countries supporting the restoration of such sites also plays a strategic role, as such engagement grants visibility and recognition.

The case studies below present both approaches to the strategic and/or political value.

4.7.1. U.S. v. Cambodian Sculpture

This case presents not only the strategic value of cultural property but also tackles upon the case of the fluctuating nature of items isolated from their immovable context and transformed into a marketable movable object.

During the Cambodian civil war in the mid-late 1960s and 1979, cultural heritage sites in the country were the object of a "widespread looting by a 'looting network' involving 'local teams of looters' removing artifacts from original locations and transporting them to 'dealers in Khmer artifacts located in Thailand'" (Stepnowska, 2019, p. 134). This case illustrates the use of cultural property as a strategic tool in the sense that the Khmer Rouge had an intention of wiping out not only the political remnants of their predecessors but also the culture and civilization of Cambodia.

Cambodia's heritage has been subject to looting and illicit trafficking especially starting from the early 20th century. The rise of trafficking in its cultural property, influenced by the conflicts in the 1960s and 70s involved "refugee groups in Thailand trained to pillage Cambodia's ancient sites for the purpose of transferring dismembered cultural property

abroad to reach the art market in Bangkok and, subsequently, Europe or the United States" (Stepnowska, 2019, p. 134).

As far as the legal status at the time is concerned, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention was ratified by Cambodia no earlier than in 1962. The transfer of Cambodian cultural property to the United States in late 1960s caused Cambodia to adopt the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1972.

The case presented in this section considers the Koh Ker Warrior, a sculpture that had been isolated from its original location by breaking off its pedestal at the Prasat Chen temple in Koh Ker. The sandstone sculpture referred to as the Koh Ker Warrior, or the Duryodhana is an example of Cambodia's heritage from the time of the Khmer kings who ruled the empire "that flourished from the ninth to fifteenth century" (ICCROM, 2017, p. 25). The Duryodhana has been selected as an example of an object type shift: from immovable property to movable and marketable property of artistic interest.

The sculpture was removed from the Prasat Chen temple in 1972, under communist control, thus, is supposed to have served a strategic purpose financing the military activity of the Khmer Rouge and, as a result, gained the status of a "blood antiquity" (Stepnowska, 2019, p. 135).

The looting network later smuggled the sculpture in parts to a dealer in Bangkok (Velioglu, Bandle, and Renold, 2014). In 1975, the object entered the market as a Khmer antiquity. It was sold via a British auction house to a Belgian businessman, who, as later asserted by the claimants, acted in good faith (Velioglu, Bandle, and Renold, 2014). After the owner's death, the statue was consigned to Sotheby's and transported to the U.S. At this point, it is important to stress that in 1999, the U.S. Customs Regulations were amended to include particular provisions on import restrictions on "certain Khmer stone archeological material of the Kingdom of Cambodia" (Department of the Treasury 31 CFR Subtitle A, Chs. I and II) imposing "emergency import restrictions on certain Khmer stone archeological material of the Kingdom of Cambodia of the 6th century through the

16th century A.D. These restrictions are being imposed, pursuant to a determination of the United States Information Agency, issued under the terms of the Convention on Cultural Property Implementation Act, in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" (Department of the Treasury, 19 CFR 12).

The sculpture was, therefore, imported illegally. Moreover, while the object was being prepared for sale, it was confirmed by experts to had been removed from the temple by force. However, one of the experts advised to put the object up for sale as "it did not appear as if Cambodia, as a general practice, was requesting the return of looted Cambodian art and artifacts" (Velioglu, Bandle, and Renold, 2014, p. 3).

The above statement was confirmed by later events. The auction house notified the Cambodian Ministry of Culture of the intent to sell the sculpture, with no reply, however, after the object had been included in the auction catalogue, the Secretary General of the Cambodian National Commission for UNESCO took the action to withdraw it from sale and work towards the return to its original location.

In spite of the object's withdrawal from the sale, Sotheby's remained the possessor of the piece. This is why The Cambodian National Commission for UNESCO turned to the U.S. government to file a civil forfeiture action against the defendant (Henderson, 2014, p. 254). It was asserted that the sculpture had indeed been imported to the U.S. illegally and, after negotiations, as part of an out-of-court settlement between the U.S. government and the claimants, the ownership was claimed by Cambodia and the sculpture returned to its source country.

The process of restitution of artifacts removed from this and other Khmer temples in Cambodia, ICOM has been playing a key role in strengthening the international recovery efforts, convincing all ICOM members to comply with its Code of Ethics, publishing awareness-raising materials i.e. "One Hundred Missing Objects—Angkor's Lootings"

and the “Red List of Cambodian Antiquities at Risk,” listing examples of artworks looted from Cambodian sites (Chechi, 2019, p. 469).

4.7.2. Benin Bronzes

Objects currently referred to as the “Benin Bronzes,” are a set of “sculptures which include elaborately decorated cast plaques, commemorative heads, animal and human figures, items of royal regalia, and personal ornaments” (The British Museum), created from the 16th century onwards in Benin (Nigeria). Contrarily to their name, the “bronzes” are not all made of bronze but also ivory, wood, or coral, and are now dispersed around the world, e.g. located in state collections of Britain, Germany, and France, their total number exceeding 3,000 artifacts (Greenberger, 2021).

As summarised by Plata (2022), the works of court artists from Benin were, by law, state property, kept in the royal palace. There are two particular periods in the development of Beninese craftsmanship. First of them, coincides with the beginning of the reign of Oba Esigie in the first half of the 16th century, when the amount of metals supplied to the Kingdom by European traders increased significantly, therefore, there was a development of creativity allowing for the introduction of new artistic molds for crafts, such as the head of the “Queen Mother.” The second one evolved during the reign of Oba Eresonye in the 18th century, when, in connection with an even greater influx of raw materials, new styles flourished in Benin. (Plata, 2022, pp. 226).

The value of the Benin bronzes arises from their complex history, the materials used, and the social function performed. As stated by Oriakhogba, the bronzes “are important parts of Benin arts, culture and creativity. Its history, techniques, and artistic and socio-cultural significance are well documented. The bronzes are traditionally used to depict historical events, send coded messages to the Oba, used as symbols of worship, rituals, and celebration of royalty. However, they were symbols of trade between the Benin traditional empire and Portugal in precolonial times. Their commodification for trade purposes still continues today among the jealously guarded guild of bronze casters (Igun Eromwon) in the popular Igun Street in Benin City. Nonetheless, the Benin bronzes still remain

symbols of cultural heritage, and expressions of tradition and cultural creativity of the Benin people passed down from generation to generation" (2022, pp. 825-826).

During the second half of the 19th century, the British dominated the trade on the Nigerian coast. In 1897, James Phillips, an official in Niger Coast Protectorate, established by the British in 1885 (modern-day Nigeria), embarked on an "unarmed trading expedition" (Smithsonian) to Benin City. While the official was welcomed by the Kingdom of Benin's ruler, the Oba Ovonramwen, chiefs reporting to him decided that the expedition would stand in the way of several annual ritual ceremonies.

As a result of the dispute, a number of members of the expedition, along with 200 African porters were killed (Greenberger, 2021), which triggered the British Empire to command its troops to loot Benin's cultural objects. While some of them were loaned to the British Museum, the majority of them were sold to state institutions in Britain and Germany, as well as to private dealers. Since gaining independence in 1960, Nigeria has successfully campaigned for the return of only a few original sculptures, as well as copies (Wills, 2021). The imperial approach to returning the objects has been sustained and is best illustrated by the explicit refusal related to the 1977 African festival "FESTAC."

In 1970, the organisers of "FESTAC" requested the British Museum to return the Queen Idia mask to place it as the symbol of the event (Opoku, 2011). The British Museum refused, at first "requiring a bond, and later arguing that the mask was too fragile to travel" (Kiwara-Wilson, 2013, p. 394). In the end, a copy of the mask was used. As underlined by Kiwara-Wilson, "Despite independence and the notions of post-independence cooperation between colonizers and the colonized, the British still hold the power and the final verdict on whether the Nigerians and other Africans have access to their cultural past" (2013, p. 394).

While the majority of Benin Bronzes are housed by The British Museum and Berlin's Ethnological Museum (part of the Humboldt Forum) but also the Metropolitan Museum of Art in New York, the Art Institute of Chicago, the Los Angeles County Museum of Art, the Victoria and Albert Museum in London, the Musée du Quai Branly–Jacques

Chirac in Paris, the Vatican Museums, the Australian Museum in Sydney, the National Museum of Ethnology in Osaka, and the Louvre Abu Dhabi in the United Arab Emirates (Hicks, 2020, as cited in Greenberger, 2021).

According to a study by Hicks (2020, cited in Greenberger, 2021), only nine Nigerian institutions own items from the Benin Bronzes group, while as many as forty-five British ones in total own such objects. The calls for restitution have been made for at least 50 years now. The claims are not only related to the fact that the object were seized in the context of the colonial rule and should be returned as part of the moral obligation to help Nigeria recover from its effects but also a valid artistic influence the original artifacts could have on local modern day artists. As Ehikhamenor points out "today, only a very few of our ancestors' early artifacts can be seen at museums in Africa. Many artists of my own and future generations would greatly benefit from having emblematic artworks, such as the Queen Idia masks, nearby for reference. Artists would be able to create their own vernacular based on the close study of these works" (2020).

The strategic value of the Benin Bronzes is evident in the current debate on their restitution. On the one hand, Europe is openly discussing its colonial past and the need to establish a long-term plan to return objects looted from its former colonies. It is important to note that the Humboldt Forum research laboratory permits for a deeper dive into the substance of the pieces, not to mention excellent preservation conditions provided by all expert institutions, allowing for the maintenance of the scientific and artistic value of the pieces. The debate on whether Britain should agree to the restitution of the Benin Bronzes to Nigeria has been vocal for decades.

Image 7. Benin Bronzes at the British Museum

Source: Photo by Agnieszka Plata

Currently, the collection of the Metropolitan Museum of Art in New York (the Met) is home to such remarkable pieces as the mentioned Queen Mother Pendant Mask, a counterpart of which is in the British Museum in London.

The description of the object available on the website of the Metropolitan Museum of Art, indicates that "this ivory pendant mask is one of a pair of nearly identical works; its counterpart is in the British Museum in London. Although images of women are rare in Benin's courtly tradition, these two works have come to symbolize the legacy of a dynasty that continues to the present day. The pendant mask is believed to have been produced in the early sixteenth century for the King or *Oba* Esigie, the king of Benin, to honor his mother, Idia. The *oba* may have worn it at rites commemorating his mother, although today such pendants are worn at annual ceremonies of spiritual renewal and purification."

