

UNIDROIT 1995:Tackling the illicit trafficking of cultural property through private law means

Citation for published version (APA):

Groenen, A. C. C. (2018). *UNIDROIT 1995:Tackling the illicit trafficking of cultural property through private law means: An evaluation of the appropriateness of the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects to Cultural Property Theft in comparative perspective*. [Doctoral Thesis, Maastricht University, tUL-Universiteit Hasselt (UHasselt)]. Datawyse / Universitaire Pers Maastricht. <https://doi.org/10.26481/dis.20181002ag>

Document status and date:

Published: 01/01/2018

DOI:

[10.26481/dis.20181002ag](https://doi.org/10.26481/dis.20181002ag)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
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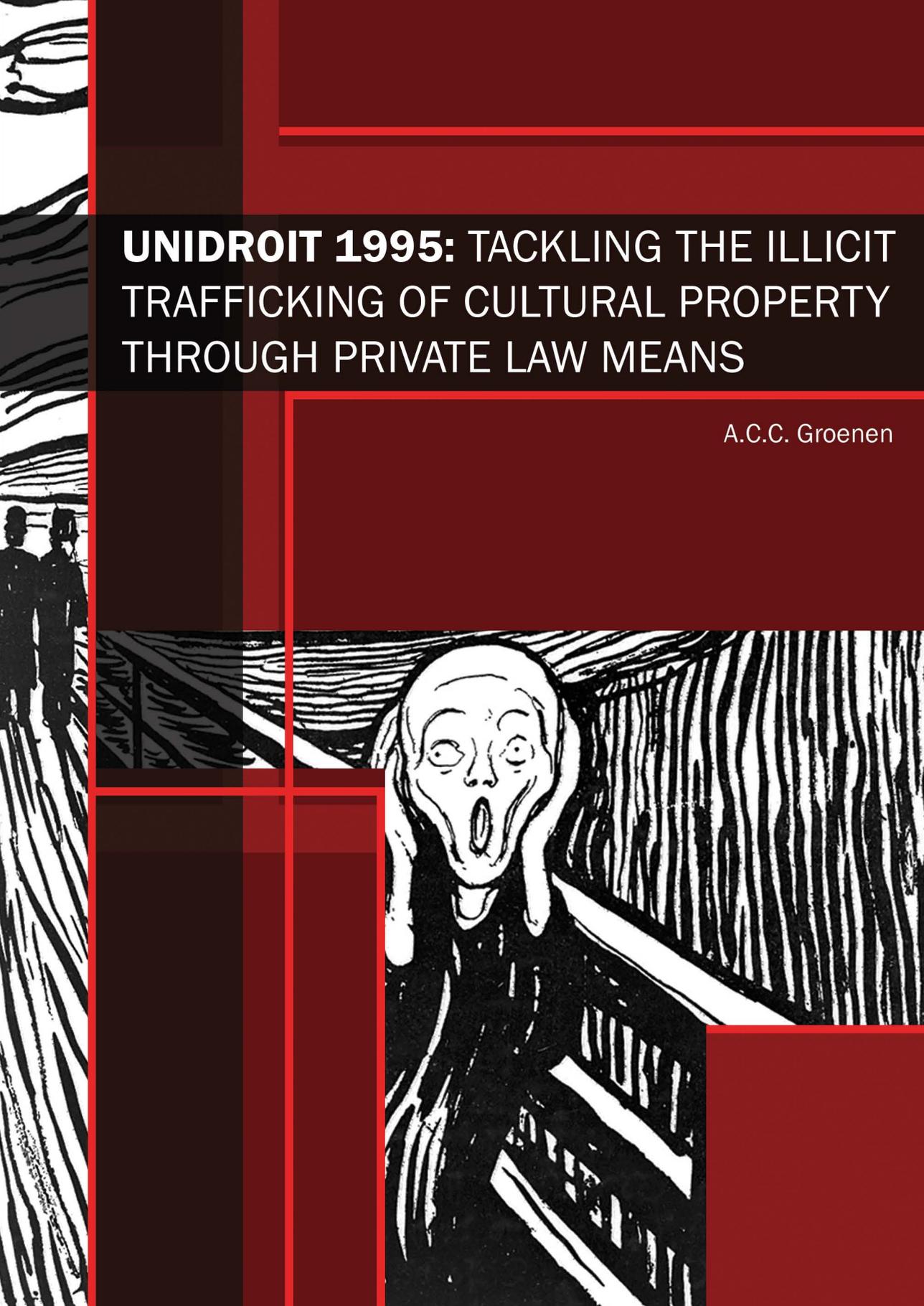
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UNIDROIT 1995: TACKLING THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY THROUGH PRIVATE LAW MEANS

A.C.C. Groenen

UNIDROIT 1995: Tackling the Illicit Trafficking of Cultural Property Through Private Law Means

An Evaluation of the Appropriateness of the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects to Cultural Property Theft in Comparative Perspective

DISSERTATION

To obtain a degree of Doctor at Maastricht University,
on the authority of the Rector Magnificus,
Prof.dr. Rianne M. Letschert
and a degree of Doctor in Law at the
Transnational University Limburg/University of Hasselt, on the
authority of the Rector,
Prof.dr. L. De Schepper

in accordance with the decision of the Board of Deans to be
defended in public at Maastricht University
on Tuesday 2 October 2018 at 16:00 hours in Maastricht

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Acknowledgments

With hindsight, the redaction of this PhD has been a challenging, demanding and life-changing experience. The completion of the present research has constituted a Herculean task that I could not have been able to complete alone. Throughout this journey, I have had the honour and pleasure to be assisted by many people. In fact, the finalisation of this book would not have been possible without the support of the following persons:

First and foremost, Professor **Anne Mie Draye** (Universiteit van Hasselt) for giving me her trust and unconditional support throughout the PhD; for advising me appropriately; for providing me with the financial means – to the extent of what was possible – to complete the research; for supporting my choices; for giving me all the leeway necessary; for meeting on a regular basis to discuss the progress of the manuscript; and, last but not least, for being affable, patient and lending me a sympathetic ear when needed. Furthermore, I would like to thank Professor Draye for being particularly invested in the research and for sharing her in-depth technical expertise in the field of law relating to the ownership of artefacts, as well as in the fields of Belgian and private international law. Professor **Hildegard Schneider** (Maastricht University) for giving me the opportunity to write a PhD; for advising appropriately; for providing me with work at the law faculty; for giving me the opportunity to participate in international conferences; for supporting many of my ideas; and for generously offering to host the reception at her residence following the defence of the PhD. Doctor **Lars van Vliet** (Maastricht University) for his advanced expertise in comparative private law and informed opinion; for his passion and expertise in art law; for fully investing himself in supervising my work; for his rigour, precision and fastidiousness; as well as for his time, support and motivating words.

I would, furthermore, specifically like to thank **Octave Hardy and Anita Hardy- van der Heijden** for their unfettered help; for being present when others were not; for giving me a home for many years – both as a student and during the PhD –; for treating me like their own son; for always having been present and advising me properly; for supporting me both through good and bad times; for sharing all these good moments we had; for cat-sitting ☺; and for being who they are.

Pauline Hardy, my beloved partner, for her unconditional assistance through these very challenging years; for being there when I needed it the most; for her help with (re)doing the language revision; for her assistance with garnering copyrights' authorisations; for her further assistance with the finalisation of the PhD; for her patience; for her unconditional love and affection; and also for being there. I could not have found a more supportive, engaged, compassionate, intelligent and wonderful partner to share these good, as well as challenging, moments. I would also like to thank **Luc Hardy** and **Thomas Hardy**, for having been present whenever I needed help and for being such fantastic brothers-in-law.

Furthermore, this work would not have been possible without the help of: **Marina Schneider**, for taking the time to answer my questions; for showing great interest in my work; for sharing her expertise; for her valuable input and for her unconditional support; **Leo Jaervinen** for his assistance in finalising the PhD; for his consideration; for thinking along; and for being my best friend. **Sejo Kadic**, for his assistance with the language revision; for making time to assist me; for his good companionship and for being such a close friend. I would furthermore like to thank **Yelena Gordeeva**, **Hannelore Niesten** and **Vanessa Tuensmeyer** for being wonderful colleagues, my close confidants and, more importantly, the friends I really needed to go through difficult times. I would also like to thank **Stefaan de Jonckheere**, for his valuable input, as well as **Mathea Neijmeijer** en **Welmoed Neijmeijer** for providing me with access to the *Corpus iuris secundum*.

Renée This for her good companionship and for being there whenever I needed. **Philipp Lebedev**, **Eno Scheeren**, **Jonathan Ponsard**, **Sven Skoric** for being such good friends; for their help and for giving me the distraction I needed.

Sophia de Groot who has done outstanding work with the cover of the book. She has proved not only to be a very creative and talented person, but she has also showed that she is outstandingly reliable, involved and professional in the execution of her tasks.

Guy Loyson for purchasing my tenancy rights and the one of my partner, thus giving us the financial means to complete our education. I would also like to thank Mr Loyson for his understanding having regard to the circumstances due to which we needed to sell our tenancy rights, as well as for his honesty. We wish him the very best in his future endeavours.

At last, I would like to thank my cats – **Vino** and **Tinto** – for comforting me throughout all these years, especially during all-nighters.

I would warm-heartedly like to thank all of you for your continuous and unconditional support.

Amoury

TABLE OF CONTENTS

Acknowledgements	v
List of abbreviations	xvi
Introduction	1
Part I Applicability of the Convention.....	21
Chapter 1 Presentation and Applicability of the Convention	23
Part II Cultural Property Theft	93
Chapter 2 Cultural Property Theft – Understanding the paradox (I) - Belgium, France and The Netherlands.....	95
Chapter 3 Cultural Property Theft – Understanding the paradox (II) - New Jersey, California and New York	201
Chapter 4 Cultural Property Theft – The Unidroit Solution	297
Part III Archaeological Theft	375
Chapter 5 Archaeological Theft.....	377
Part IV Application of the Convention.....	433
Chapter 6 Application of the Convention	435
Chapter 7 Unidroit and the World	462
Concluding chapter.....	509
Summary	531
Samenvatting.....	535
Valorisation addendum	539
Glossary	541
Bibliography, legislation and case law	547
Copyrights	611
Curriculum Vitae	615

DETAILED TABLE OF CONTENTS

Acknowledgements	v
List of abbreviations.....	xvi
Introduction	1
A. Purpose of the research.....	3
1. Field of operation of the convention.....	5
2. Research questions	5
3. Scientific and societal relevance.....	6
B. Setting the scene, methodology and country selection	9
1. Setting the scene	9
2. Methodology	13
3. Country selection.....	13
C. Limitations of the research, selected case law and terminology.....	15
1. Limitations of the research	15
2. Selected case law.....	18
3. Terminology	18
D. Research structure.....	19
Part I Applicability of the Convention.....	21
Chapter 1 Presentation and Applicability of the Convention	23
Introduction	25
A. Presentation of the convention	26
1. Contextualization	26
(1) First coordinated attempts at thwarting the illicit traffic	26
(2) Towards a pragmatic solution – renewed efforts	29
2. Preparatory work.....	32
3. Objectives pursued	39
4. Structure of the convention	42
B. Applicability of the convention.....	45
1. Conceptualization	45
(1) Cultural objects.....	45
(2) International character of the claim or request	57
2. Scope of application	60
(1) Material scope.....	60
(2) Territorial scope	75
(3) Temporal scope.....	76
(4) Personal scope.....	84
Summary	87

Part II	Cultural Property Theft	93
Chapter 2	Cultural Property Theft – Understanding the paradox (I) - Belgium, France and The Netherlands.....	95
	Introduction	98
A.	Belgium	100
1.	Basic concepts.....	100
(1)	Ownership, possession and detention	100
(2)	Theft.....	103
(3)	Cultural object	103
(4)	Legal remedy.....	104
(5)	Prescription.....	105
2.	Contextualization.....	106
(1)	Voluntary and involuntary loss of possession.....	106
(2)	Nemo plus iuris ad alium transferre potest quam ipse habet.....	107
3.	Operationalization.....	107
(1)	Third-party protection – acquisitions in good faith (voluntary loss of possession).....	108
(2)	Third-party protection – acquisitions in good faith (involuntary loss of possession)	116
(3)	Third-party protection – acquisitions in bad faith.....	118
4.	Legal effects.....	118
(1)	Third-party protection – acquisition in good faith (voluntary loss of possession)	118
(2)	Third-party protection – acquisition in good faith (involuntary loss of possession).....	119
(3)	Third-party protection – acquisition in bad faith.....	120
B.	France.....	121
1.	Basic concepts.....	121
(1)	Ownership, possession and detention	121
(2)	Theft.....	125
(3)	Cultural object	125
(4)	Legal remedy.....	127
(5)	Prescription.....	128
2.	Contextualization.....	132
(1)	Voluntary and involuntary loss of possession.....	132
(2)	Nemo plus iuris ad alium transferre potest quam ipse habet.....	133
3.	Operationalization.....	133
(1)	Third-party protection – acquisition in good faith (voluntary loss of possession)	133
(2)	Third-party protection – acquisition in good faith (involuntary loss of possession).....	154
(3)	Third-party protection – acquisition in bad faith.....	156
4.	Legal effects.....	157
(1)	Third-party protection – acquisition in good faith (voluntary loss of possession)	157
(2)	Third-party protection – acquisition in good faith (involuntary loss of possession).....	157
(3)	Third-party protection – acquisition in bad faith.....	158
C.	The Netherlands	160
1.	Basic concepts.....	160
(1)	Ownership, possession and detention	160
(2)	Theft.....	163
(3)	Cultural object	163
(4)	Legal remedy.....	164
(5)	Prescription.....	166
2.	Contextualization.....	167
(1)	Voluntary and involuntary loss of possession.....	167
(2)	Nemo plus iuris ad alium transferre potest quam ipse habet.....	168
3.	Operationalization.....	169
(1)	Third-party protection – acquisitions in good faith (voluntary loss of possession).....	169
(2)	Third-party protection – acquisitions in good faith (involuntary loss of possession)	179
(3)	Third-party protection – acquisitions not in good faith.	182
4.	Legal effects.....	184

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)	184
(2) Third-party protection – acquisition in good faith (involuntary loss of possession)	185
(3) Third-party protection – acquisition not in good faith.....	185
Summary	187
Chapter 3 Cultural Property Theft – Understanding the paradox (II) - New Jersey, California and New York.	201
Introduction	203
A. New Jersey, California and New York.....	205
1. Basic concepts.....	205
(1) Ownership, possession and detention	205
(2) Theft.....	206
(3) Cultural object	208
(4) Legal remedy.....	209
(5) Statute of limitations.....	212
2. Contextualization	216
(1) Nemo plus iuris transferre potest quam ipse habet.....	216
(2) Third-party protection – voidable title, statutory and equitable estoppel.....	218
3. Operationalization.....	221
(1) New Jersey Adverse Possession	222
(2) New Jersey Discovery Rule.....	228
(3) California Strict Discovery Rule.....	237
(4) New York Demand and Refusal	248
(5) New York Laches	256
4. Legal effects.....	270
(1) New Jersey Adverse possession	270
(2) New Jersey Discovery rule	272
(3) California Strict Discovery Rule.....	273
(4) New York Demand and Refusal	276
(5) New York Laches	276
Summary	277
Chapter 4 Cultural Property Theft – The Unidroit Solution	297
Introduction	299
A. Prerequisites to lodging a claim in restitution	301
1. Claimant	301
2. Superior right of possession	303
3. Identification of the stolen cultural object.....	304
B. Timeliness of the claim in restitution	306
1. General Rule.....	306
(1) Relative Period.....	308
(2) Absolute Period.....	314
(3) Interruption and suspension	316
2. Exceptions	317
(1) Cultural objects concerned	318
(2) Exception	328
(3) Exception to the exception	329
3. Legal effects.....	330
(1) Relative period.....	331
(2) Absolute period.....	332
C. Restitution	334
1. Principle of mandatory restitution	334
(1) Reprimanding theft.....	335
(2) Appropriate response to the illicit traffic in stolen cultural objects.....	335

(3) Tailor-made solution for cultural objects.....	336
2. Operationalization.....	336
(1) Possessor.....	337
(2) Return.....	338
(3) Person to whom the stolen cultural object is returned.....	339
D. Entitlement to compensation	341
1. Indemnified party.....	341
(1) Good faith possessor.....	341
(2) For value and gratuitous acquisitions	343
(3) Protecting innocent acquisitions.....	345
2. Burden of proof.....	347
3. Innocent acquisition	349
(1) Acquisition in good faith	349
(2) Due diligence	352
E. Fair and reasonable compensation.....	354
1. Compensation.....	354
2. Fair and reasonable	354
3. Method of computation.....	357
F. Modalities of payment	362
1. Who?.....	362
(1) Claimant.....	362
(2) Subsidiarity.....	362
(3) Claimant's right to recover the compensation	364
2. When?.....	364
3. Legal implications of non-payment.....	364
Summary	366
Part III Archaeological Theft	375
Chapter 5 Archaeological Theft	377
Introduction	379
A. Archaeological Theft – Causes and Effects.....	380
1. The economics of clandestine excavations.....	380
(1) Demand and supply.....	380
(2) Protecting artefacts <i>in situ</i> and <i>ex situ</i>	386
2. The externalities of clandestine excavations.....	390
(1) Destruction of information.....	391
(2) Societal externalities.....	394
B. The Response of Source States	396
1. Controlling the demand – patrimonial claims.....	396
2. Patrimonial laws – pitfalls.....	399
(1) Ownership versus possession	400
(2) Sufficiently clear, unambiguous and intelligible declaration.....	400
(3) Conditionality of ownership.....	402
(4) Language hurdles	403
(5) Declaration of ownership precedes the removal of the object.....	404
(6) Exercised right.....	405
(7) Exclusive right.....	406
3. Patrimonial laws – guidelines	408
C. The Unidroit Solution	410
1. Assimilation to Theft (Chapter II)	412
(1) Cultural objects.....	413
(2) Illegality of the act of appropriation	414
(3) Assimilation to stolen cultural objects.....	422

2.	Assimilation to Illegal Export (Chapter III).....	422
(1)	Article 5 (3) (a) – physical preservation of the object or of its context.....	423
(2)	Article 5 (3) (b) – integrity of a complex object.....	423
(3)	Article 5 (3) (c) – preservation of information of, for example, a scientific or historical character.....	423
3.	Interactions between Chapter II and Chapter III.....	424
	Summary	426
Part IV	Application of the Convention	433
Chapter 6	Application of the Convention	435
	Introduction	437
A.	Application	438
1.	Interaction between Chapter II and Chapter III.....	438
2.	Reservations.....	438
3.	Direct applicability.....	441
4.	Modulation.....	442
(1)	Rules more favourable to restitution or return.....	444
(2)	No obligation to recognise the more favourable regime of other state parties.....	447
5.	Interpretation.....	448
(1)	General rule on the interpretation of treaties.....	450
(2)	Supplementary means of interpretation.....	453
(3)	Interpretation of treaties authenticated in two or more languages.....	455
B.	Monitoring	456
1.	Special Committee to Review the Practical Operation of the Convention.....	456
2.	1995 Unidroit Convention Academic project.....	459
	Summary	460
Chapter 7	Unidroit and the World	462
	Introduction	465
A.	Compatibility with other multilateral treaties	466
1.	Unidroit in the international norm-setting.....	466
2.	The UNESCO – Unidroit Nexus.....	471
(1)	Definition cultural property.....	473
(2)	Means of corrective justice.....	473
(3)	Time limitations.....	475
(4)	Treatment of innocent purchasers.....	475
3.	Interactions between the 1970 and 1995 conventions.....	476
B.	Improved application of the Convention	477
C.	Clause de déconnexion	478
1.	Directive 93/7/EEC (repealed by Directive 2014/60/EU).....	479
(1)	Scope of application.....	483
(2)	Conceptualisation.....	488
(3)	Time limitations.....	489
(4)	Obligation of return.....	489
(5)	Standard of care during the acquisition.....	490
(6)	Burden of proof.....	491
(7)	Compensation.....	491
(8)	Ownership returned object.....	492
(9)	Modulation of the Directive’s provisions.....	492
(10)	Cooperation between Member States.....	493
2.	Directive 2014/60/EU (recast of Directive 93/7/EEC).....	493
(1)	Scopes of application.....	495
(2)	Time limitations.....	496
(3)	Standard of care during the acquisition.....	497

(4) Burden of proof	497
(5) Cooperation between Member States	498
Summary	499
Concluding chapter.....	509
A. Overview.....	511
B. Purpose of the research.....	512
1. Object and purpose	512
2. Research questions.....	512
C. Findings of the research.....	513
1. Merits of the regime of restitution in addressing cultural property theft	513
2. Weaknesses of the regime of restitution in addressing cultural property theft	518
D. Recommendations	521
E. Conclusion.....	527
F. Suggestions for further research	529
Summary	531
Samenvatting.....	535
Valorisation addendum	539
Glossary	541
Bibliography, legislation and case law.....	547
Bibliography.....	548
Books / sections / articles	548
Official reports / communications / announcements	568
Preparatory work	574
Digital sources	581
Miscellaneous sources	585
Legislation.....	586
International instruments	586
European Union Law	587
National Legislation	588
Soft Law instruments.....	588
Case law	589
Belgium.....	589
France	589
Ireland	593
Italy.....	593
Switzerland.....	593
The Netherlands	593
United Kingdom.....	594
United States of America – Federal cases	595
United States of America – State cases.....	597
Copyrights	611
Curriculum Vitae.....	615

LIST OF ABBREVIATIONS

ADAA – Art Dealers Association of America
ALR – Art Loss Register
ANS – American Numismatic Society
BCC – Belgian Civil Code
BCrC – Belgian Criminal Code
CCC – California Civil Code
CCCP – California Code of Civil Procedure
CGE – Committee of Governmental Experts
CPC – California Penal Code
CPLR – New York Civil Practice Law and Rules
CUCC – California Uniform Commercial Code
DC – Diplomatic Conference
DCC – Dutch Civil Code
DCrC – Dutch Criminal Code
EC – European Community
ECC – European Cultural Convention
EEC – European Economic Community
FCC – French Civil Code
FCrC – French Criminal Code
GATT – General Agreement on Tariffs and Trade
GCL – General Construction Law
GDR – German Democratic Republic
ICPRCP – Intergovernmental Committee for Promoting the Return of Cultural Property to its
Countries of Origin or its Restitution in Case of Illicit Appropriation
IFAR – International Foundation for Art Research
ILC – International Law Commission
IMI – Internal Market Information System
IS – Islamic State of Iraq and the Levant
KZM – Kunstsammlungen zu Weimar
LIDAR – Light Detection And Ranging of Laser Imaging Detection and Ranging
NJCCJ – New Jersey Code of Criminal Justice
NJRC – New Jersey Rules of Court
NJRS – New Jersey Revised Statutes
NJSA – New Jersey Statutes Annotated
NSPA – National Stolen Property Act
NYPS – New York Penal Section
NYUCC – New York Uniform Commercial Code
SG – Study Group
SKM – Staatliche Kunstsammlungen Museum
SNA – Syndicat National des Antiquaires
SOL – Statute(s) of Limitations
STW – Staatliche Kunstsammlungen zu Weimar
TEC – Treaty Establishing the Economic Community
TEEC – Treaty Establishing the European Economic Community
TFEU – Treaty on the Functioning of the European Union
UCAP – 1995 Unidroit Convention Academic Project
UCC – Uniform Commercial Code
UNIDROIT – International Institute for the Unification of Private Law
UNESCO – United Nations Educational, Scientific and Cultural Organization
VCLT – Vienna Convention on the Law of Treaties (1969)
WG – informal Working Group

INTRODUCTION

INTRODUCTION

A. Purpose of the research	3
1. Field of operation of the convention	5
2. Research questions	5
3. Scientific and societal relevance	6
B. Setting the scene, methodology and country selection	9
1. Setting the scene.....	9
2. Methodology.....	13
3. Country selection.....	13
C. Limitations of the research, selected case law and terminology	15
1. Limitations of the research	15
2. Selected case law.....	18
3. Terminology.....	18
D. Research structure	19

A. Purpose of the research

On 8 May 2015, the *International Institute for the Unification of Private Law* – hereinafter UNIDROIT – celebrated the twentieth anniversary of the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* at the Musei Capitolini in Rome, Italy. The prestigious venue – garnering together experts with variegated expertise in the field of Art law¹ – reflected the apogee of twenty years of existence of the convention in the ambit of international cultural property law.² Despite a general stasis in the convention’s application – witnessing very little practical operation of its provisions thus far –, this milestone engenders a fundamental debate as to its role in tackling the illicit trafficking of cultural property: before its adoption, legislative inputs enacted by states to deal with this issue have not always proved to be responsive to the situations addressed.³ This lack of apposite responsiveness stems partly from the lack of a unified front, from the adoption of instruments that are too broad⁴ and from a conspicuous ideological divide between market and source states.⁵ As to the present convention, it is considered to be the “most significant attempt at protection [of cultural objects] since 1970”.⁶ Therefore, at the time of its adoption, the expectations as to the role it would play in finding workable solutions to the afore-mentioned illegal activity were high.⁷ Nonetheless, whilst more than two decades have transpired since its enactment, it remains unsettled whether the convention has, hitherto, achieved its objective of becoming the most appropriate instrument in the fight against the illicit trafficking of cultural property in peace times.

In 2012, this question had, notably, been pondered during the first sitting of the Special Committee to Review the Practical Operation of the 1995 Convention, organized at the Headquarters of the *United Nations Educational, Scientific and Cultural Organization* – hereinafter UNESCO – in Paris, France.⁸ During this gathering, the instrument was exalted as one of the most successful multilateral instruments in the domain to date. Several speakers applauded the changes to the art market wrought by its letter and endorsed its increasing influence. Furthermore, the document was qualified as the culmination of cooperation between international organizations, notably *in casu* UNESCO and UNIDROIT.⁹ What is more, the convention has been qualified as the other side of the same coin together with the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.¹⁰ Aside from the committee’s findings, UNESCO had also recommended ratifying conjointly the 1970 and the 1995 conventions as an effective means of fighting the illicit traffic in cultural objects.¹¹ Coincidentally, many other resolutions, recommendations and calls from other international organizations – including the General Assembly of the United Nations,¹² INTERPOL¹³ and the

¹ The program of the event can be found at the following url <http://www.unidroit.org/english/news/2015/20150508-conv-culturalobjects-20years/programme-e.pdf>, last retrieved on 01.03.2018.

² Reports of the venue are available at the following url <http://www.unidroit.org/conferences-and-seminars/previous-years>, last retrieved on 01.03.2018.

³ Fox, C., ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property’, 9 (1) *American University International Law Review*, (1993), p. 229.

⁴ Schneider, M., ‘Le Projet de Convention d’Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés’, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 142.

⁵ Warring, J., ‘Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property’, 19 *Emory International Law Review*, (2005), p. 244.

⁶ Cottrell, E. M., ‘Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property’, 627 *Chicago Journal of International Law*, (2008-2009), p. 647.

⁷ It was hoped that the convention would be met with more success than the LUAB and the 1970 UNESCO convention (both are discussed below). See Roodt, C., ‘Keeping cultural objects ‘in the picture’: traditional legal strategies’, 27 (3) *The Comparative and International Law Journal of Southern Africa*, (1994), p. 321.

⁸ The meeting of the first Special Committee took place in June 2012 at UNESCO’s headquarters upon request of the President of UNIDROIT acting on the basis of Article 20 of the convention (see Governing Council of UNIDROIT, 90th session, Rome, 9 – 11 May 2011, ‘Summary of the Conclusions’, UNIDROIT 2011 – C. D. (90) Misc. 3, available at <https://www.unidroit.org/english/governments/councildocuments/2011session/cd90-08-e.pdf>, last retrieved on 01.03.2018.

⁹ Sánchez-Cordero, J., ‘The Unidroit cultural Convention. The unfulfilled tasks’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

¹⁰ *Idem*.

¹¹ See for example UNESCO, ‘UNESCO and Unidroit – Cooperation in the Fight Against Illicit Traffic in Cultural Property – Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, 24 June 2005, UNESCO Headquarters, Paris, 16 June 2005, CLT-2005/Conf/803/2, p. 1-2.

¹² Resolution 66/180 of the General Assembly of the United Nations of 19 December 2011 (A/RES/66/180) recalling among other the 1995 Convention “and reaffirming the necessity for those states that have not done so to consider ratifying or acceding to and, as states parties, implementing those international instruments”. The Resolution can be found at <http://undocs.org/A/RES/66/180>, last retrieved on 01.03.2018.

¹³ Grosse, L., Jouanny, J.-P., ‘La protection du patrimoine culturel en vertu des instruments de l’UNESCO (1970) et d’UNIDROIT (1995): la position d’Interpol’, 8 (1-2) *Uniform Law Review*, (2003), pp. 579-580. See also the ICPO-Interpol Resolution AGN/64/RES/6 (1995)

ICOM¹⁴ – and regional organizations – such as the Council of the European Union¹⁵ and the Parliamentary Assembly of the Council of Europe¹⁶ – have invited states that have not yet done so to become a party to the 1995 instrument.¹⁷ In the same vein, the academic world has advocated the adoption of both conventions to ensure their complementary effectiveness.¹⁸

But for these Panglossian considerations, the convention has not been received by the global community with the same enthusiasm: on the international plane, it has achieved a relatively low amount of ratifications in its twenty-two years of existence.¹⁹ Instead, many states have preferred adopting a ‘lesser evil’ by becoming party to the less-constraining 1970 UNESCO convention.²⁰ From the perspective of the art market, adamant stakeholders have often perceived its letter as another Voynich Manuscript and specious criticisms pertaining to the supposed abstruseness of its provisions have ensued.²¹ Furthermore, notwithstanding scepticism as to its success prior to its enactment,²² and mixed feelings from its inception onwards,²³ commentators aver that the broad nature of its provisions might not only impair its ratification but, ultimately, also its effectiveness.²⁴ What is more, it has been submitted that the objectives it pursues have been unsatisfactorily fulfilled,²⁵ and that its status is one of a dead letter or of a “paper tiger without much actual effect”.²⁶ Others have even concluded that the convention was stillborn.²⁷ As such, it has, at times, been considered as a quixotic academic exercise with little pragmatic relevancy. Having regard to the apparent discord with which the convention is being received, there exists a clear need to revisit its provisions in order to shed light on its role in tackling the illicit traffic in cultural property during peace times. The uncertainties surrounding the convention call for efforts at laying down a comprehensive analysis of its regime, for as long as its letter remains unclear, the malaise surrounding its acceptance will remain unfathomable.

mentioned in the same source, available at <https://www.interpol.int/content/download/22469/210873/version/5/file/AGN-64-RES-6%20-%20Stolen%20cultural%20property.pdf>, last retrieved on 01.03.2018 and Interpol, ‘Protecting Cultural Heritage – An Imperative for Humanity’, (United Nations, 22 September 2016), p. 13, available at <https://www.interpol.int/News-and-media/Publications2/Leaflets-and-brochures/Protecting-Cultural-Heritage>, last retrieved on 01.03.2018.

¹⁴ Anfruns, J., ‘The Role of Museums’ in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming; Boonyakiet, J., ‘L’ICOM et la lutte contre le trafic illicite des biens culturels’, École du Louvre, *Monographie*, (1998-1999), p. 28.

¹⁵ Conclusions adopted by the Council of the European Union in December 2011 ‘Preventing and combating crime against cultural property’, p. 3, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126866.pdf, last retrieved on 01.03.2018.

¹⁶ Council of Europe Recommendation 1372 (1998), ‘Unidroit convention on stolen or illegally exported cultural property’, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16624&lang=en>, last retrieved on 01.03.2018.

¹⁷ See UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, *Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

¹⁸ Prott, L. V., ‘Strength and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption (Background paper)’, *The fight against the illicit trafficking of cultural objects. The 1970 convention: past and future*, (UNESCO Headquarters: Paris, 15-16 March 2011), p. 9.

¹⁹ To date, forty-four states are party to the convention. See <http://www.unidroit.org/status-cp>, last retrieved on 30.08.2018.

²⁰ Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Sixteenth Session, Oral Report of the Rapporteur (Professor Folarin Shyllon), Paris, UNESCO Headquarters, 21-23 September 2010, pp. 3-4, available at <http://unesdoc.unesco.org/images/0019/001925/192535E.pdf>, last retrieved on 01.03.2018; to date, one hundred and thirty four states have become party to the 1970 convention. See for example <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/>, last retrieved on 01.03.2018.

²¹ Droz, G. A. L., ‘La Convention d’UNIDROIT sur le Retour International des Biens Culturels Volés ou Illicitement Exportés (Rome, 24 juin 1995)’, 86 (2) *Revue Critique de Droit International Privé*, (1997), p. 277; Armbrüster, C., ‘La Revendication de Biens Culturels du Point de Vue du Droit International Privé’, 93 (4) *Revue de Droit International Privé*, (Octobre – Décembre 2004), p. 726; it has also been submitted that many of the provisions of the convention have been found unacceptable by the museum community and by the art world. See Olivier, M., ‘The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property’, 26 *Golden Gate University Law Review*, (1996), p. 629.

²² Lenzner, N. R., ‘The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcoming of the Unesco Convention?’, 15 *University of Pennsylvania Journal of International Business Law*, (1994), p. 477.

²³ Byrne-Sutton, Q., ‘Introduction’, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 10; Bergé, J.-S., ‘La Convention d’Unidroit sur les Biens Culturels (*)’: Remarques sur la Dynamique des Sources en Droit International’, 127 *Journal du Droit International*, (2000), p. 217; Browne, A., ‘Unesco and Unidroit: The Role of Conventions in Eliminating the Illicit Art Market’, 7 (1) *Art, Antiquity and Law*, (March 2002), p. 385.

²⁴ Olivier, (1996), p. 629; this criticism is also supported by both Germany and Sweden, see Office Fédéral de la Culture (Suisse) (ed), ‘Transfert International des Biens Culturels. Convention de l’Unesco de 1970 et Convention d’Unidroit de 1995, Rapport du Groupe de Travail’, (l’Office fédéral de la culture: Berne, 1998), p. 47.

²⁵ Jolles, A., ‘Un Regard Critique sur la Convention d’Unidroit’, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 53.

²⁶ Dutra, M. L., ‘Sir, How Much is That Ming Vase in the Window?: Protecting Cultural Relics in the People’s Republic of China’, 5 *Asian-Pacific Law & Policy Journal*, (2004), p. 74.

²⁷ Love Levine, A., ‘The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention’, 36 *Brooklyn Journal of International Law*, (2010-2011), pp. 779-780; Olivier, (1996), p. 629.

Consequently, the celebration of the convention's anniversary provides an appropriate opportunity to engage with this debate and to distil candid answers.

1. FIELD OF OPERATION OF THE CONVENTION

To appreciate the field of operation of the convention with more exactitude, its functionality must be considered first: despite a traditional thematic regulation of the areas of international cultural heritage and cultural property law, no functional classification of international instruments in force has hitherto been undertaken. Ideally, the various conventions ought to be classified depending on the function(s) served.²⁸ In a loose attempt at categorization, it is possible to discern the following types of rules in the international cultural property / cultural heritage regulatory framework: rules on the cooperation between states; rules on protection, conservation and preservation of cultural goods; rules on the prevention of destruction or disappearance; rules on the exchange or retention of cultural materials; rules on usage; rules on scientific research and public access, means of corrective justice, etc. The legislative framework established by the UNIDROIT convention operates within the field of corrective justice: the UNIDROIT convention was adopted in 1995 to deter the illicit trafficking of cultural property. Although no harmonized definition exists,²⁹ the terms 'illicit traffic in cultural property' are often used to express the aggregate range of illegal activities involving cultural materials.³⁰ These activities encompass a plethora of unlawful acts, which include – but are not limited to – thefts, illegal imports and exports, looting of archaeological sites, unauthorized excavations and the plundering of sanctuaries or of spiritual sites.³¹ But for this lack of a universal definition, the traffic is mainly characterized by three components: theft, illegal import / export and archaeological theft. These inherently different scenarios³² constitute the three pillars upon which the illicit trade in cultural property operates.³³ Throughout its regime, the convention sets forth means of redress specifically directed at cancelling-out some of the perverse effects of the illicit trafficking. Therefore, it operates in the three shutters of the illicit traffic by commanding methods of corrective justice. Corrective justice serves to rectify wrongs,³⁴ and constitutes a *modus operandi* prescribing the handing back of an object to a wronged party.³⁵ More particularly, corrective justice addressing the illicit traffic in cultural property is concerned with restoring situations to their former condition, or – put differently – to their *status quo ante*. Correspondingly, the convention is concerned with the *ex post facto* transnational legal implications of cultural property thefts – including archaeological theft –, and of illegal exports of cultural objects, both regulated by Chapter II and Chapter III of the convention respectively.³⁶

2. RESEARCH QUESTIONS

Whilst the issue of theft is quintessentially governed by private law, the regulation of illegal export falls exclusively within the public law domain. Due to the breadth of the convention's ambit, it is not possible, for the purpose of the present research, to address this instrument in its entirety. Therefore, in tackling the given quandary, the present disquisition will put the emphasis on private law considerations. This means that the research analyses the 1995 convention, with the exception of Chapter III thereof relating to illegal exports. Subsequently, the following research question will be answered: ***what merits of Chapter II of the 1995 UNIDROIT convention contribute to the achievement of its objective of becoming an appropriate tool against cultural property theft?*** In other words, the present research is concerned with assessing the extent to which Chapter II of the convention has achieved the overarching goal of becoming an adequate tool in fighting cultural property theft. In order to assess the convention's achievements, two additional sub-questions underline the present research: ***what pitfalls of the convention thwart it in the said enterprise?*** Finally, in order to secure a higher degree of participation to

²⁸ See notably Warring, (2005), pp. 227-303 for a discussion about the existence of different fields of operation in the realm of international cultural property / cultural heritage law.

²⁹ Prott, L. V., "Problems of Private International Law for the Protection of the Cultural Heritage", in: Académie de Droit International de La Haye / Hague Academy of International Law, *Recueil des cours de l'Académie de droit international de La Haye*, V, Tome 217, (1989), p. 231.

³⁰ See for example the description given by the ICOM *International Observatory on the Illicit Traffic in Cultural Goods*, available at <http://obs-traffic.museum/illicit-traffic-0>, last retrieved on 01.03.2018. Compare with the description given by Interpol, available at <https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art>, last retrieved on 01.03.2018.

³¹ McCord, J. A., "The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Traffic in Art", 70 *Indiana Law Journal*, (1994-1995), p. 989.

³² Love Levine notes that the theft of cultural object is closely related to the activities of illegal export of cultural materials [notably in terms of acquisition by innocent third parties], albeit these two domains pose problems of a different nature. See Love Levine, (2010-2011), p. 769.

³³ Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), pp. 137-138; Sherlock, M. A., 'A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property', 8 *Tulane Journal of International & Comparative Law*, (2000), p. 485.

³⁴ Gold, A. S., 'A Theory of Redressive Justice', (unpublished document, on file with author), (4 February 2011), p. 6.

³⁵ Gold, (2011), p. 7.

³⁶ Sherlock, (2000), p. 485.

the convention, ***how can the scrutinised regime be improved to foster adherence to the convention?*** To answer to these questions, the present research will engage in the following undertakings:

- i. *introduce the convention by establishing the context within which it is set to operate and the objectives it pursues*: as an international instrument regulating the private law implications of the illicit traffic in cultural property, both the convention's field of operation and the context within which it operates are particularly revealing of its allocated role. What is more, as the convention ought to be interpreted in the light of the objectives it was set to achieve, attention is given to the said objectives;
- ii. *briefly explain the process of elaboration of the convention*: the convention is the result of almost a decade of preparatory work, including gatherings of study groups, of committees of governmental experts and the organization of a diplomatic conference towards its adoption. To fully understand the evolution of some of its provisions, the main stages through which its regime was developed are presented;
- iii. *analyse the convention's scope of application to survey its applicability*: in order to determine in which instances the convention is applicable, the material, temporal, territorial and personal scope of application of the convention will be identified. This will allow delimiting the exact fringes of the convention and provide the reader with a comprehensive overview of the role played by its regime in the international norm setting;
- iv. *evaluate the regime relating to cultural property theft*: whilst the purpose of the present research is to assess the appropriateness of the convention's regime with regard to cultural property theft – for which it is assumed that third-party protection constitutes one of the main contributing factors –, this will be done by comparing Chapter II thereof to the regime regulating the situations of third-party protection in six jurisdictions. By the same token, this comparative approach appropriately illustrates the paradoxical outcomes that result from the lack of harmonization of rules on the subject-matter, the same lack of harmonization that UNIDROIT was set to correct with the present convention;
- v. *review the added-value of Chapter II with regard to archaeological theft*: for the purpose of the convention, archaeological theft has been subsumed under the regime of cultural property theft (cf. Article 3 (2)). Because archaeological theft constitutes a *sui generis* problem, the present contribution addresses the suitability of the regime of the convention to this scenario;
- vi. *discuss residual aspects relevant to the convention's application*: to further elucidate the working of the convention, residual aspects of importance to its operationalization – e.g. the modulation of its provisions, the impossibility to formulate reservations, etc. – are discussed. These residual elements are conducive to the convention's application and ought, therefore, to be addressed;
- vii. *position the convention in the light of other international instruments regulating the same subject-matter*: the convention's sphere of influence can only be fully explored by positioning it in the norm-setting constellation in force at the international level. Therefore, attention is devoted to its relationship with other key interstate agreements regulating subject-matters relative to the convention's field of operation;
- viii. *give a general evaluation of the scrutinized regime of the convention as a matter of conclusion and propound improvements to its letter*.

3. SCIENTIFIC AND SOCIETAL RELEVANCE

The scientific relevance of the present research should not be understated: the lack of specificity of some of the provisions of the convention – alongside the on-going disagreement as to its understanding – often contributes to its dismissal. This haphazard debate calls for the adoption of overarching guidelines relating to the convention's applicability. Furthermore, it is important to note that two earlier publications about the UNIDROIT convention have tried to explain the inner workings of its regime. Nonetheless, their reach in understanding Chapter II is limited: on the one hand, the first research entitled *Commentary on the Unidroit Convention on Stolen or Illegally Exported Cultural Objects*³⁷ – published by Lyndel Prott in 1997 and conducted in English – has limited itself to explaining the convention as a result of the work undertaken by UNESCO and UNIDROIT. On the other hand, a second – although less accessible – German publication entitled *Internationaler Kulturgüterschutz nach der UNIDROIT-*

³⁷ Prott, L. V., *Commentary on the Unidroit Convention*, (Institute of Art & Law: Leicester, 1997).

*Konvention*³⁸ undertaken in 2005 by Bettina Thorn has compared the regime of Chapter II of the convention with the rules applicable in Austrian, English, French, German, Italian, Portuguese, Spanish and Swiss law,³⁹ despite clear indications in Prott's 1997 contribution that the regime of Chapter II has its roots in American law. In accordance with Prott's observations, the present research finds that the convention is prominently inspired by American law. Therefore, part of the scientific relevance of this research is to further the work undertaken in these previous contributions. This is notably done by discussing the convention in light of the manifold sources – including the preparatory work, doctrine or even domestic case law – and by providing a bottom-up analysis of the regime of Chapter II in the light of, *inter alia*, California, New Jersey and New York law. Additionally, the present exercise differs from earlier research as it frames the discussion about the convention in terms of fighting the illicit trafficking of cultural property instead of putting the emphasis on the convention as a means of restitution and / or return. Finally, the present research attempts at providing a constructive reflection of the convention to seek further fine-tuning of its regime. The potential for improvement is tabled with the intention of securing a higher incidence of participation.

Concurrently, this dissertation is embedded with a multifaceted societal relevance: firstly, the international community has recently been faced with pervasive acts of terrorism worldwide and with a notable increase of terrorist attacks occurring within the Western hemisphere. In this context, the looting of cultural property has been identified as a potential source of income used by terrorists to finance their activities.⁴⁰ With the recent rise of the so-called Islamic State and the spoliation of artefacts originating from Iraq, Syria and Libya, this has provided the art market with 'blood antiques';⁴¹ the international community is now facing an unprecedented challenge. Thenceforth, the process of looting artefacts in politically unstable territories in order to generate means of subsistence has become a reality that states cannot leave unaddressed.⁴² Therefore, means to disincentivize the art market from acquiring blood antiques are needed,⁴³ which, in turn, calls into question the role that the UNIDROIT convention could play in this regard. Its ability of moralizing the art market may provide the necessary deterrence.⁴⁴ Secondly, due to the lackadaisical participation of the international community in the convention's

³⁸ Thorn, B., *Internationaler Kulturgüterschutz nach der UNIDROIT-Konvention*, (De Gruyter Recht: Berlin, 2005).

