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Restitution of Looted Art: What About Access to Justice?

Abstract: While international conventions clearly establish the rule that misappropriated artefacts should be returned, the situation with respect to losses that predate these conventions is highly fragmented. The question of whose interests are given priority in title disputes that regard such losses – those of the former owner or a new possessor – vary per jurisdiction. Given the fragmented situation, international soft-law instruments promote an ethical approach and alternative dispute resolution (ADR) as a way of filling this "gap". A lack of transparent neutral procedures to implement and clarify soft-law norms has proven problematic in this regard. The questions raised in this paper are: why is ADR necessary; and what about guarantees in terms of access to justice in such an "ethical" framework? Two recent initiatives are discussed in this article: the European Parliament resolution of 17 January 2019 on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars; and the newly established Court of Arbitration for Art in The Hague.

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Introduction

"What is stolen should be returned" is probably one of the oldest legal principles.[1] When it comes to the return of artefacts stolen longer ago, the legal reality is less straight-forward. Given the reliance on non-binding soft law in this area and obstacles in the positive legal framework, the question of *how* former owners can have their stolen artefacts returned – in terms of access to justice – deserves further attention.

Often, an "ethical" approach and alternative dispute resolution mechanisms are promoted as the way to resolve such claims. Over the last decades, a body of international soft law has emerged in support of redress for losses of cultural objects in the course of what are now regarded as human rights violations, such as Nazi-looting[2] or takings from indigenous peoples.[3] On the other hand, such claims tend not to be supported by positive law, especially in civil law jurisdictions. Thus, grey categories of "tainted" artefacts have come into existence, where expectations have been raised that "justice" will be done – expectations that in many European countries cannot be fulfilled by relying on regular legal channels. On the practical level this means that certain artefacts cannot be sold or sent on international loans for as long as their title is not "cleared" by a settlement between the parties. And although market forces have come to fill in some of the gaps in the law, it is questionable whether this is a guarantee for justice. Problematic in this regard is the lack of transparent neutral procedures to implement and clarify the often vague soft-law norms, and a trend where "big" European restitution cases are brought before (US) foreign courts (forum-shopping).

In its 2019 resolution on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars ("the 2019 Resolution"), the European Parliament has addressed the problems claimants encounter in re-

[1] The duty to return objects obtained in violation of the law "can be found in the oldest known legislation, such as, for example, Eshnunna law going back to the middle of the twenty-third century BC". W.W. Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, "Recueil des cours de l'Académie de droit international de La Haye" 2002, Vol. 288, p. 28.

[2] Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998, https://www.state.gov/p/eur/rt/hlcst/270431.htm [accessed: 16.01.2019]. See E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes*, Eleven International Publishing, The Hague 2015.

[3] With respect to indigenous peoples' cultural property claims, see the UN Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295 (2007). See also E. Campfens, *The Bangwa Queen: Artifact or Heritage?*, "International Journal of Cultural Property" 2019, Vol. 26.

gaining their lost artefacts, with a focus on Nazi-looted art.[4] The resolution calls on the European Commission and Member States to support restitution claims by former owners. As a solution for *future* cases, the Parliament proposes the adoption of the principles of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("the 1995 UNIDROIT Convention").[5] With respect to cases that concern *past* losses – today's restitution cases – the resolution proposes (i) the introduction of general standards for provenance research; and (ii) the use of alternative dispute resolution mechanisms (ADR).[6] In other words, the European Parliament confirms the extra-legal "ethical approach" towards restitution claims: awareness-raising and voluntary ADR mechanisms. With regard to ADR, the resolution: "Calls on the Commission to consider establishing a specific alternative dispute resolution mechanism for dealing with cases of restitution claims of looted works of art and cultural goods in order to overcome existing legal obstacles, such as a hybrid form of arbitration and mediation" and "stresses the importance of clear standards and transparent and neutral procedures".[7]

The questions raised in this paper are: why is ADR necessary; what kind of ADR procedures are available; and can this ethical approach guarantee clear standards and neutrality, i.e. access to justice? This article sets out in the first section with an overview of the legal setting; followed by an examination of the ethical model that relies on soft law and ADR procedures in the second section.

Two recent initiatives are discussed in this article: Firstly the regulation initiative by the European Parliament; and secondly the newly established Court of Arbitration for Art in The Hague.

The Legal Setting

Artefacts cross borders and are meant to be kept over time, meaning that the laws of different times and places may be relevant to their legal status. Artefacts are also unique and have an intangible quality, although that may differ per setting: the same object that in the hands of a collector or museum is of aesthetic, monetary, or art-historical value, may be held sacred by the former owner, or it may be a symbol of a family history. In consequence, the legal framework based on such a variety of interests is highly fragmented.[8] Moreover, a basic notion in assessing the legal

[4] European Parliament resolution of 17 January 2019 on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (2017/2023(INI)), P8_TA-PROV(2019)0037, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0037+0+DOC+PDF+V0//EN [accessed: 23.04.2019].

[5] Ibidem, paras 11, 12.

[6] Ibidem, para. 15 and further.

[7] Ibidem, para. 21.

[8] The multi-layered and de-centralized structure of cultural property law is well explained in F. Fiorentini, *A Legal Pluralist Approach to International Trade in Cultural Objects*, in: J.A.R. Nafziger, R.K. Pater-

status of an artefact is that at times more than one party may have a legitimate interest. Whose interests are given priority varies per jurisdiction. What follows is a birds'-eye overview of legal approaches.

The international level

On the international level a clear choice was made for the principle that "the possessor of a cultural object which has been stolen shall return it", marking a victory for the interests of dispossessed owners over the interests of subsequent possessors.[9] This echoes and confirms the special status cultural objects have had since the beginning of international law as symbols of the identity of people: both the destruction of monuments and looting of cultural objects are prohibited during times of war or foreign occupation.[10] This prohibition arguably gained customary international law status in the 19th century and was codified in the 1899 Hague Convention.[11] After the massive plundering by the Nazi's during the Second World War, multilateral treaties firmly established the norm that looted artefacts should be returned to their original owners.[12]

In this conventional framework, with as its main pillar the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 Convention")[13], States are seen as "owners" of the cultural objects within their territory.[14] In such

son (eds.), *Handbook on the Law of Cultural Heritage and International Trade*, Edward Elgar, Cheltenham 2014, pp. 589-621.

[9] See e.g. Article 3(1) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322.

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

[11] Articles 46, 47, and 56 of the Regulations Concerning the Laws and Customs of War on Land, annex to the Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, 32 Stat. 1803. For more on the development of the norm, see E. Campfens, *The Bangwa Queen…*; on its customary status, Y. Zhang, *Customary International Law and the Rule Against Taking Cultural Property as Spoils of War*, "Chinese Journal of International Law" 2018, Vol. 17(4), pp. 943-989.

[12] In particular, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240 and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358.

[13] 14 November 1970, 823 UNTS 231.

[14] This state-centred approach may work well to combat the illegal trade in cultural objects, but does not answer the question who are, ultimately, "right-holders". See E. Campfens, *Whose Cultural Heritage? Crimean Treasures at the Crossroads of Politics, Law and Ethics*, "Art Antiquity and Law" 2017, Vol. 22(3), pp. 193-213; A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford 2014, p. 138; I.F. Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes*, Transnational Publishers, Ardsley, NY 2004, p. 52.

an approach, the legal status of artefacts depends on the national regulation of property and ownership, predominantly[15] a matter of state sovereignty. Likewise, Article 345 of the Treaty on the Functioning of the European Union leaves issues of "property ownership" to Member States, the reason why regulation of restitution of looted art on a European level is problematic.[16]

Aimed at the harmonization of national laws, in 1995 the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was adopted. It can be seen as a key compromise between civil law and common law jurisdictions, and its main principles include:

(i) Stolen cultural objects should be returned to their owners;[17]
(ii) Claims should be brought within three years from the time the location of the artefact and the identity of its possessor are known – with a maximum of 50 years from the time of the theft. No time limitation is set out if it concerns "a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection" or concerns "a sacred or communally important cultural object belonging to and used by a tribal or indigenous community as part of its community's traditional or ritual use";[18] and
(iii) A new possessor can claim compensation if his or her due diligence at the time of the acquisition can be proven, for which standards are set.[19]

These rules, however important for future restitution cases, only apply insofar as it concerns the loss of an artefact *after* ratification and implementation by States on the national level.[20] This means that many categories of stolen artefacts remain beyond the scope of their application: misappropriated artefacts tend to

[15] With the exception of the human right to property and rights of indigenous peoples to their cultural property. See further in this article.

[16] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". Article 36 exempts from free trade "national treasures possessing artistic, historic or archaeological value", and constitutes the basis for the 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.

[17] Article 3(1) of the 1995 UNIDROIT Convention.

[18] However, also for these categories limitations can be set up to 75 years. Articles 3(3), 3(5), and 3(8) of the 1995 UNIDROIT Convention.

[19] Article 4(4) of the 1995 UNIDROIT Convention: "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances".