On the one hand, the ritual value of the mask is evident, on the other, its artistic significance is also the reason why it is proudly presented by internationally acclaimed institutions all around the world. This object itself presents certain unique qualities that amount for its artistic value, e.g. the rarity of the subject (image of a woman, the noble material, and the level of detail of the ornamentation indicating the highest level of craftsmanship). The material of the mask is also precious itself as ivory is Benin's main commercial good. The overall social value of the works is also of main interest for this study. After the dispersal of Benin's royal cultural property in the 19th century, the awareness of its value has impacted Black public intellectuals, such as W.E.B. Dubois, Alain Locke and artists from the Harlem Renaissance on (The Metropolitan Museum of Art).

An important turn of the events happened in 1950 and 1951, when selected Benin works, i.e. Benin plaques, were de-accessioned by the British Museum and either sold, exchanged or donated to the Colony and Protectorate of Nigeria and the government of the Gold Coast, and were later "accessioned into the collections of newly established West African museums (The British Museum). After the Federation of Nigeria as a nation was established in 1960, with its capital in Benin City, those who had bought Beninese traditional items at the international art market, forwarded them to the Metropolitan

Museum of Art to "at once make them accessible to the public and celebrate their excellence" (The Metropolitan Museum of Art).

After Oba Ewuare II became Benin's current oba in 2016, he has noted that while such works as the Benin Bronzes have come to serve as "ambassadors of our culture around the world," a priority is the building of a new museum in Benin City that could ensure "expanded opportunities to understand and reflect on the significance of this living tradition at its source, as well as for international collaboration" (LaGamma, 2021).

The British Museum has committed to engage in an active cross-border cooperation concerning the Benin Bronzes with Nigerian institutions to facilitate a new permanent exhibition of Beninese works in Benin City to include works form the British Museum via the Benin Dialogue Group and the Digital Benin initiative to develop and online platform to "digitally reunite as many as possible of the historical objects, documents, and photographs that illuminate the Benin Kingdom" (The British Museum).

Currently, one may ask whether such steps are enough in the dispute or whether a more specific declaration should be made. The arguments on both sides of the dispute can refer to both the national and ritual significance of the objects, the passage of time and investment undertaken, as well as preservation conditions. The below table contains suggestions of arguments that could be included the dispute:

Table 17. Argumentative matrix for The Benin Bronzes

Party	British Museum/ The Met	Nigeria
Principle	Protection of cultural heritage	Social utility of cultural heritage
Argument	The safest place, investment undertaken, passage of time	Cultural, national, and historical affiliation
Value	Artistic, scientific, ethnographic	National significance, religious significance

Source: Own elaboration.

The above summary is a simplification of what argumentative approaches could be. The solution to each dispute concerning specific items should be analysed case-by-case and in close cooperation with the source country.

Nonetheless, the process of returning Benin bronzes to their original location is not only an issue of cross-boundary negotiations and physical ownership. Internally, it is also a matter of who exactly should take control over the copyright relating to the objects upon their return to Nigeria. As stated by Oriakhogba (2022), "the awakened international consultations for the return of the looted ancient Benin bronzes forming part of the holdings of museums in Germany and the UK stirred schism among the governments of Edo State (sub-national), the Nigerian Federation, and the Benin Royal Palace led by the Oba of Benin (the Oba Palace is located at the centre of Benin City, Edo State [Province], Nigeria). The schism was about who would control the ancient Benin Bronzes upon their return. While the schism has been settled, (…) the local "warring" parties did not avert their minds to questions around who owns, would manage, and benefit from, the copyright relating to the ancient Benin bronzes." (p. 823).

Conclusion

The above case studies illustrate various cases of cultural property, both in terms of their social significance and the ways they were removed from their original context and, subsequently, what were the arguments on both sides of the dispute concerning their place and context of destination.

The arguments utilised in disputes were based on values assigned to the properties listed. Cultural significance, social utility, and preservation were selected as the main points of reference for the subsequent analysis of cases. It may be argued that these values are interconnected, thus cannot be distinguished from one another. On the one hand, they all appear in disputes concerning cultural property. On the other, their distinctiveness is clear when it comes to particular arguments, e.g. the argument from the most secure location addresses the value of preservation and the argument from social utility refers to particular social values.

It may be concluded that every cultural object plays a vital role in the development of society in its broadest sense, and thus should be preserved for future generations. In the case of "negative" heritage, often brought to the fore in response to such statements, it may be claimed that every object documenting the past is a transmitter of memory, and we, the society as a whole, cannot ensure sustainable development without noting the importance of past events. Thus, the preservation of any and all products of human creativity is in the interest of us all. Regardless of ownership, e.g. public or private, the main value behind every restitution dispute should be its preservation in the best condition possible.

That is why the 1995 UNIDROIT Convention plays such an important role in the protection of cultural property. Regardless of its status and value from the perspective of states, cultural objects need to be safeguarded for the benefit of future generations, to enable the exchange of views and assure diversity of expressions.

CONCLUSIONS

The thesis begins with the question *How are cultural property restitution claims justified?* By a way of concluding, one may ask *What values lie behind cultural property?* Since cultural property restitution is viewed as a hard case in law, the answers to where an object really belongs is often nowhere to be found if we look at legal acts concerning ownership rights. One needs to go beyond positive law to realise that the solution to restitution disputes often lays in the values that each individual object holds, not only objectively but from the perspective of each party to the dispute. The thesis of the dissertation is that every restitution argument is a reflection of the values assigned to the object in question and that these values refer to both collective and individual interests.

In Chapter 1, the lens through which the values are analysed is the very linguistic layer of legal provisions and the doctrine. The definition and the connotative layer of terms used in different languages and sources varies from country to country and from one legal area to another. Therefore, first, I aimed to present the variety of linguistic choices to narrow the scope down to a single term, also used in the 1995 UNIDROIT Convention, to follow up with an analysis of provisions utilising this very term. The conclusion related to the terms used in translated texts is that even direct equivalents do not guarantee that same scope of application, and the term used should reflect the values that are to be protected as single terms not always illustrate the complexity of the original concept. To this end, the meanings of such terms as: cultural heritage, cultural property, cultural objects and goods, as well as monuments and antiquities were analysed and compared to indicate the varying level of values assigned to each of them. For the purpose of simplification and to avoid repetition, the terms: cultural property, objects, goods, and items were used interchangeably, if the context permitted it, however, it needs to be underlined that each of them has slightly different associations.

The linguistic analysis of all the cultural property-related terms utilised in legal sources, their translations, and the doctrine allows us to claim than these concepts are used often interchangeably, in spite of the fact that the connotative layer of each of them is different. Nonetheless, the boundaries between them are not always possible to be firmly

established due to the fluctuating nature of the values assigned to cultural property as such.

To reiterate the takeaways from the first chapter, it may be concluded that decoding the meaning of terms in the area of cultural property law may be done in two steps, i.e. hierarchical or connection-based. When looking at UNESCO instruments, the term of cultural heritage refers to the broader category of objects and practices possessing universal social values seen mainly as national significance, while cultural property forms a sub-category of cultural heritage, therefore, the approach to this concept is hierarchical. If cultural property is analysed from the perspective of individual rights, *inter alia* copyright or physical ownership rights to a given cultural object, a more connection-based approach may be applied. In this view, the overall social or cultural significance of a particular item is not the central point of the analysis but rather the intrinsic features and personal attachment to the object, regardless of its categorisation performed by an authority in a given area. In general, cultural property may be considered as the most open-ended category, as its application is not necessarily driven by national interests, however, even in the case of applying this term, its linguistic equivalents are not always rooted in the same set of values, e.g. "heritage" v. "*Kulturgut*."

Creating a catalogue of values assigned to cultural property is the first step in the process of understanding what value-based restitution arguments could be. International instruments in the area of heritage protection often refer to values, however they are not concerned with the methods of establishing market value. This is why other branches of law and fields of study can be included in the overall analysis of values. Intellectual property law refers to financial thresholds established in order to calculate an appropriate level of resale rights. The value analysis in this dissertation aims to shed some light on the ways valuation is performed, as required not only by pure market needs but also as required by law and it lists examples of situations when valuation is needed.

It may also be stated that despite linguistic discrepancies between various legal terms and their translations, not only under international or EU law, but also on national law level, the bottom line for the terms utilised in the realm of the broad category of cultural law,

e.g. heritage and intellectual property protection, it is the value and the interest of particular parties in a dispute that can determine the scope of application for a given term. The above statement proves that the creation of a multi-language cultural property law dictionary that would also include an in-depth value analysis could be a helpful tool for parties to a dispute concerning cultural property.

In Chapter 2, I analysed the notion of restitution and other related concepts, as well as the scope of the 1995 UNIDROIT Convention. The Convention is a comprehensive instrument focusing, in the first place, on the importance of the protection of cultural goods, regardless of their ownership status, and, secondly, lists the means of performing due diligence that are one of its main developments in the context of both cultural heritage law as such but also the art market. Due to its comprehensive nature, this act has been selected as a point of reference for the analysis of particular provisions illustrating the values of cultural property as the grounds for the further implementation of restitution and/or return measures.

It needs to be stressed that the aim of the 1995 UNIDROIT Convention was to bridge the gaps between varying national systems of cultural property restitution. The 1995 UNIDROIT Convention extended the scope of the 1970 UNESCO Convention by, first and foremost, addressing the issues of private law in the case of restitution and return of looted or illegally exported property, both state or private. Secondly, it provided specific measures for establishing due diligence on the part of the buyer of the good, thus changing the behaviour of the actors on the art market.

The common minimal legal rules established by the 1995 UNIDROIT Convention are easily applicable to a larger scope of issues related to cultural property, therefore their relationship with other international instruments is complementary. The 1995 UNIDROIT Convention is not only interlinked with the 1970 UNESCO Convention but has also had a significant on EU law and national laws in the area of cultural property restitution and the development of soft law, e.g. codes of professional practice.

In Chapter 3, drawing from the provisions of the 1995 UNIDROIT Convention, a broader restitution model based on values, principles, and arguments has been suggested, to classify and order the means of reasoning in the context of cultural property restitution. The model addresses the problem of vagueness and ambiguity often encountered when analysing particular restitution cases and aims to create a catalogue of values and corresponding principles and arguments. As the processes of restitution and return need to be analysed case by case, the model is, needless to say, a clear simplification of what the argumentation could be based on, however, thanks to its enumerative structure, it allows readers and researchers to select and combine adequate elements listed in it to build further argumentation and analysis of the overall value of cultural property in the context of other disputes.