³⁹ See Renold, M. A., 'Bettina Thorn, Internationaler Kulturgüterschutz nach der Unidroit – Konvention. Schriften zum Kulturgüterschutz, Berlin, De Gruyter Recht, 2005, pp. XX + 416, ISBN 3-89949-253-6', 11 (2) *Uniform Law Review*, (2006), pp. 477-478.

⁴⁰ This was recognized by the Security Council of the United Nations in Security Council Resolution 2347 (2017) dated 24 March 2017 (S/RES/2347 (2017)). See notably Recitals 7, 9, 16, 17, and paragraphs 1, 3, 8, 9, 10, 11, 12 and 17 of the Resolution.

⁴¹ For more information in this regard, please consult Pipkins, J., 'ISIL and the Illicit Antiquities Trade', XXIV *International Affairs Review*, (2016), pp. 100-119.

⁴² Rostomian, P. C., 'Looted Art in the U.S. Market', 55 *Rutgers Law Review*, (2002-2003), pp. 271-272.

⁴³ For example, in a reaction to the trafficking in cultural materials originating from Iraq and Syria, the Council of the European Union is considering adopting an import-licensing scheme for cultural objects entering the EU, see Council of the European Union, Communication from the Commission to the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing, COM(2016) 50 final, Strasbourg, 02.02.2016, available at <http://data.consilium.europa.eu/doc/document/ST-5782-2016-IN11/en/pdf>, last retrieved on 01.03.2018. See also Point 3.3 of the European Commission Joint Communication between the European Parliament and the Council of the European Union – Towards an EU strategy for international cultural relations JOIN(2016) 29 Final, Brussels 08.06.2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN%3A2016%3A29%3AFIN>, last retrieved on 01.03.2018 specifying that "Cultural heritage is fragile and often threatened by natural disasters, man-made destruction such as wars, looting and pillaging, sometimes motivated by sectarian hatred. Looted artefacts are often sold and the revenues generated by these transactions can be used to support terrorist activities: this impoverishes the world's cultural heritage. The EU has adopted restrictive measures towards Syria and transposed UN sanctions against Daesh/ISIL and Al-Qaida, as well as the UN sanctions regime for Iraq: these include a ban on illegal trade in cultural and archaeological artefacts. [...] Combat trafficking of heritage: the Commission is planning a legislative proposal to regulate the import into the EU of cultural goods, based on the results of a recently launched study to identify gaps in national legislation. The Commission will consider a wider response to combatting terrorist finance via illicit trafficking in cultural goods – whatever the country of provenance. Potential action includes the introduction of a certification system for the import of cultural goods into the EU coupled with guidance to stakeholders such as museums and the art market. The EU intends to support the training of customs officers at border controls to promote the early detection of stolen artefacts and encourage cooperation among art market professionals in the fight against illicit trafficking. The EU will also enhance cooperation with partner countries to combat the trafficking of cultural goods". The envisaged proposal can nowadays be found in European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods', COM(2017) 375 final, Brussels, 13.7.2017, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/cultural_goods_proposal_en.pdf, last retrieved on 01.03.2018; The United Nations Office on Drugs and Crime is also looking for new solutions in tackling this problem. See <http://www.unodc.org/unodc/en/frontpage/2016/May/unodc-promotes-innovative-ways-of-tackling-trafficking-in-cultural-property.html>, last retrieved on 01.03.2018.

⁴⁴ See for example Security Council Resolution 2253 (2015), S/Res/2253 (2015), and more specifically paragraphs 14 and 15, available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2253\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2253(2015)), last retrieved on 01.03.2018. See also the latest actions undertaken by UNESCO in securing the implementation of Security Council Resolution 2253, in UNESCO, 'UNESCO Director-General and Heads of agencies discuss means to strengthen the fight against illicit trafficking', available at http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_and_heads_of_agencies_discuss_means/, last retrieved on 01.03.2018. Additionally, several meetings have been recently organized to discuss the issue of the loot of cultural materials by terrorism and organized crime groupings. See for example the 'First Meeting on the Art Markets of Stolen Works of Art', which is part of the UNESCO Partnership Initiative entitled 'Protecting Cultural Heritage – an Imperative for Humanity: Acting together against the destruction and trafficking of cultural property by terrorist groups and organized crime' organized in March 2016 (see <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of>

regime, determining its added value is of the utmost importance to countries that are considering ratification. As specified above, the convention has thus far been received with mixed feelings and – since its success depends primarily on broad participation – it is important to ferret out the grievances formulated against it for the purpose of alleviating ungrounded concerns. Thirdly, at the time of concluding the present research, the European Parliament is scrutinizing the possibility to make the convention – or parts of it – legally binding within the European Union.⁴⁵ Fourthly, the regime of the convention seems to grow more influential through parallel tracks but adherence. This increase has been recorded on three occasions: in the first instance, the convention exercises indirect influence through means of UNESCO Plus ratifications. In fact, many states that have decided to stay away from the 1995 convention have favoured ratification of the 1970 UNESCO convention instead. Nevertheless, in implementing the latter, certain states have chosen to adopt a UNESCO Plus solution. This alternative encompasses an exercise of cherry-picking among the provisions of the 1995 convention squared with the implementing legislation of the 1970 convention. As such, these states have been able to benefit from the provisions of the UNIDROIT convention that they consider of avail, whilst at the same time avoiding with great finesse the question of ratification. This solution, although undeniably hampering direct participation in the regime of the 1995 convention, indirectly broadens the spectrum of application of its provisions. In the second instance, the convention has served to inspire coordinated actions between groups of states. As such, it served as a model during the preparation of Directive 93/7/EEC of 15 March 1993 *on the return of cultural objects unlawfully removed from the territory of a Member State*. With the recent adoption of European Union 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), the regime of unlawful removal of national treasures of Member States of the European Union has been brought even more in line with the convention's regime.⁴⁶ In the third instance, it has been reported that the convention served as guidance during various instances of negotiation, mediation and arbitration.⁴⁷ This growth in the indirect influence of the convention corroborates the presence of mixed-feelings surrounding its acceptance. To encourage direct participation in its regime, emphatic conclusions as to its virtues are sought. Finally, the present research enables touching upon the question of whether the 1995 instrument contributes to the improvement of society, a question that has been pending since its adoption.⁴⁸

cultural-property/meetings/un-march-meeting/, last retrieved on 01.03.2018) and the UNESCO Round table entitled 'The movement of cultural property in 2016: regulation, international cooperation and diligence of professionals for cultural heritage protection' taking place during the same month (see <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/meetings/art-market-round-table/>, last retrieved on 01.03.2018). See also http://www.unesco.org/new/en/culture/themes/dynamic-content-single-view/news/stepping_up_stakeholders_involvement_in_the_fight_against-1/, last retrieved on 01.03.2018; but also Muller, T., 'How Tomb Raiders are Stealing our History', *National Geographic*, June 2016, available at <http://www.nationalgeographic.com/magazine/2016/06/looting-ancient-blood-antiquities/>, last retrieved on 01.03.2018; and the 14th edition of Europe Lecture about the protection of Cultural Heritage: https://www.europelecture.com/id/vk11ecr17cvb/europe_lecture_cultural_heritage, last retrieved on 01.03.2018.

⁴⁵ In this regard, see European Parliament, Committee on Legal Affairs, 'Cross-border restitution claims of work of art and cultural goods looted in armed conflicts and wars', legislative procedure 2017/2023(INL), (2017), available at [http://www.europarl.europa.eu/ocil-mobile/fiche-procedure/2017/2023\(INL\)](http://www.europarl.europa.eu/ocil-mobile/fiche-procedure/2017/2023(INL)), last retrieved on 01.03.2018. See also European Parliament, European Parliamentary Research Service, 'Cross-border restitution claims of looted works of art and cultural goods – European Added Value Assessment Accompanying the European Parliament's legislative initiative report', PE 610.988, (November 2017), available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU\(2017\)610988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf), last retrieved on 01.03.2018 and the ensuing opinion of the Committee on Culture and Education in European Parliament, Committee on Cultural and Education, 'Opinion of the Committee on Culture and Education for the Committee on Legal Affairs with recommendations to the Commission on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (2017/2023(INL))', PE610.922v02-00, (26.1.2018), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-610.922+02+DOC+PDF+V0//EN&language=EN>, last retrieved on 01.02.2018.

⁴⁶ The influence exercised by the convention upon the directives of the European Union are discussed in more detail in 'Chapter 7 – Unidroit and the World' below.

⁴⁷ Renold, M. A., 'Round table on the influence of the 1995 Unidroit Convention (good practices, national legislation of states non-parties, case law, international instruments)', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

⁴⁸ See for example Vernet, J., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)' in: C. Breitler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 80.

B. Setting the scene, methodology and country selection

1. SETTING THE SCENE

(1) Cultural property theft

With regard to cultural property theft, it should be preliminarily noted that the circulation of stolen cultural materials is an activity that is generally endowed with an international dimension: precious and valuable cultural goods are, more than often than not, moved to other jurisdictions after having been purloined.⁴⁹ Cross-border asportations are necessary considering that some of these object's unique features make recognition more probable – leading to a higher incidence of crime detection⁵⁰ –, but also because of the title laundering capacity that certain legal systems offer in protecting innocent third parties. As will be explained below, thieves have at times astutely exploited foreign laws to pass valid title to stolen property in foreign jurisdictions.

Opening Pandora's box - the paradoxical results of variegated regimes of private law

Because of this transnational dimension, legal proceedings for the recovery of stolen cultural property have often proved particularly complex to resolve. In fact, the problems raised by these contentions are often at the crossroad of a legion of legal intricacies: election of the appropriate jurisdiction, assertion of *locus standi*, determination of the applicable law, appreciation of foreign laws, the mesh of private – property, tort, commercial, contract – law and of public law are just a handful of the complications that can ensue.⁵¹ What is more, discrepancies between domestic private law regimes have been identified as the main contributors to fuelling the illicit traffic in stolen cultural goods: despite the international working of the illicit traffic, the regulation of the recovery of stolen cultural objects is a matter that belongs exclusively to the sphere of private law. As such, domestic private law rules governing the transfer of movable goods are determinative in solving transnational disputes involving stolen cultural objects. Correspondingly, the consequences of the transfer of stolen cultural objects to innocent third parties have been regulated by national laws.⁵² Following this scheme, it is possible to obtain paradoxical results to situations marked with similarities,⁵³ as witnessed by the *Winkworth / Ellicofon* paradigm.

In the case of *Winkworth v. Christie, Manson and Woods Ltd*,⁵⁴ Japanese sculptures, known as 'netsuke' (see illustration), were stolen in England from Winkworth – an English art collector – and were, subsequently, transported abroad to be sold to an innocent third party. D'Annonne acquired the netsuke on the Italian peninsula unbeknownst of their illicit origin. Later on, he auctioned the items with Christie's auction house in London, United Kingdom. The sculptures were thus unexpectedly returned to England after having been purchased by an innocent acquirer in another jurisdiction. Winkworth recognized the figurines before the auction could proceed. He then sued *Christie, Manson & Woods* in an attempt to restrict payment of the sale proceeds of part of the items that had already been auctioned and to put a halt to the sale of the hitherto unsold items.⁵⁵ Furthermore, he reclaimed the remaining items in the possession of D'Annonne, the second defendant to the proceedings.

In this case, the seized English Court of Chancery applied the *lex rei sitae* rule,⁵⁶ which was the standard conflict rule applied in English law in cases dealing with the restitution of stolen objects.⁵⁷ Consequently, it found that

⁴⁹ Fincham, D., 'Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities', 37 *Syracuse Journal of International Law and Commerce*, (2009-2010), pp. 165-166.

⁵⁰ See Prott, L. V., "Problems of Private International Law for the Protection of the Cultural Heritage", in: Académie de Droit International de La Haye / Hague Academy of International Law, *Recueil des cours de l'Académie de droit international de La Haye*, V, Tome 217, (1989), p. 245.

⁵¹ See Papademetriou, T., 'International Aspects of Cultural Property – An Overview of Basic Instruments and Issues', 24 *International Journal of Legal Information*, (1996), p. 299.

⁵² Burke, K. T., 'International Transfer of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?', 13 *Loyola of Los Angeles International and Comparative Law Journal*, p. 441; Adjacently, while domestic legal systems already laid down safety measures to criminalize theft or prohibit the illegal export of cultural movables, (Burke, (1990-1991), p. 439) with the expansion of cultural nationalism, the fight against the illicit traffic in cultural goods has taken on an international dimension. See Burke, (1990-1991), p. 432; see also Prott, L. V., 'International Control of the Illicit Movement of the Cultural Heritage: the 1970 UNESCO Convention and Some Possible Alternatives', 10 *Syracuse Journal of International Law and Commerce*, (1983), p. 333.

⁵³ Burke, (1990-1991), p. 451.

⁵⁴ *Winkworth v. Christie, Manson and Woods Ltd and Another*, [1980] 1 ER (Ch.) 496 [1980], 1 All ER 1121. For a summary of the facts of the case and the court's rationale in resolving the issue of applicable law, see Carruthers, J. M., 'Cultural Property and Law – An International Private Law Perspective', *Juridical Review*, (2001), pp. 132-134.

⁵⁵ However, it should be noted that the balance of the goods had consequently been sold with Christie's with the consent of the plaintiff. See *Winkworth v. Christie, Manson and Woods Ltd and Another*, [1980] at 499.

⁵⁶ *Winkworth v. Christie, Manson and Woods Ltd and Another*, [1980], at 501; Renold, M.-A., "The International Protection of Archaeological Heritage: Questions of Private Law and of Legal Harmonization", in: J. A. Sánchez Cordero (ed), *La Convención de la UNESCO de 1970 – Sus Nuevos Desafíos*, (Universidad Nacional Autónoma de México: México, 2014), p. 304.

Italian private law governed the transfer of title to the actual possessor.⁵⁸ In dealing with *bona fide* acquisitions of stolen property, Italian law protects innocent buyers, provided they have not committed a gross negligence towards another person during the acquisition.⁵⁹ Because the acquisition was carried out in accordance with the Italian rules, the English court concluded that the actual possessor was entitled to retain possession by means of third-party protection. The outcome of *Winkworth* can be contrasted with the New York decision in *Kunstsammlungen zu Weimar v. Elicofon*⁶⁰ – hereinafter referred to as *Elicofon* –, a case sharing similar facts to *Winkworth* but having an unexpectedly different outcome.



In *Elicofon*, an American soldier stole two 1499 portraits by Albert Dürer in Germany at the end of the Second World War.⁶¹ In the late forties, he sold the paintings – representing Hans and Felicitas Tucher respectively (see illustrations) – to Elicofon, an American citizen residing in Brooklyn, New York, for the price of 450 dollars. Because the serviceman had told Elicofon that he had purchased the pair – along with six other paintings – in Germany, Elicofon acquired the pictures unbeknownst of any theft. He henceforth openly displayed the Dürer portraits in his residence uninterrupted for twenty years. In 1966, a friend of Elicofon discovered that the paintings had been reported stolen and informed him of their illicit origin. Elicofon then made his possession public, therefore disclosing the whereabouts of the stolen paintings. Subsequently, several claimants subpoenaed him, resulting in proceedings in front of the United States District Court of the Eastern District of New York; in March 1969, the Federal Republic of Germany – followed by the Grand Duchess of Saxony-Weimar –, brought an action in replevin for the recovery of the two paintings.⁶² Six years after the initiation of the proceedings, the *Kunstsammlungen zu Weimar* (hereinafter KZM) – a museum registered within the GDR⁶³ – was granted the right to intervene in the proceedings. At the end of 1975, Germany desisted itself from the action and the claim of the Grand Duchess was dismissed by the court, leaving the issue between the KZM and Elicofon to be resolved.

⁵⁷ The court in *Winkworth* noted that there had been a lot of controversy about the application of the *lex rei sitae* as a general conflict-of-law rule (*Winkworth* at 501-502). The law of the domicile of the defendant – i.e. the *lex domicilii* – as well as the law of the place where the transaction was concluded – i.e. the *lex loci actus* – are two other conflict-of-law rules that courts might apply in solving similar situations. Instead, the court in *Winkworth* referred to the case *Cammel v. Sewell*, where Lord Chief Baron Pollock advocated the application of the *lex situs* in lower court (*Winkworth* at 638). In appeal, the Court of Exchequer (5 H. & N. 728), confirmed judge Pollock's submission, which was formulated in the following words: "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere" (reiterated in *Winkworth* at 744). The principle laid down by Judge Pollock was later reaffirmed by other courts (for more details about these statements, see *Winkworth* at 501-502); The counsel representing the owner tried to convince the court that there were many connecting factors with England and, therefore, that English law had to determine the respective rights of both the plaintiff and the defendant. As a subsidiary point, it was argued that if the court would not agree with this submission and find Italian law to be applicable, the unique facts of the case at hand would require exempting the situation from the mechanical application of the *lex rei sitae* to the benefit of applying English law (see *Winkworth* at 503-504). These arguments were not upheld by the court, which found it appropriate applying the *Cammel v. Sewell* precedent for the sake of consistency in the administration of justice (*Winkworth* at 506). Furthermore, there had been no subsequent case overruling – or even criticizing – this precedent (*Winkworth* at 506). This therefore confirmed the application of the *lex rei sitae* principle.

⁵⁸ *Winkworth* at 502; in the opinion of the court, this conclusion could, nonetheless, have been challenged by the parties through the doctrine of *renvoi* (cf. *Winkworth* at 514). The possibility to use this doctrine was later rejected in the case of *Islamic Republic of Iran v. Berend*, [2007] EWHC 132 (QB) 1 Bus. L.R. D65. In *Berend*, the court specified that the *lex rei sitae* was the law applicable to determine the validity of the contested title. See *Islamic Republic of Iran v. Berend*, [2007] EWHC 132 (QB) 1 Bus. L.R. D65, at 24 and 32.

⁵⁹ See for example Rechtbank Limburg, zaaknummer C/03/1747752/HA ZA 12-371, 28 mei 2014, Maastricht, in which the Maastricht court had to apply Italian law to a dispute involving a stolen triptych purchased by an art dealer in Italy (at 3.18). The specifics about Italian private law are given at 3.21 (where Articles 1147 and 1151 *Codice Civile Italiano* are relied upon with regard to good faith and gross negligence towards others). See also GerechthofS-Hertogenbosch, zaaknummer 200.157.545_01, 06 juni 2017, at 3.4.6, confirming the decision of the Maastricht court in appeal.

⁶⁰ *Kunstsammlungen zu Weimar v. Elicofon*, (1981), 536 F.Supp. 829.

⁶¹ For more details about the disappearance of the paintings and the discovery of the theft, see *Kunstsammlungen zu Weimar v. Elicofon*, (1981), at 833 and ff.

⁶² The grand Duchess derived title to the paintings through assignment from her former husband, the Grand Duke Carl August. The Dürer portraits had been part of the Grand Ducal of Saxe-Weimar-Eisenach art collection until 1927 and were then transferred to the Land of Thuringia – successor to the territory of Weimar – through an agreement between Thuringia and the widow of the Grand Duke. The claim in replevin by the Duchess was dismissed on the basis of the 1927 agreement, as this 1927 document cancelled out any subsequent claim upon the art collection by the Duchy of Saxony-Weimar. See *Elicofon*, (1981), at 831.

⁶³ Before being stolen, the paintings had been kept until 1943 in the *Staatliche Kunstsammlungen zu Weimar* – hereinafter STW –, a museum located in Weimar, Germany. The STW was the predecessor of the KZM. In anticipation of the bombardments of the city, the director of the STW had important items from the museum moved to a nearby castle, the *Schloss Schwarzburg*. During the war, American forces occupied the castle for quite some time. At the end of the war, when Germany was subjected to control by the Allied powers and its administration was divided into four parts, the repatriation of the management of the territories meant that the Soviet Armed forces were to take control of the territory upon which the castle was located by 1 April 1945. In operating the change of regime, the paintings disappeared with the departure of the American troops from the castle. In 1969, the Minister of Culture of the German Democratic Republic conferred legal personality on the STW museum. Due to this formal recognition of legal personality, it became possible for the KZM to reclaim part of its collection that had disappeared, including the two Dürer portraits. Recovering the paintings was no easy task, as the KZM moved to act against Elicofon in 1969 but this motion was denied due to a lack of recognition of the German Democratic Republic by the United States, which lasted until 1974 (the motion to intervene introduced by the KZM was accepted, at last, in 1975).



In adjudicating, the District court concluded that New York law was applicable.⁶⁴ Thenceforth, the KZM's action was timely introduced and the museum was entitled to recover the two paintings. Contrasting both *Winkworth* and *Elicofon*, it is possible to infer that contentions resulting from cultural property theft can have utterly different results depending on the applicable law used by the court addressed: on the one hand, the thieves in *Winkworth* had successfully laundered title to the stolen netsukes by selling these in Italy. On the other hand, in *Elicofon* the court found that New York law was controlling the acquisition of the stolen Dürers, and, therefore, the owner was entitled to recover them. Although conflict-of-laws rules have an incidental effect on the determination of title to stolen property,⁶⁵ the crux of the problem resides in the discrepancies between national private law regimes.⁶⁶ More conspicuously, the gist of the differences resides in the approach used by domestic laws in solving what Merryman has coined the “eternal triangle of property law”.⁶⁷

To give substance to the concept developed by Merryman, account must be given of the circumstances leading to a triangular situation: after a work of art has been stolen, most owners will attempt to recover it. When these efforts prove fruitful, the object will either be retrieved in the hands of the thief himself, of a third party aware of the theft, or of an unbeknownst third party. Whilst it is generally accepted that a thief or possessor on notice ought to give the stolen property back to the owner, opinions differ as to the third scenario in which both parties to the contention are equally victims of the theft. Here, a triangular situation ‘owner – thief – innocent third party’ materializes in which legislators have to cut the Gordian knot by deciding which of the two victims is entitled to the property. This quandary – which has been qualified as the most ubiquitous dilemma⁶⁸ in the realm of private law⁶⁹ – cannot be easily resolved: both parties are victims of the activities of the thief and, therefore, deserve to be protected equally. Consequently, most legal systems have enacted domestic laws protecting these parties,⁷⁰ although these laws tend to give more protection to either the owner or the innocent acquirer.⁷¹ Therefore, disparities exist because of the different manners with which domestic legal systems uphold or discard a transfer to a third party acquiring in good faith against the claims of a dispossessed owner.⁷² These differences in domestic laws have contributed to – and sometimes facilitated – art theft:⁷³ it is believed that thieves are particularly deft in disposing of stolen cultural objects in jurisdictions that afford strong protection to third parties in good faith, cherry-picking the most favourable legal system to launder the dubious origin of the stolen property.⁷⁴ As such, they have often transferred stolen art from common law jurisdictions to civil law jurisdictions to benefit from favourable third-party protection. This protection would in turn slim down chances of recovery,

⁶⁴ *Elicofon*, (1981), at 845-846.

⁶⁵ Lalive d'Épinay, P., ‘Une avancée du droit international: la Convention de Rome d'Unidroit sur les biens culturels volés ou illicitement exportés’, 1 *Uniform Law Review*, (1996), p. 46, citing Garro, R., ‘The Recovery of Stolen Art Objects from Bona Fide Purchasers’, *International Sale of Works of Art – La vente internationale d'oeuvres d'art*, Geneva Workshop, (1985), p. 514.

⁶⁶ Lalive, P., ‘La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, 1 *Revue Suisse de Droit International et de Droit Européen*, (1997), pp. 22, 24; Lalive d'Épinay, (1996), p. 46; Burke, (1990-1991), pp. 430, 441 and 463.

⁶⁷ Grover, S. F., ‘Note – The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study’, 70 *Texas Law Review*, (1991-1992), p. 1431.

⁶⁸ It is also said that this problem was already omnipresent during the reign of the Babylonian king Hammurabi. See Grover, (1991-1992), p. 1431. See also Schwartz, A., Scott, R. E., ‘Rethinking the Laws of Good Faith Purchase’, 111 *Columbia Law Review*, (2001), pp. 1334-1335.

⁶⁹ See notably Schwartz and Scott, (2001), p. 1334 where both specified, in 2011, that scholars and law-makers had, heretofore, been unable to reach a consensus on this problem.

⁷⁰ The two parties are to be qualified as innocent because of the lack of fault on their part. See Burke, (1990-1991), pp. 442-443; including the thief in the equation, Merryman and Elsen have qualified the scenario as the ‘eternal triangle of property law’. See Grover, (1991-1992), p. 1431.

⁷¹ Burke, (1990-1991), p. 442.

⁷² Prott, L. V., ‘Unesco and Unidroit: A Partnership Against Trafficking in Cultural Objects’, in: N. Palmer (ed), *The Recovery of Stolen Art – A Collection of Essays*, (Kluwer law international, 1998), p. 206; Droz, (1997), p. 242; Last, K., ‘The Resolution of Cultural Property Disputes: Some Issues of Definition’, in: The 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 [et al.]: The Hague [et al.], 2004), p. 66; Lalive, ‘La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 32; Forbes, S. O., ‘Securing the Future of Our Past: Current Efforts to Protect Cultural Property’, 9 (1) *The Transnational Lawyer*, (1996), p. 237; Hughes V., Wright, L., ‘International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?’, 32 *The Canadian Yearbook of International Law*, (1994), p. 223.

⁷³ Olivier, (1996), p. 628; Droz, (1997), p. 242; Lalive, ‘La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 21; Office Fédéral de la Culture (Suisse), (1998), p. 4; Burke, (1990-1991), p. 430.

⁷⁴ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of International Organisations on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (UNESCO, Interpol), Study IJXX – Doc. 25, Rome, January 1992, p. 2; the process of art laundering can be understood as the process of laundering title to tainted cultural objects through its sale in a state that puts emphasis on the protection of bona fide purchasers. See Grover, (1991-1992), p. 1441 and Papademetriou, T., ‘International Aspects of Cultural Property – An Overview of Basic Instruments and Issues’, 24 *International Journal of Legal Information*, (1996), p. 289.

⁷⁴ Carruthers, (2001), p. 137.

or even render it virtually impossible,⁷⁵ thereby enabling criminals to pursue their activities without too much ado. In moving the object throughout several jurisdictions, it becomes possible for them to launder a stolen object's illicit origin and, adjacently, to launder title to it.⁷⁶ Therefore, the real hydra to the illicit traffic in stolen cultural goods stems from the lack of harmonization of the different private law rules regulating the afore-mentioned eternal triangle.⁷⁷

Harmonizing private law regimes – the input of UNIDROIT

Recognizing that the system described above is inadequate to tackle this facet of the traffic and to ensure the restitution of stolen cultural objects,⁷⁸ the 1995 convention was promulgated to remedy to these inadequacies and, by the same token, to correct – or at the very least to reduce – the unpredictability resulting from the above-mentioned system.⁷⁹ Chapter II of the convention deals with cultural property theft by prescribing means of restitution and regulating instances of *bona fide* acquisitions *a non-domino*. This end-of-the-chain-of-transactions course of action is of paramount importance because, as seen above, third-party protection constitutes the vehicle by which cultural materials of an illicit origin enter the licit market.⁸⁰ This is something that UNIDROIT understood very well, as the drafters of the convention recognized this problem from the outset of their task.⁸¹ Nevertheless, for the sake of fully comprehending the difficulties that have been encountered in drafting the provisions of Chapter II – and notably in the drafting of Article 4 (1) –, it is important to emphasize here that differences between private law regimes were the backdrop to the creation of this chapter.⁸² Henceforth, for the purpose of vetting Chapter II, the qualitative approach prescribed is operationalized through the juxtaposition of the regime of the convention with the rules it was set to change. Contrasting the two makes it possible to appreciate the added value of the convention in tackling the issue of cultural property theft and therefore, concurrently, its appropriateness.

(2) Archaeological theft

Although subjected to the same laundering process as the one described above, archaeological theft is prone to additional considerations: following the views of Bator, archaeological theft is marked by specific issues that require distinguishing this situation from other types of theft of cultural property.⁸³ The circumstances surrounding the appearance of products of clandestine excavations on the art market and the implications of their removal from the find site justify differentiation. Additionally, archaeological theft is a *sui generis* issue because, unlike the theft of known cultural materials, it is often particularly difficult for the source state to know that a theft took place, or even to be aware of the existence of the looted object before it surfaces on the antiques market.

⁷⁵ Olivier, (1996), p. 638; Lehman, J. N., 'The Continued Struggle With Stolen Cultural Property: the Hague Convention, the Unesco Convention, and the Unidroit Draft Convention', 14 *Arizona Journal of International and Comparative Law*, (1997), p. 529; Droz, (1997), p. 243; this is also true for art dealers, see Valgaeren, J. H., 'Geroofde kunstvoorwerpen tijdens WO II – Een juridisch en historisch overzicht', 42 (4) *Juris Falconis Jg.*, (2005-2006), p. 617; Burke, (1990-1991), p. 430.

⁷⁶ Fincham, (2009-2010), p. 166; Lalive d'Épinay, (1996), p. 46, citing Garro, (1985), p. 514.

⁷⁷ Lalive d'Épinay, (1996), p. 46, citing Garro, (1985), p. 514.

⁷⁸ Burke, (1990-1991), p. 430.

⁷⁹ Lalive d'Épinay, (1996), p. 47.

⁸⁰ Prott, *Commentary on the Unidroit Convention*, (1997) p. 12; it is because of disparities in property law regimes and of the strong protection given to purchaser in good faith in certain jurisdictions that thieves are able to select legal systems where they can sell the object in order to launder its illicit origin. See Grover, (1991-1992), p. 1441.

⁸¹ Doyal, S., 'Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy', 657 *Columbia Journal of Transnational Law*, (2000-2001), p. 668; in 1962, the Governing Council of UNIDROIT had already entrusted the task of drafting uniform rules on the acquisition in good faith of movable property to the Institute (see Prott, *Commentary on the Unidroit Convention*, (1997), p. 28). Published in 1968, the outcome produced by UNIDROIT was only directed at cross-border transactions relating to the sale of goods (UNIDROIT, *The Protection of Cultural Property – Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable in 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, (Prepared by Gerte Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law, Study LXX – Doc. 1, Rome, December 1986, p. 6 and Prott, *Commentary on the Unidroit Convention*, (1997), p. 28). This work was, then, subjected to revision by a committee of experts, which resulted in the draft *Uniform Law on the Acquisition in Good Faith of Corporeal Movable* (hereafter LUAB) (Prott, *Commentary on the Unidroit Convention*, (1997), p. 28). Although the LUAB never reached the stage of being discussed at a diplomatic conference, it triggered UNESCO's interest, which was struggling with the illicit handling in cultural objects (see UNIDROIT Secretariat, 'Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', 3 *Uniform Law Review*, (2001), p. 480; Sidorsky, E., 'The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration', 5 (1) *International Journal of Cultural Property*, (1996), p. 24) and approached UNIDROIT with the request of drafting harmonized rules facilitating claims for the restitution of cultural property. Due to the omnipresent protection of *bona fide* acquisitions in domestic legal regimes, UNIDROIT has questioned the desirability of the creation of such rules (see UNESCO, 'Technical and Legal Aspects of the Preparation of International Regulations to Prevent the Illicit Export, Import and Sale of Cultural Property', UNESCO/CUA/115, 14 April 1962).

⁸² Lagarde, P., 'La Restitution Internationale des Biens Culturels en Dehors de la Convention de l'UNESCO de 1970 et de la Convention d'UNIDROIT de 1995', 11 *Revue de Droit Uniforme*, (2006), p. 83.

⁸³ Bator, P. M., 'An Essay on the International Trade in Art', 34 *Stanford Law Review*, (1982), p. 285.

Coupled with further complications – such as uncertainties as to when and where the object was excavated –, this type of crime raises increased barriers to restitution. Furthermore, mandating the recovery of an artefact serves little purpose if its provenience has irreversibly been affected by its removal. Consequently, it should be emphasized from the outset of the present research that means of corrective justice are not *per se* appropriate to situations resulting from archaeological theft. This is notably due to the fact that they do not provide easily accessible means of redress for source states and afford little redress to the loss of information resulting from the destruction of the provenience. *Ergo*, the uniqueness of this situation calls for the adoption of tailor-made solutions.

2. METHODOLOGY

Because of the absence of (reliable) data inherent to any study about the illicit traffic in cultural property and of the limited practical application of the convention, measuring the appropriateness of Chapter II in addressing the illicit trafficking of cultural property through the use of empirical methods of analysis may prove impossible or fallacious. Instead, the use of qualitative methods of analysis is preferred. Therefore, for the purpose of vetting the regime of Chapter II of the 1995 UNIDROIT convention applicable to stolen cultural objects, the present research will employ a comparative legal analysis.

With regard to archaeological theft, the qualitative approach prescribed is operationalized through identifying the main difficulties encountered by source states in protecting their artefacts from being looted, analysing the tools of avail to source states in recovering plundered artefacts and vetting the added-value of the convention's regime in assisting these states in recovering such items.

3. COUNTRY SELECTION

In implementing the aforementioned comparative analysis, the present research will focus solely upon the private law rules relating to the involuntary loss of possession through theft,⁸⁴ the ensuing consequences of acquisitions *a non domino*⁸⁵ and rules of third-party protection. The distinction between voluntary and involuntary transfer of possession is of primordial importance in the present discussion as the two situations are usually governed by different sets of rules.⁸⁶ Consequently, the contemplated measures will be analysed in six different jurisdictions and will be compared to Chapter II of the convention. Although three of the legal orders studied – Belgium, France and The Netherlands respectively – are located within the European Union, the three other jurisdictions – New Jersey, California and New York – are situated in the United States of America. These jurisdictions have been selected on the basis of the following criteria: firstly, the approach to the triangular problem used in the three European states is at odds with the one used in their American counterparts. In the European legal orders, the problem is assimilated to an issue of property law. In the United States, it falls within the realm of tort law. Opposing the two provides sufficient ground for discussion in explaining the workings of the convention. This is all the more so considering that each of the three European and American states have nowise approached the problem in the exact same fashion. Secondly, none of the six states have ratified the 1995 convention thus far. Instead, they have preferred to either not consider ratification at all (i.e. in New Jersey, California and New York), to postpone the question of ratification (i.e. in Belgium and France), or have adopted an UNESCO Plus pragmatism (i.e. in The Netherlands). Thus, by comparing these domestic legal systems with the convention's regime, it is possible to understand the discrepancies between half a dozen legal orders that have not adhered to the regime of the convention. This, in turn, allows for a better understanding of the innovations brought by this instrument. Thirdly, each of the legal orders discussed has – in one-way or another – an established connexion with the present disquisition: first of all, since this research is conducted in both Belgium and The Netherlands, there is a clear predilection for the study of these two legal systems. What is more, California, New Jersey and New York have developed tailor-made rules to resolve claims for the recovery of stolen cultural property. Henceforth, these three jurisdictions are paragons because of the receptiveness demonstrated in dealing with the issue. Additionally, the abstinence of France and the United States – both being reckoned as important global

⁸⁴ In terms that are more accommodating to our American law readers, involuntary loss of possession can be paralleled to the theory of void title. See Grover, (1991-1992), p. 1447.

⁸⁵ It should be noted that the notion of acquisition *a non domino* has not been discussed for the purpose of the convention because adopting a harmonized definition of this notion was considered inutile in this context. See UNIDROIT, The International Protection of Cultural Property – Second Study Requested from UNIDROIT by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property and in the Light of the Comments Received on the First Study (prepared by Gerther Reichelt, Univ. Dozent at the Vienna Institute of Comparative Law), Study LXX – Doc. 4, Rome, April 1988, p. 23.

⁸⁶ The rationale for the distinction is, for example, discussed in *Elicofon*, where the court submitted “he who trusts another has to seek redress from the object of his confidence, and not from third parties”. *Kunstsammlungen zu Weimar v. Elicofon*, (1981), at 842, referring to the decision in appeal of the *Oberlandsgericht* of 23 March 1949.

market players by several TEFAF Art Market Reports⁸⁷ – from adhering to the regime of the convention commands some elaboration as to why their domestic rules are preferred. Fourthly, to the exception of Thorn's contribution with regard to French law, no earlier academic study about the convention has undertaken a detailed comparison between the above-mentioned jurisdictions and the regime of the convention. Finally, language constraints played a peripheral role in selecting these jurisdictions.

⁸⁷ See for example Mc Andrew, C., 'TEFAF Art Market Report 2014 – The Global Art Market, with a focus on the US and China', The European Fine Art Foundation, pp. 21-22, 24 and 40 or Pownall, R. A. J., 'TEFAF Art Market Report 2017', The European Fine Art Foundation.

C. Limitations of the research, selected case law and terminology

Before elaborating on the limitations of the present research, two preliminary remarks must be formulated: firstly, this study concerns an area of the law that is particularly complex, multidisciplinary in nature and which often involves difficult situations.⁸⁸ To facilitate the comparative analysis, attention will be devoted to one key scenario: the regulation of the triangular situation as depicted in its most basic form, i.e. owner – thief – innocent acquirer (as presented above). The reason for this simplification is to provide the reader with the main traits of the relevant problems without diverting from the objective of the research, which is to analyse and understand the regime of Chapter II of the 1995 UNIDROIT convention. Furthermore, it is important to emphasize that the purpose of this tool is to regulate the demand for illicitly trafficked cultural property and, as such, to legislate on the conditionality of claims in restitution or requests for the return of cultural objects and set the conditions against the backdrop of *bona fide* acquisitions by third parties. This entails that the situation addressed is already complex enough and that there is no reason to overburden the present analysis by digression. Secondly, although the convention is published in two official languages – French and English – the present contribution exclusively discusses the English authentic version of the convention for the sake of convenience.⁸⁹

1. LIMITATIONS OF THE RESEARCH

All things considered, the next domains are excluded from the present research based on the following considerations: (I.) the domains merely have a peripheral or incidental connection to the matters covered by the convention, (II.) other rules in existence supersede the convention in the matter concerned, or (III.) the domains are not relevant to the present research. More specifically, the following issues will not be elaborated on because of their peripheral / incidental relation to the convention (I.):

- i. *Questions of private international law relevant to the initiation of proceedings to recover stolen cultural objects or artefacts:*⁹⁰ notwithstanding the fact that private international law plays a particularly important role in the initiation of these procedures, it is not directly pertinent to the harmonization of private laws conducted by the UNIDROIT convention. In fact, the convention is not set to correct any loophole incidentally created by the application of conflict-of-laws rules that art thieves might exploit to launder the dubious origin of the stolen goods.⁹¹ Consequently, jurisdictional issues and questions of applicable law – although partly touched upon by certain provisions of the convention (cf. Article 8) –, will be left unaddressed;

⁸⁸ As pointed out above, it is not uncommon for cases about the recovery of cultural property to be at the crossroad between questions of private and public laws, but also of private and public international law. See UNIDROIT, *The International Protection of Cultural Property – Extract from the report of the 67th session of the Governing Council (Rome, 14 to 17 June 1988) relating to item 5 (d) on the agenda (C.D. 67 – Doc. 8; Study LXX – Docs. 2 and 3) (prepared by the Unidroit Secretariat), Study LXX – Doc. 5, Rome, October 1988, p. 2; Roodt, (1994), p. 315; Lalive d'Épinay, (1996), p. 47; As noted during the Diplomatic Conference towards the adoption of the convention by the Committee of the Whole “The draft Convention put into question the domestic law of different countries in relation to contracts of sale, the transfer of ownership and acquisition in good faith, private international law, the public law of foreign States and public international law”. See “Summary Records of the Meetings of the Committee of the Whole (Committee I)”, in Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings*, Rome, June 1995, (1996), CONF. 8/C.1/S.R. 1, p. 152.*

⁸⁹ It is important to note that some discrepancies exist between the two versions (e.g. the use of ‘cultural objects’ in the English version and of ‘biens culturels’ in the French version, which is to be translated as ‘cultural property’ in English). Henceforth, the present contribution will not take the French version of the convention into account throughout the analysis.

⁹⁰ There were some hesitations throughout the negotiations towards the adoption of the convention to deal with problems of private international law (see for example the discussion about whether it would be appropriate – having regard to the mandate of UNIDROIT that was in clear contrast with the mandate of the Hague Conference on Private International Law – for UNIDROIT to deal with these private international law issues. See UNIDROIT, (1988), Study LXX – Doc. 5, p. 9 or the commentary of Prott pointing at the intertwine nature of the problem, which requires the use of a multidisciplinary approach. Prott submitted as well that the Study Group set up by UNIDROIT was competent enough to deal with all these disciplines and she deprecated leaving the private international law aspect to another convention. See UNIDROIT, *The International Protection of Cultural Property – Notes on the first session of the Unidroit study group on the international protection of cultural property (submitted by Ms Lyndel V. Prott), Study LXX – Doc. 13, Rome, March 1989, p. 1). Despite this apparent hesitation, the final version of the convention does not harmonize private international law rules, with the exception of Article 8 dealing with jurisdictional matters (this was notably made clear in a commentary pertinent to the result of the second session of the Study Group, in which Frigo reiterated that the draft convention was not set to create an instrument of private international law. See UNIDROIT, *The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX – Doc. 15), Study LXX – Doc. 16 Add. 1, Rome, December 1989, p. 3).**

⁹¹ Carruthers, (2001), p. 137.

- ii. *Questions of determination of ownership or of other secondary property rights upon the cultural objects:*⁹² the convention does not attempt to regulate questions of ownership or of secondary property or possessory rights – e.g. right of pledge or of retention⁹³ – upon the stolen cultural objects falling under the umbrella of its Chapter II.⁹⁴ The drafters have left these considerations aside to ensure agreement on the principle of restitution of stolen materials and of payment of compensation to an innocent third party when it is deemed appropriate.⁹⁵ Proprietary aspects are separate matters to be resolved by the court seized with the contention.⁹⁶ There is, nonetheless, one exception to this exclusion with regard to the legal effect flowing from the expiration of limitation periods prescribed by Chapter II;⁹⁷
- iii. *Procedural aspects relating to claims in restitution of stolen property:*⁹⁸ because Chapter II merely prescribes the principle of restitution and ensuing rules directed at *bona fide* acquisitions, procedural concerns are not dealt with by the convention. In fact, the regimes outlined in it must be supplemented by domestic procedural rules.⁹⁹ Consequently, these considerations will not be addressed here;
- iv. *Constitutional guarantees relating to the deprivation of, or to constraints on, property rights* (e.g. expropriation);
- v. *Ancillary remedies available to the owner deprived of his property or to the possessor obliged by a restitution procedure:* Chapter II is uniquely concerned with ensuring the restitution from the possessor to the claimant. Consequently, residual questions of contractual or tortious liability for the sale – e.g. actions directed at the liability of the expert, seller or auctioneer responsible for the sale to the possessor¹⁰⁰ – or for any other damage due to the restitution are excluded from the present analysis;

⁹² Although abandoned in the final version of the convention, this exclusion found explicit expression in Article 1 (2) of the *Preliminary Draft Convention on the Restitution and Return of Cultural Objects* (hereafter PDC). Article 1 (2) of this PDC specified: “This Convention governs neither: (a) the question of ownership of cultural objects or that of other rights which exist over them; [...]”. See UNIDROIT, Preliminary draft Convention on the restitution of cultural property (drawn up by Mr Roland Loewe in the light of the two studies prepared by Mme G. Reichelt), Study LXX – Doc. 3, Rome, June 1988, p. 1 and UNIDROIT, Preliminary draft Convention on the restitution and return of cultural objects (prepared by the Unidroit Secretariat), Study LXX – Doc. 11, Rome, February 1989, p. 2.

⁹³ In fact, Loewe specified from the outset that it would be impossible to achieve universal acceptance as to these specific points. See UNIDROIT, (1988), Study LXX – Doc. 5, p. 3.

⁹⁴ Calvo Caravaca, A. L., Caamiña Domínguez, C. M., “El Convenio de Unidroit de 24 de Junio 1995” in: C. R. Fernández Liesa and J. Prieto de Pedro (dirs), *La Protección Jurídica Internacional del Patrimonio Cultural. Especial Referencia a España*, (Colex: Madrid, 2009), p. 157; Bergé, (2000), p. 249.

⁹⁵ UNIDROIT, (1988), Study LXX – Doc. 5, p. 3.