[20] Article 10(1) of the 1995 UNIDROIT Convention: "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". Few Western European States ratified the Convention, see: https://www.unidroit.org/status-cp [accessed: 30.05.2019].

surface much later and, as a consequence, today's restitution cases deal with takings from the past.

In its 2019 Resolution, the European Parliament proposes the harmonization of laws through the adoption of certain principles of the 1995 UNIDROIT Convention.[21] That would indeed be an important step as it basically introduces – through its due diligence standards – a ban on the trade in un-provenanced artefacts, i.e. where a history of ownership is not fully documented. Possibilities for "laundering" stolen or looted artefacts in European countries would likewise be diminished. However, apart from the question as to the competence of the European Union to harmonize national ownership laws, implementation of the 1995 UNIDROIT Convention would not solve title disputes regarding artefacts that were lost *before* the implementation of the Convention. These cases would remain in limbo and older, incompatible national norms in European jurisdictions would continue to apply.[22] In other words, due to increased efforts to list potentially looted artefacts proposed in the 2019 Resolution more claims will be facilitated, while at the same time the question of *how* to resolve such claims remains unaddressed. In such cases, as mentioned in the Introduction, the 2019 Resolution merely proposes an ethical approach and alternative dispute resolution procedures.

The legal situation will be illustrated hereafter by a discussion of some case examples, to be followed by an appraisal. A sketch of the ethical framework of soft law and ADR initiatives in this field will be given in the second part.

Different national approaches

A common denominator in art restitution cases based on a past loss is that the relevant facts are spread out over many years and involve multiple jurisdictions, whereas national laws differ widely.[23] This is at the core of what causes title disputes over looted or stolen artefacts to be so complex and unpredictable. Common law countries, and most notably the US legal system, accord relatively strong rights to the dispossessed former owner on the basis of the principle that a thief cannot convey good title (the *nemo dat* rule), whereas in countries with a civil law tradition (most European countries with the exception of the UK and Ireland), the position of the new possessor is stronger and a valid legal title can be obtained over stolen artefacts if they were acquired in good faith, or even just by the passage of time.[24] This may cause a clash of norms and tension in the legal framework.

21 European Parliament resolution of 17 January 2019..., paras 11, 12.

22 Article 10(1) of the 1995 UNIDROIT Convention.

23 For a general overview of the obstacles to restitution, see B. Schönenberger, *The Restitution of Cultural Assets*, Eleven International Publishing, Berne 2009, chapter 4.

24 Time limitations may start to run from the moment of the loss of property, or from the moment of discovery of the object (or when one would reasonably have been able to discover it); or – as under New York – from the moment of "demand and refusal". See B. Schönenberger, op. cit.; A. Chechi, op. cit., p. 89.

The opposite outcomes reached in very similar Dutch and UK cases regarding Second World War looting may serve as illustration. While the Dutch Supreme Court denied a claim to a painting looted from Dresden in the aftermath of the Second World War by the Red Army in its 1998 *Land Sachsen* ruling, the UK High Court honoured a similar claim in the *City of Gotha* case the same year.[25] The Dutch court argued it had no choice but to apply the absolute (30-year) limitation period for ownership claims, which dated from the moment of the loss and runs irrespective of the good or bad faith of the present possessor. The court in the UK, on the other hand, honoured the claim, observing that it would have invoked the public order exception if German law would have implicated a ruling in favour of a possessor that was not in good faith.[26]

A case concerning Camille Pissarro's 1897 depiction of a Paris street scene, *Rue Saint-Honoré, Après-midi, Effet de Pluie*, at the centre of litigation in the US for almost 14 years, may illustrate this point in more depth.[27] Today, the Pissarro painting is part of the Thyssen-Bornemisza Museum in Madrid. However, it once belonged to Jewish art collector Lilly Cassirer Neubauer, who was forced to sell it just before her escape from Germany in 1939. After the war, it surfaced in the US and changed hands several times before Baron Thyssen-Bornemisza acquired it from a New York dealer in 1976. He brought the Pissarro to Switzerland, after which the Spanish State acquired it as part of the Baron's art collection in 1993. Whereas the first years of the litigation revolved around the question whether a US court had jurisdiction over property of the Spanish State – foreign States' property usually being immune – the next question was which law should apply – Spanish or US law? In its 2015 ruling Judge Walter held that according to conflict rules Spanish law should be applied, which was a (temporary) victory for the museum, inasmuch as the doctrine of acquisitive prescription under Spanish law – as in many European countries – would mean that ownership of the painting passed to the museum.[28] In a July 2017 appellate ruling, the choice of Spanish law was confirmed, however the question was raised whether the museum can be seen as an "accessory to the theft" (*encubridor*) under article 1956

[25] Supreme Court (the Netherlands), *Land Sachsen*, Judgment of 8 May 1998, ECLI:NL:HR:1998:ZC2644; High Court (United Kingdom), *City of Gotha e.a. v. Sotheby's and Cobert Finance SA*, Judgment of 9 September 1998. For a similar US case, see: *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2nd Cir. 1982).

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

[27] Claude Cassirer, the grandson of Lilly Cassirer, filed the law suit in 2005 in California. The first rulings confirmed the US Foreign Sovereign Immunity Act's exception to sovereign immunity for lawsuits concerning rights to property taken in violation of international law. Two rulings on appeal confirmed this: *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).

[28] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. CV 05-3459-JFW-E (C.D. Cal. 2015).

of the Spanish Civil Code, which might mean the painting could still be claimed as stolen property.[29] On referral in its 30 April 2019 ruling the district court concluded, albeit very reluctantly, that the Thyssen-Bornemisza Museum acquired lawful ownership according to Spanish law.[30]

Interestingly Judge Walter advised the parties, in an *obiter dictum* in the 2015 ruling, to "pause, reflect and consider whether it would be appropriate to work towards a mutually agreeable resolution (…) in light of Spain's acceptance of the Washington Conference Principles (…), and its commitment to achieve just and fair solutions for victims of Nazi persecution".[31] Apparently Spanish law on this point was not considered to be "just and fair"; hence the advice that the parties consider resolving their dispute in an alternative way.[32]

Given the course of the earlier *Altmann* litigation (2001-2004) – a case that indeed was eventually solved by arbitration – this may not be surprising.[33] The *Altmann* case dealt with six paintings by Gustav Klimt – amongst them the famous *Lady in Gold* – of the Viennese Jewish Bloch-Bauer family who had been persecuted by the Nazis. The paintings had come into the possession of the Austrian National Gallery, which had refused to return them to the family ever since the Second World War, amongst other reasons because they were protected "national treasures". The case is considered seminal because it opened the doors of US courts to claimants seeking redress against foreign nations or institutions, even though foreign States and their acts would normally be exempt from jurisdiction in another State. The implication of the US Supreme Court's 2004 ruling is that, in spite of the immunity provided for by the Foreign Sovereign Immunity Act (FSIA), Nazi confiscations fall under an exception.[34] This exception "abrogates sovereign immunity in any case where rights in property *taken in violation of international law* are in issue and that property (…) is owned or operated by an agency or instrumentality

[29] According to the verdict, 26 years after acquisition by the Spanish State. US Court of Appeals, Ninth Circuit, *Cassirer v Thyssen-Bornemisza Collection Foundation*, Nos. 15-55550, 15-55977, 15-55951 (9th Cir. 2017), pp. 29-30.

[30] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 05-CV-03459 (C.D. Cal. 2019); E. Pettersson, *Spanish Museum Can Keep Nazi-Looted Masterpiece, Judge Rules*, "Bloomberg News", 1 May 2019, https://www.bloomberg.com/news/articles/2019-04-30/spanish-museum-can-keep-nazi-looted-masterpiece-judge-rules [accessed: 1.05.2019].

[31] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. CV 05-3459-JFW-E (C.D. Cal. 2015).

[32] Something according to the news report reiterated in the April 2019 ruling: "The court has no alternative (…) and cannot force the Kingdom of Spain or the TBM to comply with its moral commitments".

[33] In this case several court rulings led to two arbitral awards: *Maria V. Altmann v. Republic of Austria et al.*, 142 F. Supp. 2d 1187 (CD Cal. 2001); *Maria V. Altmann v. Republic of Austria et al.*, 317 F. 3d 954 (9th Cir. 2002), as amended, 327 F. 3d 1246 (2003); *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S. 677 (US 2004). For an overview, see C. Renold et al., *Case Six Klimt Paintings – Maria Altmann and Austria*, Platform ArThemis, March 2012, http://unige.ch/art-adr [accessed: 23.04.2019].