It needs to be underlined that restitution arguments and the principles of cultural heritage law are a reflection of the values assigned to cultural property, as listed in Chapter 1. For instance, the arguments relating to social utility of cultural property are strongly related to the corresponding principle of social utility of heritage and they both stem from the value of social utility of property, therefore, the restitution model may be seen as a matrix of corresponding elements. However, it also needs to be noted that some arguments, e.g. the argument from justice, are not easily linked to the principles and values listed, therefore it not always forms a string of elements directly linked to one another.

The arguments presented in the above context serve as a toolkit for approaching restitution disputes, however, one argument may be overridden by other conditions specific to a given object as well as the social or political factors surrounding it. The main conclusion is that restitution as such is not only necessary to achieve sustainable development goals, but also the process itself should respect the principle of sustainability.

The role of the 1995 UNIDROIT Convention in building the value-based restitution model is both exemplification, as it helps place the values described before in the context of a particular legal instrument, as well as providing a more universal outlook on cultural property values, as the 1995 UNIDROIT Convention reflects general principles of

international cultural heritage law and its values in the broadest sense possible, including both public and private objects and does not require a categorisation based on nationally acclaimed values.

Chapter 4 was focused on presenting a selection of case studies illustrating various values driving the parties of restitution and return disputes. The cases include disputes starting not only in the 19th and 20th centuries, but also more recent developments. They concern not only solved and ongoing processes but also hypothetical disputes. The aim of this approach allows us to go beyond historical events and suggest solutions that could be beneficial from our perspective, e.g. as in the case of property that was displaced as a result of complex territorial changes (see: Jakubowski, 2015) and a number of conflicts that had caused the unclear ownership *status quo*. The selected disputes are not only concerning cultural property classified as "cultural heritage" pursuant to international law but also contemporary art, e.g. murals. The selection of this approach was triggered by the fact that cultural property restitution and/or return is often associated with state property of a certain historical status and not any and all cultural property, following the understanding proposed in the 1995 UNIDROIT Convention.

Looking at legal acts drafted to answer the needs of parties of a dispute, one may see that only by applying unified measures to safeguard property, the provisions regulating the return or restitution of cultural goods respects the social significance, the unique nature of these items. The 1995 UNIDROIT Convention not only responds to the problem of legal gaps between various systems but also encourages interstate cooperation in order to find balanced solutions for restitution and/or return disputes.

Answering the question whether a value-based approach can be formulated at an international level, it may be stated that it is already partly established under the 1995 UNIDROIT Convention, however in order to achieve the aim of strengthening international cooperation in the effort to protect cultural property and to increase the number of cultural objects returned to the source country, the model needs to be applied also regardless of the legal grounds assumed by parties, as it is in the process of alternative dispute resolution that many of these disputes can be settled.

It is worth noting that the model is not only intended to answer questions in the context of restitution disputes but also serves as a point of reference for cataloguing cultural values for other fields of study, especially for the purpose of promoting culture and its social significance to a wider audience, thus acting as an example of an inter-disciplinary bridge between the fields of study and cultural activities concerning the question of what the value of cultural property is. The role of restitution disputes in promoting the value of cultural property concerned cannot be overlooked. As evidenced by the case studies presented, the values assigned to particular items or item categories were either strengthened by the attention caused by the dispute or newly emerged as a result of the publicity.

LEGAL SOURCES

French law

Code du patrimoine, legislative part promulgated by the ordonnance no. 2004-178 of 20 February 2004.

Italian law

Legislative Decree No. 42, 22.01.2004, entitled: Codice dei beni culturali e del paesaggio, Gazzetta Ufficiale della Repubblica italiana, supplemento ordinario n. 28/L, 24.01.2004, n. 45.

Cass. pen. Sez. III, Sent., 10/06/2015, n. 42458.

Cass. pen. Sez II, Sent., 21/06/2012, n. 28653.

U.S. law

The Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (C-16, AG/RES. 210 (VI-O/76).

NY Penal Law § 145.60: Making graffiti.

17 U.S.C. § 102: Subject Matter of Copyright.

United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

Polish law

The Act of 25 October 1991 on organizing and conducting cultural activity (consolidated text: *Journal of Laws* of 2020, item 194) [*Ustawa z dnia 25 października 1991 r. o organizowaniu i prowadzeniu działalności kulturalnej*].

The Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2022, item 2393) [*Ustawa z dnia 27 czerwca 1997 r. o bibliotekach*].

The Act of 23 July 2003 on the protection and preservation of monuments, consolidated text: *Journal of Laws* of 2022, item 840) [*Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami*].

The Act of 25 May 2017 on restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591) [*Ustawa z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury*].

Law of the European Union

ECJ, Case 7/68, Commission v. Italy (1968), ECR, 562.

Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.

Treaty Establishing the European Community, 24 December 2002, OJ C 325.

Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, OJ L 39, 10.02.2009, p. 1.

Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), OJ L 159, 28.05.2014, p. 1.

Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47

Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, OJ L 151, 7.06.2019, p. 1.

International law

The Berne Convention for the Protection of Literary and Artistic Works, concluded on September 9, 1886 (S. Treaty Doc. No. 99-27, 1986).

Convention (II) with Respect to the Laws and Customs of War on Land and its anne x: Regulations concernig the Laws and Customs of War on Land. The Hague, 29 July 1899.

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS. 240.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

Convention for the Protection of the Architectural Heritage of Europe, 3 October 1985, CETS No. 121.

European Convention on the Protection of the Archaeological Heritage (Revised), 16 January 1992, CETS No. 143.

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322.

UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 2562 UNTS 3, 41 I.L.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1.

Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS No. 199

Council of Europe Convention on Offences relating to Cultural Property, 19 May 2017, CETS 221.

A/RES/55/25 United Nations Convention against Transnational Organized Crime. 15 November 2000.

A/RES/56/97 Return or restitution of cultural property to the countries of origin 14 December 2001.

A/RES/69/196 International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences. 18 December 2014.

A/RES/70/174 Doha declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation. 17 December 2015.

A/RES/70/1 Transforming our world: the 2030 agenda for sustainable development. 25 September 2015.

ECOSOC. (2004). Resolution 2004/34 Protection against trafficking in cultural property. 21 July 2004.

BIBLIOGRAPHY

Adajian, T. (2018). "The Definition of Art." *The Stanford Encyclopedia of Philosophy*. Stanford: Stanford University, 2018. Web. 2 Nov 2018.

Altwicker-Hàmori, S., Altwicker, T., and Peters, A. *Measuring Violations of Human Rights, an Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*. PDF. Web. 6 Mar 2019.

Ames, K. (1993). Beyond Rogers v. Koons: A Fair Use Standard for Appropriation. *Columbia Law Review* 93.6: 1473-1526. JSTOR. Web. 21 Mar 2019.

Anderson, R. L. (2017). "Friedrich Nietzsche." *The Stanford Encyclopedia of Philosophy*. Stanford: Stanford University. Web. 28 Feb 2019.

Andreides, K., (2019). "Art Valuation in Law." Interview by J. Stepnowska. Unpublished.

Annes, C. F. (2017). *Case Note: on the criminal case involving an attempt of illicit export of cultural goods from Brazil to Uruguay.* UNIDROIT. https://1995unidroitcap.org/wp-content/uploads/2017/06/Cyro-Annes-2.pdf. Web. 8 May 2023.

Argyropoulos, V. and Stratigea, A. (2019). Sustainable Management of Underwater Cultural Heritage: The Route from Discovery to Engagement—Open Issues in the Mediterranean. *Heritage*, 2, 1588–1613.

Association of American Anthropologists (2012). *Statement on Ethics. Principles of Professional Responsibility*. https://archaeologicalethics.org/code-of-ethics/american-anthropological-association-aaa-ethics-blog-principles-of-professional-responsibility/#:~:text=The%20seven%20Principles%20of%20Professional,Make%20Your%20Results%20Accessible%3B%206. Web. 24 Oct 2022.

Aumann, A. (2014). The Relationship Between Aesthetic Value and Cognitive Value. *The Journal of Aesthetics and Art Criticism* 72:2. Spring 2014. The American Society of Aesthetics, pp. 117-127.

Bailey, M. (2018). *Starry Night: Van Gogh at the Asylum*. London: White Lion Publishing. Google Books. Web. 7 Mar 2019.

Bandle, A. L, Theurich S. (2011). Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre. *Journal of International Commercial Law and Technology*, 6(1), 28 - 41.

Bandle, A. L. and Contel, R. (2015). Reparation Art: Finding Common Ground in the Resolution of Disputes on Russian War Spoils and Nazi-Looted Art. *Art, Cultural Heritage and the Market. Ethical and Legal Issues*. Ed. Valentina Vadi and Hildegard E. G. S. Schneider. Heidelberg: Springer. 27-60.

Bandle, A.L. (2014) Arbiters of value: the complexity and dealers' liability in pricing art. *L'art a-t-il un prix? L'évaluation des oeuvres d'art, ses défis pratiques et juridiques = The art of pricing the priceless: on the valuation of art, its challenges and liabilities.* Genève: Schulthess. pp. 29-76

Bednarski, N. (2004). Give Us Your Tired, Your Poor, Your Wretched Works of Art: American Museums Can Fix Them up, Show Them, and Send Them Back with Help from the Arts Indemnity Act. *Jeffrey S. Moorad Sports Law Journal* 11: 383. Digital commons. Web. 5 Nov 2018.

Benjamin, W. (2005). *The work of Art in the Age of Mechanical Reproduction.* N.p.: Schocken/Random House. Web. 5 Mar 2019.

Blake, J.E. (2015). *International Cultural Heritage Law*. Oxford University Press.

Borowski, K. (2014). *Prowizje płacone przez kupujących i sprzedających w wybranych domach aukcyjnych w Polsce*. PDF. Web. 29 Jan 2022.

Brezianu, B. (1965). The Beginnings of Brancusi. *Art Journal* 25.1: 15-25.

Bryl, M. (2016). *Rynek sztuki w Polsce.Poradnik dla kolekcjonerów i inwestorów.* PWN. Print.

Calabi, G. (n.d.). *International circulation of artworks: An important reform approved by the Italian parliament*. PDF. Web. 29 Jan 2022.

Camara, A. (2014). International Council of Museums (ICOM): Code of Ethics. In: Smith, C. (Ed) *Encyclopedia of Global Archaeology*. Springer, New York, NY. pp 3966–3969.

Campbell, P. (2013). The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage. International Journal of Cultural Property, 20(2), pp. 113-153.

Campfens, E. (2014). Alternative Dispute Resolution in Restitution Claims and the Binding Expert Opinion Procedure of the Dutch Restitutions Committee. In: *Art, Cultural Heritage and the Market. Ethical and Legal Issues.* Eds. Valentina Vadi and Hildegard E.G.S. Schneider, Verlag Berlin Heidelberg Springer.