⁹⁶ Issues of ownership are, therefore, to be dealt with by using private international law and by applying the domestic property law regime designated by these rules. See Calvo Caravaca, A. L., “Private International Law and the Unidroit Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects”, in: H. -P. Mansel, *Festschrift für Erik Jayme*, (European Law Publishers, Sellier: München, 2004), p. 90; Calvo Caravaca and Caamiña Domínguez, (2009), p. 157; Lagarde, (2006), p. 84; it should be noted that the determination of the rights of ownership upon cultural materials is a prerogative enjoyed by states, as recognized in several instruments of international law, such as for example the Organization of American States *Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations* (Convention of San Salvador) (1976), or the UNESCO *Convention for the Protection of the World Cultural and Natural Heritage* (1972). The same conclusion was already present in the Preliminary Report of the Director-General of UNESCO about the *Recommendation on International Principles Applicable to Archaeological Excavations* (1956), at 24 (available at <http://unesdoc.unesco.org/images/0012/001273/127316EB.pdf>, last retrieved on 01.03.2018). See Papademetriou, (1996), p. 288; Throughout the convention’s drafting process, the Islamic Republic of Iran made a proposal to have an article in the convention specify that the court seized was to determine the ownership of the stolen object. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the second session of the committee (Rome, 20 to 29 January 1992), Study LXX – Doc. 29, Rome, February 1992, G.E./C.P. 2nd session Misc. 49, p. 73. This proposal was, nevertheless, not retained.

⁹⁷ It was noted during the third session of the Study Group that this point “indubitably touched on the question of ownership” and that the convention was, therefore, concerned with this aspect. In replying to this remark, the other members of the group advanced that the solution wrought by the future instrument was not to affect the rules applicable to the transfer of ownership in general, but was only limited to the transfer of cultural objects. See UNIDROIT, The International Protection of Cultural Property. Summary report on the third session of the UNIDROIT study group on the international protection of cultural property, held at the seat of the Institute from 22 to 26 January 1990 (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 18, Rome, May 1990, p. 10.

⁹⁸ Fraoua, R., “La mise en œuvre en Suisse de la Convention sur les biens culturels volés ou illicitement exportés”, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariétoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 38.

⁹⁹ The Committee of Governmental Experts was of the opinion that the future convention should not regulate procedural matters because of the diversity in procedural laws. Furthermore, it found it appropriate to leave procedural concerns to domestic laws. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects as Revised June 1993 (prepared by Ms Lyndel V. Prot, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 42, Rome, September 1993, pp. 2-3.

¹⁰⁰ This point was explicitly rejected from the scope of the Loewe draft Convention (cf Article 1). See UNIDROIT, (1988), Study LXX – Doc. 3, p. 1. The rejection found consolidation in the *Preliminary Draft Convention on the Restitution and Return of Cultural Objects*. Article 1 (2) (b) stated

Additionally, because of the existence of other norms superseding the regime of the convention (II.), the present research excludes discussions about:

- vi. *Criminalization of wrongful acts directed against cultural property or cultural heritage adjacent to the illicit traffic in cultural materials*:¹⁰¹ the convention merely addresses the private law implications of the illicit traffic in cultural materials. Therefore, considerations relating to the reprehension of these illicit activities – including criminal and administrative sanctioning – are excluded from the present analysis;
- vii. *Issues relating to the theft or illegal export of cultural property throughout wartimes*: technically, the convention does cover cultural objects misappropriated during armed conflicts or in situations of occupation.¹⁰² Nevertheless, these scenarios will be omitted from the present research to keep the focal point of the dissertation on peace times. Furthermore, because of its general non-retroactive scope, issues relating to the First and Second World Wars are excluded from the present analysis;¹⁰³
- viii. *Cultural objects misappropriated during periods of colonization*: due to the general non-retroactive nature of the convention, these cultural materials are also omitted from the scope of the convention,¹⁰⁴ and thus from the present research.

Finally, the present research deems the following topics as irrelevant to the present contribution (III.):

- ix. *Regimes directed at objects of a special cultural importance to states* – such as national cultural heritage laws, public domain regimes or regulation of national treasures – that are often classified as imprescriptible and inalienable by means of public laws: because the illicit traffic in cultural objects is mainly embedded with an international dimension, the practical effect of these special public laws will often be of little relevancy. Since cultural objects are often prone to removal to other states before being sold to third parties, these *leges speciales* will often not find echo in foreign litigation because of either conflict-of-law rules or of their public character. Consequently, the present research does not deal with these special laws. The same conclusion applies for domestic measures restricting the merchantability of certain cultural materials – such as *res extra commercium* classifications – because of the lack of recognition given to these measures in foreign jurisdictions;¹⁰⁵

specifically that: “This Convention governs neither: [...] (b) the liability of experts, auctioneers or other sellers of cultural objects”. See UNIDROIT, (1989), Study LXX – Doc. 11, p. 2.

¹⁰¹ The criminalization of these acts was specifically excluded from the scope of the research requested by UNESCO to UNIDROIT. See UNIDROIT, (1986), Study LXX – Doc. 1, p. 9; instead, other international instruments will apply to the issue, such as the 2000 United Nations *Convention against Transnational Organized Crime* (also known as the Palermo Convention), the 2003 United Nations *Convention against Corruption* or the *International Guidelines on Crime Prevention and Criminal Justice Responses to this Phenomenon* (see UNIDROIT, ‘Special event on “Promoting and Strengthening the international legal framework for the protection of cultural heritage—the 1995 UNIDROIT Convention and other relevant legal instruments and initiatives” (New York, Tuesday, 28 February 2017) – Summary’, available at <http://www.unidroit.org/english/news/2017/170228-cp-ny/summary-e.pdf>, last retrieved on 01.03.2018).

¹⁰² In this regard, see the proposal by the Croatian delegation and the ensuing discussion in the Committee of the Whole in ‘Summary Records of the Meetings of the Committee of the Whole (Committee I)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 1, pp. 159-160 where the introduction of provisions concerning cultural objects stolen during war situations was rejected. Nevertheless, – after Prott remarked that the issue was already addressed by the first Protocol to the 1954 Hague Convention (see notably article I of the Protocol) – the Committee of the Whole did not exclude the application of the convention to cultural objects misappropriated during armed conflicts (*idem*, but also p. 254). Although a provision was included in the work of the Final Clauses Committee, this proposed article D – addressing the interaction between the future convention and other instruments or matters governed by customary international law concerned with hostilities or occupation – was ultimately not retained (*ibidem*, p. 319). What is more, it can also be remarked that the representative of Finland specified that the *Statute of the International Tribunal for War Crimes in the Former Yugoslavia* contains provisions entitling the court to order the restoration of cultural objects misappropriated during armed conflicts (*ibidem*, p. 160). See also Prott, (2004), p. 129.

¹⁰³ Cf. for example Prott, *Commentary on the Unidroit Convention*, (1997), p. 39; For an overview of measures of corrective justice adopted as a consequences of the Second World War, see Prott, (2004), pp. 113-137.

¹⁰⁴ Cf. Prott, *Commentary on the Unidroit Convention*, (1997), p. 39.

¹⁰⁵ See notably the explanation given by Siehr in Siehr, K., ‘The Protection of Cultural Heritage and International Commerce’, 7 *International Journal of Cultural Property*, (1997), p. 318.

- x. *Intellectual property rights*¹⁰⁶ and *issues governing intangible goods*: the convention is only concerned with cultural objects as defined in the second article thereof. This means that it only concerns tangible movable cultural objects.

2. SELECTED CASE LAW

Due to the paucity of case law applying the convention, the discussion will draw commonalities between the regime of the convention and the domestic case law available. Consequently, cases having material ties to the present analysis will be discussed for the purpose of illustrating the points made throughout the convention. Furthermore, the cases selected are exclusively dealing with contentions relating to cultural objects.

3. TERMINOLOGY

Discrepancies in terminology used in the realm of international cultural property / heritage law make it particularly difficult to provide comprehensive definitions to a majority of the operative terms used throughout the present research. Being well aware of the different connotations that some of these notions might have in domestic or international contexts, some of these differences are overseen for the sake of simplicity. For example, – notwithstanding technical differences in meanings given to terms referring to tangible and movable forms of cultural expression – the author will use the terminology of ‘cultural objects’, ‘cultural property’ and ‘cultural materials’ interchangeably. This means that, the present disquisition uses a loose characterization of cultural objects for the purpose of simplifying the discussion.¹⁰⁷ Other terminological or semantic uncertainties are alleviated through the use of the glossary annexed to the present research. It is, therefore, highly recommended to consult this glossary for an elaboration as to the meaning given to operative concepts used, the semantics of which are unsettled in the realm of international cultural property / heritage law.

¹⁰⁶ This aspect had been explicitly excluded from the negotiations by the Committee of Governmental Experts. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, p. 10.

¹⁰⁷ The definition of cultural object given in the convention is more nuanced than this loose qualification, and will be explained for the purpose of applying the convention in ‘Chapter 1 – Presentation and Applicability’ below.

D. Research structure

The structure of the present research is divided in four main parts. *Part I* delimitates the purview of the convention: firstly, the implications of the convention's regime will be depicted by sketching the contours of the 1995 UNIDROIT convention and, more particularly, by laying down its foundations and by elucidating its applicability. As such, **Chapter 1**¹⁰⁸ firstly introduces the reader to the context within which the convention was adopted and to its making. Secondly, it delimits the applicability of the convention by defining key notions used throughout its provisions and laying down the fringes of its scope of application; *Part II* is concerned with the issue of cultural property theft: it is composed of three chapters that, respectively, provide a comparative analysis of the private law rules regulating the eternal triangle of property law in Belgium, France and The Netherlands (**Chapter 2**), in New Jersey, California and New York (**Chapter 3**) and of the solution posited by Chapter II of the convention (**Chapter 4**); *Part III* addresses archaeological theft: **Chapter 5** will firstly elaborate on the particularly vulnerable status of antiquities and the many challenges that source states face when attempting to organize the protection of their archaeological reserves from depletion. Furthermore, it will substantiate how antiquities have been incorporated into the regime of the convention and the appositeness of this incorporation in light of the idiosyncrasies of archaeological theft; *Part IV* discusses residual considerations relevant to the application of the convention: **Chapter 6** puts forward important aspects relating to the application of the provisions of the convention, such as the simultaneous use of Chapters II and III, the modulation of its provisions by contracting states, the means of interpretation of the convention and the monitoring mechanisms to supervise the application of the convention. **Chapter 7** positions the convention in the international legal framework. Thenceforth, the interactions between the convention and other international instruments – the scope of which coincides with the regime of the convention – are analysed, followed by bilateral means for contracting states to improve the application of the convention and the possibility to delegate the question of restitution or return to the internal rules of economic integration organizations and of regional bodies. Finally, the **concluding chapter** of this research offers a reflective account of the convention and formulates recommendations for further improvement of its regime on cultural property theft.

In order to provide a holistic overview of the present dissertation and to position the discussion as against the whole of the research, the scope of each chapter will be further nuanced in the introduction thereto. Furthermore, each chapter is concluded by an informative summary that recapitulates the chapter's main findings. Next to this synoptical function, the summaries of chapters 2 and 3 will also allow drawing conclusions from the comparative analyses given in these two chapters. Both introductions and summaries aim to help guide the reader throughout the present research by rendering the text clearer and, hence, more accessible.

¹⁰⁸ Note that the chapters with the Roman numerals refer to chapters of the convention, whilst the Arabic numerals are used to refer to the chapters of this research.

PART I
APPLICABILITY OF THE CONVENTION

CHAPTER 1 |

PRESENTATION AND APPLICABILITY OF THE CONVENTION

CHAPTER 1 | PRESENTATION AND APPLICABILITY OF THE CONVENTION

Introduction25

A. Presentation of the convention.....26

1. Contextualization..... 26

 (1) First coordinated attempts at thwarting the illicit traffic..... 26

 (2) Towards a pragmatic solution – renewed efforts 29

2. Preparatory work 32

3. Objectives pursued..... 39

4. Structure of the convention 42

B. Applicability of the convention45

1. Conceptualization 45

 (1) Cultural objects 45

 (2) International character of the claim or request..... 57

2. Scope of application..... 60

 (1) Material scope 60

 (2) Territorial scope..... 75

 (3) Temporal scope 76

 (4) Personal scope..... 84

Summary87

Introduction

In order to understand the intricate regime established by the convention, it is firstly important to take a look at its operability. As such, it must be recalled that its regime is not to be assimilated to an all-encompassing law, but it merely provides a framework for minimum uniformity amidst contracting states.¹ Furthermore, the convention is set to regulate the private law aspects of the different facets of the illicit traffic in cultural property² and, in doing so, it attempts to harmonize technical and detailed rules of private law by means of compromise.³ Compromising in an area of the law that is, by its very nature, technical has the pernicious effect of making the appreciation of its exact fringes abstruse at times. Concurrently, the drafters of the present instrument were more inclined to use a general language in order to facilitate its acceptance.⁴ Henceforth, analysing the extent of the convention's ambit constitutes an important – although particularly daunting – task in understanding its role.

To complete this task, the convention is introduced by providing a sequential account of its enactment (section A). In doing so, the context within which the convention was adopted will be established (section A. 1.), followed by the main stages of the elaboration of its regime (section A. 2.); by an overview of the objectives it pursues (section A. 3.) and, finally, by an analysis of its structure (section A. 4.). This sequential approach presents the phases that characterized the making of the convention. Secondly, general considerations pertaining to the applicability of the convention are tabled (section B). These considerations include discussions as to the key concepts used throughout the text of the convention (section B. 1.) and the delimitation of its scope of application (section B. 2.).

¹ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, pp. 44-45. See also Love Levine, A., 'The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention', 36 *Brooklyn Journal of International Law*, (2010-2011), p. 768; Fraoua, R., 'La mise en œuvre en Suisse de la Convention sur les biens culturels volés ou illicitement exportés', in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 39.

² See for example UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects as Revised June 1993 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 42, Rome, September 1993, p. 19.

³ See UNIDROIT, (1993), Study LXX – Doc. 42, p. 2, where Prott established that the convention deals with private law issues. See also 'Comments by International Organisations of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings, Rome 7 au 24 Juin 1995 - Actes*, (1996), CONF. 8/6, April 1995, p. 87. Furthermore, it was noted during the plenum of the Diplomatic Conference that the 1995 convention was the first international instrument hitherto dealing with the private law implications of the illicit traffic in cultural property. See 'Agenda Item 8: Adoption of the Final Act of the Conference and of any Instruments Resolutions and Recommendations Resulting from its Work (CONF. 8/C.1/Doc. 1; CONF. 8/C.2/Doc. 1; CONF. 8/C.2/W.P. 25; CONF. 8/W.P. 1, 2, 3, 4, 5 and 6)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/S.R. 6, 24 June 1996, pp. 357-358; The tension as to the use of a detailed drafting technique for an international instrument was already touched upon by the Finnish delegation amidst the Committee of Governmental Experts. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of governmental delegations on the preliminary draft Unidroit convention on stolen or illegally exported cultural objects (Finland, Netherlands, Sweden, Turkey and Venezuela), Study LXX – Doc. 32, Rome, November 1992, p. 3: "[commenting about a predecessor to article 9 (1) of the convention] Furthermore, because of the detailed drafting techniques, seldom used in international conventions, some of these rules seem to be unnecessarily narrow, leaving outside their scope certain situations which quite obviously should be therein".

⁴ See for example the commentary provided by Sweden about the need to use more common language to give meaning to the concepts of 'theft' and 'possession', in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of Governments on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Canada, China, France, Islamic Republic of Iran, Norway, Sweden and Turkey), Study LXX – Doc. 24, Rome, January 1992, pp. 19-20. Following the Swedish Delegation taking part to the work of the Committee of Governmental Experts, the generality of the provisions was to be remedied by means of fair implementation.

A. Presentation of the convention

1. CONTEXTUALIZATION

Although cultural materials have long been the unavowed victims of wars and of colonization,⁵ the illicit traffic in cultural property in peace times is a phenomenon that has beset the international community from the twentieth century onwards. Throughout this period, illegal activities have increased on a worldwide scale⁶ due to manifold factors, including notably: the marketability of cultural objects, upsurges in demand by the art market,⁷ inflating market value,⁸ the evolution of technologies and of means of transport,⁹ the erosion of borders between states,¹⁰ the loosening of border controls¹¹ and even political turmoil.¹² This growing problem has, perforce, obliged the international community to adopt a cohesive approach to tackle the problem.

(1) First coordinated attempts at thwarting the illicit traffic

A first, although particularly limited, coordinated attempt to control the illicit trafficking of cultural property in peace times originated in the *European Cultural Convention*¹³ – hereinafter ECC – adopted on 19 December 1954 in Paris, France.¹⁴ The convention established a forum of discussion for European states with a view to matters concerning the protection of cultural property¹⁵ (cf. Article 6 (1) ECC) and created the obligation to adopt appropriate measures to safeguard objects of European cultural value that are in the control of contracting parties (cf. Article 5 ECC). Despite its regional ambit, the convention did not afford effective protection because it lacked the necessary means of enforcement.¹⁶ Therefore, following a universal increase in trafficking¹⁷ by the

⁵ It is generally predicated that the misappropriation of cultural property is a problem that has affected humanity since its early days (see for example Presidenza del Consiglio dei Ministri, (1996), p. 21). Throughout history, cultural objects have been particularly coveted for their aesthetics or pecuniary values, but also for their status symbol. During conquests and wars, cultural materials were seen as spoils of war that were legitimately owed to the victors (Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), p. 132; McCord, 'The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Traffic in Art', 70 *Indiana Law Journal*, (1994-1995), p. 988; Lindsay, I., *The History of Loot and Stolen Art: from Antiquity until the Present Day*, (Unicorn Press LTD: London, 2014), p. 3); the idea that the cultural spoils enured to the winner found ground in the expression "to the victor go the spoils!" (Rostomian, P. C., 'Looted Art in the U.S. Market', 55 *Rutgers Law Review*, (2002-2003), pp. 271-299). As such, history is blotted by instances of plunder of cultural materials justified by war, starting with the earliest record of the plunderings during the 7th century B.C (Lindsay, (2014), p. 9. For an illustrative overview of the many instances through which cultural objects were victimized in wars, see the historical record provided by Ivan Lindsay, *The History of Loot and Stolen Art: from Antiquity until the Present Day*, (Unicorn Press LTD: London, 2014)). The propensity of warfare belligerents to covet the cultural property of the conquered made cultural property particularly vulnerable in times of turmoil wrought by armed conflicts. As such, the spoliation of the defeated resulted in an increased movement of cultural properties between peoples (Forrest, (2010), p. 132).

⁶ Calvo Caravaca, A. L., 'Private International Law and the Unidroit Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects', in: H.-P. Mansel, *Festschrift für Erik Jayme*, (European Law Publishers, Sellier: München, 2004), p. 87; Coggins, C. C., 'A Licit International Traffic in Ancient Art: Let There Be Light', 4 *International Journal of Cultural Property*, (1995), p. 70; Carducci, G., 'Complémentarité Entre les Conventions de l'UNESCO de 1970 et d'UNIDROIT de 1995 sur les Biens Culturels', 11 *Revue de Droit Uniforme*, (2006), p. 93; Lalive, P., 'La Convention d'UNIDROIT sur les Biens Culturels Volés ou Illicitement Exportés (du 24 Juin 1995)', 1 *Revue Suisse de Droit International et de Droit Européen*, (1997), p. 24; Portes (Des), E., 'La Lutte Contre le Trafic des Biens Culturels: Une Priorité pour les Professionnels de Musée', 115 *Gazette du Palais*, (1995), p. 327; Lenzer, N. R., 'The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcoming of the Unesco Convention?', 15 (3) *University of Pennsylvania Journal of International Business Law*, (1994-1995), p. 473; Roca-Hachem, R., 'Unesco and Unidroit Cooperation in the Fight Against Illicit Traffic in Cultural Property – Conference Celebrating the 10th Anniversary of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Unesco, Paris (France) – 24 June 2005 – Summary Report', 3 *Uniform Law Review*, (2005), p. 536; Kelly, M. J., 'Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio animo Ferundi/Lucrandi', 14 *Dickinson Journal of International Law*, (1995-1996), p. 31; Office Fédéral de la Culture (Suisse) (ed), 'Transfert International des Biens Culturels. Convention de l'Unesco de 1970 et Convention d'Unidroit de 1995, Rapport du Groupe de Travail', (l'Office Fédéral de la Culture: Berne, 1998), p. 3.

⁷ Presidenza del Consiglio dei Ministri, (1996), p. 20.

⁸ Presidenza del Consiglio dei Ministri, (1996), p. 20.

⁹ Grosse, L., Jouanny, J. P., 'La Protection du Patrimoine Culturel en Vertu des Instruments de l'UNESCO (1970) et d'UNIDROIT (1995): La Position d'Interpol', 1/2 *Uniform Law Review*, (2003), p. 575.

¹⁰ Presidenza del Consiglio dei Ministri, (1996), p. 20; Boonyakiet, J., 'L'ITCOM et la lutte contre le trafic illicite des biens culturels', École du Louvre, *Monographie*, (1998-1999), p. 4.

¹¹ Boonyakiet, (1998-1999), p. 4.

¹² Boonyakiet, (1998-1999), p. 4.

¹³ The text of the convention can be consulted at the following url: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006457e>, last retrieved on 01.03.2018.

¹⁴ Margules, P. L., 'International Art Theft and the Illegal Import and Export of Cultural Property: a Study of Relevant Values, Legislation, and Solutions', 15 *Suffolk Transnational Law Journal*, (1991-1992), p. 615.

¹⁵ Margules, (1991-1992), pp. 616-617.

¹⁶ Margules, (1991-1992), p. 617.

¹⁷ Sánchez Cordero, J., 'The Protection of Cultural Heritage: a Mexican Perspective', 1/2 *Uniform Law Review*, (2003), p. 566; Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 16; Grosse and Jouanny,

1960s, many states became aware of the necessity to protect cultural property more thoroughly.¹⁸ A multitude of factors contributed to this change of heart, including: increased dubious acquisitions by collectors and museums, pressure exercised by states to have objects imported in market states that stemmed from contraband activities returned to their country of origin, the appearance of sophisticated techniques of theft¹⁹ and the establishment of movements by ethnic communities to regain possession and respect for their cultural identities.²⁰ Because of the widening of the scope of the illegal activities, the adoption of national measures proved to be either insufficient or of no avail to curtail the problem.²¹ Adopting effective and legally binding rules on the international plane to protect cultural materials from theft and illegal export proved inevitable. Therefore, the international community had to respond adequately to this upcoming threat and opted for the adoption of enhanced measures to fight the illicit trade in cultural property²² by means of concerted actions.²³ This led the community to relocate its focal point in protecting cultural movables through the means made available by UNESCO.²⁴ By 1970, the said community moved to prioritize the fight against the illicit traffic in times of peace²⁵ and the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* followed the modest attempt that was launched in 1954.²⁶

(2003), p. 575; Carruthers, J. M., 'Cultural Property and Law – An International Private Law Perspective', *Juridical Review*, (2001), p. 127; Office Fédéral de la Culture (Suisse), (1998), p. 3; Love Levine points at the fact that statistics about stolen cultural objects are not as reliable as these pertain to be. It is, therefore, difficult to make a clear assessment of the extent of the problem since the data available is misleading. See Love Levine, (2010-2011), p. 751; Kaye points at a "systematic looting of archaeological and sacred sites in art-rich countries throughout the world". See Kaye, L. M., 'The Future of the Past: Recovering Cultural Property', 4 (1) *Cardozo Journal of International and Comparative Law*, (1996), p. 24; Grover, S. F., 'Note – The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study', 70 *Texas Law Review*, (1991-1992), p. 1454.

¹⁸ Presidenza del Consiglio dei Ministri, (1996), p. 20; Sánchez Cordero, (2003), p. 565; Portes (Des), (1995), p. 327; Kaye, (1996), p. 23.
¹⁹ Grover, (1991-1992), pp. 1437-1438.

²⁰ Nafziger, J., Kirkwood Paterson, R., 'Cultural Heritage Law', in: J. Nafziger and R. Kirkwood Paterson (ed), *Handbook on the Law of Cultural Heritage and International Trade*, (Edward Elgar Publishing: United Kingdom, 2014), pp. 5-6; see also Planche, E., 'Le point de départ, la Convention de l'UNESCO de 1970 concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels', 20 *Uniform Law Review*, (2015), p. 516.

²¹ Presidenza del Consiglio dei Ministri, (1996), p. 20, where it is noted that states came to realize that domestic measures were insufficient to tackle this international traffic; Burke, K. T., 'International Transfer of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?', 13 *Loyola of Los Angeles International and Comparative Law Journal*, (1990-1991), p. 439; Love Levine, (2010-2011), p. 779; Even nowadays, there seems to be agreement between specialists that national efforts are inefficient against theft and illegal exports and that tailored made rules need to be promulgated at the international level to remedy to the illicit traffic. See Vicien-Milburn, M., 'International claims for restitution outside the framework of the 1970 and 1995 instruments - genesis of the 1995 Convention', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming; Stamatoudi, I., *Cultural Property law and Restitution. A Commentary to International Conventions and European Union Law* (Edward Elgar Publishing, 2011), p. 187; Protz, L. V., 'International Control of the Illicit Movement of the Cultural Heritage: the 1970 UNESCO Convention and Some Possible Alternatives', 10 *Syracuse Journal of International Law and Commerce*, (1983), p. 333.

²² UNIDROIT Secretariat, 'Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', 3 *Uniform Law Review*, (2001), p. 478; Lenzner, (1994-1995), p. 476; Francioni, F., 'La Protección del Patrimonio Cultural a la Luz de Los Principios de Derecho Internacional Público', in: C. R. Fernández Liesa and J. Prieto de Pedro (dirs), *La Protección Jurídica Internacional del Patrimonio Cultural. Especial Referencia a España*, (Colec: Madrid, 2009), p. 14; Love Levine, (2010-2011), p. 752.

²³ Stamatoudi, (2011), p. 187; Protz, (1983), p. 333; UNIDROIT Secretariat, (2001), p. 478.

²⁴ Gerstenblith, P., *Art, Cultural Heritage, and the Law: Cases and Materials*, (Carolina Academic Press: Durham, Fourth Edition, 2008), p. 618; for a detailed overview of the development that took place in the 1960s, see Planche, (2015), pp. 516-517.

²⁵ McCord, (1994-1995), pp. 985-1008.

²⁶ Burke, (1990-1991), p. 432; The 1970 convention is an international agreement that was finalized in Paris in November 1970 and that is considered as a significant achievement in tackling the theft and illegal export of cultural property (see Warring, J., 'Underground Debates: the Fundamental Differences of Opinion that Thwarted UNESCO's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review*, (2005), p. 8). The convention can be consulted on the following link: http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html, last retrieved on 01.03.2018; For an in-depth explanation as to its adoption and as to its provisions, please consult Bator, P. M., 'An Essay on the International Trade in Art', 34 *Stanford Law Review*, (1982), pp. 370-384. The adoption of this new instrument resulted from an increase in the import of unlawfully acquired artifacts during the 1960s (Love Levine, (2010-2011), pp. 759-760): vast pillaging of ethnical and archaeological objects from source states found their way to market states during this period (Fox, C., 'The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property', 9 (1) *American University International Law Review*, (1993), p. 248). The convention was the end product of many efforts to constrain the plundering of archaeological materials as well as to protect important cultural objects from theft (Lehman, J. N., 'The Continued Struggle with Stolen Cultural Property: the Hague Convention, the UNESCO Convention, and the Unidroit Draft Convention', 14 *Arizona Journal of International & Comparative Law*, (1997), p. 539, citing Protz, (1983), pp. 338-339). The convention has a public character as it regulates relations between states and establishes means of cooperation to refrain the illicit traffic of cultural property in times of peace through administrative channels (Klein, F.-E., 'En Relisant la Convention UNIDROIT du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés : Réflexions et Suggestions', 118 *Zeitschrift für Schweizerisches Recht*, (1999), p. 266). In doing so, it seeks to adopt an intermediary position between two conflicting interests: the fight against the illicit traffic in cultural property and the free flow of culture between nations (Burke, (1990-1991), p. 435). It additionally strives to prevent the illegal transfer of cultural property, ensuring the return of the object to its rightful owner and allowing him to bring actions in recovery of property irrespective of the limitations laid down in domestic legislation (*idem*). Nonetheless, the 1970 convention does not lay down the details of such procedure. The 1970 UNESCO convention is discussed in more detail in 'Chapter 7 – Unidroit and the World' below.



The 1970 convention – symbolized by the drawing on the left – is the first comprehensive international instrument adopted to counter the illicit traffic of cultural property in times of peace,²⁷ and is generally viewed as an important step towards the prevention of this traffic.²⁸ Notwithstanding its adoption, a decade later there was a general feeling that the international community had not been able to cope properly with the issue addressed.²⁹

This feeling – although mainly nourished by a prospering illicit trade³⁰ – arose due to the lack of effectiveness of the 1970 tool; the nebulousness and non-compulsory nature of its provisions – including of Article 7 (b) (ii)³¹ – were seen as important flaws of the 1970 agreement.³² In fact, UNESCO experienced difficulties in getting state parties to implement the convention; legal gaps in its regime and a general lack of clear implementation guidelines created barriers to transposition.³³ More conspicuously, the requirement laid down in Article 7 (b) (ii) to pay just compensation to an innocent purchaser was considered particularly problematic. The epicentre of this predicament stemmed from a deeply rooted conflict of ideologies – which had already found expression during the negotiations of the convention –, notably in respect of the different approaches proposed by civil and common law jurisdictions in the ambit of third-party protection.³⁴ The irreconcilability of the different approaches blotted the regime instated by the convention.³⁵ Ultimately, another problem stemmed from the lack of directly applicable rules for the restitution of stolen cultural objects.³⁶ All in all, it was believed that the 1970 convention failed to address adequately the targeted traffic,³⁷ leading commentators to qualify it as futile in regulating the said issue.³⁸ Combined with a lack of participation of important market states – such as Japan and Western European States – in the convention’s early stages,³⁹ the apparent unpopularity of the 1970 instrument called for the creation of a more pragmatic text.⁴⁰

²⁷ Margules, (1991-1992), p. 620;

²⁸ Vicien-Milburn, (2012), forthcoming.

²⁹ Presidenza del Consiglio dei Ministri, (1996), p. 20; Coulée, F., ‘Quelques Remarques sur la Restitution Interétatique des Biens Culturels sous l’Angle du Droit International Public’, *Revue Générale de Droit International Public*, (2000), p. 361; Burke, (1990-1991), p. 432; Yasaitis, K. E., ‘Case note – National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz’, 12 (1) *International Journal of Cultural Property*, (February 2005), p. 99.

³⁰ Warring, (2005), p. 232.

³¹ Schneider, M., ‘Le Projet de Convention d’Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés’, in: Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 143; Prött noted that the Unidroit Preliminary draft Convention was freed from the ambiguities that were present in its 1970 counterpart. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Commentary on the UNIDROIT preliminary draft Convention on Stolen or Illegally Exported Cultural Objects as revised June 1992 (prepared by Ms Lyndel V. Prött, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 36, Rome, February 1993, p. 4.

³² Burke refers to the analysis of Bator (op. cit.) concerning the weak provisions of the UNESCO convention. Following the latter, the provisions have a rhetorical character and impose goals instead of providing substantive duties and obligations. For an in-depth analysis of the weaknesses of the provisions of the convention, see Burke, (1990-1991), pp. 435 and ff., and Margules, (1991-1992), pp. 621-622; Vicien-Milburn, (2012), forthcoming; Arduin, C. D., ‘Vers un Trafic Licite des Biens Culturels? Quelques Réflexions et Questions à Partir d’une Perspective Anthropologique’, in: International Chamber of Commerce, *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 76 (relying on the writings of Merryman); Ironically, more specific treaties have received less support by the international community because of the unbridgeable schism in ideologies between source and market nations. See Warring, (2005), p. 244; Lehman, (1997), p. 541.

³³ Gambaro, A., ‘Community, State, Individuals and the Ownership of Cultural Objects’, in: J. A. Sánchez Cordero (ed), *La Convención de la UNESCO de 1970 – Sus Nuevos Desafíos*, (Universidad Nacional Autónoma de México: México, 2014), p. 139; It should be noted that the parties to the convention remedied the lack of guidelines by adopting ‘Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property’ (UNESCO, Paris, 1970) in May 2015 during the third meeting of the State Parties. Text available at http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/pdf/OPERATIONAL_GUIDELINES_EN_FINAL.pdf, last retrieved on 01.03.2018.

³⁴ Kuitenbrouwer, F., ‘The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance’, 13 *European Review*, (2005), pp. 599-600; Warring, (2005), p. 253.

³⁵ Kuitenbrouwer, (2005), pp. 599-600; Warring, (2005), p. 253.

³⁶ Vicien-Milburn, (2012), forthcoming.

³⁷ Exporting states have raised concerns about the lack of effective remedies in the 1970 convention (see UNIDROIT, The International Protection of Cultural Property – Extract from the report of the 67th session of the Governing Council (Rome, 14 to 17 June 1988) relating to item 5 (d) on the agenda (C.D. 67 – Doc. 8; Study LXX – Docs. 2 and 3) (prepared by the Unidroit Secretariat), Study LXX – Doc. 5, Rome, October 1988, p. 6). Furthermore, the UNESCO convention did not regulate disputes between private parties, which was one of the main issues in relation to third-party protection in acquisitions of stolen cultural property. See also the commentary of UNESCO in Presidenza del Consiglio dei Ministri, (1996), p. 84 by which it submits that the 1970 convention had hitherto not resolved the problem of illicit trafficking.

³⁸ Lehman, (1997), p. 541.

³⁹ Japan, England, France and Switzerland refrained from becoming parties to the convention in its early stages. See Margules, (1991-1992), p. 622. Today, however, these four states are all parties to the UNESCO convention (for the actual status of ratification of the convention, see <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha>, last retrieved on 01.03.2018).

⁴⁰ Bergé, J.-S., ‘La Convention d’Unidroit sur les Biens Culturels (*): Remarques sur la Dynamique des Sources en Droit International’, 127 *Journal du Droit International*, (2000), p. 223; Melachlan, C., *Foreign Relations Law*, (Cambridge University Press: Cambridge, 2014), p. 443.

(2) Towards a pragmatic solution – renewed efforts

Despite the adoption of several resolutions by the United Nations General Assembly for the protection of cultural property from 1972 onwards,⁴¹ the establishment of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation* – hereinafter ICPRCP – in 1978,⁴² and the adoption of the *Resolution on Return of Works of Art* by the Council of Europe in 1983,⁴³ a new multilateral instrument was much needed. By the 1980s, the illicit traffic continued to beset the international community, pressing for the prompt adoption of new initiatives.⁴⁴ Following the issuance of a report on *National Legal Control of the Illicit Traffic in Cultural Property*,⁴⁵ and the recommendation by a committee of experts analysing the progress of the 1970 UNESCO convention⁴⁶ – both recommending submitting the matter to an international body specialized in private law⁴⁷ – UNESCO thereby endowed UNIDROIT with the task at hand.⁴⁸ In fact, recognizing the flaws and ambiguities inherent to its 1970 offspring,⁴⁹ UNESCO believed that it was possible to further the cause through the use of private law mechanisms, therefore acting upon the aspect that was at the heart of the problem of Article 7 (b) (ii).⁵⁰ The 1970 convention had raised important questions of private law that the article did not adequately address.⁵¹ Nevertheless, the organization did not possess the mandate to deal with matters of national (private) law,⁵² another reason why it was appropriate to ask the Rome-based institute to draft the future instrument.⁵³ Thus, by mandating the latter, UNESCO gave the impetus to the creation of the UNIDROIT convention.⁵⁴ UNIDROIT – an institute that specializes in harmonizing material rules and which holds a broad area of expertise in private law, as well as in private international law⁵⁵ – was considered to possess the technical know-how required for the elaboration of a solution.⁵⁶ Less than a decade theretofore, the Institute had completed and revised a study about rules on acquisitions in good faith of corporeal movables.⁵⁷ The *Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables* (LUAB) – adopted in 1968

⁴¹ See the list of the resolutions addressed at protecting cultural property that have been listed by UNESCO, available at <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/resolutions-adopted-by-the-united-nations-general-assembly-about-return-and-restitution-of-cultural-property/>, last retrieved on 01.03.2018.

⁴² See Resolution 20 C/4.7.6/5 adopted during the 20th session of UNESCO's General Conference (24 October – 28 November 1978), available at <http://unesdoc.unesco.org/images/0011/001140/114032e.pdf#page=92>, last retrieved on 01.03.2018.

⁴³ Warring, (2005), pp. 257-258.

⁴⁴ UNIDROIT, *The International Protection of Cultural Property – Summary report on the second session of the UNIDROIT Study Group on the international protection of cultural property, held at the seat of the Institute from 13 to 17 April 1989* (prepared by the Unidroit Secretariat), Study LXX – Doc. 14, Rome, June 1989, p. 3.

⁴⁵ UNESCO, 'National Legal Control of the Illicit Traffic in Cultural Property', by L. V. Prott and P. J. O'Keefe, CLT-83/WS/16, Paris, 11 May 1983, available at <http://unesdoc.unesco.org/images/0005/000548/054854Eo.pdf>, last retrieved on 01.03.2018.

⁴⁶ UNESCO, 'Consultation on Illicit Traffic of Cultural Property', (Paris, 1-4 March 1983), UNESCO Doc. CLT/CH/CS 51/4, Recommendation 4, available at <http://unesdoc.unesco.org/images/0005/000569/056950EB.pdf>, last retrieved on 01.03.2018, cited in Prott, L. V., 'Unesco and Unidroit: A Partnership Against Trafficking in Cultural Objects', in: N. Palmer (ed), *The Recovery of Stolen Art – A Collection of Essays*, (Kluwer law international, 1998), p. 206; Prott, L. V., 'Strength and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption (Background paper)', in UNESCO, 'The fight against the illicit trafficking of cultural objects, The 1970 convention: past and future', (UNESCO Headquarters: Paris, 15-16 March 2011), CLT/2011/CONF.207/7, p. 5; Prott, L. V., 'The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On', 14 (1-2) *Uniform Law Review*, (2009), p. 215.

⁴⁷ Prott, L. V., *Commentary on the Unidroit Convention*, (Institute of Art & Law: Leicester, 1997), p. 12; See also Prott, (2011), p. 11, point 4 (the recommendations are reproduced in the annex of the document, including the commentaries of Prott as to the fulfillment of these recommendations).

⁴⁸ Prott, (1998), p. 206.

⁴⁹ See for example Presidenza del Consiglio dei Ministri, (1996), p. 18.

⁵⁰ UNIDROIT, (1988), Study LXX – Doc. 5, p. 6; UNIDROIT, (1993), Study LXX – Doc. 42, p. 19: "The raison d'être of the whole UNESCO/Unidroit exercise was indeed to make changes to the private law of many states"; See also Presidenza del Consiglio dei Ministri, (1996), p. 85 where it is advanced that UNESCO was convinced by expert opinions that the protection of good faith acquirers to the detriment of dispossessed owners was salutary to the illicit traffic in cultural property.

⁵¹ Presidenza del Consiglio dei Ministri, (1996), pp. 18 and 84.

⁵² See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of International Organisations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Unesco, Interpol), Study LXX – Doc. 25, Rome, January 1992, p. 2; See also Presidenza del Consiglio dei Ministri, (1996), p. 84; Prott, (1998), p. 206.

⁵³ See Presidenza del Consiglio dei Ministri, (1996), p. 18.

⁵⁴ Kuitenbrouwer, (2005), p. 601.

⁵⁵ Doyal, S., 'Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy', *Columbia Journal of Transnational Law*, (2000-2001), p. 666.

⁵⁶ Sánchez Cordero, J., 'The Unidroit cultural Convention. The unfulfilled tasks', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming; UNIDROIT, (1986), Study LXX – Doc. 1, pp. 6 and 7. See also Presidenza del Consiglio dei Ministri, (1996), p. 84.

⁵⁷ UNIDROIT, (1986), Study LXX – Doc. 1, p. 6; Prott, (1998), p. 206. See also Presidenza del Consiglio dei Ministri, (1996), p. 84.

and revised in 1974⁵⁸ – was the resulting product of this study.⁵⁹ Principally based upon the work published by UNIDROIT in 1968, the draft LUAB (1974) strived for the establishment of a balance between the interests of dispossessed owners and purchasers in good faith.⁶⁰ Nevertheless, this balance had not been easy to achieve; the negotiations towards the adoption of the draft LUAB already made salient the prominent schism existing between countries adhering to the common law tradition and those belonging to the civil law tradition.⁶¹ Although the LUAB failed to gain support in being applied to all types of properties,⁶² UNESCO saw it as an adequate model to address the contemplated problem.⁶³ What is more, UNIDROIT was an appropriate body to draft the future instrument since it had been rather compassionate about problems encountered by the members of the international community with regard to the illicit traffic.⁶⁴ Consequently, UNESCO entrusted UNIDROIT with the following tasks: to work upon a solution that would complement the regime instated by the 1970 UNESCO convention, to ensure certainty in title to cultural property, to correct the legal loopholes from which dealers or purchasers were benefiting and to provide assistance to source states in the preservation of their cultural heritage.⁶⁵ Thenceforth, during its 65th session in April 1986, the Governing Council of UNIDROIT included the topic of international protection of cultural property to its Working Programme for the period 1987-1989.⁶⁶

Almost two decades after the adoption of the 1970 UNESCO convention, a new multilateral treaty was on its way. The illicit traffic had not waned by any means, but had instead pervaded, in part due to the appearance of new contributory factors: in the last decades of the twentieth century, the impetus for thieves to direct their attention to cultural property was reinvigorated due to the amelioration of means of transport and of communication,⁶⁷ the easiness to carry and hide cultural goods,⁶⁸ the political thrill encountered in unstable states⁶⁹ and the difficulties linked to identifying dispossessed owners in an international trafficking scheme.⁷⁰ More conspicuously, the last decades of the century were particularly marked by a thriving art market, in which cultural property was no longer seen as a mere commodity but also as an enticing investment. Following Merryman, both demand and supply rose because of the appearance of new contributory factors, such as the increase in the levels of education or the fact that more items acquired the anquity status by mere lapse of time.⁷¹ What is more, inflated and lucrative prices ensuing from a high demand contributed to making this market

⁵⁸ UNIDROIT, (1986), Study LXX – Doc. 1, p. 6; The text of the draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables can be found in UNIDROIT, *The International Protection of Cultural Property – Unidroit draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables* (LUAB, 1974), Study LXX – Doc. 9, Rome, January 1989.

⁵⁹ Nonetheless, this Draft Convention had not been adopted in the end. See Prot, *Commentary on the Unidroit Convention*, (1997), p. 29.

⁶⁰ Prot, *Commentary on the Unidroit Convention*, (1997), pp. 28-29; See also UNIDROIT, *The International Protection of Cultural Property. Preliminary draft Convention on Stolen or Illegally Exported Cultural Objects approved by the UNIDROIT study group on the international protection of cultural property, with Explanatory Report* (prepared by the Secretariat), Study LXX – Doc. 19, Rome, August 1990, p. 13.

⁶¹ Prot, *Commentary on the Unidroit Convention*, (1997), p. 29.

⁶² Presidenza del Consiglio dei Ministri, (1996), p. 85.

⁶³ Presidenza del Consiglio dei Ministri, (1996), p. 85.

⁶⁴ Sánchez Cordero, (2012), forthcoming; As noted at the end of the Diplomatic Conference towards the adoption of the 1995 convention, UNIDROIT had played an important role in the protection of cultural property as it had drafted an *International Convention for the Protection of Cultural Property in Case of War* in 1951, which served as a basis for the adoption of the 1954 UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict*. See ‘Summary Records of the Meetings of the Conference (Plenum)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/S.R. 1, 10 June 1995, p. 348.

⁶⁵ Prot, (2009), p. 216; Nonetheless, problems as to the scope of the mandate given by UNESCO to UNIDROIT were emphasized during the preparation of the future convention; as noted by Bennet, many policy issues that fell within the mandate of UNESCO were to be addressed by the future instrument. For example, rules about the infringement of export legislation were *ultra vires* to UNIDROIT’s mandate considering that it was to address only private law implications (see UNIDROIT, (1988), Study LXX – Doc. 5, pp. 4-5). Nevertheless, the President of the Governing Council of UNIDROIT found it advisable for UNIDROIT to deal with these specific issues in close cooperation with UNESCO (*ibidem*, p. 9). Consequently, UNESCO participated to the debates of the Study Group as an observer (see UNIDROIT, (1990), Study LXX – Doc. 19, p. 12).

⁶⁶ UNIDROIT 1986, C.D. 65 – Doc. 18. *Report on the 65th session of the Governing Council*, 22; see UNIDROIT Secretariat, (2001), p. 482; UNIDROIT, *Outlines for a private law Convention on the International Protection of Cultural Property* (submitted by Mr Riccardo Monaco, President of UNIDROIT), Study LXX – Doc. 2, Rome, May 1988, Introduction; Presidenza del Consiglio dei Ministri, (1996), p. 18; Fox, (1993) p. 256, footnote 215.

⁶⁷ Schneider, (1996), p. 141.