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

of the foreign state and that agency or instrumentality is engaged in *a commercial activity* in the United States".[35] As to this last condition, the availability of a museum catalogue in the US was deemed sufficient. Such a low threshold may illustrate the US courts' readiness to claim jurisdiction over Holocaust-related cases.[36] Interesting too is the rejection by the California District Court in 2001 of the plea by Austria that the matter should have been litigated in Austria (the US being a *forum non conveniens*). The court found that: "Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years. (…) [Then] she would be left without a remedy; clearly, therefore, Austria is not an adequate alternative forum for Plaintiff's claims".[37] After this victory, the Austrian government agreed to arbitration and eventually returned five of the six Klimt paintings to Maria Altmann, the Bloch-Bauer heir.[38]

A similar clash of laws as in the *Pissarro* case was at issue in the *Malewicz v. City of Amsterdam* case.[39] This case revolved around a claim by the heirs of the painter Malewicz to 14 of his paintings in the Amsterdam Stedelijk Museum collection which had been on temporary loan in the US, on the grounds that the painter had been forced to leave them behind in Berlin in 1927 and could not retrieve them as a result of persecution by the Bolsheviks.[40] Two court rulings made it evident that the position of the City of Amsterdam that it was the legitimate owner of the paintings, was not looked upon favourably by the judges in New York. The City of Amsterdam argued that title had passed on grounds of acquisition in good faith of the collection from a relative of Malewicz in 1958, and that even if that sale would not be valid, the absolute prescription periods under Dutch law would render a claim time-barred. Similarly as in the *Altmann* case, the American judge ruled in favour of the former owners and stated that the taking of the paintings without paying compensation to the "true owner" is a violation of international law – referring to the human right to property – and therefore the facts provided a sufficient basis for jurisdiction by a US court.[41] The *Malewicz* case was also eventually settled out

[35] As cited in *David L. de Csepel et al. v. Republic of Hungary et al.*, No. 10-1261 (ESH), Memorandum Opinion, U.S. Dist. (C.D. Columbia, 14 March 2016), at p. 28 (emphasis added).

[36] B. Schönenberger, op. cit., p. 213, in fn. 1102 cites from a review by G. Cohen of the book by M.J. Bazyler (*Holocaust Justice*, New York/London 2003): "The author (…) posits that the 'real hero' is the American justice system, the only forum in the world where Holocaust claims can be heard today".

[37] *Maria V. Altmann v. Republic of Austria et al.*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001), 1209.

[38] Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, 15 January 2004, http://bslaw.com/altmann/Klimt/award.pdf [accessed: 1.04.2019]; Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, 6 May 2004, http://bslaw.com/altmann/Zuckerkandl/Decisions/decision.pdf [accessed: 1.04.2019].

[39] *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007) and *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005).

[40] A. Chechi, E. Velioglu, M.-A. Renold, *Case 14 Artworks – Malewicz Heirs and City of Amsterdam*, Platform ArThemis, December 2013, http://unige.ch/art-adr [accessed: 23.04.2019].

[41] *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007), 340. On this point see also *David L. de Csepel et al. v. Republic of Hungary et al.*, p. 28.

of court, in this instance with the help of a neutral third party who mediated a settlement.[42] Under the settlement, five paintings were returned to the ownership of the heirs, while the heirs acknowledged legal title of the City of Amsterdam to the remainder of the collection in the Stedelijk Museum.[43] The settlement agreement of 2008 acknowledges, on one hand, the circumstances that prevented Malewicz from returning to his artworks and the interests of the heirs while, on the other hand, it aims at keeping "such a part of the collection together, that in essence it embodies a representation of and homage to Malewicz as one of the major artists of the twentieth century and as a leading source of modern and contemporary art".[44] This guaranteed the continued public exhibition by the Amsterdam Stedelijk Museum of a considerable collecton of Malewicz works.

As the *Malewicz* case was not the first restitution claim that revolved around paintings that were on loan in the US,[45] anxiety in the museum world that these developments would hinder cross-border loans resulted in the adoption of a law aimed at providing greater security for foreign museums sending their works on loan to the US: the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.[46] Nevertheless, under this law two important exceptions apply. The first exception concerns "Nazi-era claims", and the second concerns artefacts "taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group". In other words, owing to these exceptions the door of the US judiciary remains open to cases alleging property takings in the course of human rights violations.[47]

As a final example of the willingness of US courts to assess such claims, the 2016 ruling in *Simon v. Republic of Hungary* should be mentioned.[48] In this case

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

[43] Settlement Agreement between the Municipality of Amsterdam and the Malewicz heirs of 24 April 2008; on file with the author.

[44] Ibidem, under g and h.

[45] A similar case concerned Egon Schiele's *Portrait of Wally*, seized while on loan from the Leopold Museum in Austria for a temporary exhibition in New York: *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009). N. van Woudenberg, J.A.R. Nafziger, *The Draft Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purpose*, "International Journal of Cultural Property" 2014, Vol. 21(4), pp. 481-498.

[46] 16 December 2016, PL 114-319.

[47] I. Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, Lawfare, 2 January 2017, https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act [accessed: 23.04.2019].

[48] *Simon v. Republic of Hungary*, No. 14-7082 (D.C. Cir. 2016): "Such takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as themselves genocide".

the court argued that confiscation of private property – in this instance not artefacts – can, in itself, constitute genocide and therefore violates international law. This case concerned confiscations by the Hungarian Wartime authorities. And although this interpretation of the term "genocide" seems inconsistent with the generally-accepted notion of genocide,[49] it may underline that such cases are approached in the US from the perspective of fundamental human rights.[50]

The above overview may also illustrate that European civil law jurisdictions tend to protect the acquired interest of new possessors of artefacts. With respect to Holocaust takings, one reason for tension within the European legal framework is the expiration of post-war restitution laws that were enacted in an attempt to return looted art to the victims of Nazi-plundering after the Second World War.[51] At times such laws may still apply.[52] In France, for example, the Tribunal de Grande Instance de Paris ruled that the painting *Pea Harvest* by Camille Pissarro should be returned to the grandson of Jewish art collector Bauer, who had lost his collection through confiscation by the Vichy government in 1943 and this ruling was upheld on appeal.[53] Generally speaking however, the 2018 German court ruling

[49] In its *Genocide* case (2007), the International Court of Justice (ICJ) concluded that: "(…) the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports, 2007, p. 43. See also the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[50] Jayme argues, on the basis of the *Altmann* cases, that the retroactive application of human rights calls for the restitution of Nazi-confiscated artworks held by State-owned museums. E. Jayme, *Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?*, "Uniform Law Review" 2006, Vol. 11(2).

[51] For more on post-war restitution laws, see: E. Campfens, *Sources of Inspiration: Old and New Rules for Looted Art*, in: E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes*, Eleven International Publishing, The Hague 2015, pp. 21-26. In the Netherlands, for example, claims had to be filed before July 1951. Regulation concerning Article 21 of Law KB E 100 "Koninklijk Besluit Herstel Rechtsverkeer", as published in the Dutch Staatscourant (Official Gazette) of 27 December 1950, no. 251, p. 5.

[52] In France courts held claims admissible on the grounds of a "void" transaction, see the *Gentili di Giuseppe* case (Court of Appeal [France], 1st Division, Section A, *C. Gentili di Giuseppe e.a. v. Musee du Louvre*, 2 June 1999) and the Bauer case discussed hereafter. In the German *Hans Sachs Poster collection* case a claim was honoured on grounds that it had been impossible for claimant to meet deadlines earlier (Bundesgerichtshof V ZR 279/10, 16 March 2012).

[53] Tribunal de Grande Instance de Paris, *Bauer e.a. v. B. and R. Toll*, Judgment of 7 November 2017, No. RG 17/587/35, no. 1/FF; upheld in appeal on 2 October 2018, V. Noce, *Paris Court Orders US Collector to Turn over Pissarro Painting*, "Art Newspaper", 3 October 2018, https://www.theartnewspaper.com/news/paris-court-orders-us-collector-to-turn-over-pissarro-painting [accessed: 30.04.2019]. Previously, on 8 November 1945, a Paris court had ruled the confiscation of the painting – from Simon Bauer – to be null and void. See Judgment of 7 November 2017, p. 4.

that denied a claim to a painting by Max Pechstein from the collection of Jewish art collector Robert Graetz, lost as a result of Nazi persecution, seems more representative of legal systems in Europe.[54] As the German ruling explains: When the law is clear on the matter of ownership and limitation periods for claims, the hands of a judge are tied.

Obviously, regulations concerning time limits for claims serve a purpose. In the interest of legal certainty, at some point in time the legal reality adapts itself to the prevailing situation, and those who acquired an object in good faith for a reasonable price may gain valid legal title. The American couple that had acquired the Pissarro from Christie's in New York in 1995 for $800,000 and had to part from it without compensation – on the basis of the French ruling – certainly did not agree that the outcome was "pure justice". While the verdict was being welcomed by the representative of the claimants with these words, they voiced their discontent by stating that: "It surely is not up to [us] to compensate Jewish families for the crimes of the Holocaust".[55] This leaves open the question of the "just and fair" balance of the interests of the original owner against those of a subsequent possessor.