Carroll, N. (1993). Historical Narratives and the Philosophy of Art. *The Journal of Aesthetics and Art Criticism* 51.3: 313. JSTOR. Web. 2 Nov 2018.

Carroll, N. (1999). *Philosophy of Art: A Contemporary Introduction*. New York: Routledge.

Casini, L. (2017). *The protection of cultural heritage: Rules, practices, and education. G7 Meeting of Experts Florence, March 30, 2017*. PDF. Web. 25 May 2021.

Cavalli, G. (1998). Che imprudenza, io il Giardiniere lo portavo in banca con la Cinquecento. *Corriere della Sera* 22 May 1998: 15. Corriere della Sera. Web. 7 Mar 2019.

Chechi, A. (2004). Cultural Matters in the Case Law of the European Court of Justice. *Art, Antiquity, and Law* Volume IX, Issue 3, pp. 281-298.

Chechi, A. (2014). *The Settlement of International Cultural Heritage Disputes*. Oxford: Oxford University Press. Google books. Web. 7 Mar 2019.

Chechi, A. (2019). Non-State Actors and the Implementation of the World Heritage Convention in Asia: Achievements, Problems, and Prospects. *Asian Journal of International Law*, 8 (2018), pp. 461–489.

Chisholm, R. M. (1986). *Brentano and Intrinsic Value*. New York: Cambridge University Press. Google Books. Web. 28 Feb 2019.

Coccolo, F. (2017). Law no. 1089 of 1 June 1939 The Origin and Consequences of Italian Legislation on the Protection of the National Cultural Heritage in the Twentieth Century. *Cultural Heritage. Scenarios 2015-2017.* Ed. Simona Pinton and Lauso Zagato. Venezia: Edizioni Ca' Foscari - Digital Publishing. 195-210. ResearchGate. Web. 6 Mar 2019.

Cohen, B. et al. (1995). Trash or Treasure: Valuing Personal Property – Art, Antiques, Jewelry, and Collectibles. *Family Advocate*. 17.4: 34-39. JSTOR. Web. 7 Mar 2019.

Cohen, P. (2012). In Art, Freedom of Expression Doesn't Extend to 'Is It Real?' *New York Times* N.p., 19 Jun 2012. Web. 6 Mar 2019.

Colaviti, A. M. (2018). *Urban Heritage Management: Planning with History.* Springer: n.p., 2018. Google books. Web. 5 Nov 2018.

Connolly, K. (2019) Jewellery of 'immeasurable worth' stolen in dramatic Dresden museum heist. *The Guardian.* Web. 25 Nov. 29 Jan 2022.

Cornu, M., Renold, M. A. (2010). New Developments in the Restitution of Cultural Property: Alternative means of Dispute Resolution. *International Journal of Cultural Property* 17.1: 1-31. Archive ouverte UNIGE. Web. 6 Mar 2019.

Council of Europe. (2005). *Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society*. Council of Europe Treaty Series - No. 199, 2005. Web. 4 Mar 2019.

Cultural Heritage Thesaurus in French English and Polish. PDF. Web. 29 Jan 2022.

Cunliffe, E., Curini, L. (2018). ISIS and heritage destruction: A sentiment analysis. *Antiquity, 92*(364), 1094-1111.

Czarnecka, A. (n.d.). Popiersie bogini Diany. Łazienki Królewskie. https://www.lazienki-krolewskie.pl/pl/katalog/obiekty/dep-957. Web. 04 Apr 2023.

Damich, E. J. (1990). The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art. *Cath. U. L. Rev.* 39.4: 945. Cath. U. L. Rev. Web. 5 Nov 2018.

Damodaran, A. (2012). *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset, University Edition.* Hoboken: John Wiley & Sons. Google books. Web 4 Mar 2019.

Davies, S. (2016). *The Philosophy of Art*. Chichester: Wiley Blackwell.

Davis, T. (2015). The Lasting Impact of the United States vs. Cambodian Sculpture. In: Desmarais F (ed.) *Countering Illicit Traffic in Cultural Goods. The Global Challenge of Protecting the World's Heritage*. ICOM, pp. 95-105.

Delepierre, S., and Schneider M. (2015). Ratification and Implementation of International Conventions to Fight Illicit Trafficking of Cultural Property. *Countering Illicit Traffic in Cultural Goods: The Global Challenge in Protecting the World's Heritage*. Ed. France Desmarais. Paris: The International Council of Museums, pp. 129-139.

Demetriades, V. (n.d.) *Was the Removal of the Marbles Illegal?* http://www.parthenon.newmentor.net/illegal.htm . Web. 15 May 2023.

De Visscher, C. (1949*), International Protection of Works of Art and Historic Monuments*. Washington: The Department of State Publications.

Dolan, M. (2011) If you take street art off the street, is it still art? Fans cut mural linked to Banksy from wall; One Man's Rescue, Another's Heist, *The Wall Street Journal*,

https://www.wsj.com/articles/SB10001424052748704071304576160544164062176. Web. 5 Feb 2022.

Dziemidok, B. (1993). Artistic Formalism: Its Achievements and Weaknesses. *The Journal of Aesthetics and Art Critics* 51.2:185-193. JSTOR. Web. 5 Mar 2019.

Eco, U. (1988). *The Aesthetics of Thomas Aquinas*. Cambridge: Harvard University Press. 164.

ECOSOC. (2004). *Protection against trafficking in cultural property*. https://www.unodc.org/documents/treaties/organized_crime/ECOSOC_res_2004-34.pdf. Web. 15 Sep 2019**.**

Ehikhamenor, V. (2020). Give Us Back What Our Ancestors Made. The New York Times. Jan. 28, 2020. https://www.nytimes.com/2020/01/28/opinion/looted-benin-bronzes.html. Web. 19 Jan 2023.

Estreicher, K. (1980). Preface. In G. Vasari, *The Lives of the Most Excellent Painters, Sculptors, and Architects*. Warszawa: Państwowy Instytut Wydawniczy. XXIV. Print.

Ferrazzi, S. (2019). EU National Treasures and the Quest for a Definition.

Findlay, M. (2014). *The Value of Art. Money, Power, Beauty.* Munich/London/New York: Prestel.

Flescher, S. (2004). The International Foundation for Art Research. In R.D. Spencer, *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts.* New York: Oxford University Press.

Flint, L. (n.d.). "Constantin Brancusi." *Guggenheim.* Web. 7 Mar 2019.

Forrest, C. (2012). *International Law and the Protection of Cultural Heritage*. Routledge. Google Books. 29 Jan 2022.

Francioni, F., Gordley, J. (2013). *Enforcing International Cultural Heritage Law*. Oxford. Google Books. 24 May 2022.

Frigo, M. (2004). Cultural property v. cultural heritage: A "battle of concepts" in international law? *International Review of The Red Cross - INT REV RED CROSS*. 86.

Frigo, M. (2011). Model Provisions on State Ownership of Undiscovered Cultural Objects — Introduction. *Uniform Law Review*, Volume 16, Issue 4, December 2011, pp. 1024–1035.

Frigo, M. (2016). The Implementation of Directive 2014/60/EU and the Problems of the Compliance of Italian Legislation with International and EU Law. *Santander Art and Culture Law Review* 2/2016 (2): 71-84.

Frigo, M., (2019). "Art Valuation in Law." Interview by J. Stepnowska. Unpublished.

Fyderek, N. (2010). Eksperci rynku sztuki w Polsce – sytuacja prawna i praktyka. In W. Kowalski, K. Zalsińska (Eds.), *Rynek sztuki: Aspekty Prawne.* Warszawa: Wolters Kluwer.

Gaut, B. (2018). "The Cluster Account of Art." In T. Adajian, "The Definition of Art." *The Stanford Encyclopedia of Philosophy*. Stanford: Stanford University, 2018. Web. 2 Nov 2018.

Gaweł, Ł. (2016). Dziedzictwo kulturowe – ustalenia podstawowe. In A. Jagielska-Burduk, W. Szafrański, Ł. Gaweł (Eds.), *Mechanizmy prawne zarządzania dziedzictwem kultury*. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, Warszawa: Wolters Kluwer. 15-26.

Ginsburg J. C., Ricketson, S. (2006). *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*. New York: Oxford University Press.

Girard, A. and Gentil G. (1983). *Cultural development: experiences and policies.* Paris: UNESCO.

Gołaszewska, M. (1984). *Estetyka rzeczywistości.* Warszawa: Instytut wydawniczy PAX.

Golka, M. (2008). *Socjologia sztuki.* Warszawa: Difin.

Gołuchowski, J., Spyra, Z. (2014). *Zarządzanie w kulturze, sztuce i turystyce kulturowej*. Warszawa: CeDeWu.

Gombrich, E. H. (n.d.) *The Story of Art.* N.p.: Phaidon.

Górka, M. (2016). Directive 2014/60: A New Legal Framework for Ensuring the Return of Cultural Objects within the European Union. *Santander Art and Culture Law Review* 2: 27-34.

Gracyk, T. (2016). "Hume's Aesthetics." *The Stanford Encyclopedia of Philosophy*. Stanford: Stanford University. Web. 2 Nov 2018.

Grant, D. (2015). *The Business of Being an Artist.* New York: Allworth Press.

Greenberger, A. (2021). The Benin Bronzes, Explained: Why a Group of Plundered Artworks Continues to Generate Controversy. *Artnews* April 2, 2021.

https://www.artnews.com/feature/benin-bronzes-explained-repatriation-british-museum-humboldt-forum-1234588588/. Web. 19 Jan 2023.

Greenfield, J. (1996). *The Return of Cultural Treasures*. Cambridge University Press.

Guadamuz, A. (2018) Can the monkey selfie case teach us anything about copyright law? *WIPO Magazine* Feb 2018. WIPO. Web. 5 Nov 2018.

Hart, S. L. (1971). "Axiology--Theory of Values." *Philosophy and Phenomenological Research* 32.1: 29-41.

Hastings, R. (1907). *The Theory of Good and Evil*. Vol I. N.p. Oxford at the Clarendon Press. Internet Archive. Web. 28 Feb 2019.

Hausner, J., (2019). "Art Valuation in Law." Interview by J. Stepnowska. Unpublished.

Helgesson, C. F. (2014). Valuation Studies and the Critique of Valuation. *Valuation Studies* 2.2: 87–96.

Henderson, L. (2014) The Duryodhana Dilemma: United States v. a 10th Century Cambodian Sandstone Sculpture and a Proposed Code of Ethics-Based Response to Repatriation Requests for Auction Houses, *University of Pennsylvania Law Review*, no. 163/249.

Hook, P. (2018). *Rogues' Gallery: A History of Art and its Dealers.* London: Profile Books.

Houlgate, S. (2016). "Hegel's Aesthetics." *The Stanford Encyclopedia of Philosophy*. Stanford: Stanford University. Web. 2 Nov 2018.