⁶⁸ Gerstenblith, P., ‘Chapter 9 - Questions of Title’, in: P. Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (Carolina Academic Press: Durnham, Third Edition, 2004), p. 385.

⁶⁹ Armbrüster, C., ‘La Revendication de Biens Culturels du Point de Vue du Droit International Privé’, *Revue Critique du Droit International Privé*, (2004), p. 724.

⁷⁰ Olivier, M., ‘The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property’, *26 Golden Gate University Law Review*, (1996), p. 629.

⁷¹ Merryman, J. H., ‘A Licit Trade in Cultural Objects’, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), pp. 9-10.

appealing.⁷² Additionally, the flourishing demand was partly generated by the money laundering capacity of cultural objects; drugs or weapons dealers could easily launder the profits of their illegal activities by investing in cultural property.⁷³ This process of laundering illegal activities through investing in art and antiquities was made viable due to the opacity of the art market, witnessed by the confidentiality and the secrecy with which it operated.⁷⁴ In fact, this illicit trade had taken off – in close competition with the traffic in narcotics and in weapons –, only differing in the licit nature of the end-of-the-chain-of-transactions: the legality of retailing cultural objects of dubious origin on the art market ensured its continuity.⁷⁵ Put differently, both the licit and illicit market in cultural property were considered as parallel markets, where it was possible for the latter to meet the former's course at a nexus situated at the end-of-the-chain-of-transactions.⁷⁶ Nonetheless, the increase in demand was also triggered by museums in their quest to acquire exclusive materials.⁷⁷ In an attempt to satisfy this thriving demand, thieves have become specialized in the art of stealing⁷⁸ and smuggling cultural property.⁷⁹ Consequently, there was a genuine need for new international coordinated solutions,⁸⁰ as it was considered that universal cooperation through the medium of a multilateral agreement could be the only efficient mechanism available to cleanse the art market of its illicit facet.⁸¹

The climax of these interstate efforts materialized two and a half decades after the adoption of the 1970 convention. The UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* was adopted on the 24 June 1995 in Rome, Italy. To date, it is the latest multilateral attempt to tackle the illicit traffic in cultural property in times of peace⁸² and reflects the apogee of a vast array of efforts directed at responding to the said problem.⁸³ Originally inspired by both the 1970 convention and by the LUAB draft,⁸⁴ the convention is the result of almost ten years of negotiations and involved the participation of a multitude of stakeholders including – but not limited

⁷² Grosse and Jouanny, (2003), p. 575; Lenzner, (1994-1995), pp. 473-474; Hughes, V., Wright, L., 'International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?', 32 *The Canadian Yearbook of International Law*, (1994), p. 222; Lehman, (1997), p. 527; Schneider, (1996), p. 141; Gerstenblith, (2004a), p. 385.

⁷³ See for example Presidenza del Consiglio dei Ministri, (1996), p. 20.

⁷⁴ Nafziger, J. A. R., Kirkwood Paterson, R., Dundes Renteln, A., *Cultural Law- International, Comparative and Indigenous*, (Cambridge University Press: Cambridge, 2010), p. 226. See also Olivier, (1996), p. 632.

⁷⁵ See Alder, C., Polk, K., "The Illicit Traffic in Plundered Antiquities", in: P. Reichel (ed), *Handbook of Transnational Crime and Justice*, (Sage Publications: California, 2005), p. 101.

⁷⁶ See Presidenza del Consiglio dei Ministri, (1996), p. 349: "Recent studies show a direct correlation between figures for theft and figures for the licit trade of objects – it can no longer be denied that much of what is illicitly acquired is funnelled into the legal trade and ends up in the hands of those who are, usually unwittingly, supplying the looters and thieves with rewards for their crimes"; see also Rand Europe, 'Assessing the illegal trade in cultural property from a public policy perspective', (Cambridge, 2011), p. 11, referring to the "lock" instead of nexus.

⁷⁷ Kelly, (1995-1996), pp. 36-37; Office Fédéral de la Culture (Suisse), (1998), p. 3.

⁷⁸ Lalive specifies that art thieves belong to a different category than the average thief: they are better-organized, better-educated and daredevils, making them redoubtable. See Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 19.

⁷⁹ For an explanation of the smuggling practices of thieves, see Alder and Polk, (2005).

⁸⁰ Prott notes that within the period of twenty five years following the adoption of the 1970 UNESCO convention, market states were also affected by theft, making them more prone to accepting an instrument prescribing the mandatory restitution of stolen cultural objects. Furthermore, the influence of the 1970 convention and the work of UNESCO, ICOM and other professionals – such as archaeologists and anthropologists – helped to change the mentalities of market stakeholders, opening the way towards an instrument that would prescribe the unconditional restitution of stolen cultural objects. In case of illegal export, it was clear in 1970 that states would not enforce one another's export legislation. By 1995, the situation had clearly changed: there was a general recognition that cultural materials the removal of which would imperil the cultural heritage of a state should not be legally imported in market states. Hence, some states had implemented changes in their domestic laws towards the recognition of foreign export legislation. What is more, the European Community had adopted a unified regime within its territorial boundaries, which constituted a Rubicon for the Community to reconsider the question of illegal export to / from third countries (see Prott, (1998), pp. 208-209). Finally, states with laws protecting *bona fide* purchasers recognized that this legislation fuels the illicit traffic in cultural objects and that the problem was further exacerbated by the secrecy of the art market. See Prott, (1998), p. 212.

⁸¹ Presidenza del Consiglio dei Ministri, (1996), p. 21.

⁸² Love Levine, (2010-2011), p. 753.

⁸³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 31.

⁸⁴ During its 63rd session (May 1984), the Governing Council of UNIDROIT envisaged a revision of the LUAB and concurrently to the application of the new rules to acquisitions in good faith of cultural materials. See UNIDROIT, *The Protection of Cultural Property – Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable in 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, (Prepared by Gerte Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law), Study LXX – Doc. 1, Rome, December 1986, p. 7. Nonetheless, a mere adaptation of the LUAB was not considered as a viable option in elaborating a new instrument dealing with *bona fide* acquisitions of cultural objects (*idem*). Instead, the LUAB could be used as a model of reference in drafting the new convention (*idem*). Nonetheless, it was only relevant to the creation of Chapter II. Instead, Chapter III is considered as a completely separate and new regime that is considerably innovative. See Droz, G. A. L., "Mémoire sur le Projet de Convention d'Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés", in: P. J. I. M. de Waart, G. A. L. Droz, F. Rigaux, C. J. H. Brunner, *Kunsthandel (Inclusief Antiquiteiten) en de Bescherming van Nationaal Cultureel Erfgoed*, 47. (Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, 109), (Kluwer: Deventer, 1994), p. 48.

to – UNESCO,⁸⁵ UNIDROIT, no less than seventy participating art-importing and art-exporting states and eight observing states.⁸⁶ The drafters of the convention put the focus on instances of theft and of illegal export because both scenarios had been specifically dealt with in Article 7 (b) (ii) of the 1970 convention.⁸⁷ This choice was mainly due to the fact that UNIDROIT was entrusted with clarifying and improving this article wherever possible.⁸⁸ Following UNESCO, improvement was to be achieved in three ways: 1) by alleviating the private law problems raised by the 1970 convention.⁸⁹ This would, by the same token, help to render this instrument fully effective;⁹⁰ 2) by clarifying the ambiguity in the main obligations posited by its Articles 3, 7 and 9⁹¹ and 3) by imputing a responsibility of inquiry into the provenance of the cultural objects on art dealers and collectors.⁹² Since Article 7 (b) (ii) constitutes the backbone of the UNIDROIT convention with regard to *bona fide* acquisitions of stolen or illegally exported cultural objects, the latter's elaboration aimed at resolving the flaws of its predecessor by regulating private law aspects that were touched upon by the article. Therefore, the UNIDROIT initiative was set to address the most difficult issues that had remained problematic after the enactment of the 1970 convention.⁹³ Furthermore, although not mentioned in Article 7 (b) (ii), archaeological theft was added in the process of drafting the newest instrument.⁹⁴

An important difference between the two documents resides in the means of corrective justice prescribed: whilst the earlier instrument provides for the use of diplomatic means, the latest foresees direct judicial recourse by making it possible to bring a claim in restitution or request for return before the courts of another contracting state.⁹⁵ The possibility to approach courts directly for both claims and requests constitutes an important innovation of the 1995 addendum. What is more, UNIDROIT's output was modelled to adopt minimum rules constraining the illicit traffic in the most efficient way,⁹⁶ notably by regulating the demand side of the market and addressing the question of acquisitions in good faith. Most of the previous efforts had touched upon this question, without dealing with it intimately by proposing changes or seeking the adoption of uniform rules.⁹⁷ UNIDROIT worked for close to a decade on the elaboration of an instrument that would put the focus on this aspect and help diminish the illicit trade in cultural objects.⁹⁸

2. PREPARATORY WORK⁹⁹

Throughout the creation of the convention, its elaboration was marked by several distinct stages: at first, two expert studies – serving as a basis to illustrate the challenges to address – were undertaken in 1985 and 1988 respectively.¹⁰⁰ Subsequently, a total of three sessions carried out by a Study Group¹⁰¹ – hereinafter SG – and

⁸⁵ It should be noted that UNESCO supported UNIDROIT in developing the 1995 convention by means of financial contributions, technical support and by reporting the progresses of the work done to the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*. Additionally, UNESCO translated the 1995 convention in Arabic, Chinese, Russian and Spanish. See Protz, (1998), pp. 12-13.

⁸⁶ For a complete overview of the participants to the Diplomatic Conference, see 'Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/9, 23 June 1995, pp. 365-367.

⁸⁷ Presidenza del Consiglio dei Ministri, (1996), p. 21.

⁸⁸ See the commentary by Turkey on the submissions of the Secretariat of UNIDROIT given in the explanatory report of the Preliminary draft Convention submitted by the Study Group (UNIDROIT, (1990), Study LXX – Doc. 19) in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of Governments on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Canada, China, France, Islamic Republic of Iran, Norway, Sweden and Turkey), Study LXX – Doc. 24, Rome, January 1992, p. 20.

⁸⁹ UNIDROIT, (1992), Study LXX – Doc. 25, p. 2. See also UNIDROIT, (1993), Study LXX – Doc. 36, p. 3 and UNIDROIT, (1993), Study LXX – Doc. 42, p. 6.

⁹⁰ UNIDROIT, (1992), Study LXX – Doc. 25, p. 2 and UNIDROIT, (1993), Study LXX – Doc. 42, p. 6.

⁹¹ UNIDROIT, (1992), Study LXX – Doc. 25, p. 2. This point is discussed in more details in UNIDROIT, (1993), Study LXX – Doc. 36, p. 4 and UNIDROIT, (1993), Study LXX – Doc. 42, pp. 6 and 7.

⁹² UNIDROIT, (1992), Study LXX – Doc. 25, p. 3. See also UNIDROIT, (1993), Study LXX – Doc. 36, p. 4 and UNIDROIT, (1993), Study LXX – Doc. 42, p. 6.

⁹³ UNIDROIT, (1993), Study LXX – Doc. 42, p. 7; See also Presidenza del Consiglio dei Ministri, (1996), p. 86.

⁹⁴ See notably the commentary by the Islamic Republic of Iran bewailing the lack of measures for archaeological theft in the Preliminary draft Convention submitted by the Study Group, in UNIDROIT, (1992), Study LXX – Doc. 24, pp. 11 and 13, noting that the PDC was more limited than the 1970 convention as it failed to address the issue of archaeological theft.

⁹⁵ See for example the commentary by the Islamic Republic of Iran about the differences between the 1970 convention and the Preliminary draft Convention, in UNIDROIT, (1992), Study LXX – Doc. 24, p. 11.

⁹⁶ Protz, *Commentary on the Unidroit Convention*, (1997), p. 31.

⁹⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 31.

⁹⁸ Bergé, (2000), p. 216.

⁹⁹ It is neither desirable, nor astute to review almost a decade of negotiations of the convention in the present contribution. Discussing the entirety of the *travaux préparatoires* of the convention is a particularly cumbersome exercise which does not add much value to the objective pursued by the present research. Instead, reference will be made to the preparatory work of the convention when such references are instructive to understanding the regime of the convention.

¹⁰⁰ These two studies on the international protection of cultural property were both undertaken by Reichelt. The first study can be found in UNIDROIT, (1986), Study LXX – Doc. 1. The second study can be found in UNIDROIT, Second Study Requested from Unidroit by

four Committees of Governmental Experts¹⁰² – hereinafter CGE – were held,¹⁰³ respectively throughout the period 1988-1990,¹⁰⁴ and the period 1991-1994.¹⁰⁵ Although there seemed, *prima facie*, to be some hesitation as to the form of the prospective instrument – either a convention, a mere recommendation or a model law¹⁰⁶ –, and as to its ambit, it was finally decided that an international treaty dealing with cultural property theft and illegal export¹⁰⁷ would be more suitable.¹⁰⁸ A *preliminary draft Convention on the restitution of cultural objects* drafted by Loewe was handed to the SG as a premise to their work.¹⁰⁹ This Study Group of experts¹¹⁰ was well aware of the different dimensions of the law involved, of the international instruments in the field, of discrepancies between domestic legal systems, as well as of the various private and public interests concerned.¹¹¹ Although there was consensus about the need to prescribe the return of stolen cultural objects, the return of illegally exported items was much more disputed between the members of the SG.¹¹² In January 1990, the group's work resulted in a *Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, also known as the PDC or the Urtext.¹¹³ The PDC brought innovations to the realm of international cultural property law in two respects: firstly, it provided that the good faith purchaser of a cultural object that had been stolen or illegally exported was entitled to compensation.¹¹⁴ Secondly, regarding illicitly exported cultural objects, the PDC mandated a return only when an internationally significant interest was endangered, thus creating a limited right of return of illegally exported items.¹¹⁵ In its final form, the UNIDROIT convention upheld both innovations, respectively in Articles 4 and 6, and in Article 5.¹¹⁶ Although some alterations were made to the PDC *ex post*,¹¹⁷ the revised Urtext was subsequently used throughout the gatherings of governmental experts.¹¹⁸ The committee – chaired by Lalive –

UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property and in the Light of the Comments Received on the First Study (prepared by Gert Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law, Study LXX – Doc. 4, Rome, April 1988; See Protz, *Commentary on the Unidroit Convention*, (1997), p. 12; Sidorsky, E., 'The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration', 5 (1) *International Journal of Cultural Property*, (1996), p. 24; Fox, (1993) p. 256, footnote 215.

¹⁰¹ The decision to establish the Study Group was taken during the 67th session of the General Council of UNIDROIT, which took place in June 1988. See UNIDROIT, *The International Protection of Cultural Property – Summary report on the first session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 12 to 15 December 1988* (prepared by the Unidroit Secretariat), Study LXX – Doc. 10, Rome, January 1989, p. 3 or Presidenza del Consiglio dei Ministri, (1996), p. 18.

¹⁰² The committees were composed of delegates from fifty state members of UNIDROIT, twenty-five non-member states of UNIDROIT, eight inter-governmental organizations and of many other non governmental organizations and professional associations. See Presidenza del Consiglio dei Ministri, (1996), p. 19 and Schneider, (1996), p. 143.

¹⁰³ Protz, *Commentary on the Unidroit Convention*, (1997), p. 12.

¹⁰⁴ More specifically in the periods 12-15 December 1988, 13-17 April 1989 and 22-26 January 1990. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 9 and Presidenza del Consiglio dei Ministri, (1996), p. 19; UNIDROIT Secretariat, (2001), p. 484; Sidorsky, (1996), p. 24.

¹⁰⁵ More specifically in May 1991, January 1992, February 1993 and September / October 1993. See Presidenza del Consiglio dei Ministri, (1996), p. 19 and Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 27; Renold, M. A., 'Les Principales Règles de la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés', in: M. A. Renold and C. Breiter, *La Convention d'UNIDROIT du 24 juin 1995 sur les biens culturels volés ou illicitement exportés*. Genève - 2 octobre 1995 (Schulthess: Zürich, 1997), p. 20; Vicien-Milburn, (2012), forthcoming; Fifty documents resulting from the preparatory work of the Study Group and from the meetings of the Committee of Governmental Experts are available online. The study undertaken by UNIDROIT – referred to as 'Study LXX' –, which took place in the period December 1986 to January 1995 can be found at the following url <http://www.unidroit.org/preparatory-work-cp>, last retrieved on 01.03.2018; Schneider, (1996), p. 143. See Sidorsky, (1996), p. 24.

¹⁰⁶ See notably the commentary of Loewe, submitting that an international convention should be preferred due to the disparities of interests between the parties concerned, in UNIDROIT, (1988), Study LXX – Doc. 5, p. 2.

¹⁰⁷ UNIDROIT, (1990), Study LXX – Doc. 19, p. 13. See also UNIDROIT, (1993), Study LXX – Doc. 42, p. 3.

¹⁰⁸ UNIDROIT, (1990), Study LXX – Doc. 19, p. 12; See also Protz, *Commentary on the Unidroit Convention*, (1997), p. 16.

¹⁰⁹ UNIDROIT Secretariat, (2001), p. 484; The text of this preliminary draft is published in UNIDROIT, *Preliminary draft Convention on the restitution of cultural property* (drawn up by Mr Roland Loewe in the light of the two studies prepared by Mme G. Reichelt), Study LXX – Doc. 3, Rome, June 1988, pp. 1-5.

¹¹⁰ For a list of the experts taking part to the Study Group, see Protz, *Commentary on the Unidroit Convention*, (1997), p. 12, footnote 6 or see the appendix of UNIDROIT, (1990), Study LXX – Doc. 19.

¹¹¹ Protz, *Commentary on the Unidroit Convention*, (1997), pp. 12-13; See also Presidenza del Consiglio dei Ministri, (1996), p. 18 where the Secretariat of UNIDROIT specified that it "seemed to be crucial [...] to recognize the combined effect of civil law, private international law and public law when contemplating an overall solution to the complex problem of international protection of cultural property".

¹¹² See UNIDROIT, (1993), Study LXX – Doc. 42, p. 14, where it was also noted that the same disparity of opinion was observed by UNESCO in administering the 1970 UNESCO convention.

¹¹³ Merryman, J. H., "The Unidroit Convention: Three Significant Departures from the Urtext", in: J. H. Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, (Kluwer Law International: The Hague / London / Boston, 2000), p. 270; Renold, (1997), p. 20; UNIDROIT Secretariat, (2001), p. 484; The text can be found in UNIDROIT, (1990), Study LXX – Doc. 19, p. 2-6; For a summary of the work undertaken up until the final session of the Study Group, please consult UNIDROIT, (1990), Study LXX – Doc. 19.

¹¹⁴ Merryman, (2000), p. 271.

¹¹⁵ Merryman, (2000), p. 271.

¹¹⁶ Merryman, (2000), p. 271.

¹¹⁷ Merryman, (2000), p. 271; For a general overview of the differences between these texts, see Siehr, K. G., 'The UNIDROIT Draft Convention on the International Protection of Cultural Property', 3 *International Journal of Cultural Property*, (1994), pp. 301-307.

¹¹⁸ Merryman, (2000), p. 270; Renold, (1997), p. 20; The PDC was sent for consideration to the General Council of UNIDROIT during its 69th session (Rome, 23-26 April 1990). The PDC was approved by the Council, which then authorized the Secretariat to submit a copy of

and composed of members and non-members of UNIDROIT,¹¹⁹ revised the PDC over the course of four meetings, which resulted in the adoption of the *Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects* – hereinafter the Draft UNIDROIT Convention – that was finalized during the last session of the committee¹²⁰ on 8 October 1993.¹²¹ It is important to stress that the convention – as the end product of this complex development – resembles the PDC in many ways.¹²²

The Governing Council of UNIDROIT approved the Draft UNIDROIT Convention at its 73rd session in May 1994¹²³ and decided that the text was sufficiently advanced to submit it to an international conference.¹²⁴ Primarily based on the study of UNIDROIT,¹²⁵ the convention is the outcome of a Diplomatic Conference – hereinafter DC – held from 7 to 24 June 1995 in Rome in which seventy-eight states¹²⁶ (including eight observing states), seven international organizations and seven non-governmental organizations participated.¹²⁷ The negotiations took place throughout nineteen sessions of the Committee of the Whole and were closed by the last vote of the Plenum.¹²⁸ The experts involved in the negotiations during the drafting process were mainly museum members and civil servants from specific national ministries (e.g., ministries of culture or of justice).¹²⁹ Few of them were legal practitioners and many participants suffered from a lack of legal knowledge,¹³⁰ which was axiomatically needed for this undertaking. Thenceforth, it is important to realize that, since many of these representatives were not particularly familiar with private international law,¹³¹ conflict of laws or even the international harmonization of private law, there was an asymmetrical distribution of information between the participants.¹³² This imbalance made the task of finalizing the present treaty one of the most challenging for UNIDROIT hitherto.¹³³ Further difficulties, ranging from an apparent cultural diversity in the composition of the conference participants, and an overwhelming willingness to follow domestic methodologies in the drafting process, complicated the redaction of the final document.¹³⁴ Additionally, an overcasting scepticism about giving

it to interested parties (e.g. states, recognized experts and organizations) in order to garner observations from them. What is more, the Council agreed to convene a first meeting of experts in the spring of 1991. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 9. See also Presidenza del Consiglio dei Ministri, (1996), p. 19.

¹¹⁹ The participating state members of UNIDROIT were: Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Egypt, Finland, France, Germany, Greece, (the) Holy See, Hungary, India, Iran, Ireland, Italy, Korea, Luxembourg, Malta, Mexico, Norway, Pakistan, Poland, Portugal, Saint Martin, Senegal, Spain, Sweden, Switzerland, The Netherlands, Turkey, the United Kingdom, the United States of America and Uruguay. The participating non members states of UNIDROIT were: Angola, Cyprus, Croatia, Lituania, Peru, Slovenia, Thailand and Ukraine. Additionally, several governmental and non-governmental organizations were given observer status: the Hague Conference on Private International Law, the International Association of Art Dealers in Ancient Art, the International Cultural Property Society, the International Bar Association, the International Union of Notaries, the Sovereign Military Order of Malta and UNESCO. This list can be found in Presidenza del Consiglio dei Ministri, (1996), pp. 48 and ff.

¹²⁰ Presidenza del Consiglio dei Ministri, (1996), p. 19; Merryman, (2000), p. 270; Renold, (1997), p. 20; UNIDROIT Secretariat, (2001), p. 484.

¹²¹ Sidorsky, (1996), p. 25.

¹²² Prott, *Commentary on the Unidroit Convention*, (1997), p. 13; Merryman, (2000), p. 270.

¹²³ Presidenza del Consiglio dei Ministri, (1996), p. 19; UNIDROIT Secretariat, (2001), p. 484.

¹²⁴ Presidenza del Consiglio dei Ministri, (1996), p. 19; Schneider, (1996), p. 144.

¹²⁵ For a detailed analysis of the preparatory work of the convention, see UNIDROIT, Study LXX – Docs. 1-50 and the explanatory report reproduced in 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings*, Rome, June 1995, (1996), pp. 18 and ff.

¹²⁶ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 15.

¹²⁷ Renold, (1997), p. 20; Siehr, K., 'Editorial', 5 (1) *International Journal of Cultural Property*, (1996), p. 7; Sidorsky, (1996), p. 25; Bergé,

(2000), p. 216; For a detailed list of participants, see 'States and Organisations Represented at the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Rome, 7 - 24 June 1995) – Final List of Participants', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/INF. 1 FINAL, 23 June 1995, pp. 48-62 and 'Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/9, 23 June 1995, pp. 365-367.

¹²⁸ See 'Reports Submitted to the Plenum', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/Doc. 1, 23 June 1995, p. 335.

¹²⁹ Crewdson, R., 'Putting Life into a Cultural Property Convention: UNIDROIT; Still Some Way to Go.', 17 *International Legal Practitioner*, (1992), p. 46; Klein, (1999), p. 265.

¹³⁰ Crewdson, (1992), p. 46; Klein, (1999), p. 265; Lalive D'Épinay, P., 'Une Avancée du Droit International: la Convention de Rome d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés', 1 *Revue de Droit Uniforme*, (1996), p. 41.

¹³¹ This was also the case for the legal practitioners present during the Diplomatic Conference. See Lalive d'Épinay, (1996), p. 42.

¹³² Klein, (1999), p. 265; Lalive D'Épinay, (1996), p. 41. Disinformation was not only apparent during the Diplomatic Conference, but also after the adoption of the final text between art market stakeholders. For a commentary about these various misunderstandings, see Lalive, P., 'Une Convention Internationale Qui Dérange: La Convention Unidroit sur les Biens Culturels Volés', in: *Droit et Justice / R.-J. Dupuy (Hrsg), Mélanges en l'Honneur de Nicolas Valitakis*, (Perdone: Paris, 1999), pp. 177-188.

¹³³ Lalive D'Épinay, (1996), pp. 42-43, specifying that the difficulties were exacerbated by conflicting interests, lack of information and knowledge by professional art dealers, non-specialized jurists and civil servants. This melting-pot resulted in many misunderstandings and mistakes.

¹³⁴ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 28-29; Lalive D'Épinay, (1996), p. 41-43.

leeway to domestic courts overshadowed the negotiations: members did not trust upon their judiciary to take just decisions in cases concerning cultural objects.¹³⁵ Moreover, the topic of restitution to private parties seemed to be of no interest to the majority of the experts discussing the future document.¹³⁶ While restitution to private parties constitutes one of the main innovations of the 1995 convention, it was thus in this lacklustre climate for the protection of private interests that the convention was born.¹³⁷

Furthermore, the negotiations taking place during the conference were subject to polarization. Two conflicting interests-based categories of states could be identified:¹³⁸ source states and market states. As had already become apparent throughout the negotiations towards the adoption of the 1970 convention, the clash of ideologies between these groups was detrimental to finding coordinated solutions to the illicit traffic in cultural property.¹³⁹ On the one hand, source states have often advocated intervention in the art market. It is mainly because these states generally lack the necessary economic means to protect their cultural heritage¹⁴⁰ that they support legal intervention in the art trade.¹⁴¹ Several arguments have been notably advanced by these states to support the adoption of the convention: firstly, there had been no previous coordination on the regulation of the international art market because of the complexities of formulating common principles and rules.¹⁴² This difficulty was, *inter alia*, due to the differences between the underlying legal or commercial interests of the main actors participating in the discussions.¹⁴³ Therefore, an international effort to overcome this difficulty was desirable.¹⁴⁴ Additionally, national laws were deemed not to be sufficient enough by themselves to resolve the issue of art theft and of illicit export for two reasons: 1) the content of these laws was not *per se* aimed at specific and extraordinary objects such as cultural goods and were in fact developed in the optic of protecting fungible goods¹⁴⁵ and 2) these 'local' laws could not fight by themselves a traffic which is mainly embedded with an international character;¹⁴⁶ as noted in the introduction to this research, the reasons why most thefts of cultural property have a cross-border component are notably due to the difficulties that a thief might face in liquidating the object in the same state,¹⁴⁷ to avoid national criminal investigations¹⁴⁸ or to benefit from the disparities between domestic laws.¹⁴⁹ Secondly, as explained above, differences in national laws can result in judicial insecurity.¹⁵⁰ This is notably the case in procedures where conflict-of-laws rules dictate the applicable law, which

¹³⁵ Crewdson, (1992), p. 46.

¹³⁶ Crewdson, (1992), p. 46.

¹³⁷ Protz discusses the general scepticism of some representatives during the conference about the legitimate willingness to produce a genuine document to fight the illicit trading in cultural objects. See Protz, (2009), pp. 215-216.

¹³⁸ Forrest, (2010), p. 139; Schneider, (1996), p. 144; See also Presidenza del Consiglio dei Ministri, (1996), p. 22, where it is advanced that this division was also present amidst the SG and the CGE.

¹³⁹ Warring, (2005), p. 233 and 302; The contrast between the interests of source and market states has constituted an important difficulty to the adoption of any international agreement towards the protection of cultural property from theft before the adoption of the UNIDROIT convention. For example, this conflict of interests was already apparent in the making of the 1970 UNESCO convention. See Love Levine, (2010-2011), p. 756.

¹⁴⁰ It is important to recall the weak position that source states are in compared to market states: the lack of sufficient resources to counter the illicit trade or even put the 1970 convention into practice as been an omnipresent concern to them. See Warring, (2005), p. 236. Examples of measures that can be used by source states to fight the plundering of their cultural identity are to be found in Mackenzie, S., 'Illicit Antiquities, Criminological Theory, and the Deterrent Power of Criminal Sanctions for Targeted Populations', 7 (2) *Art, Antiquity and Law*, (2002), p. 128.

¹⁴¹ Calvo Caravaca, (2004), p. 88; It is not to be forgotten that the UNIDROIT convention was, surprisingly enough, instigated by market nations frustrated by the loss of their cultural property by theft or illegal export. See Lalive, 'Une Convention Internationale Qui Dérangé: La Convention Unidroit sur les Biens Culturels Volés', (1999), p. 188; It should also be remarked that states belonging to the market nations category also struggle to protect the entirety of their cultural property. The United States is but one example. See Bengs, B., 'Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law', 6 *Transnational Law & Contemporary Problems*, (1996), p. 525.

¹⁴² Biondi, A., 'The Merchant, the Thief & the Citizen: the Circulation of Works of Art Within the European Union', 34 *Common Market Law Review*, (1997), p. 1175.

¹⁴³ Biondi, (1997), p. 1175.

¹⁴⁴ Département Fédéral de l'Intérieur Suisse, 'Résultat de la Procédure de Consultation Portant sur la Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés', (Office Fédéral de la Culture, Mai 1996), p. 11; Lalive, (1996), p. 42. Shyllon, F., 'Private Law Beyond Markets for Goods and Services: The Example of Cultural Objects', 1/2 *Uniform Law Review*, (2003), p. 513.

¹⁴⁵ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 18.

¹⁴⁶ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 18, 21 and 25; Carruthers, (2001), p. 127; Browne, A., 'Unesco and Unidroit: The Role of Conventions in Eliminating the Illicit Art Market', 7 (1) *Art, Antiquity and Law*, (March 2002), p. 384.

¹⁴⁷ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 18, 21.

¹⁴⁸ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 21; Roca-Hachem, (2005), p. 539; Lalive D'Epinay, (1996), p. 45.

¹⁴⁹ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 21; Roca-Hachem, (2005), p. 539; Lalive D'Epinay, (1996), p. 45.

¹⁵⁰ Lagarde, P., 'La restitution internationale des biens culturels en dehors de la Convention de l'UNESCO de 1970 et de la Convention d'UNIDROIT de 1995', 11 *Revue de droit uniforme*, (2006), p. 83; Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 24 and 55.

in turn affects the outcome of the case.¹⁵¹ Domestic laws of art-importing and art-exporting countries have often been antithetical and, therefore, have rendered any harmonization effort difficult.¹⁵² Consequently, only concerted action by means of international cooperation in harmonizing private laws¹⁵³ ought to effectively fight the illicit trade in cultural goods.¹⁵⁴ Thirdly, regarding restitution, the introduction of a private right of action for individuals without governmental intervention would constitute a favourable step for the recovery of privately owned assets.¹⁵⁵ Although a procedure for the retrieval of stolen cultural objects was already available in a majority of states prior to the introduction of the 1995 convention,¹⁵⁶ the procedure often failed due to diverse considerations: high costs incurred,¹⁵⁷ the unfamiliarity with foreign legal systems,¹⁵⁸ problems of gathering of evidence¹⁵⁹ – including difficulties in proving ownership¹⁶⁰ – are just a handful of examples.¹⁶¹ Hence, contrary to what some have argued,¹⁶² the adoption of the convention would be innovative, as it would provide an absolute – and uniform¹⁶³ – right of action¹⁶⁴ subject to a minimum time frame.¹⁶⁵ Fourthly, it was in the interest of the art market to distinguish between the licit and illicit origins of cultural objects.¹⁶⁶ This would notably contribute to the moralization of the said market.¹⁶⁷ At the time, a moralized market was considered as an important tool to change existing domestic practices as to the handling of cultural objects that were known to be stolen or illegally exported.¹⁶⁸ A ‘reasonable standard of commercial conduct’ ought to be expected from dealers and intermediaries dealing in cultural goods.¹⁶⁹ Morally speaking, the expected effect of the future convention was that collectors who acquired the good(s) while not being in good faith would feel uncomfortable with exposing them.¹⁷⁰ Thenceforth, professionals would hesitate or experience difficulties in selling goods with a dubious origin or even difficulties in insuring these goods against theft.¹⁷¹ Fifthly, introducing rules imposing mandatory restitution without compensation for stolen cultural objects and return of illegally exported cultural objects when the possessor did not exercise a certain standard of care during the acquisition helps to avoid situations where third-party protection through acquisition in good faith is misused.¹⁷² Sixthly, not taking part in the international effort to reduce the illegal traffic in cultural property by not adhering to the future instrument might also lead to an increase in the said traffic in non-adhering states.¹⁷³ Correspondingly, ratification sustains the international feeling that action needs to be undertaken.¹⁷⁴ Finally, through its entry into force, the convention would create

¹⁵¹ Lagarde, (2006), p. 84. For more explanation in this regard, see the *Winkworth / Eliafon* paradigm explained in more details in the introduction to the present research.

¹⁵² Lehman, (1997), p. 529.

¹⁵³ Valgaeren, J. H., ‘Geroofde Kunstvoorwerpen Tijdens WOII – Een Juridisch en Historisch Overzicht’, 42 *Jura Falconis*, (2005-2006), p. 617.

¹⁵⁴ Portes (Des), (1995), p. 330; Forbes, S. O., ‘Securing the Future of Our Past: Current Efforts to Protect Cultural Property’, 9 (1) *The Transnational Lawyer*, (1996), p. 263; Reichelt, G., ‘International Protection of Cultural Property by Gerte REICHELT, Univ. Dozent Vienna Institute of Comparative Law’, 43 *Uniform Law Review*, (1985), p. 63; Office Fédéral de la Culture (Suisse), (1998), p. 4; Carey Miller, D. L., Meyers, D. W., Cowe, A. L., ‘Restitution of Art and Cultural Objects: a Re-assessment of the Role of Limitation’, 6 (1) *Art, Antiquity and Law*, (2001), p. 12.

¹⁵⁵ Carruthers, (2001), p. 137; Prott, (2009), pp. 232-233.

¹⁵⁶ Merryman, (1996), p. 10.

¹⁵⁷ Warring, (2005), p. 289; Roodt, C., ‘Keeping cultural objects ‘in the picture’: traditional legal strategies’, 27 (3) *The Comparative and International Law Journal of Southern Africa*, (1994), p. 316.

¹⁵⁸ Roodt, (1994), p. 316.

¹⁵⁹ Roodt, (1994), p. 316.

¹⁶⁰ Roodt, (1994), p. 316.

¹⁶¹ Prott, (2009), p. 231; For more examples, see Roodt, (1994), p. 316.

¹⁶² For example, Mackenzie argues that the UNIDROIT convention only innovates in the introduction of a uniform ‘system of limitations’. See Mackenzie, (2002), p. 133.

¹⁶³ Nafziger, J. A. R., Scovazzi, T., ‘La Restitution des Biens Culturels Volés ou Illicitement Exportés en Temps de Paix’, in: J. A. R. Nafziger and T. Scovazzi, *Le Patrimoine Culturel de l’Humanité – The Cultural Heritage of Mankind*, (Martinus Nijhoff Publishers: Leiden / London, 2008), p. 67.

¹⁶⁴ Presidenza del Consiglio dei Ministri, (1996), p. 92; Prott, (1998), p. 214; Olivier, (1996), p. 656.

¹⁶⁵ This standard is to be seen as a minimum standard because, under Article 9 (1), it is possible for state parties to adopt rules that are more favourable to restitution or return. This is explained in more details in ‘Chapter 6 – Application of the Convention’ below.

¹⁶⁶ Carducci, (2006), p. 96; The illicit trade has the negative effect of reducing sales, imposing more restrictions on the licit trade and puts innocent dealers at risk when litigation results from the illicit activity. See Carey Miller, Meyers and Cowe, (2001), p. 11; The market was already generally poorly regulated. See Das, H., ‘Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence?’, in: The 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 [et al.]: The Hague [et al.], 2004), p. 198.

¹⁶⁷ Carducci, (2006), p. 100; Droz, G. A. L., ‘La Convention d’UNIDROIT sur le Retour International des Biens Culturels Volés ou Illicitement Exportés (Rome, 24 juin 1995)’, 86 (2) *Revue Critique de Droit International Privé*, (1997), p. 279.

¹⁶⁸ For stolen goods, see Prott, (2009), p. 227.

¹⁶⁹ Roodt, (1994), p. 339.

¹⁷⁰ Droz, (1997), p. 280.

¹⁷¹ Droz, (1997), p. 280; Département Fédéral de l’Intérieur (Suisse), (1998), p. 11.

¹⁷² Carducci, (2006), p. 100.

¹⁷³ This argument is notably submitted for Switzerland, see Département Fédéral de l’Intérieur (Suisse), (1998), p. 10.

¹⁷⁴ Département Fédéral de l’Intérieur (Suisse), (1998), p. 10.

practical advantages. For example, the resolution of disputes relating to the ownership of cultural objects become faster, more predictable and less expensive.¹⁷⁵ Consequently, states supporting the adoption of the convention have advocated the broadest application of the principles of restitution and of return possible.¹⁷⁶

On the other hand, professionals, collectors and market states have categorically opposed the regulation of the art market and, in doing so, have preached for the free trade in cultural materials.¹⁷⁷ In their opinion, a liberal approach as to the regulation of the art trade entails various advantages. From an inter-state perspective, the need to deregulate the art market and to ensure the free circulation of cultural goods has been referred to as the ‘world ownership theory’.¹⁷⁸ This theory entails an obligation for every nation to protect cultural property – irrespective of its origin – and the correlating right to enjoy it.¹⁷⁹ Two prominent advantages can be derived from this theory: firstly, by allowing art objects to flow towards art-importing states, both the preservation of cultural objects and of archaeological research are enhanced.¹⁸⁰ This in turn contributes to the open dialogue and peace between nations through cultural channels.¹⁸¹ Secondly, source states often do not have the resources necessary to take care of important collections, which could therefore be better ascertained by collectors or museums. Alongside these two advantages, the absence of regulation of the art market may prove to have other virtues: it has, thirdly, been argued that the interventionism flowing from the enactment of the convention constitutes an impediment to free trade¹⁸² and to equality before the law of public and private property,¹⁸³ something that commentators have qualified as disproportionate.¹⁸⁴ Any impediment to the free trade of cultural property is detrimental to a nation’s economy in that it limits the possibility for traders to access foreign markets.¹⁸⁵ Fourthly, it is believed that the regime established by the convention creates considerable unpredictability for art owners.¹⁸⁶ This uncertainty finds expression in four instances:¹⁸⁷ 1) during the acquisition of the object; 2) through the passage of time, when the origin of the object is not clear to the possessor (e.g., in case of donation or inheritance); 3) when financial and legal unpredictability flows from abusive procedures against the possessor, but also 4) in case of moral unpredictability: since the art market often deals with objects that are unique in their genre, knowing that such items have been the subject of a procedure for return or restitution could make it impossible for the possessor to resell it, even if the said claim was unfounded. Fifthly, it was predicted that the adoption of the convention could also lead to complications at the national level; arguably, the regime of the convention could conflict with fundamental rights and other fundamental principles found in domestic laws.¹⁸⁸ More specifically, the convention was criticized as undermining concepts such as the presumption of good faith, fundamental property guarantees or even entitlement to full compensation.¹⁸⁹ Finally, it has even been warned that the ratification of the convention would lead the market to create its own black market:¹⁹⁰ art collectors, dealers and museum could be victims of the pernicious restitutionary effects of the convention – bringing their possession into jeopardy –, leaving them with the only solution of hiding their belongings in anticipation of such an outcome.¹⁹¹ Consequently, market states have tried to constrain the scope of the convention so as to ensure

¹⁷⁵ Carducci, (2006), p. 97; UNESCO, ‘UNESCO and Unidroit – Cooperation in the Fight Against Illicit Traffic in Cultural Property, Conference Celebrating the 10th Anniversary of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, 24 June 2005, UNESCO Headquarters, Paris, 16 June 2005, CLT-2005/Conf/803/2, p. 2; Das, (2004), p. 194.

¹⁷⁶ Forrest, (2010), p. 139.

¹⁷⁷ Calvo Caravaca, (2004), p. 88; Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 23; Bengs, (1996), p. 507.

¹⁷⁸ Margules, (1991-1992), p. 614.

¹⁷⁹ Margules, (1991-1992), p. 614, footnote 27; it is important to note that the proponents of the ‘world ownership theory’ consider that it is possible to restrict the free movement of cultural assets when a ‘specific cultural value’ to the nation’s cultural heritage is at stake. This ‘specific cultural value’ is explained as a strong connection between the nation and the concerned object. See Margules, (1991-1992), p. 614.

¹⁸⁰ Olivier, (1996), p. 641.

¹⁸¹ Hughes and Wright, (1994), p. 223.

¹⁸² Calvo Caravaca, (2004), p. 88; Klein, (1999), p. 264.

¹⁸³ UNIDROIT Secretariat, (2001), p. 478.

¹⁸⁴ Lubina, K., *Contested Cultural Property – The Return of Nazi Spoiled Art and Human Remains from Public Collections*, (Maastricht University Publication: Maastricht, 2009), p. 113.

¹⁸⁵ Margules, (1991-1992), p. 615.

¹⁸⁶ Byrne-Sutton, Q., “Introduction”, in: C. Breitler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 11; Jolles, (1997), p. 54; Jayme, E., ‘Globalization in Art Law: Clash of Interests and International Tendencies’, 38 *Vanderbilt Journal of Transnational Law*, (2005), p. 941.

¹⁸⁷ Byrne-Sutton, (1997), p. 11.

¹⁸⁸ Byrne-Sutton, (1997), p. 10.

¹⁸⁹ Byrne-Sutton, (1997), p. 10-11; Département Fédéral de l’Intérieur (Suisse), (1998), p. 15.

¹⁹⁰ Département Fédéral de l’Intérieur (Suisse), (1998), p. 16.

¹⁹¹ Département Fédéral de l’Intérieur (Suisse), (1998), p. 16.

protection to good faith purchasers on their art market.¹⁹² It is understandable that the interests defended by these states are those of thriving art markets, steered by influential and particularly well-to-do shadow groups.¹⁹³

Thenceforth, during one sitting of the Committee of the Whole, the outcome of the voting procedure as to the form of the future convention weighed in favour of source states.¹⁹⁴ This raised concerns between the delegations representing market states, because there would be a lack of support by their governments for the future instrument.¹⁹⁵ These concerns were shared by the Chairman of the DC, who emphasized that an acceptable agreement had to be reached before the end of the conference.¹⁹⁶ Although the stakes of finishing within due time were high, it is worth reminding that the convention's success could only be guaranteed by the adoption of a universally acceptable agreement.¹⁹⁷ To achieve this uniform stance, the compromise had to balance carefully all the interests involved,¹⁹⁸ including the interests of source and market states. Therefore, the Mexican delegation attempted to remedy the imbalance by instating an informal Working Group – hereinafter WG – striving towards a better compromise between the two interest-driven categories of states.¹⁹⁹ This informal WG was established ten days after the beginning of the DC because insurmountable constraints were leading the negotiations into a deadlock.²⁰⁰ The text produced by the informal group took the minimum demands of both sides into consideration and produced a viable compromise, in addition to a draft preamble.²⁰¹ This text was subjected to the voting procedure of the Plenum and was adopted by thirty-five votes in favour, against five rejections²⁰² and seven abstentions.²⁰³ The convention was thus born on 23 June 1995²⁰⁴ and was opened for signature on the following day.²⁰⁵ As witnessed by the above, the text agreed upon was the result of a compromise between various domestic laws with many different approaches.²⁰⁶ It has been reported that it took six years to reconcile the two groups in reaching an acceptable compromise.²⁰⁷ Nonetheless, although the chasm between these two categories of states had been bridged, the achieved equilibrium was a fragile one.

The product of the Diplomatic Conference was very controversial from its first steps onwards:²⁰⁸ to the present day, the 1995 convention has been signed by twenty-two states and was ratified by no more than forty-

¹⁹² Forrest, (2010), p. 139.

¹⁹³ Forrest, (2010), p. 139.

¹⁹⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 13; Siehr, (1996), p. 7.

¹⁹⁵ Prott, *Commentary on the Unidroit Convention*, (1997), p. 13.