Tension may also arise as a result of cultural differences and unknown forms of (collective) ownership unknown forms of (collective) ownership of cultural property may not be recognized in foreign courts. In December 2018, for example, the Amsterdam District Court denied a claim by two Chinese villages seeking the return of a stolen sacred Buddha statue with the special feature of carrying a mummy inside. The statute was allegedly stolen from a local temple in 1995 and, in 1996, was bought in Hong Kong by a Dutch collector. Without addressing the many difficult substantive issues raised by the case the claim was dismissed on the grounds that the status of the village committees as a legal entity and owner of the statute was unclear.[56] Similarly, a claim by the Hopi tribe in 2013 French litigation aimed at preventing an auction in Paris of their sacred "Katsina", masks that represent incarnated spirits of their ancestors, based on their communal and inalienable rights, was deemed inadmissible and reason for denial.[57]

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

[55] A. Quinn, *French Court Orders Return of Pissarro Looted by Vichy Government*, "The New York Times", 8 November 2017, http://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html [accessed: 16.01.2019]. According to the representative of the Toll couple, Ron, the contract with Christie's stands redress "upstream" in the way.

[56] Amsterdam District Court, Judgment of 12 December 2018, ECLI:NL:RBAMS:2018:8919.

[57] The auction was considered legitimate since their claim has no legal basis in French law. Tribunal de Grande Instance de Paris, *Association Survival Interantional France v. S.A.R.L. Néret-Minet Tessier Sarrou* (2013), No. RG 13/52880 BF/No. 1.

Appraisal of the present legal framework for restitution cases

Although human rights law notions seem to gain importance, claims to artefacts lost in the past are predominantly approached as a matter of stolen property and thus rely on national private law. There is a discrepancy between the approach in the US and Europe. In the US, where the interests of original owners of stolen artworks are traditionally taken more into consideration, courts are willing to assume jurisdiction, even if the case concerns artefacts in European collections.[58] In Europe, the situation is fragmented. At times, national laws offer a loophole in specific cases (as in the *Bauer* case). But often, cases are settled, provided that the parties are willing, in accordance with the "ethical" approach. In such a situation settlements will depend on the bargaining chips brought to the table by the parties.[59] And one of such bargaining chips may be the possibility of taking "big" cases to the US for costly and lengthy litigation.

In this regard, the following statement in the 2016 US Holocaust Expropriated Art Recovery (HEAR) Act – establishing an extended federal (uniform) limitation period of six years after the actual discovery of an object subject to claims as Nazi-confiscated art – is of importance:[60]

> While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.[61]

The rationale is that parties should attempt, seriously and in good faith, to resolve their dispute by means of ADR before resorting to litigation in the US. In arguing that a US court is not the proper forum to litigate a claim concerning artefacts in European museums before local remedies have been exhausted – the *forum non conveniens* argument – it would be important to have efficient and authoritative procedures in place.[62] In that sense, the establishment of a European ADR commit-

58 For a listing, see E. Campfens, *Nazi-looted Art: A Note in Favour of Clear Standards and Neutral Procedures*, "Art Antiquity and Law" 2017, Vol. 22(4), pp. 339-342.

59 F. Shyllon, *The Rise of Negotiation (ADR) in Restitution, Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure*, "Art Antiquity and Law" 2017, Vol. 22(2), pp. 130-142.

60 Holocaust Expropriated Art Recovery Act of 2016 (S.2763), 114th Congress (2015-2016), 2nd session, 1 April 2016. This means, basically, that such claims can be considered on their merits.

61 Section 8 of the HEAR Act.

62 "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law (…). Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system". *Interhandel case* (*Switzerland v. United States of America*), Preliminary Objections, 1959 ICJ 6, pp. 26-27.

tee with certain guarantees as to due process would reduce the need to instigate cases overseas.

The "Ethical" Framework

Since the end of the last century, the adoption of various soft-law instruments in the field of art restitution underscores a need for new international rules in this field. Ethical codes, professional guidelines, and declarations tend to have a similar pattern, one that focuses on (i) equitable solutions for title disputes that take the interests of former owners into account; and (ii) the use of ADR mechanisms to resolve claims.[63]

The following section provides a discussion of such soft-law instruments and their referral to specific ADR procedures. This is followed by a closer look at two institutionalized procedures in this field – the Binding Opinion Procedure of the Dutch Restitutions Committee, a national procedure established for the assessment of Nazi-looted art claims; and the recently-established international Court of Arbitration for Art, a private initiative.

Soft-law instruments

Soft-law in the field of Nazi-looted art, the most well-settled category of restitution claims, follows the above outline promoting equitable solutions by means of ADR.[64] The referral by Judge Walter in the Spanish/US *Pissarro* case mentioned above highlights their impact. With the adoption of the Washington Principles, 40 States agreed to assist parties in finding "just and fair" solutions to ownership disputes that regard Nazi-confiscated art. The relevant rule reads as follows:

> If the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.[65]

ADR mechanisms are advocated in Principle no. 9: "Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues". Their adoption instigated a practice of settlements and returns, initially restricted to national public collections, but soon followed by the private sector.[66] Today,

[63] For more co-operative solutions, see: M.-A. Renold, *Cultural Co-ownership: Preventing and Solving Cultural Property Claims*, "International Journal of Cultural Property" 2015, Vol. 22(2-3), pp. 163-176.

[64] *Washington Conference Principles…*

[65] Washington Principle no. 8.

[66] E.g., a 26 November 2018 German/US Joint Declaration Concerning the Implementation of the Washington Principles from 1998 states that: "Both our governments recognize that the Washington Principles and Terezin Declaration apply to public *and private* collections, although we recognize the latter presents

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

While this extra-legal "ethical" approach can overcome legal obstacles that today are seen as leading to immoral outcomes, given the special circumstances of the loss, such an approach nonetheless has a drawback: the field is hampered by a lack of clear rules and compliance mechanisms.[67] Some believe a "fair and just solution" means the full restoration of property rights – a straightforward and absolute right on the part of dispossessed owners to restitution of their lost property. Others believe interests of other parties should also be weighed to reach a "fair and just" solution.[68] Likewise, views on what exactly is "Nazi-looted art" differ. While it is well-understood that the confiscation of artefacts on basis of racial (Nazi) laws, theft, and forced sales fall under the notion, some argue that sales in neutral countries by Jewish refugees – having an indirect causal relation with the Nazi regime – should also be considered as forced sales.[69] Furthermore, while in the post-war system restitution was restricted to personal property, today artefacts sold in business transactions by art-dealers also fall under the notion of looted art.[70] Clearly the norm is widening, and is also applied to wartime losses at the hands of others than the Nazis.[71] The twin-pronged question is: In what direction is it evolving and who is to clarify these rules?

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a particular challenge. We therefore call on art auction houses and other private dealers in each of our countries to adhere to the Washington Principles, taking note of positive examples set by some auction houses and art dealers in handling possible Nazi-looted artworks" (emphasis added), https://www.lootedart.com/web_images/pdf2018/2018-11-26-gemeinsame-erklaerung-washingtoner-prinzipien-engl-data.pdf [accessed: 6.12.2018].

67 E. Campfens, *Nazi-looted Art…* It has also not been clarified by later international declarations, such as: Resolution 1205 of the Council of Europe "Looted Jewish cultural property", 5 November 1999, https://www.lootedart.com/MG7Q8X93594 [accessed: 23.04.2019]; Vilnius Forum Declaration, 5 October 2000, http://www.lootedart.com/MFV7EE39608 [accessed: 23.04.2019] (signed by 38 governments), and the Terezin Declaration, 30 June 2009, https://www.lootedartcommission.com/NPNMG484641 [accessed: 23.04.2019], with 46 signatory States. For an overview, see E. Campfens, *Sources of Inspiration…*, p. 37.

68 See, e.g., the commotion over a Dutch decision that held that the interest of the museum outweighed the interests of former owners (discussed below). See C. Hickley, *Dutch Policy on Nazi-loot Restitutions Under Fire*, "The Art Newspaper", 21 December 2018, https://www.lootedart.com/news.php?r=TETJ4L309041 [accessed: 23.04.2019].

69 Examples in E. Campfens, *Nazi-looted Art…*, pp. 23-26.

70 Law No. 59 of the Military Government in Germany, US Zone, in: United States Courts of the Allied High Commission for Germany, *Court of Restitution Appeals Reports*, 1951, pp. 499-536. Article 19 provides that *no* right to restitution of property exists if it was sold "in the course of an ordinary and usual business transaction in an establishment normally dealing in that type of property"; an exception was made for sales of artefacts from *private property* "of artistic, scientific or sentimental personal value" (emphasis added).

71 E.g. Reports of the Spoliation Advisory Panel regarding the *Beneventan Missal* of 23 March 2005 and 15 September 2010; Recommendation of the Dutch Restitutions Committee 1.152 regarding *Krasicki* of 20 February 2017.

It has been argued that a similar instrument to the Washington Principles should be developed for restitution claims that concern colonial takings.[72] And on the national level – in France, the Netherlands, and Germany – guidelines and declarations of this type have recently been adopted.[73] Obviously, this demonstrates a political will to act. It should be noted, however, that the Washington Principles *themselves* are not more specific or legally binding than already existing soft-law instruments in the field. Some examples of these follow below.