Hutter, M., Frey, B. (2010). On the Influence of Cultural Value on Economic Value. *Revue d'économie politique*, vol. 120(1), 35-46.

ICCROM (2020). Our Collections Matter. https://www.iccrom.org/news/our-collections-matter. Web. 12 Aug 2020.

Ierna, C., Rollinger, R., (2016). Christian von Ehrenfels. *The Stanford Encyclopedia of Philosophy.* Stanford: Stanford University. Web. 28 Feb 2019.

Ilczuk, D. (2012). *Ekonomika kultury*. Warszawa: PWN.

Ilczuk, D. et al. (2015). *Artyści na rynku pracy.* Kraków: Attyka.

Inde, V. R. (1998). *Art in the Courtroom.* N.p.: Praeger. Google books. Web. 9 Mar 2019.

Ingarden, R. (1966). *Przeżycie – dzieło – wartość.* Kraków: Wydawnictwo Literackie.

Jagielska, A., Szafrański, W. and Skąpski, M. (2007). Eksperci i ekspertyzy na rynku dzieł sztuki. In W. Szafrański (Ed.), *Wokół problematyki prawnej zabytków i dzieł sztuki*. Vol. 1. Poznań Wydawnictwo poznańskie. 27-52.

Jakubowski, A. (2011). *The Effects of State Succession on Cultural Property: Ownership, Control, Protection*. European University Institute. Department of Law. https://cadmus.eui.eu/bitstream/handle/1814/18414/Jakubowski_2011.pdf. Web. 29 Apr 2023.

Jakubowski, A. (2015). *State Succession in Cultural Property*. Oxford University Press.

Jakubowski, O. (2017). The Threat to Cultural Heritage from Crime in Poland: 2016 Cases. *Santander Art and Culture Law Review* 2: 319-342.

Jakubowski, O., Trzciński, M. (2019). Przestępczość przeciwko dziedzictwu kulturowemu - charakterystyka zjawiska. In M. Trzciński (Ed) Praktyczne aspekty zwalczania przestępczości przeciwko dziedzictwu kulturowemu. Wydawnictwo Uniwersytetu Gdańskiego, pp. 85-157.

Jokilehto, J., et al. (2008). *What is OUV? Defining the Outstanding Universal Value of Cultural World Heritage Properties*. ICOMOS. Berlin: Hendrik Bäßler Verlag. Web. 4 Mar 2019.

Jones, Siân. (2016). Wrestling with the Social Value of Heritage: Problems, Dilemmas and Opportunities. Journal of Community Archaeology & Heritage. 4. 1-17.

Kan, M. (2002) An Eskimo Mask in the Barbier-Mueller Collection. In: *Arts & Cultures* No3, pp. 89-90

Karmel, D. (2012). Abandonment and the First Sale Doctrine. *Columbia Journal of Law and Social Problems*, pp. 353-378.

Karmowska, J. (2003). Cultural heritage as an element of marketing strategy in European historic cities. In R. Kozłowski (Ed.), *Cultural heritage research: a pan-European challenge*. European Communities, pp. 139-141.

Kind, K.H. (2011). The Role of INTERPOL in the Fight Against the Illicit Trafficking in Cultural Property. In S. Manacorda, D. Chappell (Eds.), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*. Springer, pp. 175-183.

Kiwara-Wilson, S. (2013). Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories. *DePaul Journal of Art, Technology & Intellectual Prop*erty Vol 23. No. 2, pp. 375-425. https://via.library.depaul.edu/jatip/vol23/iss2/5. Web. 04 Apr 2023.

Kociołek-Pęksa, A., Menkes. J. (2019). Ochrona dóbr kultury w reżimie ochrony ludności – obrony cywilnej – prawo polskie i międzynarodowe. In J. Sobczak, K. Chałubińska-Jentkiewicz, and K. Kakarenko (Eds.) *Prawo wobec kultury i sztuki*. Warszawa: Wolters Kluwer, pp. 191-208.

Kono, T. (2007). UNESCO and intangible cultural heritage from the viewpoint of sustainable development. In Yusuf, Abdulqawi A. (Ed.) Standard-setting in UNESCO, volume I: normative action in education, science and culture, essays in commemoration of the Sixtieth Anniversary of UNESCO, pp. 237-265. https://unesdoc.unesco.org/ark:/48223/pf0000156737. Web. 07 Apr 2023.

Kono, T. (2014). Authenticity: Principles and Notions. *Change Over Time 4*(2), pp. 436-460.

Kono. T, *et al.* (2020). *The Impacts of COVID-19 on Heritage: an overview of survey responses by ICOMOS National Committees (2020) and path forward*. International Council on Monuments and Sites (ICOMOS).

Kowalski, W. (1996). *Konwencja UNIDROIT o skradzionych lub nielegalnie wywiezionych dobrach kultury*. Warszawa: Polski Instytut Spraw Międzynarodowych.

Kowalski, W. (2001). Repatriation of Cultural Property Following a Cession of Territory or Dissolution of Multinational states. *Art Antiquity & Law*. 6, 139.

Kowalski, W. (2015). The road to the 1995 UNIDROIT Convention and its basic solutions. *Santander Art and Culture Law Review*, 1/2015, pp. 67-92.

Kowalski, W. (2016). Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland. *Santander Art and Culture Law Review*, 2/2016 (2), pp. 165-178.

Kowalski, W. (2017). Sprzedaż, zamiana, zastaw lub darowizna zabytków (…). In K. Zeidler, M. Marcinkowska (Eds.), *Dekret Rady Regencyjnej z 1918 r. o opiece nad zabytkami sztuki I kultury z komentarzem, czyli eseje o prawie ochrony dziedzictwa kultury*. Gdańsk: Wydawnictwo Uniwersytety Gdańskiego, pp. 254-263.

Kowalski, W., Kuhnke, M. (2011). *Restytucja dóbr kultury utraconych przez Polskę w okresie II wojny światowej jako element polskiej polityki zagranicznej realizowanej przez Ministerstwo Spraw Zagranicznych RP w latach 1999-2009, Looted and recovered: restitution by the Ministry of Foreign Affairs of Poland's cultural property lost during World War II,* Warszawa: Ministerstwo Spraw Zagranicznych.

Kraussl, R., Lehnert, T., Martelin, N. (2016). Is there a Bubble in the Art Market. *Journal of Empirical Finance* 35: 99-109. ScienceDirect. Web. 19 Nov 2018.

Krawczyk, J. (2013). Kryteria i metody wartościowania zabytków architektury. In B. Szmygin (Ed.) *Wartościowanie zabytków architektury.* Warszawa: Polski Komitet Narodowy ICOMOS, Muzeum Pałac w Wilanowie, pp. 139-146.

Kuprecht, K. (2013). *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*. Springer.

Kvale, S. (2011). *Prowadzenie wywiadów*. Warszawa: Wydawnictwo Naukowe PWN.

La Gamma, A. (2021). *The Legacy of Benin Court Art: From Tragedy to Resilience.* https://www.metmuseum.org/blogs/now-at-the-met/2021/benin-court-art-legacy. Web. 21 Apr 2023.

Lamprakos, M. (2014). Riegl's 'Modern Cult of Monuments' and The Problem of Value. *Change Over Time*, 4.2: 418–435.

Lazar, A. (2015). Illicit trafficking in cultural goods in South East Europe: 'Fiat Lux!' In F. Desmarais (Ed.) *Countering Illicit Traffic in Cultural Goods. The Global Challenge of Protecting the World's Heritage.* Paris: ICOM. pp. 107-124.

Leiboff, M. (2009). Art Actually! The Courts and the Imposition of Taste. P*ublic Space: The Journal of Law and Social Justice* Vol 3: 1-23. UOW. Web. 4 Nov.2018.

Leitzel. J. (2022). Athens or London? The Parthenon Marbles and economic efficiency. *Social Sciences & Humanities Open*, Volume 6, Issue 1, https://www.sciencedirect.com/science/article/pii/S2590291122000791. Web. 13 May 2023.

Lothian, A. (1999). Landscape and the Philosophy of Aesthetics: Is Landscape Quality Inherent in the Landscape or in the Eye of the Beholder? *Landscape and Urban Planning* 44: 177. ResearchGate. Web. 4 Nov 2018.

Łągiewska, M. (2021). Ratification of the 1995 UNIDROIT Convention in Poland: Pipe dream or realistic prospect? *Gdańskie Studia Prawnicze* Nr 2(50)/2021: *Prawo dziedzictwa kultury*: pp. 125-133.

Mackenzie, S. (2009). *Protection against trafficking in cultural property*. N.p. PDF. https://www.unodc.org/documents/organized-crime/trafficking_in_cultural/CCPCJ_EG_1_2009_CRP_1/V0987314E.pdf.

Magri, G. (2016). Directive 2014/60/EU and Its Effects on the European Art Market. *Santander Art and Culture Law Review*, pp. 195-210.

Mahmoudjafari, N. (2014). Comment. What is the Bottom Line? Valuing Art, Antiques, and Other Personal Property in A Divorce. *Journal of the American Academy of Matrimonial Lawyers.* 26: 465-479. PDF.

Manacorda, S., Chappell, D. (2011). *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*. New York: Springer.

Mancorda, S. (2011). Criminal Law Protection of Cultural Heritage: an International Perspective. In S. Manacorda, D. Chappell (Eds.) *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*. New York: Springer, pp. 17-51.

Mann, S. K. (2008). What's a Survivor to Do? An Inquiry into Various Options and Outcomes for Individuals Seeking Recovery of Nazi-Looted Art. *Loyola University Chicago International Law Review* 5.2: pp. 191-208. https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1068&context=lucilr. Web 14 Feb 2022.

Mann, T. (2011). The Brouhaha: When the Bird Became Art and Art Became Anything. *Spencer's Art Law Journal* 2.2. N.p. Web. 7 Mar 2019.

Mattet, L. (2002). The Barbier Mueller Museum Celebrates Its Twenty-fifth Anniversary. In: *Arts & Cultures* No3, pp. 31-32.

McCloskey, M. A. (1987). *Kant's Aesthetic*. Albany: SUNY Press. Google Books. Web. 4 Nov 2018.

Melbinger, C. (2015). The Sonnabend Estate and Fair Market Valuation of Canyon. *The University of Pennsylvania Law Review Online* 163: 239. PENNLAWREVIEW. Web. 4 Nov 2018.

Miliszkiewicz, J. (2016). Credit rating agencies for the art market. *Santander Art and Culture Law Review* 1.2: pp. 143-152.

Milkov, N. (N.d.) Rudolf Hermann Lotze. *Internet Encyclopedia of Philosophy*, Web. 28 Feb 2019.