¹⁹⁶ See Presidenza del Consiglio dei Ministri, (1996), pp. 275-276, where the following commentary was reported on 19 June 1995 about the concerns of the Chairman of the Committee of the Whole: "As work was behind schedule, he [i.e. the chairman] reminded delegations that they were under an obligation to deploy their best efforts in order that a Convention be adopted on 24 June. He emphasized the negative consequences that would result from a failure to do so. It was likely that for the next twenty years or so States would no longer be interested in making any efforts to protect cultural heritage on the basis of a treaty. Furthermore, the failure of the Conference would be interpreted as a lack of interest of States in the international protection of cultural heritage, and as tacit, but clear, encouragement for the development of illegal traffic. The failure of the Conference would have even more serious consequences on substantive law. Regarding stolen cultural objects, the subject of Chapter II, illegal traffic was most certainly encouraged by numerous factors: in private international law by the almost universal conflict rule of the *lex rei sitae*; in substantive law by the widespread protection afforded to the good faith acquirer or possessor, and also by reason of the few cases in which a distinction was drawn between cultural objects and commercial goods in general, especially as regards their non-transferability. In connection with illegally exported cultural objects, the subject of Chapter III, private international law refused in principle the application of export prohibitions on cultural objects of the State of origin. Except for rare exceptions, those rules, which were by definition breached in the State of origin, would not be taken into account by the court of the forum. In this respect, the contribution of Chapter III was particularly desirable. The adoption of the Draft Convention was, therefore, an obligation for the international community".

¹⁹⁷ Schneider, (1996), p. 151; UNIDROIT, (1986), Study LXX – Doc. 1, p. 26.

¹⁹⁸ Schneider, (1996), p. 151; UNIDROIT, (1986), Study LXX – Doc. 1, p. 26; UNIDROIT, (1988), Study LXX – Doc. 2, p. 2; It has been submitted that a fair balance must be reached between the interests of the countries concerned. See UNIDROIT, (1988), Study LXX – Doc. 5, p. 2.

¹⁹⁹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 13; The states present during the informal working group were: Australia, Cambodia, Canada, France, Greece, Ireland, Italy, Mexico, the Republic of Korea, Spain, Turkey, the United States of America and Zambia. See 'Working Papers Submitted to the Plenum', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/W.P. 5, 23 June 1995, p. 329.

²⁰⁰ UNIDROIT Secretariat, (2001), p. 487.

²⁰¹ The text produced by the informal working group can be found in 'Working Papers Submitted to the Plenum', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/W.P. 5, 23 June 1995, p. 329. The text of the preamble can be found in 'Working Papers Submitted to the Plenum', Presidenza del Consiglio dei Ministri, (1996), CONF. 8/W.P. 6, 23 June 1995, p. 333; UNIDROIT Secretariat, (2001), p. 487; unfortunately, the negotiations undertaken by this working group have not been reported. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 80.

²⁰² It should be remarked that the five rejections related to procedural matters, and not to the substance of the proposed convention. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 14.

²⁰³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 13.

²⁰⁴ Sidorsky, (1996), p. 25; Renold, (1997), p. 20; Carruthers, (2001), p. 137; Siehr, (1996), p. 7.

²⁰⁵ Sidorsky, (1996), p. 25.

²⁰⁶ Presidenza del Consiglio dei Ministri, (1996), p. 19; UNIDROIT, Study LXX – Doc. 1, (1986), p. 25.

²⁰⁷ Schneider, (1996), p. 144.

²⁰⁸ Siehr, (1996), p. 7.

two states.²⁰⁹ It must be noted that there is a need for ratification by both importing and exporting countries in order for the convention to be a success.²¹⁰ Albeit the two interests-based categories put the emphasis on values that cannot be easily accommodated, it is unquestionable that the interference in the exchange of cultural goods needs, at the same time, to afford protection to market operators and to the licit trade without leading to a reduction in trade exchanges.²¹¹ This truism was also the cornerstone of the balancing of interests effectuated during the negotiations towards the adoption of the convention. Furthermore, the important asymmetry of participation between source and market states in international agreements dealing with cultural property issues is representative of the challenge that the UNIDROIT convention has to face.²¹² While this asymmetry was emphatic at the time of conclusion of the negotiations, it is important to note that nowadays this schism is less pronounced, since both source states and market states suffer from the increasing movement of stolen art.²¹³ This would seem to turn the tables in favour of the 1995 convention. Nonetheless, its popularity does not only depend on the exponential nature of the illicit market, but also on states' ability to make concessions.

3. OBJECTIVES PURSUED

The UNIDROIT convention pursues a multitude of objectives, many of which are addressed throughout its preamble. The goals described are either direct or indirect: the convention operates directly, as its title suggests,²¹⁴ insofar as it attempts to organize restitution to rightful owners in cases where cultural objects have been stolen, unlawfully excavated or lawfully excavated but unlawfully retained,²¹⁵ or returned to the state of removal following their illegal export.²¹⁶ This is notably emphasized in Recital 5 of the Preamble to the convention.

Recital 5 Preamble UNIDROIT Convention (1995) – EMPHASISING that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States, [...]

As such, the convention is equipped to regulate both theft and illegal export, the former inherently regulated by means of private law and the latter by means of public law.²¹⁷ It is important to mention that the convention is the first instrument to distinguish clearly theft from illegal exports in its regulatory regime, since prior

²⁰⁹ For a better understanding of the actual participation to the convention, its status of ratification can be consulted at the following url: <http://www.unidroit.org/status-cp>, last retrieved on 01.02.2018.

²¹⁰ Presidenza del Consiglio dei Ministri, (1996), p. 175; Doyal, (2000-2001), p. 662; it is also in the interest of both importing and exporting countries to adopt a unified cultural property regime, see Carey Miller, Meyers and Cowe, (2001), p. 11 and Warring, (2005), p. 233; Bengs also submitted that the participation of the United States of America constitutes one of the determinative element of the success of an international instrument dealing with the illicit traffic in cultural property. This is notably because the United States is the 'nation with the largest illicit cultural property trade in the world'. See Bengs, (1996), p. 516; Olivier, (1996), pp. 664-665.

²¹¹ Cottrell, E. M., 'Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property', 627 *Chicago Journal of International Law*, (2008-2009), p. 636; Calvo Caravaca and Caamiña Domínguez submitted that the convention does not pretend to interfere with the licit trade, with the exchange of artistic objects or with the works of artist for the international markets. See Calvo Caravaca, A. L., Caamiña Domínguez, C. M., "El Convenio de Unidroit de 24 de Junio 1995" in: C. R. Fernández Liesa and J. Prieto de Pedro (dirs), *La Protección Jurídico Internacional del Patrimonio Cultural. Especial Referencia a España*, (Colex: Madrid, 2009), p. 163; Loewe already advanced during the early stages of development of the convention that the future instrument should take into consideration the 'political and economic realities', including the differences between importing, exporting and hybrid countries. See UNIDROIT, (1988), Study LXX – Doc. 5, p. 2; This was further recognized by the Secretariat of UNIDROIT in its explanatory report about the PDC, which submitted that distinguishing between the licit and the illicit commerce was 'vital' to encourage the licit commerce. Making it more difficult for the licit market to operate by adopting restrictive measures would result in the expansion of the illicit market. Nonetheless, it is difficult to advocate a licit market if nothing is done to tackle its illicit counterpart. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 11.

²¹² Cottrell, (2008-2009), pp. 640 and 644; Dutra, M. L., 'Sir, How Much is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China', 5 *Asian-Pacific Law & Policy Journal*, (2004), pp. 78-79.

²¹³ Carducci, (2006), p. 93; Portes (Des), (1995), p. 327; it is also advanced that some countries can be qualified as source and market nations at the same time. This qualification can differ depending upon their position. See Ardouin, (1996), pp. 74-75, see also Prot, *Commentary on the Unidroit Convention*, (1997), p. 16.

²¹⁴ It should be noted that the drafters wanted the title of the convention to be as representative as possible of its aims. See UNIDROIT Secretariat, (2001), p. 488.

²¹⁵ UNIDROIT, (1993), Study LXX – Doc. 42, p. 53, where the Secretariat of UNIDROIT specified that the aim of the future convention "was to improve the protection of cultural property by ensuring its return to its owner". Nonetheless, it should be emphasized that this commentary is more relevant to theft than to illegal export; Calvo Caravaca, (2004), p. 90; Streiff, D., "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (Débats)", in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariétoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 63; Rodriguez Pineau, E., "Adhesión de España al Convenio de Unidroit sobre los Bienes Culturales Robados o Exportados Illegalmente de 1995", LV (1) *Revista Española de Derecho Internacional*, (2003), pp. 573-574; Valgaeren, (2005-2006), p. 618; Droz, (1997), p. 247.

²¹⁶ Byrne-Sutton, (1997), p. 15.

²¹⁷ Droz, (1994), p. 47 commenting about the Draft UNIDROIT Convention.

instruments failed to differentiate distinctly between the two.²¹⁸ As such, it protects the interests of both states and individuals.²¹⁹ Furthermore, restitution and return are to be reached following the convention's establishment of common minimal rules constraining state parties,²²⁰ as posited in Recital 4 of the Preamble:

Recital 4 Preamble UNIDROIT Convention (1995) – DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of **establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States**, with the objective of improving the preservation and protection of the cultural heritage in the interest of all, [...]

Because of this minimum standard, it is possible to derogate from the threshold of the convention if states want to apply more appropriate rules to secure restitution or return, as can be inferred from Recital 4 of the Preamble and Article 9 (1) of the convention (the latter article being discussed in 'Chapter 6 – Application of the Convention' below).²²¹ Alongside its objective of formulating minimal rules to ensure restitution and return of cultural objects, the convention is in fact concerned with civil suits for restitution or return. In regulating restitution procedures, it attempts at harmonizing conflicting private law rules by resolving the tort law / property law assimilation (see the introductory chapter above, but also Chapters 2 and 3 below).²²² Hence, the convention aims at proposing a generally acceptable set of minimal rules that would be adopted by all states to resolve the issue of stolen cultural property.²²³ Concurrently, it attempts at correcting the discrepancies between the various national legal regimes²²⁴ by balancing the approach of civil law systems – prescribing third-party protection in specific circumstances; and of common law systems (foreseeing no third-party protection) – in their private law rules relating to the acquisition of stolen cultural property.²²⁵ More conspicuously, it is set to prevent the abuse of the mechanism of third-party protection to good faith purchasers;²²⁶ although it mandates automatic restitution (cf. Article 3 (1)) and conditional return (cf. Article 5 (1) and (3)), these obligations are tampered by the conditional payment to the good faith purchaser of the so-called fair and reasonable compensation (cf. Articles 4 (1) and 6 (1)).²²⁷ Finally, the convention pursues the objective of guaranteeing the fair and transparent exchange of cultural objects whilst ensuring respect for the obligation of due diligence during acquisitions.²²⁸

Indirectly, the convention aims at thwarting the international illicit traffic in cultural objects²²⁹ by: preventing the ever-growing theft of cultural property,²³⁰ preventing the plundering of monuments, diminishing illicit exports and eliminating illegal excavations.²³¹ In doing so, it is designed to regulate thoroughly the demand side of the art market;²³² it focuses upon the demand of the art and antiquities markets by specifically regulating the end-of-the-chain-of-transactions. Acting at this stage is considered imperative in the fight against illicit trafficking.²³³ This is notably because the art market has often been fraught with opacity: market stakeholders

²¹⁸ Love Levine, (2010-2011), p. 774.

²¹⁹ Presidenza del Consiglio dei Ministri, (1996), p. 25.

²²⁰ Fraoua, (1997), p. 39. This common minimum standard notably implies an obligation for states to introduce a direct right of action before their domestic courts to ensure the possibility for individuals to reclaim their stolen cultural property. See Prott, (2004), p. 129; Fraoua, (1997), p. 38; Rodriguez Pineau, (2003), p. 575; Calvo Caravaca and Caamiña Domínguez, (2009), p. 157; Bergé, (2000), p. 244; Prott, *Commentary on the Unidroit Convention*, (1997), pp. 31 and 87; Forrest, (2010), p. 199.

²²¹ Calvo Caravaca, (2004), p. 90; Rodriguez Pineau, (2003), p. 575.

²²² Forbes, (1996), p. 247; Roodt, (1994), p. 321; Valgaeren, (2005-2006), p. 618.

²²³ Forbes, (1996), p. 246; Presidenza del Consiglio dei Ministri, (1996), p. 22.

²²⁴ UNIDROIT Secretariat, (2001), p. 564.

²²⁵ Droz, (1997), p. 248.

²²⁶ UNESCO, (2005), p. 5. This was also recalled by the Chairman of the Committee of Governmental Experts – Lalive – at the opening of the third session of the committee. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the third session (Rome, 22 to 26 February 1993) (prepared by Unidroit), Study LXX – Doc. 39, Rome, May 1993, p. 1.

²²⁷ Calvo Caravaca, (2004), p. 90; Lagarde, (2006), p. 84.

²²⁸ Jolles, (1997), p. 53.

²²⁹ Droz, (1997), p. 240; Bergé, (2000), p. 226; Forrest, (2010), p. 198; UNIDROIT Secretariat, (2001), p. 564.

²³⁰ Klein, (1999), p. 263; Jolles, (1997), p. 53; Rodriguez Pineau, (2003), p. 574.

²³¹ Byrne-Sutton, (1997), p. 15. See also Presidenza del Consiglio dei Ministri, (1996), p. 88.

²³² Forrest, (2010), p. 200.

²³³ Lalive D'Épinay, (1996), p. 47; Prott notes that criminologists who have undertaken to investigate the illicit market have reached the conclusion that restricting the supply of cultural object through legal means is otiose as long as the demand for these objects remains important. See Prott, (2011), p. 7. See also UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the second session of the committee (Rome, 20 to 29 January 1992), Study LXX – Doc. 29 (Misc. 6), Rome, February 1992, p. 8: “[...] one of the most significant concerns behind the whole project, [...] was to alter the widely accepted practice among collectors and dealers of not rigorously checking the provenance of cultural objects offered to them. It was felt that requiring proper diligence on their part (sanctioned by the risk of having to return an object without compensation) is the major possibility of deterring the illicit trade and discouraging theft. If the existing rules on *bona fide* purchase are left intact, a substantial body of the trade will continue their existing practices with little or no impact on the flow of stolen cultural objects” (reiterated with different words in UNIDROIT, (1993), Study LXX – Doc. 42, p. 55); see also UNIDROIT, (1993), Study LXX – Doc. 39, p. 12, where a member of the SG advanced that the establishment of a special regime with regard to acquisitions in good faith of cultural objects was the only means of hindering the illicit

have often credulously accepted secrecy in transacting, without questioning the origins of the property sold, so as to ensure their own protection.²³⁴ Furthermore, connivance and ensuing acts of concealment by the demand side of the market have been conducive to fuelling the illicit traffic in cultural materials. Thenceforth, the convention tries to change the mindsets of market operators in the trade of cultural materials. As explained by Marina Schneider – Executive Secretary of the Diplomatic Conference and now senior officer at UNIDROIT – in 1997:

“While the Convention certainly sets out to secure a higher incidence of restitution or return of stolen or illegally exported cultural property, its main thrust is nevertheless likely to be the reduction of illicit trafficking by **fostering a gradual yet profound change in the behaviour of art market operators** [...]”²³⁵

... and in 2012 ...

“[...] the main objective of the [Unidroit] convention is **not to increase the number of restitutions / returns but to change the behaviour of buyers**”.²³⁶

The convention is thus set to create a gradual change in the mentalities of market operators,²³⁷ by making the sale of cultural objects with a dubious origin more difficult.²³⁸ Subsidiarily, the objective of changing mindsets has repercussions for the treatment of cultural materials by states: the convention codifies a change of attitude towards cultural objects, ultimately creating a differentiation with ordinary goods.²³⁹ This differentiation – leading to the creation of a *lex specialis* for cultural materials – is particularly welcomed considering that the application of non-tailor made rules to cultural property had thus far contributed to the illicit traffic.²⁴⁰ Additionally, the convention aims at addressing the said traffic from the perspective of the manifold parties affected by it. For instance, Recital 3 recalls the irreparable damage frequently caused to the materials of ‘national, tribal, indigenous or other communities’.

Recital 3 Preamble UNIDROIT Convention (1995) – **DEEPLY CONCERNED** by the **illicit trade** in cultural objects and the **irreparable damage frequently caused by it**, both to these objects themselves and to the **cultural heritage of national, tribal, indigenous or other communities**, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information, [...]

The recognition of the rights of tribal, indigenous groupings and other communities in the Preamble and in other operative parts of the convention was included because of demands formulated by Australia, Canada and the United States.²⁴¹ Interestingly, by listing these different categories of actors, the convention considers the

traffic in cultural property. See furthermore UNIDROIT, (1993), Study LXX – Doc. 42, p. 7, but also Presidenza del Consiglio dei Ministri, (1996), p. 108, where UNESCO submitted: “For many years, experts in cultural heritage law from different legal systems have emphasised that the only way substantially to hinder the illicit trade in cultural property is to ensure the return of cultural objects to the original holder after a theft, even at the cost of changing the rule in many European legal systems protecting the *bona fide* purchaser of stolen goods (Chaterlain, Rodotà, O’Keefe and Prott, Reichelt, Fraoua)”. See also *ibidem*, p. 234, where Prott submitted: “the philosophy behind the draft Convention was to make the art market as clear as possible by increasing the diligence required of prospective purchasers. The return of any cultural object to its original owner would maximise this result”.

²³⁴ Coggins, C. C., “A Licit International Traffic in Ancient Art”, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art – Vol. V – International Sales of Works of Art*, (ICC Publishing: Paris / New York; Kluwer Law International: The Hague / London / Boston, 1996), p. 49.

²³⁵ Schneider, M., ‘The Unidroit Convention on Cultural Property: State of Play and Prospects for the Future’, 2 (3) *Uniform Law Review*, (1997), p. 506; and Schneider, M., ‘The Unidroit Convention – A Shared Vision and a Joined Responsibility’, in UNESCO Havana, ‘Culture and Development – Stop the Illicit Traffic of Cultural Property’, (December 2013), p. 26.

²³⁶ The persistent call for changing the practices of adamant market stakeholders was reiterated more recently by Schneider during a workshop in Turkey. See Schneider, M., ‘Unidroit Convention on Stolen or Illegally Exported Cultural Objects and its Complementarity with the 1970 UNESCO Convention’, in UNIDROIT, ‘Fight against illicit traffic of cultural property in South-East Europe.’ (Regional Training Workshop) Gaziantep, Turkey, 19-21 November 2012, slide 23. Powerpoint presentation available at <https://www.slideshare.net/UNESCOVENICE/marina-schneider-1995-unidroit-convention-16003850> last retrieved on 01.03.2018.

²³⁷ UNIDROIT Secretariat, (2001), p. 564; as noted by Prott in 2012, the convention was not established to generate more case law, but merely to change the attitudes of market operators. See Prott, L.-V., ‘Is the 1995 UNIDROIT Convention still a valid Multilateral Instrument?’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012. Prott already came to this conclusion in 1993 when representing UNESCO in the drafting of the 1995 convention. She submitted that it was her opinion that “[...] the future Unidroit Convention would have the effect of modifying practices in the art trade by requiring purchasers to exercise much more caution in ascertaining the origin of objects”. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 2.

²³⁸ Office Fédéral de la Culture (Suisse), (1998), p. 93.

²³⁹ Lalive D’Epinay, P., “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)” in: C. Breiter, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 82.

²⁴⁰ Lalive D’Epinay, (1997), p. 82.

²⁴¹ Papademetriou, T., ‘International Aspects of Cultural Property – An Overview of Basic Instruments and Issues’, 24 *International Journal of Legal Information*, (1996), p. 296.

notion of ‘heritage’ within a multilevel dimension: the cultural heritage does not – as traditionally conceived – either belong to the nationals of a state or to the international community, but is shared by an amalgam of actors. This innovative approach distinguishes itself from previous international instruments.²⁴² What is more, the treaty also aims at protecting and preserving the cultural heritage of all states in the interest of humankind, ...

Recital 4 Preamble UNIDROIT Convention (1995) – **DETERMINED** to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of **improving the preservation and protection of the cultural heritage in the interest of all, [...]**

... and at enhancing the spread of culture, as well as promoting comprehension between people so as to secure a sound progress of civilization:²⁴³

Recital 2 Preamble UNIDROIT Convention (1995) – **CONVINCED** of the **fundamental importance** of the protection of cultural heritage and **of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation, [...]**

Recital 2 of the Preamble makes a particularly emphatic statement as to its position towards the licit art trade: it does consider this activity as an important means of cultural exchange between civilizations, for the benefit of all.²⁴⁴ Consequently, contrary to what might be believed, the convention attempts to tackle the illicit traffic without affecting the licit trade (see also Recital 7 of the Preamble which is reproduced below). Additionally, it is important to note that the drafters considered the 1995 convention as a further step in the establishment of international cooperation in the realm of cultural property.²⁴⁵ As such, they recognized that the convention was not the *ultimum remedium* to remedy the afore-mentioned traffic.²⁴⁶ Recital 7 of the Preamble acknowledges the limited role that the UNIDROIT convention can play to dispose of the this unlawful activity.

Recital 7 Preamble UNIDROIT Convention (1995) – **CONSCIOUS** that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges, [...]

In fact, the preamble recognizes in its eighth Recital the need to adopt further measures:

Recital 8 Preamble UNIDROIT Convention (1995) – **ACKNOWLEDGING** that **implementation of this Convention should be accompanied by other effective measures for protecting cultural objects**, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation, [...]

Finally, it can be concluded that the convention has a particularly important role to play in the international protection of cultural property, but also in the ambit of interstate cooperation.²⁴⁷ It demonstrates that international efforts can supplement national provisions for the protection of states’ cultural heritage.²⁴⁸ In doing so, the convention properly balances the interests at stake, because it adopts an intermediate position between cultural nationalism and cultural internationalism.²⁴⁹

4. STRUCTURE OF THE CONVENTION

The UNIDROIT convention has a bipartite shutter: it intends to deal with both the restitution of stolen cultural property and the return of illegally exported cultural property in one instrument.²⁵⁰ The document is divided into a Preamble, five chapters²⁵¹ and one annex, constituting a total of twenty-one articles. Chapter II of the

²⁴² For an in-depth discourse analysis of the different instruments adopted at the international level to date, see Warring, (2005), pp. 227 and ff.

²⁴³ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 30.

²⁴⁴ Forrest, (2010), p. 198.

²⁴⁵ Van Gaalen, M. S., Verheij, A. J., ‘De Gevolgen van het Unidroit-Verdrag Inzake Gestolen of Onrechtmatig Uitgevoerd Cultuurobjecten voor Nederland’, 5 *Nederlandse Juristen Blad (NJB)*, (31 januari 1997), p. 195.

²⁴⁶ UNIDROIT Secretariat, (2001), p. 490; See also Presidenza del Consiglio dei Ministri, (1996), p. 88: “The instrument should not seek to do too much: after 30 centuries of relocation of cultural objects in peace and war, one instrument cannot turn the tide of history. What this instrument can do is take one or two clear steps to reversing the current tide of theft, illegal excavation and illegal export of cultural objects which will result in their return by practical legal steps”.

²⁴⁷ Streiff, (1997), p. 63.

²⁴⁸ UNIDROIT Secretariat, (2001), p. 564.

²⁴⁹ Protz, *Commentary on the Unidroit Convention*, (1997), p. 19.

²⁵⁰ This is notably due to the fact that the drafters based the future instrument upon Article 7 (b) (ii) of the 1970 UNESCO convention, which addressed both issues simultaneously (see section A. 1. (2) above).

²⁵¹ The proposal to divide the convention in five parts was introduced during the third session of the Study Group. See UNIDROIT, *The International Protection of Cultural Property. Summary report on the third session of the UNIDROIT study group on the international protection of cultural property, held at the seat of the Institute from 22 to 26 January 1990* (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 18, Rome, May 1990, p. 7.

convention regulates instances of cultural property theft and archaeological theft, whilst Chapter III regulates the problem of illegal export.²⁵² It should be noted that the convention is particularly clear, simple²⁵³ and well structured compared to other international instruments,²⁵⁴ such as the 1970 UNESCO antecedent.²⁵⁵ This clarity is supposed to make it easier to understand the provisions of the convention and consequently apply them.²⁵⁶ The present section provides an overview of these provisions and explains how their analysis is distributed throughout the present research.

The text of the convention is divided as follows: the Preamble contains nine Recitals, stating the objectives of the convention and the rationale inherent to its provisions. This Preamble was partly addressed above and will be referred to sporadically throughout the following chapters, wherever appropriate.

Chapter I encompasses two articles: Article 1 delimits the scope of application *ratione materiae* of the convention while Article 2 provides a definition of the notion of ‘cultural objects’. These two provisions are analysed in detail in section B. 1. below.

Chapter II lays down the mechanism that is relevant to claims for the restitution of stolen cultural objects in Articles 3 and 4 thereof. Article 3 is subdivided in eight sub-sections dealing specifically with the mechanism of restitution: it elaborates upon the time frame to the introduction of a claim in restitution (§3), other time limitations instated for special categories of cultural materials deserving enhanced protection (§4, §5, §7 and §8), the conditional assimilation of archaeological materials to stolen objects (§2), and the mandatory handing over of the object to the claimant as a consequence of a timely introduced claim in restitution (§1). Article 4 counterbalances the obligation of restitution laid down in Article 3 by creating a conditional right of compensation for the possessor that exercised due diligence when acquiring the object (§1). This right of compensation is further developed in the four subsequent paragraphs (§2-§5). The provisions of Chapter II are discussed in detail in Chapter 4 of the present research, with the exception of the assimilation of archaeological materials to stolen objects, which is addressed in Chapter 5 below.

Chapter III is composed of three articles. Article 5 lays down the inter-state mechanism of return (§1), the conditionality of a demand for the return (§3), including the time frame to introduce timely a demand in return (§5). Additionally, it assimilates cultural objects that have been temporarily lawfully exported as illegally exported when these objects are not returned in accordance with the export certificate (§2). Article 6 provides for the payment of compensation to a purchaser that neither knew nor ought to have known that the object had been illegally exported (§1 and §2). Additionally, Article 6 discusses alternative solutions to the return, subject to the caveat that both the requesting state entitled to the return and the possessor can reach an agreement (§3). Furthermore, the costs of the return are imputed upon the requesting state that is entitled to the said return (§4). Article 6 also specifies that the possessor of a cultural object that has acquired possession by donation or by inheritance shall not be in a better position than a possessor that has acquired the object differently (§5). Article 7 exempts certain categories of goods from the regime of Chapter III (§1) with the exception of certain objects belonging to tribal and indigenous communities having a special function for the said groupings (§2). Chapter III of the convention is exempted from this analysis because of the private law focus given to the present disquisition, as was laid down in the introductory chapter (cf. section A. 2.).

Chapter IV garners the general provisions of the treaty in Articles 8, 9 and 10. Article 8 prescribes the competent jurisdictions for claims based on the treaty (§1) but also foresees mechanisms of party autonomy by giving the choice to submit the dispute to another court or competent authority, or even to an arbiter (§2). Additionally, Article 8 makes it possible to use provisional measures of the state where the object is located during the proceedings (§3). Because the aspects discussed in Article 8 are not salient enough to answer the research question posited above, they will not be further discussed. Article 9 allows states to derogate from the provisions of the treaty if their domestic legislation is more favourable to the restitution or the return of stolen or illegally exported cultural objects (§1). It is, nonetheless, made clear that these more favourable rules do not have *inter partes* effect (§2). Article 9 is discussed in more detail in Chapter 6 below. Article 10 lays down the

²⁵² In fact, from the outset of the making of the convention, Loewe firmly believed that illegal export should be differentiated from theft on the basis of moral consideration as it might prove virtually impossible for the purchaser of an illegally exported cultural object to be aware of the illegal export. See UNIDROIT, (1989), Study LXX – Doc. 10, p. 10.

²⁵³ It is important to note that simplicity was also one of the objectives strived for by the drafters of the convention. See Presidenza del Consiglio dei Ministri, (1996), p. 22.

²⁵⁴ Prott notes that, contrary to the drafting of the 1970 convention, the 1995 convention had been drafted by an “extremely good drafting committee” and by the “best experts of private international law”. In her opinion, the text is thus ‘crystal clear’. See Prott, (2009), p. 216; it should be remarked that the study group established during the early stages of development of the convention that the text needed to be ‘uncomplicated’, even if the simplicity of the text would require making sacrifices. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 3. The Study Group was thus anxious to produce the clearest and most simple regime possible. UNIDROIT, (1990), Study LXX – Doc. 19, p. 14.

²⁵⁵ Love Levine, (2010-2011), p. 768; for an in-depth explanation as to the problems linked to the establishment of the text of the 1970 convention and the reason for its untidy formulation, see Bator (1982), pp. 370 and ff.

²⁵⁶ Love Levine, (2010-2011), p. 768.

scope *ratione temporis* of the convention (§1 and §2) and is, therefore, addressed in the present chapter (cf. section B. 2. (3)).

Chapter V lays down the final clauses of the treaty in Articles 11 to 21 thereof. It is important to remark that this chapter of the convention did not find its origin in the PDC: the SG had been informed that the final provisions were better drafted during the DC and would, thus, not need to be drafted in advance.²⁵⁷ In fact, Articles 11 to 21 of the convention are standard provisions used in conventions dealing with harmonization of law.²⁵⁸ More particularly, this boilerplate has often in the past been applied in the drafting of other international instruments of harmonization, such as the 1983 Geneva *Convention on Agency in the International Sale of Goods*, or the 1988 UNIDROIT conventions on International Financial Leasing and on International Factoring.²⁵⁹ Because the majority of these provisions are straightforward, they require little explanation²⁶⁰⁻²⁶¹ and do not contribute to answering the research question posited above. Therefore, the present research does not address the rules laid down in most of these provisions, with the exception of Articles 13, 18 and 20 discussed in ‘Chapter 6 – Application of the Convention’ and ‘Chapter 7 – Unidroit and the World’ below.

²⁵⁷ Merryman, (2000), p. 271.

²⁵⁸ Renold, (1997), p. 32; Prot, *Commentary on the Unidroit Convention*, (1997), p. 83.

²⁵⁹ UNIDROIT Secretariat, (2001), p. 552.

²⁶⁰ Prot, *Commentary on the Unidroit Convention*, (1997), p. 83.

²⁶¹ In their application to the 1995 convention, these standard clauses are divided as follows: Article 11 prescribes the modalities of accession. Article 12 specifies the objective date of entry into force. Article 13 regulates the relations between the convention and other international regulatory regimes. Article 14 organizes its application in states with several territorial units, such as federal states. Article 15 lays down formalities concerning the issuance of declarations at the time of accession. Article 16 lays down further details with regard to the mandatory declaration as to the designation of the competent authority for the introduction of claims in restitution and requests in return, as foreseen by Article 8. Article 17 requires the state parties to send information about their domestic export legislation to the depositary. This must be done in one of the two authentic languages of the convention and within a period of six months following adherence. Article 18 is probably the least standard provision of Chapter V as it excludes the possibility to formulate reservations to any of the convention's provisions. This rule thus obliges the adhering state to accept the document on an all-or-nothing basis. Article 19 arranges the peculiarities of the mechanism of denunciation of the convention by state parties. Article 20 allows for the creation of a special committee to review the practical operation of this instrument. Finally, Article 21 imputes the function of depositary to the Italian state. Furthermore, it lays down a short list of obligations incumbent upon the said depositary.

B. Applicability of the convention

To understand the influence exercised by the convention upon the illicit traffic in cultural property, it is at first important to determine in which instances the convention's regime will be applied. From the outset of the present analysis, it should be stressed that the court seized with either a claim for the restitution of a stolen cultural object or with a request for the return of an illegally exported cultural good that falls within the ambit of the convention needs to apply the convention's regime, to the detriment of its domestic conflict-of-law rules.²⁶² Therefore, in providing the instances in which the convention is to be applied, the following section firstly defines the general concepts used throughout UNIDROIT's regime, and secondly it provides an analysis of the convention's scope of application.

1. CONCEPTUALIZATION

Two general concepts used throughout the provisions of the convention are particularly important in appreciating its ambit, i.e. 'cultural objects' and 'international character'. These two notions – common to both Chapter II and Chapter III – are discussed in detail below.

(1) Cultural objects

Unlike other treaties in the realm of international cultural property law, both the title of the convention and the majority of its articles suggest that it is specifically directed at cultural objects instead of cultural property or cultural heritage. Because the treaty instates a *lex specialis* for these objects,²⁶³ the very meaning given to the notion of 'cultural objects' is crucial in nuancing the convention's ambit. 'Cultural objects' is defined in Article 2 of the UNIDROIT regime *juncto* to its annex:

Article 2 UNIDROIT Convention (1995) – For the purposes of this Convention, **cultural objects** are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

Before discussing this provision's specificities, it should be remarked that alongside the use of the terms 'cultural objects' in Article 2, the text of the convention makes additional references to the two notions of 'cultural heritage' and 'cultural property'. In fact, there seems to be a tension in the use of either 'cultural objects' or 'cultural heritage' throughout its letter. Whilst the former notion is predominantly used, the latter is mentioned in six instances, four times in the Preamble, once in Article 1, and once more in Article 5. In addition, 'cultural property' has been included in the provisions of the treaty. Nonetheless, the use of this terminology seems to have waned considerably compared to the use predicated in the 1970 UNESCO predecessor,²⁶⁴ as it only appears once in the Preamble of the 1995 convention. Because the three notions are all to be found in the 1995 instrument, it is important to clarify their respective meaning. The present section discusses the semantics of 'cultural heritage', as well as 'cultural property', and then distinguishes these two from the concept of 'cultural objects', a notion that has been favoured throughout the convention's regime.

Cultural heritage

Although a handful of international documents have touched upon the notion of cultural heritage,²⁶⁵ the definitions produced have traditionally been thematic, and the meaning given has, therefore, been sectorial. For example, in the 1985 Council of Europe *Convention for the Protection of the Architectural Heritage of Europe*,²⁶⁶ the notion of 'architectural heritage' posited in Article 1 refers specifically to the heritage intrinsically linked to

²⁶² See for example the commentary by the Finnish delegation in UNIDROIT, (1992), Study LXX – Doc. 32, p. 1.

²⁶³ UNIDROIT, (1986), Study LXX – Doc. 1, p. 25, calling for the creation of a *lex specialis* for cultural objects. The *sui generis* character of cultural property is further recognized on page 43 of the same document; This definition is welcome since it introduces a distinctive category of cultural goods to which different rules in domestic property laws will apply. See Love Levine, (2010-2011), p. 770; Cultural objects have traditionally been subsumed under the regime applicable to movables in general, although specific tailor-made rules should be adopted because of the finite nature of cultural materials, of their uniqueness and of their fundamental importance to a state's cultural identity. Because of these characteristics, these goods are embedded with historical and sentimental value. See Office Fédéral de la Culture (Suisse), (1998), p. 4.

²⁶⁴ The concept of 'cultural property' was used forty-three times in the text of the 1970 convention but only once in the 1995 convention.

²⁶⁵ It should be remarked that this notion has not, traditionally, found ground in domestic legislation, and, has only emerged recently on the international plane. This remark is also relevant to the notion of cultural property. See Prott, L. V., O'Keefe, P. J., 'Cultural Heritage' or 'Cultural Property?', 1 *International Journal of Cultural Property*, (1992), pp. 318-319.

²⁶⁶ Prott and O'Keefe, (1992), p. 318.

architecture.²⁶⁷ Similarly, the 1992 *European Convention on the Protection of the Archaeological Heritage* (Revised) gives a contextualized definition of cultural heritage, whereby Article 1 gives substance to the concept of archaeological heritage.²⁶⁸ In the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, the notion of ‘underwater cultural heritage’ – similarly prescribed in Article 1 –, refers to the cultural heritage found periodically or continuously under water.²⁶⁹ But for these thematic definitions, the notion had been more specifically defined in the 1972 UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*²⁷⁰ and was also subsequently touched upon in the 2003 UNESCO *Declaration Concerning the Intentional Destruction of Cultural Heritage*.²⁷¹ Despite both efforts to come up with a harmonized definition, there is – to date – no universally accepted definition of the notion of cultural heritage.²⁷² This lack of universal definition is mainly due to the difficulties in semantics.²⁷³ In fact, the concept is considered particularly evolutive and is influenced by many different factors.²⁷⁴ But for this evolutive character, the notion is best understood in general terms as garnering “manifestations of human life which represents a particular view of life and witness the history and validity of that view”.²⁷⁵ Although an international definition remains nebulous, and despite the fact that this term is often used loosely,²⁷⁶ the notion of ‘cultural heritage’ is composed of two discernible elements: ‘cultural’ and ‘heritage’.

²⁶⁷ Article 1 *Convention for the Protection of the Architectural Heritage of Europe* (1985) – “For the purposes of this Convention, the expression “architectural heritage” shall be considered to comprise the following permanent properties: 1 monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings; 2 groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units; 3 sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest”.

²⁶⁸ Article 1 *European Convention on the Protection of the Archaeological Heritage* (Revised) – “1. The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study. 2. To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs: i. the preservation and study of which help to retrace the history of mankind and its relation with the natural environment; ii. for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and iii. which are located in any area within the jurisdiction of the Parties. 3. The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water”.

²⁶⁹ Article 1 UNESCO *Convention on the Protection of the Underwater Cultural Heritage* (2001) – “For the purposes of this Convention: 1. (a) “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character. (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage. (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage”.

²⁷⁰ Prott and O’Keefe, (1992), p. 318; Article 1 of the 1972 Convention: “For the purposes of this Convention, the following shall be considered as “cultural heritage”: monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view”.

²⁷¹ Frigo, M., ‘Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?’, 86 (854) *International Review of the Red Cross*, (June 2004), pp. 368-369; Stamatoudi, (2011), p. 7.

²⁷² Frigo, (2004), p. 375.

²⁷³ Forrest, (2010), p. 1; Last, K., “The Resolution of Cultural Property Disputes: Some Issues of Definition”, in: The 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 [et al.]: The Hague [et al.], 2004), p. 58, citing Lyndell V. Prott, who advanced that formulating a definition of the notion cultural heritage is one of the most challenging exercises for scholars (to be found in Prott, L. V., “Problems of Private International Law for the Protection of the Cultural Heritage”, in: Académie de Droit International de La Haye / Hague Academy of International Law, *Recueil des cours de l’Académie de droit international de La Haye*, V, Tome 217, (1989), p. 224). See also the discussion about the inherent difficulties in defining this concept in Last, (2004), pp. 58 and ff.

²⁷⁴ Forrest, (2010), p. 2.

²⁷⁵ Prott and O’Keefe, (1992), p. 307; Prott defines cultural heritage as “[...] those things and traditions which express the way of life and thought of a particular society, which are evidence of its intellectual and spiritual achievements. They represent a particular view of life and witness the history and validity of that view.” See Prott, (1989), p. 224. For an illustrative list of tangible cultural expressions in movable or immovable form, see Prott and O’Keefe, (1992), p. 307-308. For examples of intangible cultural expressions, see *ibidem*, p. 308; See also Forrest (2010), p. 2, referring to the same definition but making an incorrect statement about a further refinement made by Prott in 1989 (cf. footnote 7). Nevertheless, Forrest provides another alternative definition of cultural heritage embedded with a similar substance than the definition of Prott and O’Keefe given above (Forrest, (2010), p. 2); See also the analysis in terms of emotional value given by Sigmond, in Sigmond, J. P., ‘Some Thoughts on the Importance of Cultural Heritage and the Protection of Cultural Goods’, X (1) *Art Antiquity and Law*, (2005), pp. 63-71.

²⁷⁶ Forrest, (2010), p. 1.

At first, attention should be given to the cultural element: cultural heritage entails firstly the manifold forms of expressions of culture,²⁷⁷ thus primarily laying the focus on the cultural significance of the object.²⁷⁸ This cultural significance is the value given to the object by a culture or by collectors,²⁷⁹ and is subject to fluctuant appreciation by these actors.²⁸⁰ As put by Last, “[culture] means different things to different people”,²⁸¹ Nevertheless, any potential universal definition of cultural heritage requires making choices about its substance, and thus, indirectly, implies giving universal meaning to the cultural component,²⁸² an element that is by definition local in nature; irrespective of the international legal qualification given to the notion of cultural heritage, it is important to realize that the ‘international patrimony’ is composed of national patrimonies.²⁸³ States are thus the only competent legislators to enact rules protecting cultural heritages.²⁸⁴ Determining which objects fall within the ambit of any definition of cultural heritage constitutes a subjective value-laden judgement,²⁸⁵ in which significance plays a prominent role.²⁸⁶ Because states are to determine which objects significantly belong to their cultural identity,²⁸⁷ this entails that a harmonized definition of cultural heritage at the international level cannot be easily achieved. Consequently, in defining the notion, its meaning must be nuanced by reference to the respective cultural context addressed.²⁸⁸ Thenceforth, a comprehensive international definition of either ‘cultural heritage’, ‘cultural property’ or even ‘cultural object’ needs to take this subjective and heterogeneous dimension into account when assessing the cultural element, and thus rely on objective criteria – such as the disciplines of history, sociology, ethnography or even art – to complement their meanings.²⁸⁹

Secondly, the composite ‘heritage’ requires some consideration: the notion of heritage suggests an intrinsic faculty of transferability, either through the inheritance of the said heritage by forbearers,²⁹⁰ or through the passing down of the actual cultural patrimony to future generations.²⁹¹ The conceptualization of this idea of transference has been qualified as “nomadic and elastic”²⁹² and is rather quixotic in nature.²⁹³ Correspondingly, transference to future generations implies the need for protection and safeguarding for future generations.²⁹⁴ The 1995 convention has avoided dealing with the daunting task of finding common ground between national patrimonies by leaving the notion of ‘cultural heritage’ undefined.²⁹⁵

Cultural property

Whilst ‘cultural property’ and ‘cultural heritage’ have a history of being used interchangeably,²⁹⁶ both notions have a clearly distinct legal meaning.²⁹⁷ Contrasted to the notion of ‘cultural heritage’, ‘cultural property’ is narrower in its scope: it is considered as a branch of cultural heritage that specifically deals with the tangible

²⁷⁷ Nafziger, J., Kirkwood Paterson, R., ‘Cultural Heritage Law’, in: J. Nafziger and R. Kirkwood Paterson, *Handbook on the Law of Cultural Heritage and International Trade*, (Edward Elgar Publishing, 2014), p. 1.

²⁷⁸ Mastalir, R. W., ‘A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law’, 16 (4) *Fordham International Law Journal*, (1992), p. 1037.

²⁷⁹ Mastalir, (1992), p. 1039.

²⁸⁰ Ardouin, (1997), p. 79; Last, (2004), p. 58.

²⁸¹ Last, (2004), p. 58.

²⁸² Last, (2004), p. 60.

²⁸³ UNIDROIT Secretariat, (2001), p. 496.

²⁸⁴ Mastalir, (1992), p. 1042.

²⁸⁵ Presidenza del Consiglio dei Ministri, (1996), p. 24; UNIDROIT Secretariat, (2001), p. 496.

²⁸⁶ Forrest, (2010), pp. 3-4.

²⁸⁷ Mastalir, (1992), p. 1042.

²⁸⁸ Mastalir, (1992), p. 1039; Ardouin discusses the subjective appreciation of the cultural nature of cultural objects and points at the prominent relativity of the notion of cultural objects. See Ardouin, (1997), pp. 76 and ff.; Forrest goes one step further by specifying that culture is society, and that a culture must be assimilated to a society’s “values, beliefs and ideologies as expressed both in its language, practices and objects”. See Forrest, (2010), p. 2.

²⁸⁹ Frigo, (2004), p. 376; comprehensiveness set aside, it should be remembered that the various notions of ‘cultural’ posited in domestic laws are marred by subjectivity. As such, for example, ‘biens culturels’, ‘beni culturali’, ‘culturele goederen’ or ‘bienes culturales’ have acquired different meanings in their respective legal systems, incorporating different types of tangible or intangible objects. See Frigo, (2004), p. 370.

²⁹⁰ Nafziger and Kirkwood Paterson, (2014), p. 1; Prott and O’Keefe, (1992), p. 307; Forrest, (2010), p. 3.

²⁹¹ Frigo, (2004), p. 369; Nafziger, Kirkwood Paterson and Dundes Renteln (2010), p. 206; Prott and O’Keefe, (1992), p. 307; Forrest, (2010), pp. 2, 3; Last, (2004), p. 60; Prott, (1989), p. 224.

²⁹² Forrest, (2010), p. 2.

²⁹³ Frigo, (2004), p. 377.

²⁹⁴ Stamatoudi, (2011), pp. 6, 8; Prott and O’Keefe, (1992), p. 307. There exist widespread agreement between states that an important portion of their cultural materials must be preserved for future generations. See Prott and O’Keefe, (1992), p. 309.