Insofar as it concerns claims where museums are involved, the 1986 International Code of Ethics adopted by the International Council of Museums (ICOM), for example, gives guidance.[74] Most museums are members of ICOM and are expected to adhere to the principles adopted in the ethical code. Similar to the approach outlined above, these guidelines state that with regard to restitution issues, museums should collaborate with source communities. Insofar as this concerns claims, the provisions encourage readiness to enter into dialogue, preferably on a non-governmental level. The relevant provisions read as follows:

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

Another instrument that provides guidelines is the 2006 Principles for Co-operation in the Mutual Protection and Transfer of Cultural Material.[75] Adopted

[72] J. van Beurden, *Treasures in Trusted Hands: Negotiating the Future of Colonial Cultural Objects*, Sidestone Press, Leiden 2017; also: Herrmann Parzinger, President of the Stiftung Preussischer Kulturbesitz in the "Frankfurter Allgemeine Zeitung" of 25 January 2018.

[73] In France, recommendations were presented but not yet policy lines; see the press release: *Remise du rapport Savoy/Sarr sure la restitution du patrimoine africain*, 23 November 2018, https://www.elysee.fr/emmanuel-macron/2018/11/23/remise-du-rapport-savoy-sarr-sur-la-restitution-du-patrimoine-africain [accessed: 23.04.2019]; German: *Eckpunkte zum Umgang mit Sammlungsgut aus kolonialen Kontexten*, 13 March 2019, https://www.kmk.org/aktuelles/artikelansicht/eckpunkte-zum-umgang-mit-sammlungsgut-aus-kolonialen-kontexten.html [accessed: 23.04.2019]; for the Dutch guidelines, see: https://www.volkenkunde.nl/en/about-volkenkunde/press/dutch-national-museum-world-cultures-nmvw-announces-principles-claims [accessed: 23.04.2019].

[74] See 6.2 (Return of Cultural Property) and 6.3 (Restitution of Cultural Property). The ICOM Code of Professional Ethics was adopted by the General Assembly of the International Council of Museums on 4 November 1986, retitled ICOM Code of Ethics for Museums in 2001 and revised in 2004. https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf [accessed: 29.03.2019].

[75] International Law Association, Report of the Seventy-second Conference (2006). Annex to J.A.R. Nafziger, *The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*, "Chi-

by the International Law Association, they emphasize a general duty on the part of institutions and governments to enter into "good-faith negotiations" regarding restitution claims by persons, groups, or States. The principles also list what should be taken into account during those negotiations, namely "(…) the significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting state, and protection of the cultural material".[76] Insofar as concerns the outcome, a focus is placed on "caring and sharing": the alternatives to outright restitution mentioned include loans, production of copies, and shared management and control.[77] Two categories are singled out: Principle 4 sets out the obligation "to respond in good faith and to recognize claims by indigenous groups or cultural minorities whose demands are not supported by their national governments"; whereas Principle 5 confirms the special status of human remains with a straightforward obligation of repatriation.

Indigenous Peoples' cultural property claims form a category that increasingly is acknowledged as a matter of international human rights law. For this category, the adoption in 2007 – after 20 years of negotiations – of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is of major importance.[78] The primary obligation is for States to "provide redress, (…) which may include restitution, with respect to cultural property taken without their free, prior and informed consent".[79] Beyond emphasizing the need for redress, it also obliges States to set up "fair, transparent and effective mechanisms" to address claims. Given the fact that in many (civil law) jurisdictions new possessors gained valid legal ownership/title, States seem to have the choice to either (i) arrange by law for expropriation and restitution; or perhaps more feasibly as a first step, to (ii) provide assistance in finding solutions through the setting up of transparent ADR mechanisms.[80]

Apart from these instruments, numerous UN and UNESCO declarations underline the importance of return of (a representative part of) a country's lost cultural patrimony.[81] In this regard, in 1978 the UNESCO Intergovernmental Committee (ICPRCP) was established to assist Member States with return requests that

cago Journal of International Law" 2007, Vol. 8(1), p. 159. Nafziger states that current practice is the jurisprudential basis.

[76] Ibidem, Principle 8.

[77] Ibidem, Principle 3.

[78] Articles 11(2) and 12(2) of the UNDRIP.

[79] Ibidem.

[80] See also E. Campfens, *The Bangwa Queen…*

[81] For an overview of UN Resolutions, see http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/united-nations/ [accessed: 29.04.2019].

concern cultural property "which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation".[82] In various UN Resolutions attention is drawn to the services of the ICPRCP, and the 2015 Operational Guidelines to the 1970 UNESCO Convention reiterate this.[83] Notwithstanding this appreciation and the introduction of a special mediation procedure, the relatively low number of cases referred to the Committee indicates that the state-centred approach of the ICPRCP creates a political setting that may not *per se* be suitable to resolve these matters.[84] It therefore mainly acts as a forum for best practice examples and for governments to state certain claims.

Alternative Dispute Resolution mechanisms

In the context of cultural property claims, adversarial litigation is generally considered a last option, to be entered into only after good-faith negotiations and ADR mechanisms and procedures have been exhausted.[85] Their specific nature and the complex moral, legal, and practical issues that are involved are often cited as reasons. Apart from different property laws, notions on which artifacts can and cannot be traded freely may cause a clash.

The main reason for resorting to ADR is that positive legal standards will not provide the redress promised in soft-law instruments.[86] Consequently, international organizations such as UNESCO and ICOM promote the use of alternative

[82] UNESCO General Conference, 20th Session, *Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*, adopted by 20 C/Resolution 4/7.6/5, Paris, 24 October-28 November 1978, Article 2.

[83] See, e.g., United Nations General Assembly Resolution No. 67/80, 12 December 2012, A/RES/67/80, para. 18. UNESCO, *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970)*, May 2015.

[84] Cf. A. Chechi, op. cit., pp. 104-106. The General Conference of UNESCO adopted, at its 33rd session (Paris, October 2005), 33 C/Resolution 44v adding mediation and conciliation to the mandate of the Intergovernmental Committee.

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

[86] As was illustrated by the examples in the first section. See also C. Woodhead, *Nazi Era Spoliation: Establishing Procedural and Substantive Approaches*, "Art Antiquity and Law" 2013, Vol. 18(2), pp. 167-192. In the UK, for example, the Spoliation Panel is not an alternative method – it is the sole way to resolve Nazi-era claims on their merits.

procedures in cultural property disputes.[87] Below are some comments on specific ADR formats.

Arbitration

Arbitration is specifically mentioned in the 1995 UNIDROIT Convention, which provides that: "The parties may agree to submit the dispute to any court or other competent authority or to arbitration".[88] And in 2003, at a seminar at the Permanent Court of Arbitration (PCA), the idea was launched of creating a special arbitral regime equipped with unique substantive and procedural rules for handling cultural property claims.[89] Whereas arbitration may offer advantages, its value mainly lies in the field of contractual claims over authenticity and attribution, due to the confidentiality that it grants.[90] At the same time, so far arbitration plays hardly any role in restitution claims.[91] The *Altmann* arbitration, which was instituted after the initial stage of litigation, is amongst the few such cases. In the words of Chechi: "In effect, while negotiation is very common and mediation is becoming increasingly popular, it appears that recourse to arbitration is the exception rather than the rule".[92]

Mediation and negotiated settlements

Mediation, an informal procedure in which a mediator helps parties to settle a dispute by identifying their interests but without imposing a decision, is a method that has gained considerable popularity in cultural property disputes. In the private sector special mediation initiatives have been created, such as Art Resolve;[93] and also in the public sector specific mechanisms for cultural property disputes have been set up. In 2011 ICOM established its mediation programme for the museum sector in cooperation with the World Intellectual Property Organization (WIPO).[94] It was presented after positive experiences in the restitution case regarding a *Makonde*

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

88 Article 8(2).

89 "Resolution of Cultural Property Disputes", organized in 2003 by the PCA in The Hague. See O.C. Pell, *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-looted Art*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes: Papers Emanating from the Seventh PCA International Law Seminar, May 23, 2003*, Kluwer Law International, The Hague 2004, pp. 307-327.

90 A. Chechi, op. cit., p. 177.

91 E.g. ibidem, p. 181.

92 Ibidem.

93 https://artresolve.org.

94 https://www.wipo.int/amc/en/center/specific-sectors/art/icom/.