Mitchell, N., Rössler, M., and Tricaud, P. M. (2012). *World Heritage cultural landscapes: a handbook for conservation and management*. PDF. Web. 29 Jan 2022.

Moffat, G. (2005). *Trusts Law: Text and Materials*. New York: Cambridge University Press. Google books. Web. 7 Mar 2019.

Mooya, M. M. (2016). *Real Estate Valuation Theory*. Berlin: Springer.

Moś, A. (2017). *Kodeks dóbr kultury i krajobrazu Republiki Włoskiej*. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.

Moulin, R. (2008). The French Art Market. In I. Robertson, D. Chong (Eds.) *The Art Business*. London: Routledge.

Mourato, S., Mazzanti, M. (2002). Economic Valuation of Cultural Heritage: Evidence and Prospects. In M. de la Torre (Ed.) *Assessing the Values of Cultural Heritage. Research Report*. Los Angeles: The Getty Conservation Institute, 2002.

Możejko, B. (2019). Peter von Danzig: The Story of a Great Caravel, 1462-1475. Leiden – Boston: Brill.

Murdoch, J. (2019). *Law of Estate Agency*. New York: Routledge. Google books. Web. 6 Mar 2019.

Murphy, M. (2008). Pure Art, Pure Desire: Changing Definitions of "l'art pour l'art" from Kant to Gautier. *Studies in Romanticism* 47.2:147-160. JSTOR. Web. 5 Nov 2018.

Murphy, N. (2010). Splitting Images: Shared-Value Settlements in Nazi-Era Art Restitution Claims. *Florida Entertainment Law Review* 3.1: n.p. Web. https://www.lootedart.com/web_images/pdf/SSRN-id1559373%5b1%5d.pdf.

Nahlik, S. E. (1958). *Grabież dzieł sztuki. Rodowód zbrodni międzynarodowej.* Wrocław-Kraków: Zakład Narodowy im. Ossolińskich.

Nietzsche, F. (1913). *The Genealogy of Morals*. Project Gutenberg. Edinburgh – London. Web. 28 Feb 2019.

Nietzsche, F. (2019). *The Gay Science*. New York: Vintage, 1974. Philoslugs. Web. 4 Mar 2019.

O'Keefe, P.J. (1994). Feasibility of an International Code of Ethics for Dealers in Cultural Property for the purpose of more effective control of illicit traffic in cultural property. UNESCO. Web. 13 Dec 2019.

O'Keefe, R. (2010). Protection of Cultural Property Under International Criminal Law. *Melbourne Journal of International Law*, vol. 11, pp. 1-54.

Oriakhogba, D. (2022). Repatriation of ancient Benin bronzes to Nigeria: reflection on copyright and related issues. *Journal of Intellectual Property Law & Practice*, Volume 17, Issue 10, October 2022, pp. 823–833.

Pappas, N. (2017). Plato's Aesthetics. *The Stanford Encyclopedia of Philosophy*. Stanford: Stanford University. Web. 2 Nov 2018.

Perrotta, C. (2004). Economic Value and Moral Value in Aristotle. In T. Aspromourgos, J. Lodewijks (Eds.) *History and Pollitical Economy. Essays in Honour of P.D. Groenewegen*. New York: Routledge.

Perry, R. B. (1950). *General Theory of Value*. Cambridge: Harvard University Press. Archive. Web. 21 Mar 2019.

Plata, A. (2022). *Spór o zbiory Muzeum Brytyjskiego jako trudny przypadek w prawie*. Unpublished.

Polak, P. M. (2017). *Art Law: Restrictions on the Export of Cultural Property and Artwork*. IBA Art, Cultural Institutions and Heritage Law Committee.

Pownall, R.A. J. (2017). *TEFAF Art Market Report 2017*. Helvoirt: The European Fine Art Foundation.

Prott, L.V. (2012). Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption. UNESCO. Web. 14 Dec 2019.

Pruszyński, J. (1999). Dziedzictwo kultury: europejskie, narodowe czy własne? *Ochrona Zabytków*, No. 52/4.

Pruszyński, J. (2001). *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*. Vol. 1. Kraków: Zakamycze.

Przybysz, P.J. (2010). *Filozofia sztuki Stefana Morawskiego*. Gdańsk: słowo/ obraz terytoria.

Riccardi, R. (2022). *Detective dell'arte. Carabinieri na straży dziedzictwa kultury*. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.

Riegl, A. (1982). *The Modern Cult of Monuments: Its Character and Its Origin.* Cambridge: MIT Press.

Roger, V. (n.d.) The Discovery and Identification of Jean Antoine Houdon's Bust of Diana, a Looted Work Returned to Poland.

http://www.dzielautracone.gov.pl/articles/142-the-discovery-and-identification-of-jean-antoine-houdon-s-bust-of-diana-a-looted-work-returned-to-poland. Web. 04 Apr 2023.

Roodt, C. (2013). Restitution of art and cultural objects and its limits. *The Comparative and International Law Journal of Southern Africa* 46.3: 286-307. JSTOR. Web. 7 Mar 2019.

Rössler, M. (2012). *Partners in site management: a shift in focus; heritage and community involvement*. PDF. Web. 29 Jan 2022.

Saetersdal, T. (1998). Maconde carvings: Cultural and symbolic aspects. In P. Seppälä and B. Koda (Eds.), *The Making of a Periphery. Economic Development and Cultural Encounters in Southern Tanzania*, Nordic Africa Institute, Uppsala, pp. 285–308.

Sánchez, J.P. (2017). How the Parthenon Lost Its Marbles. *National Geographic History Magazine*, March 2017, https://www.nationalgeographic.com/history/history-magazine/article/parthenon-sculptures-british-museum-controversy. Web. 13 May 2023.

Schneider, M. (1993). Explanatory Report on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects. *Uniform Law Review* 21.1: 119–213. Web. 04 Nov 2018.

Schneider, M. (2001). UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report. *Uniform Law Review* 3: 476-564. UNIDROIT. Web. 6 Mar 2019.

Schneider, M. (2016). The 1995 UNIDROIT Convention: An Indispensable Component to the 1970 UNESCO Convention and an inspiration for the 2014/60/EU Directive, *Santander Art & Culture Law Review*, 2, 149-164.

Schneider, M. (2019). "Art Valuation in Law." Interview by J. Stepnowska. Unpublished.

Schwartz, S. H. (2012). An Overview of the Schwartz Theory of Basic Values. *Online Readings in Psychology and Culture*, 2.1.: n.p. Web. 1 Mar 2019.

Scott, G. R., Karaback, O., Maull, K. E. (2013). Cultural Property, Art and Law in the United States and Turkey. *Law & Justice Review* IV. 2: n.p. Web. 13 Jun 2022.

Shaw, A. (2012). Banksy Murals Prove to be an Attribution Minefield. *The Art Newspaper*, February, 16, 2012. Web. 26 Jul 2021.

http://www.theartnewspaper.com/articles/Banksy-murals-prove-to-be-an-attributionminefield/25631.

Sheldon, W. H. (1914). An Empirical Definition of Value. *The Journal of Philosophy, Psychology and Scientific Methods* 11.5: 113-124. JSTOR. Web. 28 Feb 2019.

Silverman, H., and Fairchild Ruggles, D. (2007) *Cultural Heritage and Human Rights.* N.p.: Springer Science+Business Media.

Simpson, M. (2009). Museums and restorative justice: heritage, repatriation and cultural education, *Museum International*, 61(1-2), 121-129.

Smith, L. (2007) Empty Gestures? Heritage and the Politics of Recognition. In: Silverman, H., and Fairchild Ruggles, D. (Eds.) *Cultural Heritage and Human Rights.* N.p.: Springer Science+Business Media.

Smithsonian. National Museum of African Art. (n.d.). https://africa.si.edu/exhibitions/current-exhibitions/visionary-viewpoints-on-africas-arts/the-raid-on-benin-1897/. Web. 19 Jan 2023.

Spencer, R. D. (2009). *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts.* Warszawa: Ośrodek Ochrony Zbiorów Publicznych.

Stamatoudi, I. (2002). Legal grounds for the return of the Parthenon Marbles. *Revue Hellénique de droit International* 513: pp. 513-530.

Stamatoudi, I. (2011). *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law*. Cheltenham – Northampton: Edward Elgar Publishing.

St. Clair, W. (1998). *Lord Elgin and the Marble.* Oxford University Press.

Stecker, R. (1997). Two Conceptions of Artistic Value. *Iyyun: The Jerusalem Philosophical Quarterly* 46: 51–62. *JSTOR*, JSTOR. Web. 5 Mar 2019.

Stepnowska, J. (2017). Asian cultural objects in Europe. Art market expansion and the illicit trafficking of cultural heritage: An outline of legal issues. *Gdańskie Studia Azji Wschodniej*, 57-65.

Stepnowska, J. (2019). Due Diligence and the Art Market. Assessing the Impact of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. *Studia Iuridica Toruniensia,* 22, 377-392.

Stepnowska, J. (2019). The Blood Antiquities Convention and Asian Cultural Property. A Remedy or Disappointment? The Case of Cambodia. *Gdańskie Studia Azji Wschodniej*. 15. Pp:133-140.

Stepnowska, J., Zeidler, K. (2018). The Case of Polish Museums Holding Cultural Objects "in Trust" after WWII. In O. Kaiser, C. Kostner-Pemsel, M. Stumpf (Eds.) *Treuhänderische Übernahme und Verwahrung*. Göttingen: V&R unipress GmbH.

Szafrański, W. (2010). Handel Dziełami sztuki w Polsce a gry rynkowe – zarys problematyki. In W. Kowalski, K. Zalasińska (Eds.) *Rynek sztuki: Aspekty prawne.* Warszawa: Wolters Kluwer.

Szafrański, W., Wilk, D. (2017). Sposoby czy metody? Aspekty podmiotowe i przedmiotowe wycen dzieł sztuki w Polsce. Ways or methods? Subjective and objective aspects of art valuation in Poland. *Santander Art and Culture Law Review* 1/2017 (3), pp: 115-156.

Szmelter, I. (2013). New Values of Cultural Heritage and the Need for a New Paradigm Regarding its Care. *CeROArt*: n.p. CeROArt. Web. 5 Mar 2019.

Szmelter, I., Ważny, (2019). Multi-Disciplinary Complex Research to Reconsider Basic Questions on Attribution and Dating of the *Last Judgment* Triptych from National Museum in Gdańsk by Rogier van der Weyden and Hans Memling. In A. Nevin, M. Sawicki (Eds.) *Heritage Wood*. Cultural Heritage Science. Springer, Cham.

Taşdelen, A. (2016). *The Return of Cultural Artefacts: Hard and Soft Law Approaches*. N.p.: Springer.