²⁹⁵ Merryman, (2000), p. 272; Office Fédéral de la Culture (Suisse), (1998), p. 23.

²⁹⁶ Nafziger, J. A. R., Kirkwood Paterson, R., “Cultural Heritage Law”, in: J. Nafziger and R. Kirkwood Paterson, *Handbook on the Law of Cultural Heritage and International Trade*, (Edward Elgar Publishing, 2014), p. 1; Stamatoudi, (2011), p. 8; Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 206.

²⁹⁷ Stamatoudi, (2011), p. 6.

cultural patrimony of mankind.²⁹⁸ The very notion of ‘cultural heritage’ has, therefore, a broader spectrum than the one of ‘cultural property’²⁹⁹ since it agglomerates the tangible as well as the intangible cultural patrimony of mankind.³⁰⁰ In a more pragmatic tone, the notion of ‘cultural property’ allows for the establishment of legal means to put the cultural heritage ideology into practice,³⁰¹ a reason why the delimitations of its fringes are of paramount importance to international conventions that are directly applicable, such as the 1995 UNIDROIT convention.³⁰² Cultural property is thus applied where the specifics of property law can be of avail to handling cultural heritage.³⁰³ Therefore, it should be remarked that – contrary to the idea of cultural heritage – no duties of protection and preservation are attached to the concept of cultural property.³⁰⁴

Similar to the notion of ‘cultural heritage’, there is no internationally settled meaning given to the concept of ‘cultural property’ in international law.³⁰⁵ Several treaties have attempted to provide a comprehensive definition thereof. As is, for example, the case of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*,³⁰⁶ and of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*³⁰⁷ (discussed below). Notwithstanding these attempts, the elaboration of an all-encompassing settled international definition remains one of the main hurdles to the protection of cultural materials.³⁰⁸ The notion of ‘cultural property’ is a relative and evolutive notion whose understanding depends on several factors,³⁰⁹ including: the legal and contextual³¹⁰ confinements prescribed, the perspective taken by the state(s) constructing this legal meaning and the objectives targeted.³¹¹ Nevertheless, in broad terms, the concept agglomerates “anything which bears witness to the artistry, history and identity of a particular culture”.³¹² Much like the notion of ‘cultural heritage’, the meaning of ‘cultural property’ is bipartite, equally making agreement as to a single harmonized definition particularly difficult.³¹³ The subjective appreciation of the cultural aspect that was apparent in defining cultural heritage is equally true to the idea of defining cultural property.³¹⁴ While the reasoning laid down above in respect of the ‘cultural’ adjective can be equally applied here, the term ‘property’, merely refers to the commodification of cultural materials throughout the use of domestic property law regimes.³¹⁵ These are often composed of an aggregate set of rules regulating the relations between natural or legal persons and (in)tangible objects,³¹⁶ by means of property rights.³¹⁷ These

²⁹⁸ Frigo, (2004), p. 369.

²⁹⁹ Frigo, (2004), p. 369.

³⁰⁰ Frigo, (2004), p. 369; as such, definitions of cultural property do not encompass intangible elements. See Stamatoudi, (2011), p. 8 (this exclusion poses problems to indigenous and tribal groupings who do consider cultural heritage as one whole. Last, (2004), pp. 55-56).

This is, at least, not an absolute rule as certain civil law countries have broadened the meaning of ‘cultural property’ to include non-material aspects, thus including part of the intangible cultural patrimony. Frigo, (2004), p. 369. The broadening is partly due to the subjective meaning that the notion of cultural property has received in the official languages of some European countries (*ibidem*, p. 370).

³⁰¹ Frigo, (2004), p. 377.

³⁰² In this regard, see ‘Chapter 6 – Application of the Convention’ below.

³⁰³ Prott and O’Keefe, (1992), p. 312, and for an application to the different clusters of cultural heritage (*ibidem*, p. 313); the inappropriateness of ownership concepts for cultural materials has been pointed out by Prott and O’Keefe. Both have advanced that notions of property law cannot and should not agglomerate all aspects of cultural heritage, restricting instead their application to part of the cultural heritage protected. Furthermore, both submit that notions of property law seem inappropriate because of the lack of obligation of protection and preservation, both obligations being inherent in the concept of heritage. See Prott and O’Keefe, (1992), p. 310, and Nafziger, Kirkwood Paterson and Dundes Renteln (2010), p. 207.

³⁰⁴ Prott and O’Keefe, (1992), p. 307.

³⁰⁵ Coulée, (2000), p. 362.

³⁰⁶ Prott and O’Keefe, (1992), p. 312; UNIDROIT, (1986), Study LXX – Doc. 1, p. 2, submitting that the 1954 Hague Convention was the first convention to give legal effect to the concept; Article 1 *Hague Convention on the Protection for the Protection of Cultural Property in the Event of Armed Conflict* (1954) – “For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments”.

³⁰⁷ Frigo, (2004), pp. 367-368; Stamatoudi, (2011), p. 7; Prott and O’Keefe, (1992), p. 318.

³⁰⁸ Coulée, (2000), p. 362.

³⁰⁹ Stamatoudi, (2011), p. 4.

³¹⁰ UNIDROIT, (1988), Study LXX – Doc. 4, p. 17; Stamatoudi, (2011), p. 11; See also UNESCO, ‘Legal and Practical Measures Against Illicit Trafficking in Cultural Property – UNESCO Handbook’, CLT/CH/INS-06/22, (2006), p. 4 specifying that this concept is defined differently depending on the state concerned or on the international instrument adopted; Papademetriou, (1996), p. 272.

³¹¹ Stamatoudi, (2011), p. 4.

³¹² Stamatoudi, (2011), p. 5.

³¹³ Love Levine, (2010-2011), p. 758.

³¹⁴ Frigo, (2004), p. 370.

³¹⁵ Stamatoudi, (2011), p. 6.

³¹⁶ Mastalir, (1992), p. 1037; Stamatoudi, (2011), p. 8.

embedded rights imply the abilities of controlling the property by being able to exclude others from its use, to exploit the object or to alienate it.³¹⁸ This proprietary commodification of cultural materials principally reflects Western values.³¹⁹ Furthermore, there is a clear tension between the two terms under scrutiny: the traditional property conceptualization presupposes ownership by one or several identifiable individuals but not by communities, whilst a culture is a commonality to a community.³²⁰ Finally, it should be stressed that cultural property and cultural heritage can be distinguished in the objectives that they pursue: although heritage implies the idea of transferability, property law regimes have vehemently protected ownership rights.³²¹ As such, the two notions have incompatible goals that cannot easily be reconciled.³²²

Cultural objects

Contrary to other treaties regulating the field of international cultural heritage or cultural property law, the 1995 convention prescribes the use of the notion ‘cultural objects’ throughout its operative parts. This choice of terminology was made during the third session of the SG: whilst the French version was to refer to ‘biens culturels’ – which literally means ‘cultural goods’ but has been at times loosely translated into ‘cultural property’ – ,³²³ it was decided to retain the terms ‘cultural objects’ in the English version.³²⁴ In fact, during the drafting procedure, a compromise was reached as to the use of the present terminology for several reasons: firstly, it is more neutral compared to ‘cultural heritage’, a term which is emotionally charged.³²⁵ In fact, many states were opposed to a reference to heritage, another reason why the word ‘object’ was preferred;³²⁶ secondly, ‘cultural property’ refers to a new concept that was unknown to common law jurisdictions at the time of drafting.³²⁷ Furthermore, ‘property’ has a commercial connotation in English, which was deemed inappropriate for the present issue;³²⁸ thirdly, the terminological choice operated by the convention is not fortuitous, as it intentionally provides for the restitution and return of ‘cultural objects’, thereby avoiding touching upon the difficult and policy related notion of cultural property.³²⁹ Nevertheless, but for the terminological choice operated, the UNIDROIT convention is directed at regulating the effects of good faith acquisition of movable cultural property. In fact, the drafters favoured the use of the terms ‘cultural objects’ to ‘cultural property’, although the former can be considered as a synonym to the latter. This approach was criticized by Fraoua after the second session of the Study Group, who advanced that the use of the terminology ‘cultural object’ was not appropriate;³³⁰ since ‘cultural property’ had been used in international instruments – with its first apparition in the 1954 Hague convention – and had subsequently been borrowed by several national instruments, the choice operated by the

³¹⁷ Nafziger and Kirkwood, (2014), p. 1; Mastalir, (1992), p. 1037.

³¹⁸ Last, (2004), p. 55.

³¹⁹ Ziegler, K., ‘Cultural Heritage and Human Rights’, (Oxford Legal Studies Research Paper Series, Working Paper No 26/2007), pp. 1-23; Last, (2004), p. 55-56, citing Prott and O’Keefe.

³²⁰ Last, (2004), pp. 56-57.

³²¹ Prott and O’Keefe, (1992), p. 309.

³²² Prott and O’Keefe, (1992), p. 309.

³²³ See for example the differences between the French and English versions of Article 1 of the 1970 UNESCO convention.

³²⁴ UNIDROIT, (1990), Study LXX – Doc. 18, p. 7. The Spanish terminology of ‘*bienes culturales*’ and the French ‘*biens culturels*’ – language counterpart to the term cultural property (as noted by Frigo in UNIDROIT, The International Protection of Cultural Property. Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX – Doc. 15), Study LXX – Doc. 16 Add. 1, Rome, December 1989, p. 1) – had already been used in different national laws and international instruments, thereby demonstrating widespread agreement as to its use (Calvo Caravaca, (2004), p. 92; Prott, L. V., ‘The International Movement of Cultural Objects’, 12 *International Journal of Cultural Property*, (2005), p. 227; UNIDROIT, (1990), Study LXX – Doc. 18, p. 7. The term ‘*bienes culturels*’ had been used in the French version of many UNESCO instruments since the 1950s, replicated in other national and international instruments and was generally accepted by the academic community in the French language (UNIDROIT Secretariat, (2001), p. 488); See also the commentary of Raidl, in UNIDROIT, The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX – Doc. 15), Study LXX – Doc. 16, Rome, December 1989, p. 22).

³²⁵ Presidenza del Consiglio dei Ministri, (1996), p. 88; Merryman, (2000), p. 271; nevertheless, proposals have been made to depart from the idea of protecting cultural property in order to focus upon the protection of cultural heritage. Last argues that the notion of cultural property is too restrictive, too domestic legal systems-related and cannot encompass all the objects that an international instrument aims to protect. See Last, (2004), pp. 53 and ff.; see also Prott, *Commentary on the Unidroit Convention*, (1997), p. 17.

³²⁶ Forrest, (2010), p. 200.

³²⁷ Calvo Caravaca, (2004), p. 92; it must be noted that, by way of contrast, the standard terminology to protect cultural assets in international law has been the one of cultural property. See Last, (2004), p. 54; See also UNIDROIT, (1990), Study LXX – Doc. 18, p. 7.

³²⁸ Presidenza del Consiglio dei Ministri, (1996), p. 88.

³²⁹ The term ‘object’ was preferred to the term ‘property’ because it was more neutral and, thenceforth, more acceptable. See UNIDROIT, (1989), Study LXX – Doc. 10, p. 5; for a discussion about the difficulties linked with the terms ‘cultural property’, see Last, (2004), pp. 54-57; additionally, Forrest advances that the ‘property’ qualification had eroded through obsolescence, (Forrest, (2010), p. 200) making the notion of ‘cultural objects’ more appealing.

³³⁰ UNIDROIT, (1989), Study LXX – Doc. 16, p. 9.

SG would affect consistency and would lead to problems in interpretation.³³¹ This submission found its way into the commentaries of Reichelt, who advanced that the term ‘cultural property’ was more suited and broader when compared with the notion of ‘cultural object’.³³² She concurrently averred that the latter term was less appropriate to cover cultural materials such as the Casenovés frescoes,³³³ which would be considered as cultural property, but not as cultural objects due to their non-movable character.³³⁴ Despite conspicuous differences in meaning that warrant cautiousness in their use, it appears that the notions of ‘cultural object’, ‘cultural material’³³⁵ and ‘cultural property’ are in general used interchangeably, even by the participants of the DC.³³⁶ In the spirit of the conference, the present disquisition will pursue this fashion of using the three terms interchangeably. In spite of this terminological choice, the meaning given in the convention to the notion of ‘cultural objects’ requires further elucidation for the purpose of the present analysis.

In order to lay down a comprehensive definition, it is important to realize that – similar to the remarks formulated above – this notion includes both an objective and a subjective element, thenceforth making it extremely difficult to adopt a uniform definition.³³⁷ Regarding the subjective element, the Secretariat of UNIDROIT noted in its explanatory report about the *Preliminary draft Convention on stolen or illegally exported cultural objects approved by the Unidroit study group on the international protection of cultural property* that:

“[...] the difficulties are multiplied in the case of an international convention as opposed to purely internal protective legislation since it is necessary to establish a general definition which will take account of the cultural situation of each State and of its particular needs.”³³⁸

This difficulty led some participants of the SG to propose referring to domestic law for the sake of defining cultural objects.³³⁹ Irrespective of the technique used, it was, nonetheless, submitted that – despite the challenges encountered in drafting the international definition – any departure from the general property law regimes of state parties should be clearly defined.³⁴⁰ *Ergo*, therefore requiring a clear ascertainment of the notion of cultural objects. In the convention’s 1970 precursor, the subjectivity of the cultural property definition was removed by allowing states to designate the materials that would be qualified as cultural property.³⁴¹ Nevertheless, the definition contained in the latest instrument could not leave a similar degree of discretion to contracting states. This is notably because the future convention was designed to tackle the entire illicit traffic in cultural materials (see below). Therefore, it also had to address privately owned cultural materials and not *per se* cultural property of particular importance to contracting states. Subsequently, the drafters encountered difficulties in reaching a compromise as to the specific meaning of this concept.³⁴² At first glance, providing a broad definition that has to be interpreted by domestic courts appeared to be undesirable for the international market.³⁴³ Nevertheless, in order to ensure that certain objects would not be exempted from the scope of the convention, the definition

³³¹ UNIDROIT, (1989), Study LXX – Doc. 16, p. 9. See also for example the commentary of the delegation of Thailand in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of governments on the preliminary draft Unidroit convention on stolen or illegally exported cultural objects (Thailand), Study LXX – Doc. 28, Rome, January 1992, p. 1 where it considered ‘cultural property’ better suited “because ‘Property’ signifies something that belongs to someone which, in this case, is the heritage of a people. [...] we feel that the word ‘property’ is more appropriate, as an ‘object’ does not necessarily have to belong to someone”.

³³² UNIDROIT, The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX – Doc. 15), Study LXX – Doc. 16 Add. 2, Rome, December 1989, p. 1.

³³³ For more information about the frescoes, see Cour de Cassation, Assemblée plénière, N° de pourvoi 85-10262, 85-11198, 15 avril 1988; see also UNIDROIT, (1986), Study LXX – Doc. 1, pp. 22 and ff.

³³⁴ UNIDROIT, (1989), Study LXX – Doc. 16 Add. 2, p. 1; See also UNIDROIT, (1990), Study LXX – Doc. 18, p. 7.

³³⁵ Nafziger and Kirkwood Paterson, (2014), p. 30.

³³⁶ Frigo, (2004), p. 368.

³³⁷ Love Levine, (2010-2011), p. 758; Presidenza del Consiglio dei Ministri, (1996), p. 21.

³³⁸ UNIDROIT, (1990), Study LXX – Doc. 19, p. 17.

³³⁹ After the second session of the Study Group, Frigo proposed making a reference to the domestic law of the state from which the object originated before being removed by theft or illegal export. See UNIDROIT, (1989), Study LXX – Doc. 16 Add. 1, p. 1. During the third session of the SG, it was proposed to leave the determination of what amounted to a cultural object to the legislation of the country of origin – meaning the country from which the object had been stolen or illegally exported – although this proposal was rejected on the basis that it would constitute a blank cheque to domestic legislation. See UNIDROIT, (1990), Study LXX – Doc. 18, pp. 9-10. Furthermore, it was submitted that it was not the purpose of the definition to resolve problems of application of private international law in establishing the meaning of the concept ‘cultural objects’ on the basis of national legislation. UNIDROIT, (1990), Study LXX – Doc. 18, p. 10; see also UNIDROIT, (1990), Study LXX – Doc. 19, p. 18; This proposal was rejected because it was advanced that not all domestic laws define clearly what is to be considered as a cultural object (*idem*).

³⁴⁰ UNIDROIT, (1990), Study LXX – Doc. 19, p. 18.

³⁴¹ Love Levine, (2010-2011), p. 758.

³⁴² Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exporté (du 24 juin 1995)’, (1997), p. 31; Hughes and Wright, (1994), p. 232; Schneider, (1996), p. 144; UNIDROIT Secretariat, (2001), p. 496.

³⁴³ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exporté (du 24 juin 1995)’, (1997), p. 31.

envisaged by the drafters was to be formulated in general and broad terms.³⁴⁴ Following the views of Last, theoretically, the challenge in law in defining a particular concept is to find a balance between certainty and flexibility.³⁴⁵ A definition that is too broad favours flexibility, thus, allowing national courts to interpret the concept in an extensive way.³⁴⁶ The advantage flowing from the adoption of this approach stems from the possibility to adapt the definition in order to include new categories of objects when needed.³⁴⁷ Needless to say, the overwhelming disadvantage lies in the underpinned vague character of such a definition.³⁴⁸ In a similar fashion, Cottrell warns about the simultaneous over and under-inclusiveness of definitions that are too broad.³⁴⁹ Instead, a narrow definition provides more certainty but will be subject to under-inclusiveness, which might risk leaving important categories of objects deserving protection outside of its scope.³⁵⁰ It has also been advanced that narrow definitions are more suitable to regional settings and are, therefore, less attractive for an international instrument.³⁵¹ Thenceforth, there is a general lack of support throughout the international community for the latter type of definition.³⁵²

Notwithstanding the difficulties linked to semantics,³⁵³ in compromising between the use of a general definition or of an exhaustive definition,³⁵⁴ the concept was at last defined in Article 2 following an item-oriented approach³⁵⁵ qualified by interest,³⁵⁶ based on a double construction. Much like the definition contained in Article 1 of the 1970 convention,³⁵⁷ the definition provided by the UNIDROIT convention puts the emphasis upon

³⁴⁴ Forbes, (1996), p. 240; there was a consensus between the drafters as to the need to have a definition that would cover all stolen cultural objects, see Protz, *Commentary on the Unidroit Convention*, (1997), p. 27.

³⁴⁵ Last, (2004), p. 62; see also Cottrell, (2008-2009), p. 633.

³⁴⁶ Last, (2004), p. 62.

³⁴⁷ Last, (2004), p. 62.

³⁴⁸ Last, (2004), p. 62.

³⁴⁹ Cottrell, (2008-2009), p. 632.

³⁵⁰ Last, (2004), pp. 62-63; Cottrell, (2008-2009), p. 632.

³⁵¹ Cottrell, (2008-2009), p. 633.

³⁵² Cottrell, (2008-2009), p. 632.

³⁵³ Cottrell, (2008-2009), p. 637; Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 30; Voulgaris specifies that the definition of cultural goods is probably the most difficult definition to formulate in the legal field, see Voulgaris, I., 'Les Principaux Problèmes Soulevés par l'Unification de Droit Régissant les Biens Culturels', 8 (1/2) *Uniform Law Review*, (2003), p. 545.

³⁵⁴ Presidenza del Consiglio dei Ministri, (1996), p. 24.

³⁵⁵ An 'item-oriented' approach lists a number of items divided in categories. See Last, (2004), p. 62; this approach had been originally discarded by the Study Group. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 17.

³⁵⁶ An 'interest-oriented' approach classifies objects depending on the interest vested in those objects. See Last, (2004), p. 63; In an earlier version of the convention – i.e. the *Preliminary draft Convention on stolen or illegally exported cultural objects approved by the Unidroit study group on the international protection of cultural property* –, the definition given was only interest-oriented. Article 2 of the PDC defined a cultural object as "any material object of artistic, historical, spiritual, ritual or other cultural significance". This general definition – although later on vociferously criticized as being too broad and incapable of including all objects in existence (see for example the commentary formulated by Mexico in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of International Organisations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Canada, Mexico, Sweden, Turkey), Study LXX – Doc. 20, Rome, April 1991, p. 3) – resulted from the recognition of the difficulties linked to making an international definition of the notion 'cultural', which was a value-laden notion, the meaning of which depends upon what states recognize as constituting their culture. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 17.

³⁵⁷ The SG had already expressed the willingness to produce a definition of cultural objects which would be simple and compatible with the definition of cultural property laid down in the 1970 convention. Nevertheless, the group rejected the idea of taking over the definition of the latter instrument because, ostensibly, the future instrument was to have different objectives than the 1970 convention and because the list of items of the 1970 instrument was deemed to create too many problems. It was also submitted that, despite the broad definition of the 1970 treaty, its scope had also been further refined and limited by Article 7 thereof. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 19; for the sake of simplicity, the SG considered a general definition more appropriate. This was, nevertheless, seen as suspicious by certain delegations and was finally rejected in favour of a more specific definition, which was consistent with the definition of Article 1 of the 1970 convention. See Protz, *Commentary on the Unidroit Convention*, (1997), p. 25; in fact, in the working papers submitted for the first session of the CGE, the Secretariat of UNIDROIT proposed to replace the too vague definition of cultural objects laid down in the PDC by the definition of cultural property used in the 1970 UNESCO convention (see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the first session of the committee (Rome, 6 to 10 May 1991), Study LXX – Doc. 22, Rome, July 1991, p. 6). This proposal was also shared by certain states participating to the work of the CGE – see for example the commentary by the Islamic Republic of Iran supporting the use of the definition of the 1970 convention and the commentary of Turkey, respectively to be found in UNIDROIT, (1992), Study LXX – Doc. 24, p. 14 and p. 20. In the same document, Turkey recalled that the purpose of the future instrument was to supplement the regime of the 1970 convention by clarifying or improving Article 7 (b) (ii). Consequently, it would be axiomatic for the two instruments to use a similar definition. See also UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the second session (Rome, 20 to 29 January 1992) (prepared by the Unidroit Secretariat), Study LXX – Doc. 30, Rome, June 1992, p. 7. UNESCO also proposed to use the definition contained in Article 1 of its 1970 convention after the second session of the Committee of Governmental Experts. See UNIDROIT, (1993), Study LXX – Doc. 36, p. 11; it should also be noted that it was not clear whether a direct reference should be made to the definition of the 1970 convention's first article in the 1995 instrument. Thenceforth, it was decided to put the categories listed in Article 1 of the 1970 convention in an annex to the 1995 convention, thus avoiding problems of compatibility for states that want to become party to the latter instrument but that are not party to the former document. See Protz, *Commentary on the Unidroit Convention*, (1997), p. 25. See also Presidenza del Consiglio dei Ministri, (1996), pp. 92-93 for more details about the reference to

universal cultural characteristics that are recognized as such.³⁵⁸ This construction is probably the most widely accepted definition of the notion of ‘cultural property’ to date.³⁵⁹ Nevertheless, this assumption is subject to two remarks: on the one hand, the use of this definition matches the ‘cultural property’ qualification found in its 1970 counterpart,³⁶⁰ which helps to increase the interaction and complementarity between both conventions,³⁶¹ ultimately advocating one definition to tackle the illicit trafficking of cultural materials coherently.³⁶² This similarity in definition introduces a uniform notion of cultural property that can help alleviate difficulties – for national administrative authorities, law practitioners and art professionals – of having to cope with different definitions.³⁶³ Furthermore, since many states had already implemented the 1970 convention, adopting a new definition might have constituted an impediment to their participation in the 1995 instrument.³⁶⁴ Nonetheless, with respect to states that did consider the definition of the 1970 convention too broad, duplicating almost faithfully this definition in 1995 would not alleviate their grievances.³⁶⁵ Nevertheless, as touched upon above, the definitions in these two instruments differ in one important respect: Article 2 of the 1995 convention does not require designation.³⁶⁶ The reason for differentiating is that this instrument addresses the illicit trafficking of cultural objects as a whole.³⁶⁷ To achieve this objective, the definition of cultural objects needed to be autonomous³⁶⁸ and it would have been impossible to enable states to designate the protected objects.³⁶⁹ Designation would bring the uniformity of the minimum threshold set by the convention in jeopardy and would have led to the exclusion of certain cultural objects that are held in the hands of private parties.³⁷⁰ Consequently, as the protection of the 1995 convention is not dependent upon designation by the state,³⁷¹ it is not possible for state parties to restrict the scope of application of the UNIDROIT convention by constraining the fringes of the

the definition of the 1970 convention and Presidenza del Consiglio dei Ministri, (1996), p. 164 for the proposal by a UNESCO representative to add the list of Article 1 of the 1970 convention in an annex to the 1995 convention. During the Diplomatic Conference, Prott warned against any departure from the definition of cultural property laid down in Article 1 of the 1970 convention as this would affect the ratification of the upcoming 1995 convention for states that are party to the 1970 instrument. See Presidenza del Consiglio dei Ministri, (1996), p. 163.

³⁵⁸ Love Levine, (2010-2011), p. 759.

³⁵⁹ Mastalir, (1992), p. 1040; Prott, (1998), p. 207 where Prott specified that the definition of the 1954 Hague convention matched both the definitions of the 1970 and 1995 conventions, although it was formulated less specifically than its two successors; See also Presidenza del Consiglio dei Ministri, (1996), p. 162; See also Article 2 a. of the Council of Europe *Convention on Offences relating to Cultural Property*, Nicosia, 19 May 2017 which adopted a definition of cultural property in line with the definition of the 1970 convention.

³⁶⁰ The UNIDROIT convention adopts the same definition of cultural objects as the UNESCO convention (1970). See Article 1 of the said convention and compare with the definition of Article 2 and the annex of the UNIDROIT instrument. Bergé, (2000), p. 224 and Renold, (1997), p. 22 (mistakenly referring to Article 2 of the 1970 convention instead of Article 1); nevertheless, the definition of the UNIDROIT convention does not foresee of a possibility for states to designate the objects falling within the scope of Article 2, as was possible under Article 1 of the UNESCO convention; Office Fédéral de la Culture (Suisse), (1998), p. 16. See also UNESCO, ‘UNESCO and Unidroit – Cooperation in the Fight Against Illicit Traffic in Cultural Property – Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, 24 June 2005, UNESCO Headquarters, Paris, 16 June 2005, CLT-2005/Conf/803/2, pp. 3-4.

³⁶¹ UNESCO, ‘Legal and Practical Measures Against Illicit Trafficking in Cultural Property – UNESCO Handbook, International Standards Section, Division of Cultural Heritage’, (2006); Droz, (1997), p. 250; Cottrell, (2008-2009), p. 629; Forrest, (2010), p. 199; Prott, (1998), p. 207.

³⁶² UNIDROIT, (1994), Study LXX – Doc. 48, p. 8 where it is submitted that the definition of the 1970 convention is well-known internationally and that it never led to interpretational problems; UNESCO Handbook, (2006), p. 4.

³⁶³ UNESCO, (2005), p. 4.

³⁶⁴ Forrest, (2010), p. 199; Prott, (2009), p. 219, specifying that the definition of the 1970 convention had already been adopted by the then eighty-five state parties to the 1970 convention.

³⁶⁵ Forrest, (2010), p. 199.

³⁶⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 26; Shyllon, ‘Why African States must Embrace the 1995 Unidroit Convention’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming; Stamatoudi, (2011), p. 12; Forrest, (2010), p. 200; during the work of the Committee of Governmental Experts, delegations of the states taking part in the negotiations favoured the possibility for each state to decide upon the meaning of cultural objects, by making a reference to classifications done by the domestic legal order of the contracting states. This solution would have permitted contracting states to introduce a subjective element in the definition of cultural objects, similar to Article 1 of the 1970 convention with regard to the meaning of cultural property. See UNIDROIT, (1992), Study LXX – Doc. 30, pp. 7-8 for more details about this discussion. This idea was, nonetheless, abandoned because this would firstly leave the discretion of assessing the cultural nature of certain objects to other states, and secondly because it was inappropriate referring to the ‘law of the requesting state’ to make such determination possible in case of restitution to individuals (*idem*).

³⁶⁷ Forrest, (2010), p. 200; Droz, (1997), p. 250; see also Presidenza del Consiglio dei Ministri, (1996), p. 161, where Prott explained that the designation was not retained for the purpose of the definition of cultural objects because the future convention was to ensure the recovery of all stolen cultural objects, irrespective of whether these were publicly or privately held. Therefore, a number of states taking part in the drafting process of the convention rejected the possibility of designating the protected objects.

³⁶⁸ See UNIDROIT, (1994), Study LXX – Doc. 48, p. 12.

³⁶⁹ UNIDROIT, (1994), Study LXX – Doc. 48, p. 12; Droz, (1997), p. 250.

³⁷⁰ UNIDROIT Secretariat, (2001), p. 500.

³⁷¹ Shyllon, (2012), forthcoming.

definition of cultural objects after its enactment.³⁷² Instead, it is only possible to extend this definition to more objects in accordance with Article 9 (1) (discussed in detail in ‘Chapter 6 – Application of the Convention’ below). What is more, contrary to the 1970 UNESCO convention’s Article 1, the definition of the 1995 addendum is more harmonized: a definition that would leave discretion to decide upon the cultural significance of an object to state parties would have failed in providing the threshold of harmonization expected.³⁷³ As such, the 1995 choice is less subjective than its 1970 predecessor³⁷⁴ because it takes out the discretion of state parties in designating the cultural materials worthy of protection.³⁷⁵

Defining cultural objects

Having discussed the differences in semantics between the various terms used throughout the provisions of the 1995 convention, this section now turns to analysing the definition of cultural objects as foreseen in Article 2. As a preliminary remark, it must be specified that the terminology and the phrasing used in the present article mirrors the legal qualifications found in the majority of domestic legislation directed at national cultural materials.³⁷⁶ This similarity rendered the definition of the convention more acceptable to many states.³⁷⁷ Furthermore, the qualification “For the purpose of this Convention” ensures that the definition of Article 2 is only to be used when referring to objects that stem from the illicit traffic.³⁷⁸ What is more, the definition was to take the cultural circumstances of the state parties into account.³⁷⁹ Article 2 thus starts with a general statement – also qualified as a ‘generic definition’³⁸⁰ – covering cultural objects of a particular nature:

Article 2 UNIDROIT Convention (1995) – For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science [...]

This (first) part of the definition follows an interest-oriented approach and comprises two elements: on the one hand, the objects need to have a certain importance on a religious or secular basis,³⁸¹ which, as such, agglomerates all movables in existence. This qualification was added in order for the definition to be brought in line with Article 1 of the 1970 convention.³⁸² But for the symbolic added value of these terms, this insertion is idle to the present definition.³⁸³ Additionally, the use of the qualification “of importance for” reflects the broad array of cultural goods that the convention aims to cover: another qualification – e.g. goods of a ‘considerable’ importance, goods of a ‘particular’ importance, or, as proposed by several states, of ‘outstanding’ importance³⁸⁴ –

³⁷² Renold, (1997), p. 22.

³⁷³ Love Levine, (2010-2011), p. 759.

³⁷⁴ Love Levine, (2010-2011), p. 759.

³⁷⁵ Love Levine, (2010-2011), p. 759.

³⁷⁶ Prott, (2005), p. 227.

³⁷⁷ Prott, (2005), p. 227.

³⁷⁸ Presidenza del Consiglio dei Ministri, (1996), p. 24.

³⁷⁹ Presidenza del Consiglio dei Ministri, (1996), p. 24.

³⁸⁰ Calvo Caravaca, (2004), p. 93.

³⁸¹ Calvo Caravaca, (2004), p. 93.

³⁸² See UNIDROIT, (1994), Study LXX – Doc. 48, p. 12. See also Presidenza del Consiglio dei Ministri, (1996), p. 163.

³⁸³ See also the commentary of the representative of Australia formulated during the Diplomatic Conference in which she specified that the words “religious or secular” are redundant because these characteristics are already present in other categories of Article 2. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/5; (sic) CONF. 8/5 Add. 1 and 3; CONF. 8/6; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 1 and 3), in Presidenza del Consiglio dei Ministri, (1996), p. 162. This was at the same time supported by Canada’s representative (*idem*). See also the proposal to delete these terms formulated by the representative of Israel in Presidenza del Consiglio dei Ministri, (1996), p. 164. Opposing views relating to the need to keep this qualification are given by the Islamic Republic of Iran and the Holy See in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 1, 13 June 1995, p. 164.

³⁸⁴ See for example the commentary by the Swedish delegation in UNIDROIT, (1992), Study LXX – Doc. 30, p. 8; Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 30; see also the discussion that took place during the third session of the CGE about the limitations of the definition in UNIDROIT, (1993), Study LXX – Doc. 39, p. 8. Whilst some participants were afraid that a broad definition would work to the detriment of the convention – as states might not be inclined to modify their private law rules on acquisition of movable property for such a broadly defined notion of cultural objects –, a majority of the other participants favoured the broad definition because a limitation of it to cultural objects of outstanding significance would have weakened one of the most important principle of the future instrument, which was to oblige purchaser of cultural objects to exercise due diligence in their acquisitions. Therefore, limiting the categories of cultural objects subject to the regime of the convention would have jeopardized the ultimate objective of changing the practice of art market stakeholders of not inquiring about the provenance of the object. Furthermore, this would have had the effect of discarding objects of lesser importance (e.g. objects stolen from small churches, private houses or local museums) and have posed problems for owners to determine what objects are of outstanding significance; Later on in the process of drafting the future convention, Prott reaffirmed that limiting its regime to cultural objects of outstanding importance would deprive it from its intended effect of regulating the acquisition of all cultural materials by mandating the use of diligence. See UNIDROIT, (1993), Study LXX – Doc. 42, p. 14. Limiting the regime of the convention only to certain cultural objects would thus defeat the purpose of the convention (*idem*). See also Presidenza del Consiglio dei Ministri, (1996), p. 91. What is more, adding this condition would have the same result as the mechanism of designation laid down in Article 1 of the 1970 convention (see UNIDROIT, (1993), Study LXX – Doc. 42, p. 15). Furthermore, the said limitation to the regime of the convention would exclude cultural materials of lesser value from its regime

would have limited the scope of application of the convention, as it would have implied that courts would first have to determine whether the goods could fall within this qualification's remit, an exercise that would be incredibly difficult to undertake in practice.³⁸⁵ Unlike the definition found in Article 1 of the 1970 UNESCO convention, it is unclear whether the determination of the importance is left to the discretion of the adhering state or whether it must be assessed from an autonomous perspective by the court seized.³⁸⁶ Secondly, the objects covered by the convention need to be qualified as being important for archaeology, prehistory, history, literature, art or science.³⁸⁷ This second element testifies of the state-centric approach used by the definition,³⁸⁸ as it exhorts states to determine the fringes of these categories; this legal categorization might prove adequate to the needs of states but is alien to the cultural identity of a grouping or people.³⁸⁹ This is notably due to the fact that when dealing with ethnographic or tribal objects, the cultural value of the object is determined by these groups and not by the state. The second part of the definition of Article 2 adjoins a list of categories of items that fall under the qualification of 'cultural objects' to the interest-oriented approach found in the first part of the definition.

Article 2 UNIDROIT Convention (1995) – [...] and belong to one of the categories listed in the Annex to this Convention.

This 'item-oriented' list – attached in an annex to the convention – includes the following categories:

Annex UNIDROIT Convention (1995) – (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

Albeit this list was initially left out of the convention and reference was made to Article 1 of the 1970 UNESCO convention, this construction was not well received.³⁹⁰ Cross-referencing between conventions was not deemed acceptable, considering that states interested in the UNIDROIT convention might repudiate it if they had no intention of ever becoming a party to the UNESCO convention.³⁹¹ In order to endow the 1995 convention with fully-fledged autonomy, it was decided to attach the list of categories in an annex to its provisions so as to ensure consistency with its 1970 counterpart without referring to it.³⁹²

(see UNIDROIT, (1993), Study LXX – Doc. 42, p. 14), objects that were more often subject to theft (UNIDROIT, (1994), Study LXX – Doc. 48, p. 9 referring to objects of private collections, objects belonging to churches, to private houses or local museums). The qualification was, therefore, erased during the fourth session of the CGE (see UNIDROIT, (1994), Study LXX – Doc. 48, p. 9).

³⁸⁵ Droz, (1997), p. 250; It should be noted that the proposed qualifications are more relevant to the discussion relating to illegally exported cultural objects than to the discussion about stolen cultural objects. Albeit the proposed qualifications have not been retained in the definition of cultural objects found in Article 2 of the convention, remains of the discussion have been left in Article 5. This article requires a requesting state to prove a 'significant' cultural interest in an object for which it is seeking the return; see also Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 30-31.

³⁸⁶ For the 1970 convention's approach, see Office Fédéral de la Culture (Suisse), (1998), p. 10.

³⁸⁷ Calvo Caravaca, (2004), p. 93.

³⁸⁸ Mastalir, (1992), p. 1042.

³⁸⁹ Mastalir, (1992), p. 1042.

³⁹⁰ UNIDROIT Secretariat, (2001), p. 496.

³⁹¹ See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 11 where it was also submitted that a mere cross reference would make the reading of the definition problematic because the reader would not *per se* have access to the text of the 1970 convention.

³⁹² UNIDROIT Secretariat, (2001), p. 496; attaching the categories in an annex was preferred to the inclusion of the definition of the 1970 convention into the text of the 1995 convention because this would have created an article of disproportionate length which would be in imbalance with other articles hereto. See UNIDROIT, (1994), Study LXX – Doc. 48, p. 11. The list of categories was, therefore, included in an annex to the convention during the fourth session of the CGE (*ibidem*, p. 12).

Although a cultural object must comply with both the interest-oriented approach and the item-oriented list in order to fall within the ambit of the convention,³⁹³ the combination of a generic definition and of a complementary list is not without its problems: in fact – as uniform laws do not always provide uniform results – the interpretation that national courts can give to the first part of the definition can, and will, differ considerably depending on the court that is hearing the matter.³⁹⁴ The second part of the definition also presents a clear disadvantage: establishing a list always poses the risk of ignoring or forgetting certain types of objects or elements – leading to legal gaps³⁹⁵ – and, hence, a risk of under-inclusiveness.³⁹⁶ In its actual form, it remains unclear whether the formulation of this second part is exhaustive or not: for example, Last considers the list to be exhaustive and has argued that a multitude of cultural objects will not fall under the provisions of the convention.³⁹⁷ In this case, it would, nonetheless, remain possible for contracting states to extend the scope of the definition with recourse to Article 9 (1). Others scholars, such as for example Caravaca, have advanced that this list is not exhaustive and is, instead, merely indicative of the types of goods that will fall within the ambit of the convention.³⁹⁸ If the second affirmation is to be taken for granted, the non-exhaustive character of the list corrects the disadvantage of using a complementary list, but still leaves a lot of discretion to national courts as to the interpretation of the interest-oriented categories.

Considering the aforementioned, it is clear that the UNIDROIT convention covers a broad array of cultural items.³⁹⁹ Nonetheless, it is important to formulate two remarks about the definition of Article 2: firstly, this definition is used for both thefts and illegal exports. While the definition is applicable in its entirety to both situations,⁴⁰⁰ for illegally exported objects its scope is restricted due to the conditionality of the request for the return of the object (cf. Article 1 (b) together with Article 5 (3)) and because certain objects are automatically exonerated from Chapter III of the convention (cf. Article 7).⁴⁰¹ Secondly, unlike many domestic laws or the European Community Directive 93/7/EEC, no pecuniary threshold is required by the present definition.⁴⁰² Albeit a monetary threshold had been foreseen in the early work of the SG,⁴⁰³ alternative values were subsequently proposed.⁴⁰⁴ Nonetheless, these considerations were admonished and later on abandoned.⁴⁰⁵ Similarly, age limitations were discarded from the definition finally adopted in the convention.⁴⁰⁶

³⁹³ UNIDROIT Secretariat, (2001), p. 498.

³⁹⁴ Calvo Caravaca, (2004), p. 93; it must be noted that the use of a general definition always leads to interpretational and operational problems. See UNIDROIT Secretariat, (2001), p. 496.

³⁹⁵ UNIDROIT Secretariat, (2001), p. 496.

³⁹⁶ Calvo Caravaca, (2004), p. 93.

³⁹⁷ Last, (2004), pp. 63-64. Nonetheless, it is important to note here that although Last bases her analysis upon Article 1 of the UNESCO convention, this does not affect the extrapolation of her argument to the UNIDROIT instrument because both conventions use a similar definition (to the exception of the mechanism of designation).

³⁹⁸ Calvo Caravaca, (2004), p. 93.

³⁹⁹ Jolles submits that the definition of Article 2 covers almost all the domains of human creativity. See Jolles, (1997), p. 54; Merryman also asks what is left outside of this definition, see Prot, (2005), p. 227; Département Fédéral de l'Intérieur (Suisse), 'Convention d'Unidroit du 24 juin 1995 sur les biens culturels volés ou illicitement exportés – Texte et rapport explicatif', (février 1996), p. 14.

⁴⁰⁰ Initially, it was proposed to adopt two distinct definitions of cultural objects, one for the chapter dealing with stolen cultural objects and the other one for the chapter addressing illegally exported cultural objects (see for example UNIDROIT, (1992), Study LXX – Doc. 30, p. 8. See also UNIDROIT, (1993), Study LXX – Doc. 39, pp. 8-9); This distinction was considered too complicated, resulting in the adoption of the common definition laid down in Article 2. See UNIDROIT Secretariat, (2001), p. 498.

⁴⁰¹ A member of the Committee of Governmental Experts already noted this limitation during the first session of the committee. Because the future convention was to give recognition and enforcement to foreign export laws, the restriction of the array of cultural objects covered and of the instances of return was a conscientious choice made by the drafters to limit the impact of Chapter III. This choice had been operated so as to strike a balance between the interests of the different states taking part in the negotiations. The restricted scope of Chapter III was not meant to constrain export states but, instead, aimed at defining categories of cultural objects that all states would be willing to return in case of illegal export. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 30; Prot, *Commentary on the Unidroit Convention*, (1997), p. 27; UNIDROIT Secretariat, (2001), p. 498. Chapter II was not subject to the same limitation because it was submitted that most domestic laws prescribed for the restitution of stolen objects. See UNIDROIT, Study LXX – Doc. 30, p. 8; See also Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 31.

⁴⁰² Droz, (1994), p. 48, commenting about the Draft UNIDROIT convention. Such a pecuniary threshold had been considered in the early stages of the convention but was abandoned later on (*idem*). This was notably because the pecuniary value of an object would differ depending on the state in which it was to be valued, but also because this type of appreciation would fail to take into account the cultural objects used for ritual purposes by communities. See Presidenza del Consiglio dei Ministri, (1996), p. 25.

⁴⁰³ See for example UNIDROIT, (1989), Study LXX – Doc. 10, pp. 7 and 8.

⁴⁰⁴ The cultural importance of the object had been proposed as an alternative means of valuation. See UNIDROIT, (1989), Study LXX – Doc. 10, p. 8 and Hughes and Wright, (1994), p. 232.

⁴⁰⁵ See for example the argument advanced that many of these methods of valuation would pose interpretative problems and would result in diverging views on the cultural objects deserving protection. UNIDROIT, (1989), Study LXX – Doc. 10, p. 8.