Mask stolen from a museum in Tanzania and acquired in 1985 by a Swiss museum, a case that fell outside of any "hard law" rules obliging restitution, as Switzerland acceded to the UNESCO Convention only much later.[95] The programme/procedure is administered by ICOM-WIPO in Geneva. As regards the question whether only the interests of the parties or soft-law norms are guiding, Article 14(a) of the WIPO-ICOM Mediation Rules states that "the mediator and the parties shall bear in mind the ICOM Code of Ethics for Museums". The scope of these words remains unclear, however, as in mediation the parties' respective interests are leading interests, which may not coincide with ethical standards. Interestingly, the Guidelines on Dealing with Collections from Colonial Contexts of the German Museum Association of 2018 advise that disputes be solved through mediation, and refer to the ICOM-WIPO procedure.[96]

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

Government advisory panels for Nazi-looted art claims

Whereas Nazi-looted art cases are often settled through confidential settlements, several European States have set up special advisory bodies. Around the year 2000 five of such committees were established: the Spoliation Advisory Panel in the UK, the CIVS[97] in France, the Dutch Restitutions Committee in the Netherlands, the Beratende Kommission in Germany, and the Beirat in Austria.[98] These are government-appointed panels to enable the assessment

[95] ICOM-WIPO Art and Cultural Heritage Mediation Program. See S. Slimani, S. Theurich, *The New ICOM-WIPO Art and Cultural Heritage Mediation Program*, in: M.-A. Renold, A. Chechi, A.L. Bandle (eds.), *Resolving Disputes in Cultural Property*, Schulthess, Zurich 2012, pp. 51-64.

[96] German Museums Association, *Guidelines on Dealing with Collections from Colonial Contexts*, July 2018, p. 98.

[97] Commission pour l'indemnisation des victime de spoliations intervenues du fair de legislations antisemites en vigueur pendant l'Occupation.

[98] For an overview of the committees, see: A. Marck, E. Muller, *National Panels Advising on Nazi-looted Art in Austria, France, the United Kingdom, the Netherlands and Germany – A Brief Overview*, in: E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes*, Eleven International Publishing, The Hague 2015, pp. 41-91.

of Nazi-looted art claims on their merits. A few notable characteristics of the various committees:[99]

- The Advisory Board of the Commission for Provenance Research in Austria (Beirat), established by the Art Restitution Law of 1998,[100] decides – on the basis of *ex officio* provenance research – whether a specific loss of possession of a work of art that is now part of a federal Austrian collection should be considered void, in which case restitution will be recommended. This can also apply to items that after the War became state property in the course of proceedings related to the Austrian export ban of artefacts of national importance.[101]
- The main objective of the French CIVS, established in 1999, is compensation for lost items, provided they were lost within the territory of France and during the Nazi occupation (i.e. under responsibility of the collaborating Vichy regime).[102] Since 2012, restitution of 25 artefacts has been recommended concerning works belonging to the so-called MNR collection of "heirless art" in the hands of the French State – a term used to describe art collections left in the custody of a specific government and not returned to their pre-war owners in the years after the Second World War.[103] At the end of 2018, improvement of the public organization was announced.[104]
- The UK Spoliation Advisory Panel (SAP) was established in February 2000 in order to resolve claims relating to art lost during the Nazi era which is currently in UK public collections.[105] As stated in its terms of reference, the Panel's function is to achieve a fair and just solution, whereby it may take into account non-legal obligations such as the moral strength of a claim.[106] Claimants can submit claims to the Panel unilaterally; and on the basis of a joint request by a claimant and possessor the Panel can also consider claims relating to items in a private collection.

[99] Based on: E. Campfens (ed.), *Fair and Just Solutions?*, p. 237.

[100] Kunstrückgabegesetz, BGBl I No. 181/1998, http://www.provenienzforschung.gv.at/empfehlungen-des-beirats/gesetze/kunstruckgabegesetze [accessed: 23.04.2019].

[101] By the end of 2018 the Austrian Committee had issued well over 300 opinions. See http://www.provenienzforschung.gv.at/empfehlungen-des-beirats/beschluesse/beschluesse-alphabetish/?lang=en.

[102] A. Marck, E. Muller, op. cit., p. 59.

[103] MNR stands for Musees Nationaux Recuperation. By June 2018, the CIVS had dealt with 298 cases involving works of art and recommended restitution of 13 artefacts. See http://www.civs.gouv.fr/images/pdf/documents_utiles/autres_documents/UK-FLYER-pageApage.pdf [accessed: 30.04.2019].

[104] Ibidem.

[105] C. Woodhead published several articles on the SAP. E.g. C. Woodhead, *Nazi Era Spoliation*.

[106] The Panel delivered 21 reports and has no cases pending by 30 April 2019. For the terms of reference and reports of the SAP, see https://www.gov.uk/government/groups/spoliation-advisory-panel#panel-reports [accessed: 30.04.2019].

- The Dutch Restitutions Committee, established in 2001, has dealt with 156 claims relating to over a thousand artefacts.[107] Most of these belong to the so-called NK collection of heirless art, comparable with the MNR in France. All claims based on Nazi-looting which involve works in the Dutch state collection are referred to the Restitutions Committee as a matter of general policy, while other parties can voluntarily submit a case for a "binding expert opinion". This procedure is further explained below.
- Germany's Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution (Beratende Kommission), installed in 2003, mediates in disputes between public institutions and former owners or their heirs. A request for advice can be lodged before the Committee provided that at least one party is a public institution and all the parties involved approve. Through its advice, the Beratende Kommission seeks to find a fair and just solution in accordance with the Washington Principles and policy guidelines as laid down in the so-called Gemeinsame Erklärung.[108] In November 2018 the German Culture Minister Gruetters announced that the procedure before the Committee would be obligatory for government-funded museums.[109]

In establishing these panels, the focus was on the specific national situation of each country. For example, in France and the Netherlands so-called "heirless art" collections call for specific obligations and solutions, while in Germany museums may have objects acquired directly from their persecuted owners. Their working methods, organizational structure, and recommendations differ, consequently, a great deal. On the other hand, art collections that were forcibly sold often were dispersed throughout the art market, hence claims in different countries may concern objects from the same collection lost in the exact same way. The different standards applied and outcomes reached in similar cases can sometimes cause confusion. Nevertheless, in terms of (procedural) justice the neutrality and transparency of these procedures would seem important.[110]

[107] Information to the author by the secretariat of the Committee as to the status in March 2019.

[108] https://www.kulturgutverluste.de/Webs/EN/AdvisoryCommission/Index.html;jsessionid=111B-8D00D3F4CFFFC357CF2BAE17CCE9.m7 [accessed: 30.04.2019]. As of April 2019 the Kommission had issued 16 recommendations.

[109] See the 26 November 2018 German/US Joint Declaration..., p. 2: "(...) museums and other institutions possessing cultural property, which are supported by the Federal Government, have to consent to mediation by the Commission upon claimant's requests".

[110] E. Campfens, *Nazi-looted Art*... In January 2019, a network was created linking the committees. http://www.civs.gouv.fr/news/establishment-of-a-network-of-european-restitution-committees [accessed: 30.04.2019].

Two Examples of Institutionalized ADR Procedures

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

The Binding Expert Opinion procedure by the Dutch Restitutions Committee

The Restitutions Committee was established by the Dutch government by a decree dated 16 November 2001.[111] As explained above, its task is two-fold: first, to advise the Minister of Culture on decisions to be taken concerning claims for the restitution of artefacts which are currently in the possession of the State of the Netherlands. A well-known case in this category is the 2005 *Goudstikker recommendation*, in which the Committee advised the Dutch government to return 202 paintings to the heirs of Jewish art dealer Jacques Goudstikker after denial of the claim by a Dutch court.[112] And secondly, to assess claims that concern non-state property that are brought before the Committee. Such cases can be referred to the Committee, the so-called "binding expert opinion procedure". This procedure takes a middle ground between mediation and arbitration and is, as all ADR mechanisms, based on the voluntary decision by the parties to refer their case(s) to the Committee. If they choose this procedures, the parties must agree beforehand to accept the opinion of the Committee as binding upon them. In other words, the binding nature of the Committee's decision is based on a contract between the parties and, obviously, does not have the same strong status of an arbitral award or court ruling.

A distinguishing element of this procedure is the factual research report, which plays a central role. After the parties are given an opportunity to clarify their positions, a neutral investigation into the facts is carried out by independent researchers based at the Netherlands Institute for War Documentation (NIOD).[113] The relevant information is summarized and cited in a draft investigation report, sent to both parties for comments. Furthermore, the Committee may order further investigations, a hearing, or consultation between the parties at any time.

111 Besluit adviescommissie restitutieverzoeken cultuurgoederen en Tweede Wereldoorlog [Decree establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War], 16 November 2001, WJZ/2001/45374(8123) ("Establishing Decree"). For more information, see the yearly reports and other information published on the website: http://www.restitutiecommissie.nl.

112 While denying the heirs' claim to 31 paintings on the grounds that rights to these works had been relinquished in the post-war period. See The Restitutions Committee, *Goudstikker*, Summary No. RC 1.15, https://www.restitutiecommissie.nl/en/summary_rc_115.html [accessed: 12.05.2019].

113 See https://www.niod.nl/nl/expertisecentrum. The "Expertisecentrum" at the NIOD was established in 2018.

The Committee is guided by "principles of reasonableness and fairness" in delivering its binding opinions and does so by weighing the interests involved.[114] An overview of the considerations the Committee may take into account is given in Article 3 of its regulations, and is summarized in the listing below:

a. The Washington Principles and other policy guidelines;
b. The circumstances of the loss of possession of the work;
c. The extent efforts were made earlier to recover the work;
d. The circumstances in which the present possessor acquired the work;
e. The importance of the work to the claimant;
f. The importance of the work to the present possessor;
g. The interest of the general public.