Tatarkiewicz, W. (1960). *Estetyka starożytna.* Wrocław: Zakład Narodowy Imienia Ossolińskich.

Tatarkiewicz, W. (1988). *Dzieje sześciu pojęć.* Warszawa: PWN.

The British Museum. (n.d.). Benin Bronzes. https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/benin-bronzes. Web. 19 Jan 2022.

Throsby, D. (2001). *Economics and Culture.* Cambridge: Press Syndicate of the University of Cambridge.

Tijhuis, E. (2011). The Trafficking Problem: A Criminological Perspective. In: Manacorda S., Chappell D. (eds) Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property. Springer, pp. 87-979.

Trioschi, A. (2018). The return of looted archaeological artifacts through the use of Alternative Dispute Resolution methods. Archeomafie, (n/v), 35-57.

UNESCO. (2006). Legal and Practical Measures Against Illicit Traffickingin Cultural Property UNESCO Handbook. United Nations Educational, Scientific and Cultural Organization International Standards Section Division of Cultural Heritage, 2006.

UNIDROIT. (1995). *The International Protection of Cultural Property Draft Final Provisions Capable of Embodiment in the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Notes.* Study LXX - Doc. 50. https://www.unidroit.org/english/documents/1995/study70/s-70-50-e.pdf. Web. 25 May 2023.

UNIDROIT. (2022). *PRIVATE ART COLLECTIONS – ORPHAN OBJECTS* Exploratory Expert Group Online meeting Geneva, 12 September 2022.

Urbinati, S. (2014). Alternative Dispute Resolution Mechanisms in Cultural Property Related Disputes UNESCO Mediation and Conciliation Procedures. In: *Art, Cultural Heritage and the Market. Ethical and Legal Issues.* Eds. Valentina Vadi and Hildegard E.G.S. Schneider, Verlag Berlin Heidelberg Springer.

Ursprung, H. W., Wiermann, C. (2008). *Reputation, Price, and Death: An Empirical Analysis of Art Price Formation*. Munich: CESifo.

Węgrzak, M. (2020). Zasady prawa ochrony dziedzictwa kultury w orzecznictwie sądów administracyjnych. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.

Vadi, V., Schneider, H. E.G.S. (2014). *Art. Cultural Heritage and the Market. Ethical and Legal Issues.* N.p.: Springer.

Van der Auwera, S. (2013). International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges. *The Journal of Arts Management, Law, and Society* 43(4), 175-190.

Veblen, T. (2012). *The Theory of the Leisure Class. An Economic Study of Institutions.* N.p.: Courier Corporation.

Velioglu, E., A.L. Bandle, A.L., M.A. Renold, M.A., Case Note Khmer Statue – Cambodia and Sotheby's and the United States, https://plone.unige.ch/art-adr/cases-affaires/khmer-statue-2013-cambodiaand-sotheby2019s-and-the-united-states/case-

note-khmer-statue-2013-cambodia-and-sotheby2019s-and-the-united-states/view. Web. 26 Nov 2018.

Velioglu, E., Chechi, A., and Renold, M. A. Case Portrait of a Young Peasant – Beyeler v. Italy. *Platform ArThemis*. Web. 7 Mar 2019.

Vickrey. W. (1962). Auctions and Bidding Games, Recent Advances in Game Theory. *Princeton University Conference*, 1962, pp. 15-29.

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

Walicki, M., Białostocki, J. (1990). *Hans Memling. Sąd Ostateczny*. Warszawa: Auriga. Oficyna Wydawnicza.

Walther, I. F. (2010). *Art of the 20th Century*. Koln: Taschen.

Warwick-Ching, L. (2012). Top tips for insuring artwork. Ensure you have the right cover for collectables. *Financial Times.* 17 Jan 2012. Web. 20 Nov 2018.

Wills, M. (2021). The Benin Bronzes and the Cultural History of Museums. *JSTOR Daily*. 22 May 2021. https://daily.jstor.org/the-benin-bronzes-and-the-cultural-history-of-museums/. Web. 04 Apr 2023.

Witkiewicz, S. I. (1922). *Szkice estetyczne*. Krakowska Spółka Wydawnicza.

Witkiewicz, S. I. (2019). *Nienasycenie: powieść. Cz. 2., Obłęd.* Wydawnictwo CM**.**

Witkowska-Mrozek, G. (2019). "Art Valuation in Law." Interview by J. Stepnowska. Unpublished.

World Heritage Centre. (2021). Operational Guidelines for the Implementation of the World Heritage Convention, WHC.21/01 31 July 2021. PDF. https://whc.unesco.org/en/guidelines/. Web. 07 Oct 2022.

Zajadło, J. (2008). *Fascynujące ścieżki filozofii prawa.* Warszawa: Wydawnictwo Prawnicze LexisNexis.

Zajadło, J., Zeidler, K. (2021). *Fascynujące ścieżki filozofii prawa 2 [Fascinating Paths of the Philosophy of Law 2]*, Warszawa: Wolters Kluwer. ISBN 978-83-8223-761-0.

Zalasińska, K. (2010). Wpływ zmiany przepisów dotyczących wywozu zabytków za granicę na rynek sztuki w Polsce. In W. Kowalski, K. Zalasińska (Eds.) *Rynek sztuki: Aspekty Prawne.* Warszawa: Wolters Kluwer.

Zangwill, N. (1995). The Beautiful, the Dainty and the Dumpy. *The British Journal of Aesthetics* 35.4: 317-329. Web. 5 Mar 2019.

Zaniewski, W. (2014). *Dokąd zmierza współczesna sztuka?* Gdynia: Novae Res.

Zeidler, K. (2004). Spór wartości w prawie ochrony dóbr kultury. In L. Leszczyński (Ed.) *Teoretycznoprawne problemy integracji europejskiej*. Lublin: UMCS.

Zeidler, K. (2016). *Restitution of Cultural Property: Hard Case - Theory of Argumentation - Philosophy of Law*. Gdańsk University Press – Wolters Kluwer.

Zeidler, K. (2020). *Aesthetics of Law*. Gdańsk – Warsaw: Gdańsk University Press – Wolters Kluwer.

Zeidler, K., Guss, A. (2021). The Protection of Cultural Heritage vs. the Right to Private Property: The Extraordinary Case of the Portrait of Dr. Gachet by Vincent van Gogh. Muzeológia a kultúrne dedičstvo, 9:4:57-68.

Zeidler, K., Łągiewska, M. (2020). Liberalism Versus Communitarianism in Cultural Heritage Law. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique,* 34(1), pp. 657–668.

Zeidler, K., Plata, A. (2019). The argumentative aspects of the Terezín Declaration and its place in public international law. In: V. Drbohlavova (Ed.) *Terezin Declaration - Ten Years Later, 7th International Conference, The documentation, identification and restitution of the cultural assets of WWII victims. Proceedings of an international academic conference held in Prague on 18-19 June, 2019, Documentation Centre for Property Pranksters of Cultural Assets of WWII Victims,* p.b.o., Prague 2019, ISBN 978-80-907507-1-5, e-ISBN 978-80-907507-2-2, pp. 25-31.

Zeidler, K., Zeidler, M. (2008). Rewindykacja gdańskich zabytków sakralnych, *Studia Prawnicze KUL,* nr 1.

Websites

https://advisor.museumsandheritage.com

https://archaeologicalethics.org

https://artsandculture.google.com

https://culture.ec.europa.eu

https://daily.jstor

https://dictionary.cambridge.org

https://digitalbenin.org

https://eur-lex.europa.eu

https://icomnathist.com/2014/02/09/an-introduction-to-icoms-code-of-ethics/

https://plato.stanford.edu

https://plone.unige.ch

https://polona.pl

https://thelawdictionary.org

https://whc.unesco.org

https://winstonartgroup.com

https://www.appraisersassociation.org

https://www.artnews.com

https://www.asanorcal.org

https://www.britishmuseum.org

https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/parthenon-sculptures/parthenon

https://www.coe.int/en/web/culture-and-heritage

https://www.etymonline.com

https://www.guggenheim.org

https://www.icomos.org/en/charters-and-texts/179-articles-en-francais/ressources/charters-and-standards/386-the-nara-document-on-authenticity-1994

https://www.interpol.int/en/Crimes/Cultural-heritage-crime/The-issues-cultural-property

https://www.iranicaonline.org/articles/jequier-gustave

https://www.lootedart.com

https://www.nytimes.com

https://www.parthenonuk.com

https://www.theartnewspaper.com
https://www.unidroit.org
https://www.unodc.org

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Summary

THE VALUE OF CULTURAL PROPERTY
THE 1995 UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS AS AN EXAMPLE OF A VALUE-BASED APPROACH TO CULTURAL PROPERTY RESTITUTION

Restitution of cultural property is perceived as a “hard case” in law. The question of where an item should be placed and by whom it should be owned is often not answered when looking at property rights. The resolution of restitution disputes often lies in the values attributed to a given object, which is why going beyond positive law is a necessary element of the analysis of restitution disputes.

The thesis of the dissertation is as follows: each restitution argument is a reflection of the values attributed to a given object, and these values refer to both collective and individual interests. The 1995 UNIDROIT Convention is a relatively new instrument of international law, and its provisions that take the values of cultural property into account, regardless of who it belongs to and whether it is classified as "cultural heritage." Due to its comprehensive nature and the impact on raising the level of international cooperation in the field of counteracting the illegal trade in cultural goods and creating standards on the art market, the 1995 UNIDROIT Convention was chosen as a reference point for creating a value-based restitution model.

The first level on which the values of cultural goods are analysed in this work is the linguistic layer of legal provisions, both in the area of cultural heritage law and, *inter alia*, intellectual property law. The definition and tone of terms used in different languages and sources vary by country and legal area. Therefore, in the first place, I set myself the goal of presenting the diversity of language choices in order to narrow the scope to one term, also used in the 1995 UNIDROIT Convention, and then analyse the provisions using this term. As a result of the analysis of the terms used in the translated texts, it can be concluded that even direct equivalents do not guarantee the same scope of application, and the term used should reflect the values to be protected, because individual terms do

not always cover their full scope. For this purpose, the meanings of such terms as: cultural heritage, cultural goods, monuments, national treasures, and even antiques were analysed and compared in order to indicate the diversity of values attributed to each of them. For simplicity and to avoid repetition, the terms: cultural goods, objects, and items were used interchangeably, if the context allowed it.

Secondly, the scope of the 1995 UNIDROIT Convention was analysed. The Convention is a comprehensive instrument focusing, firstly, on the importance of protecting cultural property, regardless of ownership, and secondly, listing due diligence measures, which are among the main elements of its impact on both cultural heritage law and the art market. This Convention, due to its comprehensive nature, was chosen as a point of reference for the analysis of individual provisions illustrating the value of cultural property as a basis for further implementation of restitution and/or return activities.