⁴⁰⁶ See notably the commentary of the delegation of Thailand to remove the 100 year limitation period "because there are cultural objects which are not more than 100 years old, but are of cultural importance. They should, therefore, be protected by this Convention". See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the third session of the Committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 38, Rome, April 1993, p. 37. See also Prot's commentary in which she specified that the age limitation of 100 years was inappropriate (for example with regard to ethnological objects) in UNIDROIT, (1993), Study LXX – Doc. 42, p. 17. Prot also noted that the same age limitation exists in the 1970 convention, but only in

Although the regime of Article 2 is to be considered all encompassing, it has been submitted that certain types of objects should not have been included in the present definition, such as the literature, ethnology or archaeology categories.⁴⁰⁷ It should, nonetheless, be recalled that it is for the sake of covering all stolen or illegally exported cultural objects that the definition has been drafted in broad terms.⁴⁰⁸ Hence, it has often been criticized as being too broad,⁴⁰⁹ ‘open and dynamic’⁴¹⁰ and it has been further argued that – due to its vagueness – it can be interpreted both restrictively and extensively,⁴¹¹ or that its broad character could lead to the non-application of the convention.⁴¹² In fact, the breadth of the definition might lead to complications for domestic courts⁴¹³ and, therefore, constitutes a considerable weakness.⁴¹⁴ What is more, concerns were raised as to the convention’s too broad ambit.⁴¹⁵ This, in turn, implicates important changes to the private law regimes of many states and, thus, constitutes a setback to adherence.⁴¹⁶ Concurrently, it should be noted that since the convention tries to moralise the art market by instating strict rules on the acquisition of cultural objects,⁴¹⁷ it is not always clear to mere dilettantes when an object will fall within its scope.⁴¹⁸ This, it is advanced, means that a potential acquirer will have to consult specialists, increasing the costs of the transaction and giving time to less conscientious buyers to seal the deal.⁴¹⁹ Furthermore, the lack of specificity of the definition – coupled with the need for interpretation by a domestic judge⁴²⁰ – makes it particularly difficult for a potential purchaser to establish the exact status of the object, and consequently it becomes impossible to calculate, beforehand, the risks of the transaction.⁴²¹ This in turn, it is argued, constitutes an impairment to legal certainty.⁴²² Additionally, in practice, only objects that have a certain pecuniary value will be subject to claims or requests for their recovery. Objects of a minor pecuniary value will most likely not be recovered because of the important costs of litigation that may have to be incurred abroad,⁴²³ as well as the struggle to initiate proceedings in a different legal order and in another language.⁴²⁴ The criticisms directed at the definition of Article 2 can be tempered by emphasizing that domestic courts will have some leeway in interpreting this definition, although this must be done within the fringes of reasonableness.⁴²⁵ Following Lalive, the broad nature of the definition does not constitute an important flaw but will be – instead – further refined through the conditions of application of Chapters II and

respect of furniture and antiquities (*idem*). Furthermore, it was submitted during the Diplomatic Conference that imposing an age requirement of 100 years would create incoherence with the regime of the 1970 convention and would discriminate by not protecting objects of modern art and of ethnographic significance. See Presidenza del Consiglio dei Ministri, (1996), p. 91.

⁴⁰⁷ Jolles, (1997), p. 54.

⁴⁰⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 27 (with regard to stolen cultural property).

⁴⁰⁹ Crevoisier, J.-M., ‘La Suisse Aimerait Mieux Protéger les Biens Culturels Étrangers’, *Le Journal de Genève*, 18 January 1996; Byrne-Sutton, (1997), p. 11; Klein, (1999), p. 264; Kuitenbrouwer qualifies broad definitions as ‘suspect’, see Kuitenbrouwer, (2005), p. 601; Biondi, (1997), p. 1192; Hughes and Wright, (1994), p. 232; Prott, *Commentary on the Unidroit Convention*, (1997), p. 27; Lalive, P., ‘Réflexions sur un ordre public culturel’, in: E. Wyler / A. Papaux (eds), *L’Extranéité ou le dépassement de l’ordre juridique étatique : actes du colloque des 27 et 28 novembre 1997 organisé par l’Institut d’études de droit international de la Faculté de droit de l’Université de Lausanne*, (Pédone: Paris, 1999), p. 172.

⁴¹⁰ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 31.

⁴¹¹ Droz, (1994), p. 49 commenting about the Draft UNIDROIT Convention; it should be remarked that the definition contained in Article 1 of the UNESCO convention had already been criticized at the second session of the Study Group as being too problematic. Whilst the group was striving for simplicity, using the same definition as Article 1 of the 1970 instrument would have had the effect of complicating the envisaged instrument. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 5.

⁴¹² Lalive, ‘Réflexions sur un ordre public culturel’, (1999), p. 172.

⁴¹³ Droz, (1994), p. 49 commenting about the Draft UNIDROIT Convention; Marsan, G. A., ‘Unidroit Lawyers Meet for International Agreement on Restitution of Stolen Works of Art’, 15 *The Art Newspaper*, 01 February 1992.

⁴¹⁴ Renold, (1997), p. 22; See also Lalive, ‘La Convention d’Unidroit sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 31, footnote 52; Carruthers, (2001), p. 143; Lalive does not consider the broad character of the definition to be problematic. In his opinion, the definition of cultural objects is not salient. Instead, what matters to him are the conditions of application of Chapter II. See Lalive, P., ‘La Définition de la Notion de Bien Culturel Volé’, in: C. Breider, Q. Byrne-Sutton, F. Geisinger-Mariétoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 72.

⁴¹⁵ UNIDROIT Secretariat, (2001), p. 498.

⁴¹⁶ UNIDROIT Secretariat, (2001), p. 498.

⁴¹⁷ UNESCO, (2005), p. 5.

⁴¹⁸ Van Gaalen and Verheij, (1997), p. 196.

⁴¹⁹ Van Gaalen and Verheij, (1997), p. 196.

⁴²⁰ It is also questionable whether domestic judges will have the required knowledge to determine the exact status of the object for the purpose of the convention. From a more pragmatic perspective, it is highly likely they will refer to the opinion of experts to determine whether the object is to be considered as a cultural object for the purpose of applying the convention. See Van Gaalen and Verheij, (1997), p. 196.

⁴²¹ Van Gaalen and Verheij, (1997), p. 196.

⁴²² Van Gaalen and Verheij, (1997), p. 196.

⁴²³ O’Keefe, P. J., *Le Commerce des Antiquités – Combattre les Destructures et le Vol*, (Unesco: Paris, 1999), p. 38.

⁴²⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 60. Prott submits that these constraints will in practice influence the decision of states to initiate proceedings for the return of cultural objects, limiting their demands to cultural materials of ‘outstanding importance’.

⁴²⁵ Lalive D’Epinay, ‘Réflexions sur un ordre public culturel’, (1999), p. 172.

III.⁴²⁶ Although this affirmation is certainly true regarding Chapter III of the convention, it is less relevant to Chapter II.

(2) International character of the claim or request

The first sentence of Article 1 specifies that the claim in restitution or the request for return must be embedded with an ‘international character’.⁴²⁷

Article 1 UNIDROIT Convention (1995) – **This Convention applies to claims of an international character for:**

- (a) the restitution of stolen cultural objects;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter “illegally exported cultural objects”).

Due to the intricacies in clearly formulating the semantics of the internationality of the claim,⁴²⁸ the drafters left the concept undefined.⁴²⁹ Instead, national courts have been left with the discretion to elaborate a workable, harmonized and consistent definition of this notion.⁴³⁰ Therefore, there is no clear explanation as to how this international aspect must be appreciated. Nonetheless, it has been advanced that the international nature of the claim necessitates a wide interpretation due to the complexity in grasping this notion.⁴³¹ Furthermore, adherence to the convention must be taken into consideration, and thus its scope of application must be strictly followed. In this regard, attention should be paid to the temporal scope of the convention, as set out in Article 10 (discussed below).

In cases of illegal export, it is unquestionable that the situation will be categorized as having an ‘international character’, since a cultural object is taken from the territory of one contracting state to the territory of another.⁴³² Thus, the mere existence of an illegal export implies that the request for the return will have an international character.⁴³³ Provided that the two states are party to the convention before the illegal export takes place and that the cultural object is located within the territorial confinements of the requested state,⁴³⁴ the provisions of the convention will unconditionally govern the request for return (see below). Additionally, it does not matter that the object has transited through other jurisdictions,⁴³⁵ as is apparent from Article 1 (b). In fact, as a request for the return of an illegally exported cultural object will always presuppose a movement between two or more states, the requirement of internationality laid down in Article 1 (b) is redundant.⁴³⁶ But for the ease with which the internationality can be assessed in case of illegal export, the exact implications of this internationality remain problematic in instances of theft.⁴³⁷ In fact, it is asserted that domestic laws are to define what is to be

⁴²⁶ Lalive D’Epinay, “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)”, (1997), p. 72.

⁴²⁷ The decision to specify that the convention would only be concerned with international claims in Article 1 was taken during the second session of the CGE, where it was considered that this simple addition to the article would make it possible to avoid having to cope with a too complicate nuancing of the international nature of the acts condemned. More specifically, the situation of theft proved to be particularly difficult to address, which is the reason why the members of the committee decided not to overthink the problems of determination of the international character of the crime by simply submitting that the claim must be of an international character. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 4.

⁴²⁸ This difficulty was notably recognized by the members of the CGE during their second session. See the discussion as to this point in UNIDROIT, (1992), Study LXX – Doc. 30, p. 4.

⁴²⁹ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the fourth session (Rome, 29 September to 8 October 1993) (prepared by the Unidroit Secretariat), Study LXX – Doc. 48, Rome, February 1994, p. 6, where it was explained that the majority of the participants to the CGE preferred to leave the concept undefined to avoid problems of interpretation and because a detailed definition might limit the scope of the convention since all foreseeable scenarios would have to be listed; Presidenza del Consiglio dei Ministri, (1996), p. 23; UNIDROIT Secretariat, (2001), p. 492; Renold, (1997), p. 21.

⁴³⁰ UNIDROIT, (1994), Study LXX – Doc. 48, p. 6; Presidenza del Consiglio dei Ministri, (1996), p. 23; UNIDROIT Secretariat, (2001), p. 492; expecting that domestic courts would come up with a uniform interpretation of this notion was considered by the Japanese delegation participating to the Diplomatic Conference as “too optimistic”. Therefore, it believed that the international character requirement should be deleted. See ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – People’s Republic of China, Japan and New Zealand’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 72.

⁴³¹ Forrest, (2010), p. 201.

⁴³² UNIDROIT, (1993), Study LXX – Doc. 39, p. 5.; Droz, (1997), p. 249; the participants to the third session of the CGE proposed to add the qualification “which have been moved across an international frontier” to further qualify the illegal export. This proposition was deemed by other participants as unnecessary because the draft under revision already specified that the future instrument would deal with international situations. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 6.

⁴³³ UNIDROIT, (1992), Study LXX – Doc. 30, p. 4.

⁴³⁴ Bergé, (2000), p. 231.

⁴³⁵ Renold, (1997), p. 22.

⁴³⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 22.

⁴³⁷ Fach Gómez, K., ‘Algunas Consideraciones en Torno al Convenio de Unidroit sobre Bienes Culturales Robados o Exportados Legalmente’, *Anuario de Derecho Internacional Privado*, (2004), p. 13; it was averred that the drafters of the convention failed to create a clear

regarded as an international claim.⁴³⁸ The problem with this submission is that, neither is it clear which domestic law is to be applied in defining the notion, nor has there been any indication made available by either the drafters of the convention or UNIDROIT as to the said applicable law.⁴³⁹ Despite propositions to refer back to the private international law rules of the state claiming restitution, or of the law of the state of domicile of the claimant – in the case of claims introduced by individuals⁴⁴⁰ – it remains unclear how this notion will be interpreted.⁴⁴¹

In order to appreciate how the internationality of the claim must be understood for the purpose of Chapter II, it is important to recall briefly the genesis of the provision. Article 1 was introduced in January 1990, during the third session of the SG.⁴⁴² This group initially considered the creation of an instrument that would govern both national and international situations regarding stolen cultural property.⁴⁴³ This idea was, later on, abandoned by the CGE – which rejected this option – mainly by putting the emphasis upon the establishment of an international regime.⁴⁴⁴ More specifically, the French delegation participating in the sessions of the committee had opined that the convention should only be applied to international scenarios and should not supplant domestic regimes for internal situations.⁴⁴⁵ What is more, it had also been argued that the convention might be more easily accepted, if it did not alter internal private law rules.⁴⁴⁶ Therefore, on the one hand, the need for the claim to be exclusively international in nature was supported by many states so as to ensure the exoneration of internal situations,⁴⁴⁷ the regulation of which would be left to the sovereign appreciation of the state parties. On the other hand, not adopting an all-encompassing system would have the result of creating duality in regimes,⁴⁴⁸ which was deemed undesirable. More specifically, the participating representative of UNESCO pointed out during the second session of the CGE that it was desirable to adopt a uniform law that would also apply to internal situations for three reasons: 1) because of the difficulties in determining the trajectory followed by a stolen object (and therefore the international character of the situation), 2) because total harmonization with regard to transactions involving cultural objects was desirable for certain states – thus to ensure their participation in the regime of the convention – and 3) because thieves had learned to exploit differences in domestic laws to their advantage when disposing of stolen cultural materials.⁴⁴⁹ Doing away with these differences might make it impossible for them to exploit discrepancies in domestic laws. This position was, nonetheless, not adopted in the final instrument.⁴⁵⁰

Instead, in case of theft, Article 1 establishes two regimes: a regime applicable to internal situations – meaning where the object did not cross the border of the country where it has been stolen –, which remains governed by domestic law;⁴⁵¹ and a second regime applicable to international situations, which – simply put – entails that when the object is stolen in one state and moved to a different jurisdiction, the claim for their restitution is embedded with an international character.⁴⁵² Consequently, purely internal claims cannot be based

definition of the concept. See Calvo Caravaca, (2004), p. 91; Siehr, K., ‘The Protection of Cultural Heritage and International Commerce’, 6 (2) *International Journal of Cultural Property*, (1997), p. 309.

⁴³⁸ UNIDROIT Secretariat, (2001), p. 492; Calvo Caravaca, (2004), p. 91.

⁴³⁹ Calvo Caravaca, (2004), p. 91.

⁴⁴⁰ Calvo Caravaca, (2004), p. 91.

⁴⁴¹ Forrest, (2010), p. 201.

⁴⁴² UNIDROIT Secretariat, (2001), p. 488.

⁴⁴³ UNIDROIT Secretariat, (2001), p. 492.

⁴⁴⁴ UNIDROIT Secretariat, (2001), p. 492; it should be noted that the idea of having the instruments apply only to situations embedded with an international element was already supported in the first stages of elaboration of the convention. The need to apply only to international situations and to exempt domestic scenarios was secured to ensure a wider acceptance of the treaty. See UNIDROIT, (1986), Study LXX – Doc. 1, p. 44; a proposal to exclude purely domestic situations from Chapter II was formulated by the UNIDROIT Secretariat in a working paper submitted to the first session of the CGE (see UNIDROIT, (1991), Study LXX – Doc. 22, p. 6). The CGE finally decided by consensus, during its second session, that the convention was only to be applied to situations having an international character. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 5.

⁴⁴⁵ See UNIDROIT, (1992), Study LXX – Doc. 30, p. 3, but also UNIDROIT, (1992), Study LXX – Doc. 24, p. 8 and UNIDROIT, (1992), Study LXX – Doc. 29 (Misc. 6), p. 6.

⁴⁴⁶ UNIDROIT, (1991), Study LXX – Doc. 23, p. 7.

⁴⁴⁷ UNIDROIT, (1992), Study LXX – Doc. 30, p. 4; Forrest, (2010), p. 201.

⁴⁴⁸ UNIDROIT, (1991), Study LXX – Doc. 23, p. 7.

⁴⁴⁹ UNIDROIT, (1992), Study LXX – Doc. 30, p. 4 and UNIDROIT, (1992), Study LXX – Doc. 25, pp. 1 and 2 and UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the second session of the committee (Rome, 20 to 29 January 1992), Study LXX – Doc. 29 (Misc. 6), Rome, February 1992, p. 7 where it was advanced that the shady side of the art market had learned to provide false provenance and exploit differences in domestic laws, and that a universal rule was qualified by Interpol as one of the main merits of the Preliminary Draft.

⁴⁵⁰ The drafters of the convention were willing to apply it in both national and international situations because of the difficulties that might be encountered with deciding what would fall under the national or international regime. This position was, nevertheless, not supported in the final version of the document. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 16.

⁴⁵¹ Conclusively, by introducing a double regime of application, the convention does not abrogate domestic provisions either embracing the *nemo dat* rule without exceptions, or adopting a favourable approach to *bona fide* third-party protection through means of exceptions to the *nemo dat*. See Siehr, (1997), p. 309.

⁴⁵² UNIDROIT Secretariat, (2001), p. 494; Droz, (1997), p. 249; Calvo Caravaca, (2004), p. 92; Renold, (1997), p. 21.

upon the convention,⁴⁵³ as its regime is only relevant to situations with a cross-border dimension.⁴⁵⁴ Despite this *summa divisio*, certain situations falling into grey areas call for a further nuancing of the above. The case of *Winkworth v. Christie, Manson and Woods Ltd*⁴⁵⁵ discussed in the introductory chapter adequately illustrates the existence of less straightforward scenarios. Recalling the above, it should be noted that in *Winkworth* the netsukes were stolen in the United Kingdom, taken to Italy, sold to an innocent purchaser, and then, subsequently, brought back to the UK to be auctioned through the services of Christie's. Had the convention been applied to this scenario, it would be debatable whether the international requirement contained in Article 1 would have been fulfilled.⁴⁵⁶ In fact, clearly inspired by *Winkworth*,⁴⁵⁷ the drafters intended to give effect to the convention to scenarios of a similar nature.⁴⁵⁸ Excluding the 'Winkworth-type-of-situation' would lead to situations in which unscrupulous dealers would try to circumvent the convention's regime by laundering the origin of the object abroad and returning the object without further ramifications.⁴⁵⁹ Consequently, the international character of the claim implies that a movement across an international border is sufficient for the purpose of triggering Chapter II.⁴⁶⁰ This means that the convention will also be applicable when the object comes back to the country where it was stolen.⁴⁶¹ Therefore, the drafters preferred to avoid using the terminology "found in the territory of another Contracting State" for the purpose of Chapter II.⁴⁶²

An important criticism as to this construction of 'international character' flows from the discriminating effect created by this system. Technically, this mechanism instates a regime of discrimination between domestic and foreign owners, as purely international situations – often involving the state's own citizens – will be governed by domestic rules. Instead, the international character of a transaction will trigger the regime of the convention, sometimes to the benefit of the domestic owner – notably in the less likely scenario where the stolen object is brought back –, but mostly to the advantage of foreign owners.⁴⁶³ However, it was submitted during the negotiations to the adoption of the convention that for those states that do not accept this discrimination, it is possible to extend the regime of the convention to internal situations through the means provided by Article 9 (1).⁴⁶⁴ As such, discrimination can be remedied by applying the regime of Chapter II to internal situations.⁴⁶⁵ What is more, it has been submitted that applying a different standard to domestic and cross-border situations would have the effect of creating two separate diligence standards.⁴⁶⁶

⁴⁵³ Calvo Caravaca, (2004), p. 91.

⁴⁵⁴ Jolles, (1997), p. 59.

⁴⁵⁵ *Winkworth v. Christie, Manson and Woods Ltd and Another*, [1980] 1 ER (Ch.) 496 [1980], 1 All ER 1121.

⁴⁵⁶ Voulgaris, (2003), p. 547; see for example the discussion in this regard that took place during the third session of the CGE in UNIDROIT, (1993), Study LXX – Doc. 39, p. 6; As pointed out by Doyal, the lack of clarity about the meaning of the 'international character' of the claim in restitution might lead courts to reach different conclusions in respect of the situation described. See Doyal, (2000-2001), p. 671. The dominant view is that this situation would fall within the purview of the convention: "[...] there are good reasons to ensure that, where an international transaction has taken place, the Convention should apply, even if the litigation takes place in the first jurisdiction. If it does not, there will be an incentive for dishonest dealers to "launder" goods through any convenient foreign jurisdiction and return the goods with impunity to the jurisdiction where the original owner was deprived of them. [...]". See Prot, *Commentary on the Unidroit Convention*, (1997), p. 22.

⁴⁵⁷ UNIDROIT Secretariat, (2001), p. 494.

⁴⁵⁸ UNIDROIT Secretariat, (2001), p. 494.

⁴⁵⁹ Presidenza del Consiglio dei Ministri, (1996), p. 89.

⁴⁶⁰ UNIDROIT Secretariat, (2001), p. 494; Droz, (1997), p. 249; This appreciation of the internationality of the claim is similar to the one used in contractual agreements with international ties: even though the buyer and seller can be located in the same state, the contract will be qualified as international in nature when the goods have to cross state borders. See Droz, (1997), p. 249.

⁴⁶¹ Calvo Caravaca, (2004), p. 92; Droz, (1997), p. 249.

⁴⁶² See Prot in UNIDROIT, (1993), Study LXX – Doc. 36, p. 7. Not all delegations agreed with this and some preferred to limit the application of the regime of both Chapters II and III to situations in which the object would be located in another contracting party. See for example the proposal submitted by the delegation of the United States of America in UNIDROIT, (1993), Study LXX – Doc. 38, p. 27.

⁴⁶³ Droz, (1997), p. 249; See also UNIDROIT, (1992), Study LXX – Doc. 29 (Misc. 6), p. 7 where the members of the SG noted: "[...] refusing to apply the rules of the Convention to thefts "not of an international character" will enable dispossessed owners in jurisdictions which protect *bona fide* purchasers to continue to recover objects in jurisdictions which do not recognise the passing of good title to stolen objects, while providing no improvement (in practical terms) for dispossessed owners in the latter jurisdictions whose stolen cultural objects are found in jurisdictions which protect the *bona fide* purchaser". See also Presidenza del Consiglio dei Ministri, (1996), p. 89.

⁴⁶⁴ See Klein, (1999), p. 272; Hughes and Wright, (1994), p. 231; Office Fédéral de la Culture (Suisse), (1998), p. 16; see also Prot, *Commentary on the Unidroit Convention*, (1997), p. 16.

⁴⁶⁵ Droz, (1997), p. 249.

⁴⁶⁶ Presidenza del Consiglio dei Ministri, (1996), p. 89; it should be noted that concerns were raised during the making of the convention as to the creation of two standards of diligence, one on the basis of domestic law and another on the basis of the convention (see UNIDROIT, (1993), Study LXX – Doc. 42, p. 11). If the convention is set to create two distinct regimes, then acquirers of cultural materials would have to take account of these two standards. This means that they would be held to a different standard, depending upon the origin of the cultural object acquired. See the commentary of Prot in UNIDROIT, (1993), Study LXX – Doc. 42, p. 11. Nevertheless, it could be advanced here that since the convention is meant to change the attitude of market players (see above), then it is most likely that acquirers – often unaware of the origin of the object – would exercise greater cautiousness – which could be tantamount to due diligence as prescribed by the convention – in any case.

2. SCOPE OF APPLICATION

As conceived from the above, the regime instated throughout the convention's provisions deals with claims for the restitution of stolen cultural objects and requests for the return of illegally exported cultural objects, provided in both instances that the claim is embedded with an international character.⁴⁶⁷ Having regard to the technicalities of this submission, it is particularly important to determine when the convention will come into play by analysing its scope of application. A proper understanding of the convention's ambit is crucial to exacting its legal implications: in the case of restitution of stolen objects, if the convention is not applicable, the regime of private international law and of national law used before the adoption of the convention – as illustrated by the *Winkworth / Elicofon* paradigm – is to be applied.⁴⁶⁸ In case of illegal export, if the regime of the convention is of no avail, states will have to rely either on diplomatic offices, on other instruments regulating the issue or, where appropriate, on the Intergovernmental Committee to request the return of the object. Article 1 provides the starting point of our analysis.⁴⁶⁹

Article 1 UNIDROIT Convention (1995) – This Convention applies to claims of an international character for:

- (a) the restitution of stolen cultural objects;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter “illegally exported cultural objects”).

In order to assess the far-reaching implications of Article 1, the present section addresses the four constitutive elements of the scope of application of the convention. Because Chapters II and III deal with two distinct facets of the illicit traffic, it is appropriate to distinguish the two when discussing these different aspects.

(1) Material scope

Chapter II – Theft

Article 1 (a) delimits the scope of application *ratione materiae* of Chapter II of the convention.

Article 1 UNIDROIT Convention (1995) – This Convention applies to claims of an international character for:

- (a) the **restitution of stolen cultural objects**; [...]

The wording of this article can be deconstructed into four pivotal components: with regard to Chapter II, the convention deals with **(1) claims in restitution**, of an **(2) international nature**, relating to **(3) stolen (4) cultural objects**. Because points (2) and (4) have been discussed at length above as common notions to Chapters II and III, the present section will cast light upon components (1) and (3), notions that are only relevant to the application of Chapter II.

(1) *Claims in restitution*

Amongst the regime of the convention, restitution is distinguished from return and is exclusively used throughout Chapter II.⁴⁷⁰ The implications flowing from Article 1 (a) with regard to the international claim in

⁴⁶⁷ Carducci, (2006), p. 95; Klein, (1999), p. 272.

⁴⁶⁸ Siehr, (1996), p. 8.

⁴⁶⁹ The idea that the first article should clarify the scope of application of the convention and provide the definitions was discussed during the third session of the Study Group entrusted with drafting the future convention. See UNIDROIT, (1990), Study LXX – Doc. 18, pp. 7-8. A predecessor to Article 1 was thus introduced in the *Preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects* that was almost similar to Article 1 of the convention in its final form. The article was phrased with the same wording, although further refinements regarding the international character of the claim and regarding the export legislation violated in case of illegal export were still to be made. See the text of the *Preliminary draft* in UNIDROIT, (1990), Study LXX – Doc. 18, Appendix III.

⁴⁷⁰ Reacting upon the work of the Study Group after its second session, Fraoua qualified the terminological choice of ‘restitution’ and ‘return’ made for the purpose of the draft convention as inappropriate. In his opinion, the differentiation unnecessarily confused the two notions. Fraoua advanced that it might be more appropriate, for the sake of developing the future instrument, but also to avoid ambiguity, to use restitution for both situations of theft and of illegal export. See UNIDROIT, (1989), Study LXX – Doc. 16, p. 8. This use would also be in accordance with the meaning given to this notion by Kowalski (see below). Changing the meaning of restitution and return for the purpose of the convention was deemed to create more confusion. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 6; in fact, both terms ‘restitution’ and ‘return’, as used in the convention, did not match the general meaning given to the term by UNESCO hitherto (UNIDROIT, (1989), Study LXX – Doc. 14, p. 4). UNESCO used the term restitution to refer to cultural property that had been subjected to the illicit traffic post 1970, the year of adoption of the 1970 UNESCO convention (UNIDROIT, (1989), Study LXX – Doc. 14, p. 4; UNIDROIT, (1989), Study LXX – Doc. 16, p. 17). ‘Return’ had been used by UNESCO to refer to cultural materials appropriated during colonial times, irrespective of the illicit nature of the removal, and which were to be returned to the former colonies (UNIDROIT, (1989), Study LXX – Doc. 14, p. 4; UNIDROIT, (1989), Study LXX – Doc. 16, p. 17). These two UNESCO qualifications are also reflected in the title and in the work of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation* (UNIDROIT, (1989), Study LXX – Doc. 16, p. 17). Consequently, the possibility of using a more neutral term less prone to confusion such as ‘recovery’ instead of these two terms was envisaged during the second session of the SG, (UNIDROIT, (1989), Study

restitution require a twofold qualification: firstly, Chapter II foresees of a right of action for the restitution of a stolen cultural object. In doing so, it instates a private law remedy in the legal orders of contracting states specifically designed to address claims in restitution of a stolen cultural object. In other words, the obligation to provide for a restitution mechanism creates an adjacent responsibility for the contracting state to enact a right of action to this effect in its domestic law, provided the said right of action did not already exist.⁴⁷¹ Secondly, the exact implications of this right have been left unaddressed. Because of the absence of a harmonized meaning of the term restitution, different national conceptions of this notion exist:⁴⁷² for example, in civil law jurisdictions based on Roman law, the concept has been used to describe the factual giving back of an object – tantamount to a *rei vindicatio*⁴⁷³ – but also reimbursement for value.⁴⁷⁴ In common law jurisdictions, the term has referred peculiarly to bringing back the parties into the position they were in before the transaction took place.⁴⁷⁵ Similar to civil law jurisdictions, this common law appreciation denotes the giving-back of the object to the original owner.⁴⁷⁶ Furthermore, Prott has noted that in the English language the term implies the payment of monetary compensation.⁴⁷⁷ Thenceforth, in both types of jurisdictions, the term ‘restitution’ has been used to refer to the act of reparation obtained through judicial means following the occurrence of a wrongful act.⁴⁷⁸ Whilst the peculiarities of the term differ between jurisdictions, the notion refers, in general, to the reparation of the wrongful act in order to restore the parties to the *status quo ante*.⁴⁷⁹ But for the disparities in national laws, the term restitution does not seem to have a settled meaning in public international law either. Following some commentators, the term means the ‘return of a cultural object to its country of origin’ in the broad sense.⁴⁸⁰ Thus, unlike its various national conceptions, ‘restitution’ in its international form does not focus so much upon the giving back of the object, but is endowed with a sense of justice and ethics.⁴⁸¹ The meaning given in international law departs from the private law technicalities that are encountered at the national level. As such, restitution in international cultural law has a wider, and less constrained, meaning than its domestic counterparts.⁴⁸² Despite attempts to provide other interpretations to the term at the international level,⁴⁸³ Kowalski’s reading of this notion deserves further consideration. As is advanced by him, the term ‘restitution’ is used whenever there has been a violation of a prohibition to commit theft or pillaging, a violation that requires restoration to its previous state of affairs.⁴⁸⁴ Therefore, Kowalski notes that restitution is a term that is generally used for overturning the consequences of cultural property theft⁴⁸⁵ or of Nazi looting that took place throughout World War II.⁴⁸⁶ Nonetheless, Kowalski admits that restitution may be extended to include any violation of a legally binding rule, for which a remedy is sought.⁴⁸⁷ This entails that both an act of theft and the violation of an export restriction could have as legal consequence the restitution of the object,⁴⁸⁸ provided that the situation relates to the violation of an internationally recognized legal standard.⁴⁸⁹ Kowalski also remarks that restitution in international law is linked to the notion of *restitutio in integrum*.⁴⁹⁰ To him, this means that restitution in

LXX – Doc. 14, p. 4) and was further supported later on (Prott shared this opinion. See UNIDROIT, (1989), Study LXX – Doc. 16, p. 17; this was also discussed in UNIDROIT, (1990), Study LXX – Doc. 18, p. 7). As an alternative to ‘recovery’, the use of the terms ‘restitution’ and ‘return’ were deemed possible, provided that the future convention defined both terms to explain the connotation given to it in the future instrument (UNIDROIT, (1989), Study LXX – Doc. 14, p. 4). Nonetheless, no definition was retained in the final version of the convention. Although left undefined, it is important to emphasize that the terminology ‘restitution’ and ‘return’ point at two distinct remedies (see Bergé, (2000), p. 228).

⁴⁷¹ Prott, (1998), p. 212.

⁴⁷² Prott, L. V., *Witnesses to History – Document and Writings on the Return of Cultural Objects*, (UNESCO Publishing, 2009), p. xxi.

⁴⁷³ Van Gaalen and Verheij, (1997), p. 195.

⁴⁷⁴ Prott, *Witnesses to History – Document and Writings on the Return of Cultural Objects*, (2009), p. xxi.

⁴⁷⁵ Prott, *Witnesses to History – Document and Writings on the Return of Cultural Objects*, (2009), p. xxi.

⁴⁷⁶ Prott, *Witnesses to History – Document and Writings on the Return of Cultural Objects*, (2009), p. xxi.

⁴⁷⁷ UNIDROIT, (1989), Study LXX – Doc. 16, p. 17.

⁴⁷⁸ Stamatoudi, (2011), p. 15.

⁴⁷⁹ Stamatoudi, (2011), p. 15.

⁴⁸⁰ Warring, (2005), p. 291.

⁴⁸¹ Prott, (2009/b), p. xxi; Stamatoudi, (2011), p. 16.

⁴⁸² Stamatoudi, (2011), p. 16.

⁴⁸³ See for example Prott, (2009/b), p. xxii.

⁴⁸⁴ Kowalski, W. W., ‘Claims for Works of Art and Their Legal Nature’, in: The 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 [et al.]: The Hague [et al.], 2004), p. 34; Forrest, (2010), p. 140.

⁴⁸⁵ In both scenarios, restitution serves as a means of correcting a situation of theft or pillaging prohibited by domestic criminal law. See Kowalski, (2004), p. 33.

⁴⁸⁶ Kowalski, (2004), p. 33.

⁴⁸⁷ Forrest, (2010), p. 142; this is also the interpretation that is given by UNESCO’s Intergovernmental Committee. See Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, ‘Guidelines for the Use of the ‘Standard Form Concerning Requests for Return or Restitution’’, 30 April 1986, CC-86/WS/3, p. 11.

⁴⁸⁸ Forrest, (2010), p. 142.

⁴⁸⁹ Kowalski, (2004), p. 50.

⁴⁹⁰ Kowalski, (2004), p. 50; Forrest, (2010), p. 141.

international law is thus tantamount to corrective justice. For the purpose of applying Chapter II, the connotation given by Kowalski should be preferred.⁴⁹¹ Nonetheless, the convention constrains Kowalski's reading to acts of cultural property theft, provided that these acts have taken place after the entry into force of the convention (cf. Article 10 discussed below). As noted during the DC, the use of the term 'restitution' in the convention is constrained to situations where a cultural object was returned to its owner post-theft.⁴⁹²

(3) *Stolen*

Theft is a crime that is recognized and sanctioned in all legal systems of the world,⁴⁹³ but has no international harmonized definition.⁴⁹⁴ Therefore, the drafters of the convention attempted, in the first instance, at drafting a common definition for the purpose of Chapter II.⁴⁹⁵ Nonetheless, because of the difficulties inherent in establishing a common meaning,⁴⁹⁶ this idea was abandoned and the concept was left undefined.⁴⁹⁷ The impossibility of coming up with a harmonized definition was partly due to disparities between national laws,⁴⁹⁸ but also because of a failure to agree upon a common definition incorporating methods of misappropriation that do not amount as such to theft but come close to it,⁴⁹⁹ such as fraud and conversion.⁵⁰⁰ The inclusion of these other methods of misappropriation had carefully been pondered throughout discussions concerning a prospective definition: despite a proposition formulated to include fraud, conversion, intentional appropriation or other similar acts to the definition of theft,⁵⁰¹ this proposal was not retained.⁵⁰² The reason for discarding these

⁴⁹¹ See also Presidenza del Consiglio dei Ministri, (1996), p. 88, where it is explained that restitution should be used "in case of illicit appropriation".

⁴⁹² See Presidenza del Consiglio dei Ministri, (1996), p. 88.

⁴⁹³ Biondi, (1997), p. 1174; Siehr, (1997), p. 304; Office Fédéral de la Culture (Suisse), (1998), p. 59; Merryman, (1996), p. 10; see also the commentary by Chatelain in UNIDROIT, *The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects* (Study LXX – Doc. 15), Study LXX – Doc. 16, Rome, December 1989, p. 2.

⁴⁹⁴ Siehr, K., 'The Protection of Cultural Property: the 1995 Unidroit Convention and the EEC Instruments of 1992/93 Compared', 3 *Uniform Law Review*, (1998), p. 674.

⁴⁹⁵ See for example the proposal of China to include an article defining theft in the convention in UNIDROIT, (1992), Study LXX – Doc. 24, p. 6 and UNIDROIT, (1992), Study LXX – Doc. 27, p. 2 where the German delegation proposed to define theft as "Whoever takes moveable property not his own from another with the intention of unlawfully appropriating it to himself commits theft within the meaning of this Convention if the act was committed in a Contracting State". UNIDROIT, (1992), Study LXX – Doc. 27, p. 2. See also the proposal by the Finnish delegation to define 'stolen' as "[theft, robbery, burglary, aggravated burglary, blackmail and acquisition of the possession of cultural objects through illegal excavations]"; in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Working papers submitted during the third session of the committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 34, Rome, April 1993, p. 1 (G.E./C.P. 3rd session Misc. 1). Furthermore, the United States delegation also made a proposal to define 'stolen' in the following words: "'Stolen'" for the purposes of Chapter II, applies to an object illegally taken without a good faith claim of a right of possession, from a person or entity who has a good faith claim of ownership, with the intent to permanently deprive the latter of possession". See UNIDROIT, (1993), Study LXX – Doc. 47 (Misc. 34), p. 39.

⁴⁹⁶ Cottrell, (2008-2009), p. 637. See also the commentary of the General Secretariat of the I.C.P.O. – Interpol where it was submitted that the objective of the convention is not to harmonize the criminal law of states. Instead, the convention was established to ensure reciprocity in regulating the legal consequences of a transfer of a cultural object that has been subjected to an unlawful act. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of International Organisations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Asian-African Legal Consultative Committee, ICPO - Interpol), Study LXX – Doc. 21, Rome, April 1991.

⁴⁹⁷ Calvo Caravaca, (2004), p. 93; Droz, (1997), p. 249; Jolles, (1997), p. 56; Schneider, (1996), p. 145; Bergé, (2000), p. 247.

⁴⁹⁸ Cottrell, (2008-2009), p. 633; Bergé submits that it is because the notion was understood in the same way in domestic laws that the drafters did not see the need to create a harmonized definition. See Bergé, (2000), p. 247.

⁴⁹⁹ See Presidenza del Consiglio dei Ministri, (1996), p. 27: "[...] a majority considered that the scope of the chapter should be limited to theft, an offence under the laws of all countries, rather than to broaden the application of the uniform law to less easily definable situations which were dealt with in widely different ways in various legal systems"; for example, Calvo Caravaca mentioned the cases of 'misappropriation' in Spain, of 'intentional misappropriation of a lost object' in common law systems and of fraud. See Calvo Caravaca, (2004), p. 93. Other qualifications exist, see for example the concept of 'illicit appropriation of an antique object' in Greece (the concept used to incriminate Malcolm Hay, see Edwards, R., Williams, J., 'Antique dealer attacks 'scandalous' European extradition laws', *The Telegraph*, 28 August 2010, available at <http://www.telegraph.co.uk/news/uknews/law-and-order/7968373/Antique-dealer-attacks-scandalous-European-extradition-laws.html>, last retrieved on 01.03.2018; conversion also seems to fall under this heading, see Protz, *Commentary on the Unidroit Convention*, (1997), p. 74. See also the proposal by the Finnish delegation (UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Working papers submitted during the third session of the committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 34, Rome, April 1993, p. 1 (G.E./C.P. 3rd session Misc. 1), mentioned above.

⁵⁰⁰ Protz, *Commentary on the Unidroit Convention*, (1997), p. 31.

⁵⁰¹ Article 2 (1) of the Loewe Preliminary draft Convention already provided a broad array of unlawful acts that would lead to restitution, including 'theft, conversion, fraud, intentional misappropriation of lost property or any other culpable act assimilated thereto'. See UNIDROIT, Preliminary draft Convention on the restitution of cultural property (drawn up by Mr Roland Loewe in the light of the two studies prepared by Mme G. Reichelt), Study LXX – Doc. 3, Rome, June 1988, p. 1; the first version of the *Preliminary draft Convention on the restitution and return of cultural objects* reproduced the list of unlawful acts laid down in the Loewe draft. Article 2 (1) of the Preliminary draft reads: "When a person has been dispossessed of a cultural object by theft, conversion, fraud, intentional misappropriation of a lost object or any other culpable act assimilated thereto [...]" as defined by the law of the state where the offence has taken place. See UNIDROIT, (1989), Study LXX – Doc. 11, pp. 2-3.

acts from the contemplated definition was that some of them generated different workings in domestic laws, making their operationalization different than the one of theft.⁵⁰³ What is more, Chatelain emphasized the already apparent difficulties in establishing harmonized rules for restitution in case of the straightforward situation of theft.⁵⁰⁴ In his opinion, including other illegal acts would have constituted an imprudent step in the making of the future instrument.⁵⁰⁵ Furthermore, by creating an unconditional obligation to give back a stolen cultural object to the claimant – cf. Article 3 (1) of the convention –, the SG understood that this obligation would jeopardize the attainment of a compromise if the definition of theft would, at the same time, be broadened.⁵⁰⁶ Consequently, the convention merely limits itself to the situation of theft, but because of its establishment as minimal rules, it is possible for a state party to extend the notion to other unlawful acts,⁵⁰⁷ including for example conversion or fraud. This means that other methods of misappropriation are – in principle – not covered by the convention,⁵⁰⁸ although the possibility to expand the notion of theft so as to encompass other unlawful acts is possible with recourse to Article 9 (1).⁵⁰⁹

Furthermore, due to the lack of definition for the purpose of the convention, the meaning of ‘stolen’ is dependant on the interpretation given by the national authorities to which a claim in restitution needs to be addressed.⁵¹⁰ Nevertheless, some guidance can be provided as to how courts might deal with the conceptualization of theft in interpreting Chapter II: during the elaboration of the preparatory work by the SG, it was proposed – in order to qualify the act – to leave discretion to the court seized with the matter to apply its own domestic law (or a foreign law) by making use of its private international law rules.⁵¹¹ Following this decision, concerns as to the lack of clarity of the notion had been highlighted by the Secretariat of UNIDROIT during the first session of the CGE.⁵¹² The Secretariat noted that there was little indication as to how theft was to be appreciated in the work produced by the SG and that certain guidelines – either in the form of a harmonized definition, or through a reference to the *lex loci delicti*, the *lex rei sitae* or the *lex fori* – should be envisaged.⁵¹³ This lack of specificity remained particularly troubling for the members of the CGE, who were strongly divided as to how to resolve the nebulousness.⁵¹⁴ In the final version of the convention, the submissions of the SG, coupled with the commentary provided by the Secretariat, seemed to be commanding. Theft is thus deemed to have accrued in three cases: a) when it is qualified as theft under the *lex fori*;⁵¹⁵ b) when it is qualified as theft under the *lex*

⁵⁰² UNIDROIT Secretariat, (2001), p. 494; there was already disagreement about the extension of the regime of the convention to other culpable acts at the first session of the Study Group (see UNIDROIT, (1989), Study LXX – Doc. 14, pp. 6-7) and at its third session (see UNIDROIT, (1990), Study LXX – Doc. 18, pp. 12-13). It was advanced that extending the regime of the convention to other criminal acts would be imprudent and that extending the scope of the future instrument would make it less effective. On the other hand, the regime of the convention would be incomplete if it were only addressing theft in the technical sense of the term. This was notably due to the fact that theft in civil law jurisdictions could include other culpable acts, making a restrictive understanding of theft not suited for these states. See UNIDROIT, (1990), Study LXX – Doc. 18, pp. 12-13. It was subsequently decided to either retain the broad comprehension of theft present in the Preliminary draft Convention and to allow states to narrow the scope of the concept through means of reservations, or to use the general term ‘theft’ and give the possibility to states to broaden the meaning of the word if so desired. The members of the Study Group preferred the second option. UNIDROIT, (1990), Study LXX – Doc. 18, p. 13.

⁵⁰³ UNIDROIT Secretariat, (2001), p. 494; see the commentary of Chatelain in UNIDROIT, (1989), Study LXX – Doc. 16, p. 2.

⁵⁰⁴ Commentary of Chatelain, in UNIDROIT, (1989), Study LXX – Doc. 16, p. 2.

⁵⁰⁵ Commentary of Chatelain, in UNIDROIT, (1989), Study LXX – Doc. 16, p. 2.

⁵⁰⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 75.

⁵⁰⁷ Forrest, (2010), p. 204.

⁵⁰⁸ Droz, (1997), p. 250; these other notions have been found particularly cumbersome during the negotiations of the final version of the convention, see Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 32.

⁵⁰⁹ See Presidenza del Consiglio dei Ministri, (1996), p. 27, referring to Article 10 that, subsequently, became Article 9; Droz, (1997), p. 270; UNIDROIT Secretariat, (2001), p. 494.

⁵¹⁰ Presidenza del Consiglio dei Ministri, (1996), p. 27; Fach Gómez, (2004), p. 12; Rodriguez Pineau, (2003), p. 574.

⁵¹¹ See Schneider, (1996), p. 145 or Prott, *Commentary on the Unidroit Convention*, (1997), p. 31; UNIDROIT Secretariat, (2001), p. 494; more particularly, this point was made during the third session of the Study Group. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 13. See also UNIDROIT, (1993), Study LXX – Doc. 39, p. 13.

⁵¹² See UNIDROIT, (1991), Study LXX – Doc. 22, p. 6.

⁵¹³ UNIDROIT, (1991), Study LXX – Doc. 22, p. 6; this was further supported by the members of the CGE, who called for the introduction of either a definition of the notion of stolen or of conflict law rules to determine the law applicable in order to define the notion. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 13; see also the commentary of the delegation of Japan in Presidenza del Consiglio dei Ministri, (1996), p. 73.

⁵¹⁴ Whilst some members believed that the domestic judge should apply the meaning of theft provided in the *lex fori*, others considered that the definition of theft of the place where the illegal act materialized (i.e. the *lex loci delicti*) should be applied. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 13. See for example the proposal made by the delegate of the Islamic Republic of Iran to adopt a provision referring to the *lex loci delicti* in the determination of the meaning of theft, in Presidenza del Consiglio dei Ministri, (1996), p. 274. See also the commentary of the Russian representative specifying that the determination of whether there had been a theft should be made on the basis of the law of the place of disappearance of the object. See Presidenza del Consiglio dei Ministri, (1996), p. 275.