As to the possible solutions or outcomes, Article 11 of the Regulations provides any solution the Committee deems fit, including restitution, although commemoration by means of a plaque has also been recommended.[115]

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

An important element of the initial success of this procedure has been that the Dutch Museum Association had advised its members to refer all Nazi-looted art claims to this procedure as a matter of general policy.[116] Recently, however, the Committee has been criticized on account of its interpretation of the "fair and just" rule in its recommendation regarding a claim on the painting *Bild mit Häusern* by Wassily Kandinsky, which had been sold by its Jewish owner in 1940 to

[114] Establishing Decree, Article 2(4) and 2(5). This weighing of interests has recently been rejected as being not in accordance with the Washington Principles (see below).

[115] See, e.g., The Restitutions Committee, *Binding opinion in the dispute on restitution of the painting entitled Christ and the Samaritan Woman at the Well by Bernardo Strozzi from the estate of Richard Semmel, currently owned by Museum de Fundatie*, Recommendation no. RC 3.128 of 25 April 2013 and The Restitutions Committee, *Binding opinion regarding the dispute about the return of the painting Madonna and Child with Wild Roses by Jan van Scorel from the collection of Richard Semmel, currently in the possession of Utrecht City Council*, Recommendation no. RC 3.131 of 25 April 2013.

[116] Letter of the Secretary of Education, Culture and Science to Parliament dated 22 June 2012 (ref. 373435).

the Stedelijk Museum in Amsterdam.[117] The Committee rejected this claim on the argument that the interests of the museum outweighed the interest of the claimant: "The work has an important art historical value and is an essential link in the limited overview of Kandinsky's work (…) and is included in the [museum's] permanent display"; whereas the claimant had not shown an "emotional or other intense bond with the work". Such a balance of interests is – according to the decision's critics – incompatible with the Washington Principles. And indeed, the essential question – if the loss should be seen as voluntary or forced – was not clearly addressed by the Committee. If nothing else, it illustrates that the "fair and just" norm is open to many different interpretations. While an appeal of this decision to a Dutch court has been announced,[118] it must be taken into account that a regular court will not be able to apply or even explain the soft-law norm in the Washington Principles, as it is bound by positive law (as explained above).

The Court of Arbitration for Art

A second example of an institutionalized ADR mechanism is the newly-founded Court of Arbitration for Art (CAfA). In June 2018, CAfA was launched as a specialized "tribunal" providing for alternative dispute resolution in the field of art-related disputes.[119] The spectrum of (private) cases aimed at by the organization is much wider than the binding opinion procedure described above: these may include authenticity issues, and contract or title disputes.

The CAfA is the result of a cooperation between the Authentication in Art foundation (AiA), founded in 2012 as a platform for stakeholders to promote best practices in art authentication, and the Netherlands Arbitration Institute (NAI). Its base is in The Hague, but proceedings in a case can be held anywhere.[120] The main "special" feature of the CAfA is the fact that experienced art lawyers are the arbitrators in charge of the assessment of cases. These arbitrators are chosen from a pool made up by the AiA Board and the NAI. In addition, for factual evidence the CAfA relies on (neutral) experts, appointed by the tribunal whenever forensic

[117] The Restitutions Committee, *Binding opinion regarding the dispute about restitution of the Painting with Houses by Wassily Kandinsky, currently in the possession of Amsterdam City Council*, Recommendation no. RC 3.141 of 22 October 2018. For criticism, see, e.g., C. Hickley, op. cit.

[118] Press release of legal representatives of the claimants, 27 December 2018, https://www.lootedart.com/web_images/pdf2019/PRESS%20RELEASE%2027%20December%202018.pdf [accessed: 1.04.2019].

[119] See the CAfA website: http://authenticationinart.org/cafa/.

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

science (authentication issues) or provenance issues arise.[121] Like the arbitrators, these experts are chosen from a controlled pool. Evidence offered by a party-appointed expert is only admissible in matters that are *not* "forensic science or provenance issues"; and even then may not "compete with or supplement the expert evidence from the arbitral tribunal-appointed expert".[122] This reliance on neutral expertise constitutes a valuable element in cases involving provenance issues – i.e. in restitution claims – where the uncertainty about the factual circumstances and weighing of (missing) evidence is often the major challenge.[123]

The parties can either agree on the governing substantive law, or may authorize the arbitral tribunal to decide equitably as *amiable compositeur*.[124] If no choice is made, the CAfA Adjunct Arbitration Rules provide for the law of the principal location of the seller in the case of a sales transaction, and the law of the principal location of the owner of the art object as "the appropriate choice of law".[125] In other words, a preference for the owner's national law. This choice might be problematic for restitution cases, given that in title disputes the question of who should be seen as the legitimate owner is often the most contentious issue at stake, especially given the different legal approaches between common and civil law jurisdictions (as described above).

Furthermore, the CAfA rules highlight only one substantive rule: "Unless agreed otherwise, the tribunal shall (…) respect the applicable periods of limitation, prescription, and repose as well as similar time-bar principles when claims or defences have not been acted on within a reasonable time".[126] In other words, restitution claims brought long after a work was lost are deemed time-barred, and this is explained by the argumentation that parties should be protected from "stale" claims or defences which were not pursued with reasonable diligence, and that situations of "undue prejudice" should be avoided, i.e. where evidence has been lost due to the lengthy passage of time.[127] As has been oft-mentioned in this article, the decisive element for the admissibility of claims with respect to cultural losses are frequently time limits, and abiding by the legal restrictions in this regard does not seem to be

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

[122] Ibidem, Point 10.

[123] Ibidem, Explanatory Notes (2.2).

[124] Ibidem, Explanatory Notes (13.9); Article 42 of the NAI Arbitration Rules.

[125] Ibidem, Explanatory Notes (9). *Nota bene* the question of who is the legitimate "owner" of the artefact is not a given, but often the contested issue.

[126] Ibidem, Point 14.

[127] Ibidem, Explanatory Note (9.3).

compatible with soft-law norms, which urge an appraisal of claims "on their merits". It might even be in conflict with special laws that lift such time limits for claims, like for example the US HEAR Act for claims that concern Nazi-looted art.[128]

Apart from arbitration, since January 2019 mediation is also a possibility.[129] As in the case of arbitration, the mediators are drawn from a pool composed of mediators with demonstrated experience in art law disputes and/or international mediation. Similar to the arbitration procedure, special attention is given to expert advice: a mediator may, with the prior consent of the parties, appoint an expert to provide the parties with neutral third-party advice on specific questions in dispute. On issues of forensic science or the provenance of an art object, only advice from experts from within the controlled "Expert Pool" is admissible. Such expert advice shall be confidential and non-binding (unless otherwise agreed) and may not be used or referred to outside of the mediation.[130]

Given the lack of follow-up to the 2003 initiative to give the Permanent Court of Arbitration a central role in the resolution of restitution claims exactly 15 years before the launch of the CAfA,[131] one might draw the conclusion that arbitration is not well-suited for dispute resolution in the field of restitution claims. The mediation procedure of the CAfA, especially in combination with the reliance on neutral expert advice, however, may be promising. Also, in light of the confidentiality of the procedure the CAfA procedure may be suited for commercial disputes, more so than for disputes where public interests – or unequal power relations between the parties – are an issue. This, however, is a general observation that may affect all voluntary ADR procedures: without having a back-up of regular courts of law to apply norms, it is questionable whether ADR procedures can act as a guardian of "neutrality, transparency and justice" – as envisaged by the 2019 Resolution.

Developments: From a Property Framework Towards a Human Rights Framework

Whereas the legal approach to restitution claims discussed in this paper still mainly relies on the general framework for stolen property, often leading to a situation where claims are time-barred and thus inadmissible before regular courts of law, human rights law notions gain importance. This development surfaces in references to the human right to property as the *rationale* for redress for losses in the course of Nazi-persecution in soft-law instruments and ourt rulings, and in policy instruments. The 2019 Resolution, for example, refers to public interests at stake like the

128 Supra, n. 60.

129 CAfA Mediation Rules, in force as of 1 January 2019 (NAI Mediation Rules and AiA/NAI Adjunct Mediation Rules Combined).