Drawing on the provisions of the Convention, a broader model of restitution was proposed, based on values, principles and arguments, in order to classify and organize ways of reasoning in the context of the restitution of cultural property. The model aims to create a catalog of values and the corresponding principles and arguments that facilitates the categorisation not only of restitution arguments, but also of the very values attributed to cultural goods. Since various examples of restitution and return require individual analysis, the model is a clear simplification of values, principles and arguments, but thanks to its structure, it allows readers and researchers to select and combine adequate elements of the model to build further argumentation and analysis of the value of cultural goods in the context of, among others, cultural heritage and other disputes.

Furthermore, selected case studies illustrating the different values followed by the parties to restitution disputes are presented. The cases included disputes originating not only in the 19th and 20th centuries, but also in more recent developments. They concern not only settled and pending lawsuits, but also hypothetical disputes. Thanks to this approach, it was possible to go beyond historical events and propose solutions that may be beneficial to both parties, e.g. in the case of property displaced as a result of territorial changes.

Selected disputes concern not only cultural heritage classified as “cultural heritage” within the meaning of international law, but also contemporary art with an unclear status, e.g. murals. The choice of this approach was dictated by the fact that the restitution and/or return of cultural goods is often associated with items of a specific historical status, which limits the way of perceiving the values attributed to cultural goods.

The 1995 UNIDROIT Convention not only addresses the problem of legal gaps between different systems, but also encourages international cooperation to find balanced solutions to restitution and/or return disputes. This thesis sets out the grounds for the creation of a value-based model of cultural property restitution. Cultural property, viewed as a unique set of elements, of both tangible and intangible value, is constantly being looted and destroyed. The cases of spoils of war or other items being illicitly trafficked regardless of the context of their removal from the original location, are not only linked to ownership issues, but also irreversible emotional damage caused to individuals and the society as a whole.

Cultural property restitution may be defined in many ways but, primarily, its goal is to limit the size of this damage. As hard as it may be, restitution of cultural property performed in respect of the value of the objects in question, for all parties involved in a dispute, may serve as a way of balancing the arguments on both sides. As a result of case study analysis, the main conclusion of the thesis is that when the same values and principles are applied to the object on both ends, the arguments may, respectively, lead to a balanced solution, regardless of the form of the process leading to its return.

The value-based model is a simplified, bullet-point collection of restitution arguments, cultural heritage law principles, and values assigned to cultural property that allows readers and researchers to select and combine adequate elements to develop further argumentation and analysis of the overall value of cultural property, not only in the context of cultural property restitution.

Streszczenie

WARTOŚĆ DÓBR KULTURY. KONWENCJA UNIDROIT O SKRADZIONYCH LUB NIELEGALNIE WYWIEZIONYCH DOBRACH KULTURY Z 1995 ROKU JAKO PRZYKŁAD RESTYTUCJI DÓBR KULTURY OPARTEJ NA WARTOŚCIACH

Restytucja dóbr kultury jest często tzw. trudnym przypadkiem w prawie (*hard case in law*). W wielu przypadkach odpowiedź na pytanie, gdzie powinien znaleźć się dany przedmiot, nie wynika jedynie z aktów prawnych dotyczących praw własności. Rozwiązanie sporów restytucyjnych często zależy od wartości, jakie przypisywane są danemu przedmiotowi, dlatego wyjście poza prawo pozytywne jest koniecznym elementem analizy sporów restytucyjnych.

Teza rozprawy jest następująca: każdy argument restytucyjny jest odzwierciedleniem wartości przypisywanych danemu dobru kultury, a wartości te odnoszą się zarówno do interesów zbiorowych, jak i indywidualnych. Konwencja UNIDROIT z 1995 r. stanowi jeden z najnowszych instrumentów prawa międzynarodowego, w którym można znaleźć przepisy uwzględniające wartości dóbr kultury, niezależnie od tego, do kogo należą i czy są klasyfikowane jako dziedzictwo kultury. Ze względu na swój kompleksowy charakter i wpływ na podnoszenie poziomu współpracy międzynarodowej w zakresie przeciwdziałania nielegalnemu obrotowi dóbr kultury i tworzenia standardów na rynku sztuki, Konwencja UNIDROIT z 1995 r. została wybrana jako punkt odniesienia do utworzenia modelu restytucyjnego opartego na wartościach.

Pierwszą płaszczyzną, na której w niniejszej pracy analizowane są wartości dóbr kultury, jest warstwa językowa przepisów prawnych, zarówno w obszarze prawa ochrony dziedzictwa kultury, jak i m.in. własności intelektualnej. Definicja i warstwa konotatywna terminów używanych w różnych językach i źródłach jest inna w zależności od państwa i obowiązującego w nim prawa krajowego. Dlatego w rozdziale pierwszym postawiłam sobie za cel przedstawienie różnorodności stosowanych pojęć, aby zawęzić zakres do jednego terminu, używanego właśnie w Konwencji UNIDROIT z 1995 r., aby następnie dokonać analizy przepisów wykorzystujących ten termin. Porównanie i analiza

terminów stosowanych w tłumaczonych tekstach pozwoliła dojść do wniosku, że nawet użycie bezpośredniego odpowiednika tłumaczonego pojęcia nie gwarantuje tego samego zakresu nazwy i tym samym zastosowania, a także nie zawsze oddaje wszystkie wartości, jakie powinny być chronione, uwzględniając przy tym perspektywę wielu grup społecznych lub konkretnych osób. W tym celu przeanalizowałam i porównałam znaczenia takich terminów, jak: dziedzictwo kultury, dobra kultury, zabytki, skarby narodowe, a nawet antyki, aby wskazać, jak różne wartości są przypisywanych każdemu z nich. Dla uproszczenia i uniknięcia powtórzeń terminy: dobra kultury, przedmioty, dobra i obiekty o charakterze kulturowym były używane zamiennie, jeśli kontekst na to pozwalał.

W drugim rozdziale dokonałam analizy zakresu Konwencji UNIDROIT z 1995 r. Jest ona kompleksowym instrumentem, który z jednej strony skoncentrowany jest na znaczeniu ochrony dóbr kultury, niezależnie od ich własności z drugiej zaś wskazuje środki zachowania należytej staranności, będące jednym z głównych elementów jej wpływu zarówno na prawo ochrony dziedzictwa kultury, jak i rynku sztuki. Konwencja ta, ze względu na swój kompleksowy charakter, została wybrana jako punkt odniesienia dla analizy poszczególnych przepisów obrazujących wartości dóbr kultury jako podstawy do dalszej realizacji restytucji i/lub zwrotu.

Opierając się na Konwencji, w rozdziale trzecim zaproponowałam szerszy model restytucji, oparty na wartościach, zasadach i argumentach. Model ten ma na celu stworzenie katalogu wartości przypisywanych dobrom kultury oraz odpowiadających im zasad i argumentów, co ułatwi skategoryzowanie nie tylko samych argumentów restytucyjnych, ale także poszczególnych wartości przypisywanych dobrom kultury. Ponieważ różne przykłady restytucji i zwrotu wymagają indywidualnej analizy, model jest oparty na generalizacji wartości, zasad i argumentów, jednak dzięki swojej strukturze pozwala dobierać i łączyć z sobą adekwatne elementy tego modelu, aby móc budować dalszą argumentację i analizę wartości dóbr kultury w realiach różnych sporów restytucyjnych.

W rozdziale czwartym zaprezentowałam wybrane studia przypadków ilustrujące różne wartości, na jakich opierają się strony-uczestnicy sporów restytucyjnych. Sprawy

obejmowały spory wywodzące się nie tylko z XIX i XX wieku, ale także nowsze zdarzenia. Dotyczą one zarówno rozstrzygniętych i toczących się procesów, jak i hipotetycznych sporów. Dzięki temu możliwe było wyjście poza wydarzenia historyczne i zaproponowanie rozwiązań, które mogą być finalnie korzystne dla wszystkich stron, np. jak w przypadku mienia przemieszczonego w wyniku zmian terytorialnych. Wybrane spory dotyczą nie tylko dóbr kultury sklasyfikowanych jako „dziedzictwo kultury" w rozumieniu prawa międzynarodowego, ale także sztuki współczesnej o niejasnym statusie, jak np. tzw. murale. Dobór przykładów podyktowany był faktem, że temat restytucji i/lub zwrotu dóbr kultury jest często kojarzony z dobrami o określonym statusie historycznym, co ogranicza sposób widzenia samych wartości przypisywanych dobrom kultury.

Konwencja UNIDROIT z 1995 r. nie tylko odpowiada na problem luk prawnych w różnych systemach normatywnych, ale także zachęca do współpracy międzynarodowej w celu znalezienia zrównoważonych rozwiązań dla sporów dotyczących restytucji i/lub zwrotu. W rozprawie doktorskiej został zaprezentowany model restytucji dóbr kultury oparty na wartościach. Dobra kultury postrzegane jako przedmioty o unikalnej, zarówno materialnej, jak i niematerialnej wartości, są nieustannie obiektem kradzieży i zniszczenia. Przypadki łupów wojennych lub nielegalnego obrotu, niezależnie od kontekstu ich usunięcia z pierwotnego miejsca, pociągają za sobą nie tylko problemy prawne, związane z kwestią własności, ale wywołują też nieodwracalne szkody o innym charakterze (emocjonalne) – wyrządzane jednostkom i całemu społeczeństwu.

Restytucję dóbr kultury można definiować na wiele sposobów, ale przede wszystkim jej istotą jest ograniczenie rozmiarów tych szkód. Choć może to być trudne, restytucja dóbr kultury dokonywana w oparciu o konkretne, jasno zdefiniowane wartości danego przedmiotu, określane dla wszystkich stron dyskursu, może przyczynić się do zrównoważenia argumentów ważonych w kontekście sporu. W wyniku analizy studium przypadków można sformułować następujący główny wniosek: gdy te same wartości i zasady prawa są przypisywane obiektowi przez obie strony sporu, wówczas argumenty mogą prowadzić do wyważonego rozwiązania, niezależnie od drogi dochodzenia i formy postępowania, w wyniku którego dobra mają zostać zwrócone.

Model oparty na wartościach zawiera uproszczony, uporządkowany zbiór argumentów restytucyjnych, zasad prawa ochrony dziedzictwa kultury oraz wartości przypisywanych dobrom kultury, co w konsekwencji pozwala wybrać i połączyć odpowiednie elementy w celu rozwinięcia dalszej argumentacji i analizy ogólnej wartości dóbr kultury, nie tylko w kontekście ich restytucji.