130 Ibidem, at 5.

131 Supra, n. 89.

identity of societies, communities, and individuals, and the human right to property of Article 1 of Protocol 1 to the European Convention on Human Rights.[132] It is even more noticeable in the discussion about cultural objects taken in a colonial context. In this regard, the reference to the right of everyone to have access to one's own culture in recent Western-European instruments is noteworthy.[133] For example, French President Macron, in his November 2017 policy announcement, underlined the need for Africans to be able to access their own culture and, hence, it cannot be acceptable that most of it is in European collections.[134] Likewise, the given rationale for the German policy framework of March 2019 is to enable the return of colonial takings so that "all people should have the possibility to access their rich material culture (…) to connect with it and to pass it on to future generations".[135]

The human rights dimension is most imminent when claims concern indigenous peoples' lost cultural property. In this category an interesting roadmap on how to proceed with claims regarding objects in foreign collections was given by the Colombian Constitutional Court in a 2017 case concerning the "Quimbaya Treasure".[136] In its ruling, the Court ordered the Columbian government to pursue – on behalf of the indigenous Quimbaya people – restitution from Spain of a treasure of 122 golden objects lost at the close of the 19th century. The court argued that under today's standards of international law, referring to human rights law and UNDRIP and international cultural property law, indigenous peoples are entitled to their lost cultural heritage. *How* such a claim is pursued is left to the discretion of the government, but according to the court *the fact that* governments should work towards this goal is clear.[137] In a first reaction to the subsequent request by the Colombian authorities for the return of the Quimbaya Treasure, the Spanish authorities declined on the grounds that today the Quimbaya Treasure has become Spanish patrimony and is inalienable. This is not an uncommon European reaction.

[132] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, Article 1.

[133] According to the 2009 General Comment on the "right of everyone to take part in cultural life" of Article 15 (1)a of the International Covenant on Economic, Social and Cultural Rights, the right to take part in cultural life has come to include "access to cultural goods". United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.

[134] In his speech in Burkina Faso on 27 November 2017, see https://www.elysee.fr/emmanuel-macron/2017/11/28/discours-demmanuel-macron-a-luniversite-de-ouagadougou [accessed: 23.04.2019].

[135] *Eckpunkte zum Umgang…* See also E. Campfens, *The Bangwa Queen…*

[136] Constitutional Court, Plenary Chamber (Republic of Colombia), Judgment SU-649/17 of 19 October 2017.

[137] For a critical discussion, see D. Mejía-Lemos, *The "Quimbaya Treasure," Judgment SU-649/17*, "American Journal of International Law" 2019, Vol. 113(1). Indeed, basing such a right on the UNESCO 1970 or UNIDROIT 1995 Conventions, which were not meant to apply to earlier losses, is quite remarkable.

For example, the 2018 decision by President Macron to return statutes and regalia taken during a punitive colonial expedition from the Kingdom of Dahomey to Benin[138] concerned a claim that had earlier been denied by French authorities by referring to the inalienability of French public collections.[139]

For the time being, the state of the law in this field is unsettled, therefore soft-law and ADR remain important to resolve restitution disputes in a way that reflects a new sense of justice. Nevertheless, it should be noted that the term "restitution" has deviated from its traditional legal meaning on several points. Traditionally, in international law restitution has been the preferred remedy for an unlawful act on the interstate level and has been aimed to restore the previous state of affairs (*restitutio in integrum*).[140] On three levels this approach has undergone changes.

First, within the context of present-day cross-border restitution claims and the soft-law framework, there is a shift from a state-centred approach towards the interests of non-state entities, such as private former owners (families) or indigenous peoples.

In the second place, the unlawfulness of the taking at the time is – in today's restitution cases – not always a given. Often, the losses occurered during times of historical injustice, such as the Holocaust, colonial rule or the suppression of indigenous peoples. At the core of such claims is a changing notion of justice and legality: In some cases the original taking can indeed be classified as unlawful, but in other cases the loss was legal at the time. One can mention here a sale by a Jewish owner in the early years of Nazi-rule in Germany that is, today, considered a sale under duress; or a confiscation of indigenous peoples' cultural objects that were sanctioned by the colonial laws at the time. This deviation from the earlier paradigm should be kept in mind. Similarly, the term "restitution" in the 2018 French Sarr/Savoy report – *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*[141] – is deliberately used to underline the authors' views on the *injustice* of colonial acquisition practices – not their *unlawfulness*. This term has undergone changes, not unlike the term "confiscation" as the central element in the Washington Principles within the context of Nazi-era losses. The sale of artefacts by Jewish collector Curt Glaser in 1933 in Berlin, i.e. before racial laws were enacted by the Nazis, could for example hardly be qualified as a "confiscation" in the legal sense or as unlawful at the time. Still the loss did qualify for a "fair and just solution" under the Washington

138 Press release of 23 November 2018: "Remise du rapport Savoy/Sarr sur la restitution du Patrimoine Africain", https://www.elysee.fr/emmanuel-macron/2018/11/23/remise-du-rapport-savoy-sarr-sur-la-restitution-du-patrimoine-africain [accessed: 23.04.2019].

139 https://www.lemonde.fr/festival/article/2017/08/17/la-restitution-d-uvres-d-art-une-question-de-dignite_5173397_4415198.html [accessed: 23.04.2019].

140 W.W. Kowalski, *Art Treasures and War*, Institute of Art and Law, Leicester 1998.

141 F. Sarr, B. Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, November 2018, p. 29, http://restitutionreport2018.com/sarr_savoy_en.pdf [accessed: 23.04.2019].

Principles for Nazi-confiscated art.[142] In other words, many of today's restitution cases rely on present-day human rights norms, and not on the unlawfulness of the taking at the time.[143] Such norms aim to provide redress for a continuing injustice; they aim to reunite people with cultural objects that have a specific symbolic meaning, like a family heirloom or works that are sacred to a certain community still today. For example, in the UNDRIP, the rights to objects taken without the "free, prior and informed consent" vary according to the meaning of the objects – spiritual or ceremonial – to people today, without reference to *how* exactly these were lost in the past.

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

All the above points underline the changes in this field have legal implications: the development of international cultural property law away from a property framework and towards a human rights framework.[144] This may indicate that the ethical model for historical restitution cases – including voluntary ADR procedures without guarantees in terms of due process – can eventually be replaced with a more solid legal framework based on a human rights inspired concept of cultural "property".

Final Observations

In art restitution claims the application of regular property law rules, and the system of conflict of law rules that would normally guide judges to a "just" outcome, do not always fulfil this aim. A common theme in the soft-law instruments that have emerged in this field includes a call for equitable solutions to ownership disputes, and for alternative methods to settle claims. Such procedures are advocated as being more efficient, less adversarial, and more flexible to culturally sensitive arguments. However, in many jurisdictions alternative procedures are the *only* way to assess claims based on such soft-law instruments on their merits, because the positive legal framework has not (yet) adapted to the newly emerging standards of morality and justice. Seen in this light, the "ethical" framework and reliance

[142] Dutch Recommendation regarding Glaser of 4 October 2010 (RC 1.99); also in Germany Glaser's claims were upheld, see http://www.preussischer-kulturbesitz.de/pressemitteilung/article/2016/04/20/pressemeldung-stiftung-preussischer-kulturbesitz-findet-erneut-faire-und-gerechte-loesung-mit-den-erb.html [accessed: 1.04.2019]. E. Campfens, *Nazi-looted Art*..., p. 325.

[143] See also A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006, pp. 2-3.

[144] For more on these developments, see E. Campfens, *The Bangwa Queen*...

on extra-legal procedures may be viewed as an intermediate solution in a process of evolving legal norms.

The Washington Principles, along with other soft-law instruments in this field, stress the importance of a non-legalistic "ethical" approach and ADR mechanisms for resolving ownership issues. And indeed parties searching for "fair and just" solutions on the merits of a case *need* alternative procedures, as most legal systems do not support title claims regarding losses that took place so many years ago. Grey categories of "tainted" artefacts have thus emerged, raising expectations that "justice" will be done. On the practical level this means that certain artefacts cannot be sold or sent on international loans as long as their title is not cleared. And although market forces may fill in some gaps in the law, this does not guarantee justice. Especially problematic in this regard is the lack of transparent neutral procedures to implement and clarify soft-law norms. The widening possibilities to litigate (Holocaust-related) restitution cases in the US raise the question of how this trend will impact the European situation. This article proposes that the institutional vacuum in terms of access to justice in Europe needs to be addressed. A lack of clarity at both the substantive and the procedural levels – e.g. what is the norm and who will interpret and apply it? – will otherwise increase legal uncertainty.

In its 2019 Resolution the European Parliament acknowledged the fragmented situation and advocated for the adoption of the principles of UNIDROIT as a roadmap to a transparent, responsible, and ethical global art market in the future, and for an ethical approach and voluntary ADR procedures to address claims of works of art looted in armed conflicts and war in the past.[145] In this regard the establishment of a European claims procedure could be considered. This would also meet the obligation that States have taken upon themselves – by signing instruments like the Washington Principles and the UNDRIP – to develop neutral and accessible procedures to ensure that promises about justice are upheld.

The "ethical" extra-legal approach and the development of ADR mechanisms for settling cases may, at times, indeed be the best setting to resolve disputes in a non-adversarial manner and to foster dialogue, cooperation, and creative solutions. Nevertheless, ultimately these cases are about justice and the role of law should be to provide a framework of norms and neutral procedures where similar cases will be dealt with similarly, independent of power-relations. This may not be guaranteed in a legal framework that depends solely on non-binding soft-law and voluntary, confidential, ADR procedures. In that respect, developments of cultural heritage law from a property framework into a human right framework are promising.

[145] Supra, n. 4.

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