⁵¹⁵ Calvo Caravaca, (2004), p. 94; Prott, *Commentary on the Unidroit Convention*, (1997), p. 31; Calvo Caravaca and Caamiña Domínguez, (2009), p. 169; UNIDROIT Secretariat, (2001), p. 494; this proposition was already advanced in the early stages of development of the convention. See UNIDROIT, (1989), Study LXX – Doc. 10, p. 9. See also UNIDROIT, (1989), Study LXX – Doc. 14, p. 7.

causae (and thus depending on the application of private international law rules, and – more conspicuously – of the connecting factor)⁵¹⁶ and c) in the case of excavated objects, when the clandestine excavation is qualified as theft under the domestic law of the place where the object has been excavated.⁵¹⁷ The judge seized with the demand in restitution will have to determine, with reference to one of these means, whether the object has been stolen or not.⁵¹⁸ Nonetheless, these three scenarios bear their own difficulties: whilst it is possible for the court seized to follow proposition a), this application might prove particularly problematic since it will lead the courts to apply national criminal conceptualizations to acts that took place outside of the territorial boundaries of the state within which the court is located.⁵¹⁹ Such a solution is contrary to the principle of the territoriality of criminal law.⁵²⁰ Hence, because of the lack of a definition in the convention, *bona fide* acquirers can be confronted with claims in restitution relating to acts classified as theft under foreign laws (i.e. under the *lex fori*) but that is not penalized under the acquirer's own domestic law.⁵²¹ Similar to proposition a), proposition b) is equally problematic: the application of a foreign notion of theft presupposes conflict rules for criminal matters, which do not exist.⁵²² Instead, it might prove more adequate and pragmatic to apply the definition of theft provided by the *lex loci delicti*.⁵²³ This solution is, nonetheless, equally troublesome because it involves the application of foreign criminal laws, thus of foreign public laws and – generally speaking – national courts rarely enforce such foreign public laws.⁵²⁴ But for these few remarks, in practice courts have solved this dilemma by adopting the following *modus operandi*: the reason domestic courts will not always enforce foreign public law – including criminal laws – stems from the distinction between acts *iure imperii* and *iure gestionis*.⁵²⁵ In the former case, domestic courts will not apply a foreign public law if that application has the effect of enforcing a foreign state's sovereign prerogative.⁵²⁶ Nevertheless, the qualification of an act as theft has the incidental result of opening access to means of restitution for the claimant in a foreign jurisdiction. The court seized is, thus, not asked to enforce foreign criminal sanctions – which would be tantamount to enforcing a prerogative *iure imperii* by excellence –, but merely to recognize the situation of theft as an *acta iure gestionis*. Consequently, the qualification of theft under the *lex loci delicti* will be taken as a *fait accompli*,⁵²⁷ find echo in the said court and its validity will not need to be reviewed.⁵²⁸

Two final remarks must be formulated with regard to the interpretation of the notion of 'stolen': firstly, despite the possible reference to domestic laws, it is important to stress that an interpretation of the notion of theft for the purpose of applying Chapter II needs to be autonomous and not constrained by national definitions.⁵²⁹ It is for the national judges to provide for this autonomous interpretation; secondly, it is advocated that the notion of 'stolen' cultural objects should refer to all cultural objects that have been subject to theft in the broadest sense of the word possible.⁵³⁰ Consequently, it is often advanced that it is sufficient for the object to

⁵¹⁶ Calvo Caravaca, (2004), p. 94; Prott, *Commentary on the Unidroit Convention*, (1997), p. 31; UNIDROIT Secretariat, (2001), p. 494; Lalive, 'La Convention d'Unidroit sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 32-33; Schneider, (1996), p. 145

⁵¹⁷ Calvo Caravaca, (2004), p. 94; following Calvo Caravaca and Caamiña Domínguez, this proposed determination on the basis of the *lex loci delicti* can also be applied to other types of stolen cultural goods, see Calvo Caravaca and Caamiña Domínguez, (2009), p. 169.

⁵¹⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 13; the CGE noted that the domestic judge seized with the matter would have to resolve this problem by the use of the domestic private international law rules in force. See UNIDROIT, (1991), Study LXX – Doc. 23, pp. 13-14.

⁵¹⁹ Calvo Caravaca and Caamiña Domínguez, (2009), p. 169.

⁵²⁰ Calvo Caravaca, (2004), p. 94; Caamiña Domínguez, C. M., *Conflicto de Jurisdicción de Leyes en el Tráfico Ilícito de Bienes Culturales*, (COLEX: Madrid, 2007), p. 144.

⁵²¹ Jolles, (1997), p. 56.

⁵²² Calvo Caravaca, (2004), p. 94; Caamiña Domínguez, (2007), p. 144; see also the commentary of the Croatian delegation taking part in the DC and specifying that a conflict-of-law rule would only be relevant to private law considerations. Presidenza del Consiglio dei Ministri, (1996), p. 275.

⁵²³ This was, nonetheless, rejected during the second session of the SG because this would have the effect of sanctioning a person for an act that might not be punishable in that person's domestic legal order, but that is condemned in the other jurisdiction. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 7.

⁵²⁴ Biondi, (1997), p. 1188.

⁵²⁵ Armbrüster, (2004), pp. 728-730.

⁵²⁶ Armbrüster, (2004), pp. 728-729. Imagine for example a situation where state A considers the sale of a particular object as a criminal act and wants the punishment for this offence to be applied to a transaction that took place in state B. If the court of state B is seized with the matter, it will not enforce the criminal law of state A, because the foreign law constitutes an act *iure imperii*, and applying it would simply infringe the principle of territoriality of criminal law. Although, when state B has to recognize a legal situation (i.e. a *fait accompli*) that took place in state A, it will recognize the act as an *acta iure gestionis* as long as this recognition does not involve the application of foreign public law. In the present case, if theft is identified in state A, state B will recognise *de facto* that theft has occurred (*idem*).

⁵²⁷ See also the commentary of Lalive, acting as Chairman of the Diplomatic Conference, by which he emphasized that questions of fact – such as the theft of a cultural object – should be distinguished from questions of law, such as the "existence and the validity of the transaction by which a good faith possessor acquired an object". See Presidenza del Consiglio dei Ministri, (1996), p. 275.

⁵²⁸ This observation was also made by the CGE during its second session. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 11.

⁵²⁹ Prott, (1997), p. 75; Siehr, (1998), p. 674; This submission was also made amidst the CGE during its second session. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 11. See also UNIDROIT, (1993), Study LXX – Doc. 39, p. 17.

⁵³⁰ Calvo Caravaca, (2004), p. 94; see also Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 32; Calvo Caravaca and Caamiña Domínguez, (2009), p. 168; Sidorsky, (1996), p. 31; Caamiña Domínguez,

have been stolen, irrespective of where the theft occurred⁵³¹ (note that this point is discussed in more detail below). What is important is that the object should be legally recognized as having been stolen,⁵³² and that the claimant brings sufficient proof of the theft in order to substantiate the claim.⁵³³ Furthermore, the convention does not require stolen goods to be inventoried as such before they can be regarded as stolen under the convention.⁵³⁴ Finally, it is advanced that theft is also deemed to have occurred when a state party to the convention claims the ‘restitution of the stolen object’.⁵³⁵

Chapter III – Illegal export

Article 1 (b) delimits the scope of application *ratione materiae* of Chapter III of the convention.

Article 1 UNIDROIT Convention (1995) – This Convention applies to claims of an international character for: [...]

(b) the **return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage** (hereinafter “illegally exported cultural objects”).

Chapter III will thus apply to **(1) requests for return** embedded with **(2) an international character** of a **(3) cultural object** that has been **(4) removed from the territory of a Contracting State** **(5) contrary to its laws regulating the export of cultural objects enacted specifically to protect its cultural heritage**. Three preliminary remarks must be formulated with regard to several of these points: firstly, with respect to point **(2)**, the request for return must be embedded with an international character. As explained above, this condition is particularly straightforward in the case of illegal export as it simply means that Article 1 (b) requires the cultural object to have been removed from the territory of a contracting state and be found in the territory of another contracting state in order for the convention to be applicable.⁵³⁶ Secondly, regarding point **(3)**, it is important to note that, despite a reference to the domestic cultural heritage of contracting states, it is not possible to apply national cultural property definitions to this mechanism.⁵³⁷ This impossibility results from the primary need to establish a balanced mechanism for the return of illegally exported objects,⁵³⁸ a balance that would have been impossible to achieve if a plethora of national definitions had to be taken into consideration. Thus, the definition of cultural objects as explained in section B. 1. (1) above must be applied to Chapter III. Thirdly, it should be emphasized that points **(4)** and **(5)** are composites of the ‘illegally exported’ qualification between brackets posited in Article 1 (b) *in fine*. This qualification was added for aesthetical purposes during the DC in order to avoid repeating the formulation of Article 1 (b) in the text of the convention.⁵³⁹ Because points **(2)** and **(3)** have been discussed at length above, the present section further discusses points **(1)**, **(4)** and **(5)**. What is more, it should be noted that although Article 1 (b) makes reference to the contracting state’s domestic laws to determine the illegality of the export, Article 5 (2) establishes a harmonized violation ground as it posits **(6) one specific instance in which a removal will automatically be considered as an illegal export**. Finally, it should be noted that **(7) Article 7** posits certain **exceptions to the regime of Chapter III**.

(1) Request for return

In the same fashion as claims in restitution of stolen cultural objects, Article 1 (b) obliges contracting states to foresee in their domestic legislation the possibility for other parties to bring a request for the return of illegally exported cultural objects before its courts or other competent authority.⁵⁴⁰ This is an important innovation since most domestic legal orders do not have specific provisions to this effect. This lack can notably be explained by the terminology adopted: contrary to the term ‘restitution’, ‘return’ is a term that is exclusively used in the realm

(2007), p. 144; Renold, (1997), p. 23. Renold submits that this broad interpretation is possible due to the universal, legal and moral condemnation of theft.

⁵³¹ Siehr, (1998), p. 675.

⁵³² Therefore, cultural objects that have been transferred to a person and later converted by the person entrusted with the object are not to be considered as being stolen. See Siehr, (1998), p. 675.

⁵³³ *Kunsten en Erfgoed, Direction du Patrimoine Culturel, ‘Opportunité en gevolgen van de toetreding door België tot het UNIDROIT 1995-verdrag inzake gestolen of illegal uitgevoerde cultuurgoederen / Opportunité et conséquences de la ratification par la Belgique de la CONVENTION UNIDROIT de 1995 relative aux biens culturels volés et illicitement exportés’, Study relating to the adhesion of the Kingdom of Belgium to the UNIDROIT Convention on stolen or illegally exported cultural objects (1995), report finalized in 2012, p. 116.*

⁵³⁴ Fach Gómez, (2004), p. 12.

⁵³⁵ Calvo Caravaca, (2004), p. 94.

⁵³⁶ Renold, (1997), p. 22.

⁵³⁷ Bergé, (2000), p. 232.

⁵³⁸ Bergé, (2000), p. 233.

⁵³⁹ See Presidenza del Consiglio dei Ministri, (1996), p. 278.

⁵⁴⁰ Protz, (1998), p. 212.

of public international law, where it is nowadays often relevant in situations pertaining to the illicit trade in cultural property.⁵⁴¹

As to its meaning, the exact implications of the term ‘return’ in international law remain disputed, similar to the notion of restitution in the sphere of international cultural heritage / property law. Whilst there used to exist an overlap between the notions of restitution and return,⁵⁴² in which the first term was predominantly used, the meaning of restitution gradually changed from the 1970s onwards, therefore leaving room for the latter term’s expansion.⁵⁴³ This gradual change can be demonstrated through three submissions: firstly, during the 20th meeting of UNESCO’s General Conference held in 1978 – discussed above in section A. 1. –, the concept of restitution was restricted, and return was introduced as an independent notion.⁵⁴⁴ Secondly, the distinct use of the term return was affirmed under the auspices of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*.⁵⁴⁵ Thirdly, in the opinion of Kowalski, the UNIDROIT convention (1995) helped to consolidate the distinction between restitution and return because two separate chapters are devoted to the two notions.⁵⁴⁶ Because return has acquired a meaning *sui generis*, attention should be devoted to it. Following Fraoua, prior to the adoption of the 1995 convention, the term return had always been used to refer to the voluntary returning of cultural materials to their country of origin.⁵⁴⁷ This means the term reflected a situation where there was no violation of law, but for which a party – i.e. either an individual or a state – voluntarily obliged itself⁵⁴⁸ to return the object to the state of origin.⁵⁴⁹ This seems to explain why UNESCO used return in the past to refer to the devolution of cultural property appropriated during periods of colonization (see above).⁵⁵⁰ Besides, as established above, Fraoua affirms that restitution was traditionally used to refer to the means of correcting a violation of a legal norm.⁵⁵¹ In line with Fraoua’s reasoning, Kowalski provides a similar account of this concept: in his analysis of restitution given above, it was established that a violation of an internationally recognized legal rule prohibiting theft or pillaging automatically results in the possibility to initiate a claim for the restitution of the object concerned. By *a contrario* reasoning, the use of the term return was thus confined to situations that did not involve a violation of an internationally recognized legal norm and was, therefore, limited to situations that were strictly speaking not illegal,⁵⁵² or at least not illegal from an international perspective. Thenceforth, to Kowalski, the notion of return is endowed with a sense of morality and ethics that implies the return of the object,⁵⁵³ but which cannot be considered to constitute a legal remedy. This means that return is mostly used for the restoration of cultural objects taken during colonization and to correct violations of national export legislation;⁵⁵⁴ as remarked above, Kowalski understands that return can also be used in cases of illicit export,⁵⁵⁵ but to him, this does not affect the meaning given to the

⁵⁴¹ Stamatoudi, (2011), p. 18.

⁵⁴² Kowalski explains that restitution used to be the general term applied in both situations. Restitution had a broad meaning and was used in cases of theft, loots or spoliation during wars or during periods of colonialism. See Kowalski, (2004), p. 47 and the explanation about restitution given above.

⁵⁴³ Kowalski, (2004), p. 48.

⁵⁴⁴ Kowalski, (2004), p. 48; this revision by the General Conference was not abrupt, as it followed from a publication of UNESCO’s Director-General entitled ‘A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It’ of 7 June 1978, published less than six months before the meeting. See M’Bow, A. M., ‘A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It’, 7 June 1978, http://www.unesco.org/culture/laws/pdf/PealforReturn_DG_1978.pdf, last retrieved on 01.03.2018 and Kowalski, (2004), p. 48.

⁵⁴⁵ Kowalski, (2004), p. 48 but also footnote 65. Furthermore, Kowalski noted that the newly established distinction was consolidated in the ‘Guidelines for the Use of the ‘Standard Form Concerning Requests for Return or Restitution’ adopted by the Intergovernmental Committee on 30 April 1986.

⁵⁴⁶ Kowalski, (2004), p. 49.

⁵⁴⁷ UNIDROIT, *The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects* (Study LXX – Doc. 15), Study LXX – Doc. 16, Rome, December 1989, p. 8; in support of this affirmation, Fraoua refers to the work of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in Case of Illicit Appropriation, which has used the term consistently throughout its existence. See UNIDROIT, (1989), Study LXX – Doc. 16, p. 8.

⁵⁴⁸ Concurrently, this entails that (diplomatic) negotiations often preceded the return of the object. See UNIDROIT, (1989), Study LXX – Doc. 16, p. 8.

⁵⁴⁹ UNIDROIT, (1989), Study LXX – Doc. 16, p. 8.

⁵⁵⁰ See for example Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, ‘Guidelines for the Use of the ‘Standard Form Concerning Requests for Return or Restitution’, CC-86/WS/3, 30 April 1986, available at <http://unesdoc.unesco.org/images/0007/000720/072071EB.pdf>, last retrieved on 01.03.2018 where the Intergovernmental Committee gave a similar meaning to the term return.

⁵⁵¹ UNIDROIT, (1989), Study LXX – Doc. 16, p. 8.

⁵⁵² Kowalski’s distinction can, at times, become blurred, notably in situations where the removal happened in conformity with the legislation, but where the circumstances would allow qualifying the removal as unjust or unfair, – such as for example removal in periods of colonisation – justifying mandatory return of the object by force of law. See Forrest, (2010), p. 142.

⁵⁵³ Forrest, (2010), p. 142.

⁵⁵⁴ Kowalski, (2004), p. 49.

⁵⁵⁵ See for example Kowalski, (2004), p. 33.

notion of return, as the violation of domestic export legislation does not trigger the violation of an internationally recognized norm.⁵⁵⁶ Interestingly, Kowalski seems to dismiss violations of export laws from the types of infringements leading to restitution, as these national laws do not fit into his conceptualization of an internationally recognized norm.⁵⁵⁷ Hence, when extrapolating Kowalski's definition of return to the regime of the convention, the use of this specific terminology presupposes that there is no legal infringement. Therefore, 'return' – as means of corrective justice to illegal export – seems inappropriate.⁵⁵⁸ Nevertheless, the adoption of both the 1995 convention and Directive 93/7/EEC – the latter being strongly inspired by the convention⁵⁵⁹ – gave international recognition to the violation of domestic export laws.⁵⁶⁰ Consequently, the use of the term 'return' for the purpose of Chapter III is not in line with its traditional use and, therefore, the term 'restitution' should have been preferred.⁵⁶¹ Nonetheless, Forrest conceives that both the convention and the Directive give a qualified meaning to return,⁵⁶² which differs from its general understanding in international law. To other commentators, the concept of return is a value-free notion that specifically requires action by a requested state or by an institution,⁵⁶³ and takes the interests of both requesting and requested states into consideration.⁵⁶⁴ In the alternative, Stamatoudi advanced that – contrary to the analysis presented by Fraoua and Kowalski – return presupposes an illegal act,⁵⁶⁵ although it differs from restitution in the intended effects: return implies the "obligation for the physical return of the displaced object with the ultimate aim of achieving the integrity of the site or that of the cultural context from which the object has been removed".⁵⁶⁶

For the purpose of analysing Article 1 (b), the meaning of return given by other commentators must be favoured to the detriment of Kowalski's views. As noted during the DC, the use of the term return in the convention was to differentiate the procedure of restitution from the one of return.⁵⁶⁷ For the purpose of Chapter III, return thus refers to the means of corrective justice that can be used by a state after the removal of a cultural object contrary to its export legislation, provided the said legislation is intended to protect its cultural heritage and that the return serves a specific purpose relating to the integrity of the find site or of the cultural context to which the object belongs. Throughout the provisions of Chapter III, return thereby implies the violation of a domestic law, the illegality of which will be given international recognition and which will trigger rules on the physical return of the object. Nonetheless, the return is not absolute as it is subjected to the condition that the requesting state must establish a significant impairment⁵⁶⁸ of one or more of the four internationally recognized interests⁵⁶⁹ laid down in Article 5 (3),⁵⁷⁰ or establish that the object is of significant

⁵⁵⁶ Kowalski, (2004), p. 51; Forrest, (2010), p. 143.

⁵⁵⁷ Forrest, (2010), p. 143. Forrest noted that Kowalski's argument with regard to the violation of domestic export laws was not grounded on sound premises: to Forrest, illegal export – for which return is prescribed – results, similarly to theft, from the violation of domestic laws. Because violation of prohibitions to commit theft is given international recognition, a violation of domestic export legislation should also be remedied by means of restitution, and not by means of return. Nonetheless, the main thrust of Kowalski's argument about restitution stems from the international recognition given to the violation: because violations of domestic export laws are often not echoed in foreign jurisdictions due to their public law character, these measures fall short of being recognized internationally. On the contrary, theft reverberates in foreign jurisdictions and is, therefore, elevated to the status of an international norm. This is something that Forrest acknowledges well, but he considers that – because of the existing discrepancies in domestic definitions of theft – theft has the same domestic properties as illegal export and is, therefore, devoid of being assimilated to an international norm (*idem*). Nonetheless, the existences of discrepancies between the domestic definitions of theft should not be confused with the willingness of the international community to remedy to the problem of theft.

⁵⁵⁸ Forrest, (2010), p. 143.

⁵⁵⁹ Forrest, (2010), p. 143.

⁵⁶⁰ Forrest, (2010), p. 143.

⁵⁶¹ Forrest, (2010), p. 143.

⁵⁶² Forrest, (2010), p. 143.

⁵⁶³ Prot, (2009), p. xxi.

⁵⁶⁴ Stamatoudi, (2011), p. 18.

⁵⁶⁵ Stamatoudi, (2011), p. 18.

⁵⁶⁶ Stamatoudi, (2011), p. 18.

⁵⁶⁷ Presidenza del Consiglio dei Ministri, (1996), p. 88.

⁵⁶⁸ Merryman proposed the requirement of significant impairment to a state's cultural heritage during the first session of the Study Group. At that time, four interests were listed by him and these interests have remained almost unchanged in the final version of the convention. See UNIDROIT, 'The International Protection of Cultural Property – Summary report on the first session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 12 to 15 December 1988 (prepared by the Unidroit Secretariat), Study LXX – Doc. 10, Rome, January 1989, p. 12 and Annex IV of the same document. Merryman proposed limiting return to objects whose non return would seriously impair the cultural heritage of a state (See Prot, *Commentary on the Unidroit Convention*, (1997), p. 53). As such, the terminology 'significant' constitutes a societal-cultural interdependence threshold, limiting instances of return to cultural objects whose disappearance considerably affects the cultural heritage of the state of export (see Prot, *Commentary on the Unidroit Convention*, (1997), p. 53). Furthermore, Article 5 (3) requires for the impairment to be ongoing or continuous, thus mandating the return of the object to correct the said impairment (Forrest, (2010), pp. 210-211). Nonetheless, Forrest notes that impaired interests with irreversible consequences may also be 'corrected' by mandating the return of the object on the basis of Article 5 (3) of the convention (see Forrest, (2010), p. 211). This broad interpretation has a dissuasive effect in infringing the interests listed in Article 5 (3) (a)-(d) (*idem*).

⁵⁶⁹ The list is, therefore, not cumulative. See Prot, *Commentary on the Unidroit Convention*, (1997), p. 58; Schneider, (1996), p. 148; Sidorsky, (1996), p. 28.

cultural importance⁵⁷¹ to it.⁵⁷² As such, under Chapter III, the requested state is not bound to recognize arbitrary classifications prescribed in the domestic law of the requesting state (cf. Article 5 (3)).⁵⁷³ Thus, contrary to restitution, the ultimate goal of the return stems from the need to preserve the cultural heritage of a nation.⁵⁷⁴ Additionally, Chapter III distinguishes itself from its Chapter II counterpart, as it constitutes a means of judicial and administrative support,⁵⁷⁵ which instates a procedure of international cooperation between state parties⁵⁷⁶ and of solidarity⁵⁷⁷ in enforcing the right of the foreign sovereign.⁵⁷⁸ Furthermore, it is important to note that there is a clear difference in the effect of restitution and return for the purpose of the convention: whilst restitution is concerned with the handing back of an object to a dispossessed claimant, return mandates a physical return, and thus deals with the whereabouts of the item.⁵⁷⁹ Similarly to the regime instated in Directive

⁵⁷⁰ Bergé, (2000), p. 232; Bengs, (1996), p. 533; during the creation of the convention, market states pointed at the general lack of recognition of foreign export controls and at the recent changes brought to this general rule. Because of this, they proposed to limit the instances of return of illegally exported cultural materials (see Protz, *Commentary on the Unidroit Convention*, (1997), p. 53) and for the exceptions to the general rule to be clearly defined (see Sidorsky, (1996), p. 28). The list proposed by Merryman obtained wide support at the Study Group and its members considered the interest-based list of Article 5 (3) of paramount importance to the future convention. Because states had been generally reluctant to recognize and give effect to foreign export legislation in the absence of bilateral agreements giving explicit expression to this recognition and enforcement, there was a need for a solution by which states would unconditionally be inclined to give effect to foreign export laws. The proposition of Merryman laid down scenarios in which it would be acceptable for many states to give effect to these foreign export laws. Following Schneider, the underlying interests present in these categories are: firstly, the preservation of the object and the knowledge of the past that can be distilled from it (point (a), (b) and (c)); and, secondly, the protection of spiritual and ritual values of living cultural (point (d)), a notion more vibrant to the cultural heritage of states and often important to their national identity (see Schneider, (1996), p. 148). As noted by Protz after the second session of the CGE, the interests laid down in Article 5 (3) reflect the most conceivable situations in which international cooperation was acceptable (see UNIDROIT, (1993), Study LXX – Doc. 36, p. 23 for the commentary of Protz. See also Merryman, (2000), p. 275). The interest-based list represented interests that the international community deemed worthy of protection (Unidroit, (1993), Study LXX – Doc. 39, p. 26), constituted an acceptable change in the universal practice and helped alleviate the concerns of adamant states as to the lack of existence of an intelligible solution to the problem (see UNIDROIT, (1990), Study LXX – Doc. 18, p. 21). Imposing conditions upon the return has the effect of limiting the amount of objects that will be subject to the principle of return (see UNIDROIT, (1993), Study LXX – Doc. 39, p. 26 and Renold, (1997), p. 23). Furthermore, these conditions have been instated in order for the requested state to check upon the cultural finality of the request (Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 44). Finally, the conditionality of Article 5 was introduced so as to ensure the widest acceptance of the convention. See Protz, *Commentary on the Unidroit Convention*, (1997), p. 53.

⁵⁷¹ The last interest of 'significant cultural importance' had not been foreseen by Merryman, but was discussed during the first meeting of the Study Group (see UNIDROIT, 'The International Protection of Cultural Property – Summary report on the first session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 12 to 15 December 1988 (prepared by the Unidroit Secretariat), Study LXX – Doc. 10, Rome, January 1989, p. 13 where it was submitted that: "[...] the Merryman paper might not cover certain cases where the State of origin could have a paramount interest in obtaining the return to its territory of a cultural object on account of the importance which it represented for the cultural heritage of that State, on account perhaps of its rarity value, or, an alternative formulation, if it was particularly representative of the culture of that State, a factor of vital importance for a number of former colonial States whose populations were seeking to establish their national and cultural identity". Protz advanced this residual condition concurrently to Merryman's proposal for the list of interests (see Protz, *Commentary on the Unidroit Convention*, (1997), p. 59). Exporting states supported the inclusion of this clause, giving them greater leeway in the protection of their cultural heritage (see Renold, (1997), p. 30). In fact, this last condition as laid down in Article 5 (3) *in fine* works as a safety net for situations that do not strictly fall under one of the sub-paragraphs mentioned above (see Schneider, (1996), p. 148). Additionally, whilst the test of 'significant cultural importance' is now a residual category of Article 5 (3), in the PDC it was listed as point (e) (see Merryman, (2000), p. 276). Therefore, Protz submitted that this last condition must be seen as a fifth condition (cf. Protz, *Commentary on the Unidroit Convention*, (1997), p. 60).

⁵⁷² Klein, F.-E., 'En Relisant la Convention UNIDROIT du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés: Réflexions et Suggestions', 118 *Zeitschrift für Schweizerisches Recht*, (1999), p. 268.

⁵⁷³ Lalive D'Épinay, 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)', (1997), p. 73.

⁵⁷⁴ Stamatoudi, (2011), p. 18.

⁵⁷⁵ Bergé, (2000), p. 229; Love Levine, (2010-2011), p. 772.

⁵⁷⁶ Office Fédéral de la culture (Suisse), (1998), p. 70; Love Levine, (2010-2011), p. 772.

⁵⁷⁷ As noted during the third session of the CGE, the innovation of Chapter III was the "expression of a greater awareness of international solidarity". See UNIDROIT, (1993), Study LXX – Doc. 39, p. 23.

⁵⁷⁸ Office Fédéral de la culture (Suisse), (1998), p. 71; this type of mechanism, requiring the assistance of another state, is not unknown of in the realm of public international law where demands for assistance are frequently codified in treaties (Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 42). In fact, the convention follows the traditional scheme applied to requests in return (see Office Fédéral de la culture (Suisse), (1998), p. 71, citing Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 42 and ff.). Nevertheless, the regime of Chapter III introduces an innovation that was hitherto not part of the said scheme: the request for the return as posited in Chapter III is conditional and does not require the blanket application of export legislation. Although an unconditional obligation of return would have the benefit of deterring the illegal trade in cultural property (Stamatoudi, (2011), p. 18), participants in the art market have voiced concerns as to the danger for domestic judges of applying foreign export legislation without having discretion to review the content of these laws (see for example Van Gaalen and Verheij, (1997), p. 196). This danger is discarded by the solution prescribed by Chapter III of the convention (Van Gaalen and Verheij, (1997), p. 196).

⁵⁷⁹ Office Fédéral de la Culture (Suisse), (1998), p. 20; the distinction between Chapter II and III is further exacerbated due to the fact that the owner himself often orchestrates the illegal export. See Droz, (1994), p. 48 and Klein, (1999), p. 268; Lalive D'Épinay, (1996), p. 49.

2014/60/EU – and previously in Directive 93/7/EEC –, return prescribes the physical return of an object to the territorial confinements of a state that has a legitimate interest in recovering the object, irrespective of ownership considerations.⁵⁸⁰ Consequently, mandating the return of a cultural object to the state of export does not touch upon questions of possession or ownership of the good,⁵⁸¹ and may even result in disconnecting the physical possession from the said ownership, which has been qualified as a special kind of expropriation.⁵⁸²

(4) Removed from the territory of a Contracting State

As will be explained below, the particular apportionment of the benefits of the convention is not applied to Chapters II and III alike:⁵⁸³ contrary to Article 10 (1) dealing with stolen cultural objects, in case of illegal exports it is particularly important for the state whose export laws has been violated to be party to the convention before the illegal export takes place for its export legislation to be recognized and given effect by other contracting states in accordance with the provisions of Chapter III.⁵⁸⁴ More specifically, in order for Chapter III to kick in, an object must have been exported illegally from a state's territorial boundaries after the entry into force of the convention in the two states concerned – i.e. the requesting and requested states⁵⁸⁵ –, as is prescribed by Article 10 (2):

Article 10 UNIDROIT Convention (1995) – (2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

The principle underpinning Article 10 (2) is one of strict reciprocity.⁵⁸⁶ This means that both states must be party to the convention before the illegal export occurs, in order for the regime of Chapter III to be relied upon.⁵⁸⁷ Further nuancing this submission, the convention will thus only apply when the illegal export has taken place after it has subjectively entered into force in both the requesting state and the requested state.⁵⁸⁸ It had been proposed during a session of the SG to allow non-state parties to rely upon Chapter III when the object was claimed in a requested state party to the convention.⁵⁸⁹ This proposal was ultimately rejected, thus explicitly requiring for both the state of export and the state where the object is situated at the time of the request to be contracting states, if they want to benefit from the regime contained in Chapter III.⁵⁹⁰ The need for both these states to be party flows from the idea of reciprocity in securing judicial and administrative means of cooperation between contracting states.⁵⁹¹ Furthermore, strict reciprocity requires the cultural object to have been illegally exported from the territory of the requesting state.

This often results in a conflict of interests between the state of export and the original owner. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 53.

⁵⁸⁰ The irrelevance of the question of ownership to the mechanism of return was first noted by members of the Committee of Governmental Experts during its first session. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 31; in regulating the return of the object, it was considered important, at first, to secure the physical return within the territorial confinements from which the item had been illegally taken, and, secondly, to prosecute the persons responsible for the unlawful removal. Therefore, proposals to this effect were already expressed on several occasions during the 1980s. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 52. Nonetheless, these two objectives had to be achieved notwithstanding existing questions of substantive law – such as questions of ownership – in order to secure a fast and effective remedy to the illegal export (Prott, *Commentary on the Unidroit Convention*, (1997), p. 52). Thenceforth, the state demanding the return of an illegally exported cultural object does not need to own the item to have it returned. In fact, Chapter III protects the interest of states by requiring the return of the object that has been illegally exported, even though these states are not the owners of the object. Byrne-Sutton, (1997), pp. 11-12; Office Fédéral de la Culture (Suisse), (1998), pp. 66 and 70; Instead, it has been advanced that the question of ownership is to be regulated by applying the domestic law of the requesting state. See Office Fédéral de la Culture (Suisse), (1998), pp. 66-67.

⁵⁸¹ Office Fédéral de la Culture (Suisse), (1998), p. 20.

⁵⁸² Siehr, (2009), p. 120; Siehr, K., “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)”, in: C. Breitler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 65. See also Office Fédéral de la Culture (Suisse), (1998), p. 67 and Klein, (1999), p. 282; as noted by the Japanese delegation during the DC, the regime of Chapter III of the convention empowers the requested state to oblige the possessor of an illegally exported cultural object to return the object to the requesting state. See Presidenza del Consiglio dei Ministri, (1996), p. 71.

⁵⁸³ Fraoua, (1997), p. 39.

⁵⁸⁴ UNIDROIT Secretariat, (2001), p. 494; the members of the SG noted during its third session that it was important for a state that wanted its domestic export laws to be respected to become a party to the convention. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 8. This was notably based on the idea that, contrary to theft – which is condemned in virtually all states of the world – not all states had adopted export legislation, making agreement as to the situation of illegal export less unified. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 16.

⁵⁸⁵ Bengs, (1996), p. 535.

⁵⁸⁶ UNIDROIT Secretariat, (2001), p. 550.

⁵⁸⁷ UNIDROIT Secretariat, (2001), p. 550.

⁵⁸⁸ Droz, (1997), p. 272; this condition was added during the third session of the SG. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 39.

⁵⁸⁹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 81.

⁵⁹⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 81; this strict interpretation of Chapter III seems to be inferred from the idea of strict reciprocity.

⁵⁹¹ Droz, (1997), p. 272.

(5) Contrary to its laws regulating the export of cultural objects enacted specifically to protect its cultural heritage

As demonstrated by the use of the more neutral term ‘removed’ instead of ‘exported’ in Article 1 (b),⁵⁹² the convention does not give automatic recognition to violations of domestic export legislation. In fact, Chapter III is concerned with the violation of domestic export legislation enacted “for the purpose of protecting its [i.e. the requesting state’s] cultural heritage”. Three cumulative conditions are, therefore, required: 1) a violation of a legally binding domestic rule; 2) the domestic rule must regulate the export of cultural objects and 3) the said export legislation must protect the cultural heritage of the requesting state.

1) Violation of a legally binding domestic rule

An important pre-requisite for the return of a cultural object that has been illegally exported is that it has to be legally protected against removal from the territory of the state of export.⁵⁹³ The protective measures can either be in the form of legislative acts or of administrative regulations.⁵⁹⁴ Additionally, the illegality of the removal is assessed based on the legislation in force at the time of the export.⁵⁹⁵ Therefore, the determination of the violation is left to the domestic law in force in the state from which the object has been removed, i.e. the *lex originis*.⁵⁹⁶ In order to define illicit export, the convention refers to this law on three occasions in Articles 1 (b), 5 (2) and 6 (2).⁵⁹⁷ As such, the conflict-of-law solution proposed is a revolutionary mechanism in line with the 1970 convention’s ideology: it provides for the application of foreign public law – in the form of export prohibitions – by domestic courts.⁵⁹⁸ This choice is sensible since it is for the jurisdiction in which the unlawful act has taken place to define the violations to its public legislation.⁵⁹⁹ Nevertheless, it should not be forgotten that it will be up to the courts of the requested state seized to assess whether that law has actually been violated.⁶⁰⁰ Furthermore, the recognition is not absolute, as the two following conditions limit the array of domestic laws that are given recognition.

2) The domestic rule must regulate the export of cultural objects

Importantly, the rules that have to be violated are the enacted export rules of the state of export, in the form of measures aimed at the protection of the national cultural heritage.⁶⁰¹ Whilst the PDC submitted by the SG at the end of its third session referred to the terminology ‘contrary to its export legislation’, during the first session of the CGE, Mexico’s expert disapproved of this formulation. He advanced that the wording would be too restrictive and that, therefore, it would be preferable to use ‘contrary to its legislation’ so as to encompass more infringements.⁶⁰² This proposition was made due to concerns that – for the sake of the provision – legislation prohibiting or regulating the territorial removal of a cultural object might not be considered as export legislation, since these measures are often assimilated to the general regime regulating the state’s cultural heritage.⁶⁰³ In other words, this legislation – not being technically classified as export law⁶⁰⁴ – could then be interpreted as not falling within the ambit of the convention.⁶⁰⁵ Furthermore, the delegation representing the Islamic Republic of Iran submitted that the terms ‘contrary to export legislation’ were nebulous and ambiguous, leading to the inclusion of ancillary violations of export regulations that do not qualify as illegal export into the ambit of the convention.⁶⁰⁶ Alternative formulations – such as ‘when a cultural object has been illegally removed’, ‘contrary to its legislation on the subject’ and ‘contrary to a legislative provision prohibiting the export of cultural property

⁵⁹² See UNIDROIT, (1993), Study LXX – Doc. 39, p. 22.

⁵⁹³ Van Gaalen and Verheij, (1997), p. 196.

⁵⁹⁴ UNIDROIT Secretariat, (2001), p. 496; during the third session of the SG, a member proposed including judicial decisions in the array of measures that could be violated for the purpose of considering the export illegal. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 20.

⁵⁹⁵ It was remarked during the third session of the SG that the rules adopted throughout the Preliminary draft Conventions were referring to existing legislation at the time of the unlawful removal. UNIDROIT, (1990), Study LXX – Doc. 18, p. 20; a member of the CGE proposed including a provision to this effect in the future instrument during the first session of the committee. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 26.

⁵⁹⁶ Bergé, (2000), p. 246; Symeonides, (2005), p. 1187.

⁵⁹⁷ Bergé, (2000), p. 246; Renold, (2014), p. 306.

⁵⁹⁸ Kay, (1996), p. 40.

⁵⁹⁹ Bergé, (2000), p. 246.

⁶⁰⁰ In fact, the SG supported the idea that the domestic judge would have to decide whether the domestic law of the requesting state had been violated. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 15.

⁶⁰¹ UNIDROIT Secretariat, (2001), p. 496; Office Fédéral de la Culture (Suisse), (1998), p. 19.

⁶⁰² UNIDROIT, (1991), Study LXX – Doc. 20, p. 3 and UNIDROIT, (1991), Study LXX – Doc. 23, p. 6-7; this proposal was further supported by the Chinese delegation (see UNIDROIT, (1992), Study LXX – Doc. 30, p. 5 but also UNIDROIT, (1992), Study LXX – Doc. 24, p. 5).

⁶⁰³ UNIDROIT, (1991), Study LXX – Doc. 23, p. 6.

⁶⁰⁴ In fact, some domestic laws prohibiting the removal of cultural objects from their respective territories were not – technically – to be considered as export laws. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 23.

⁶⁰⁵ UNIDROIT, (1991), Study LXX – Doc. 23, p. 6.

⁶⁰⁶ UNIDROIT, (1991), Study LXX – Doc. 24, p. 13.

because of its cultural significance⁶⁰⁷ – were advanced,⁶⁰⁷ but ultimately not retained. The CGE then addressed this technicality during its second session: because of the lack of export legislation specifically addressing cultural materials in certain states, and because minor violations of export legislation – e.g. a violation of an export formality – should not fall within the ambit of the convention, it was preferred to reconsider the formulation of the PDC. Alternative formulations – such as a reference to the ‘relevant legislation’, or the replacement of ‘legislation’ by ‘rules’ or ‘provisions’, or even by the wording ‘the law applicable to the protection of cultural objects’ – were consequently tabled⁶⁰⁸ but were found not to be sufficiently adequate. In line with the Mexican proposition, the Hungarian delegation noted during the CGE’s third session that because of the restrictive and technical meaning given to the terminology ‘export legislation’, there was a clear predilection for the use of ‘contrary to its law’ or ‘contrary to its law applicable to the protection of cultural objects’.⁶⁰⁹ Therefore, the formulation was changed to recognize only violations of laws relevant to the protection of cultural objects. It is then sufficient for domestic legally binding rules “regulating the export of cultural objects” to have been flouted.⁶¹⁰ This change was deemed necessary so as to exclude violations of domestic laws regulating peripheral aspects from the scope of Chapter III.⁶¹¹ Thus, violations of ancillary rules such as border control legislation,⁶¹² fiscal measures, or questions of determination of ownership are irrelevant to the application of Chapter III.⁶¹³ Therefore, Article 1 (b) is not directed at national laws in which the cultural value of a cultural object is merely incidental to the breach.⁶¹⁴

3) The said export legislation must protect the cultural heritage of the requesting state

The qualification “for the purpose of protecting its cultural heritage” – which, *inter alia*, sets considerable limitations to the ambit of Chapter III⁶¹⁵ – was introduced during the DC.⁶¹⁶ At the outset of this conference, it was recalled that the domestic measures subsumed under this qualification must be motivated by cultural considerations and cannot be driven by other motives.⁶¹⁷ Compared to the PDC, the final version of the convention has, therefore, set additional conditions for the return of a cultural object, which have considerably limited the ambit of the provision. Following Article 1 (b), a state requesting the return of an object will have to prove two elements: firstly, that the object is part of the state’s cultural heritage and, secondly, that the object needs to be protected.⁶¹⁸

The two conditions were added to the detriment of requesting states for two reasons:⁶¹⁹ firstly, specific reference has been made to the protectionist rules directed at the requesting state’s cultural heritage. This means that illegally exported cultural objects – for which return is sought – must be classified as cultural heritage of the requesting state before the export takes place.⁶²⁰ Nevertheless, the convention conspicuously fails to describe what is meant by cultural heritage.⁶²¹ The determination of the boundaries of a state’s cultural heritage by a foreign court could be a point of contention that might complicate a request for the return of the object when the said law is not specific enough. Secondly, the purpose of many export restrictions is retentionist in nature, and not protective,⁶²² rendering the ambit of Chapter III utterly narrow in its scope⁶²³ and limited to measures

⁶⁰⁷ See UNIDROIT, (1991), Study LXX – Doc. 23, p. 26.

⁶⁰⁸ UNIDROIT, (1992), Study LXX – Doc. 30, p. 5.

⁶⁰⁹ UNIDROIT, Committee of Governmental Experts – Working papers submitted during the third session of the committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 38 (Misc. 4), Rome, April 1993, p. 10.

⁶¹⁰ Presidenza del Consiglio dei Ministri, (1996), p. 90; Droz, (1997), p. 250; Prott, *Commentary on the Unidroit Convention*, (1997), p. 23; Schneider, (1996), p. 147.

⁶¹¹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 23.

⁶¹² Office Fédéral de la Culture (Suisse), (1998), p. 19.

⁶¹³ UNIDROIT Secretariat, (2001), p. 496; hence, instances of fiscal evasion resulting from violations of customs regulations – such as the act of incorrectly filling-in the declaration forms at the time of the export of a cultural object – will not be sufficient to trigger Chapter III. See Droz, (1997), p. 250.

⁶¹⁴ Presidenza del Consiglio dei Ministri, (1996), p. 90.

⁶¹⁵ UNIDROIT, (1990), Study LXX – Doc. 18, p. 20.

⁶¹⁶ See Presidenza del Consiglio dei Ministri, (1996), p. 278.

⁶¹⁷ See Presidenza del Consiglio dei Ministri, (1996), p. 24. Therefore, fiscal rules or rules relating to the transfer of title of the cultural object ought not to be considered as laws regulating the export of cultural objects enacted specifically to protect its cultural heritage (*idem*).

⁶¹⁸ Merryman, (2000), pp. 271-272.

⁶¹⁹ Merryman, (2000), p. 271.

⁶²⁰ See the examples provided by Merryman in Merryman, (2000), p. 272.

⁶²¹ Merryman, (2000), pp. 272-273. Merryman notes that the PDC included a provision that could have helped understand what the terminology ‘cultural heritage’ alludes to (*idem*, footnote 9); Bergé, J.-S., ‘La Convention d’UNIDROIT les biens culturels: retour sur un texte majeur dans la lutte contre un fait international illicite de circulation’, 20 *Uniform Law Review*, (2015), p. 542. Perhaps, reference should be made to Article 4 of the 1970 convention for the purpose of the present provision (*idem*).

⁶²² Merryman, (2000), p. 272; see also Merryman, J. H., “A Licit International Trade in Cultural Objects”, in: M. Briat and J. A. Freedberg (eds), *International Sales of Works of Art – vol. V, Legal Aspects of International Trade in Art*, (ICC Publishing: Paris – New York; Kluwer Law International: The Hague – London – Boston, 1996), p. 4, footnote 3.

⁶²³ Merryman, (2000), pp. 271-272.

directed at the protection of the cultural heritage of the state concerned.⁶²⁴ Unfortunately, the convention does not clarify what measures are to be considered protective in nature. On the one hand, Merryman supports a narrow reading of this concept, as he averred that these measures must have been instated so as to afford safeguards to cultural materials in need of protection.⁶²⁵ Merryman's argument was further supported by the Hungarian delegation participating in the CGE, which emphasized that the term 'protection' would refer to safety and prevention of theft, damage and demolition.⁶²⁶ To the delegation, this qualification would help to narrow down the types of laws the infringement of which would trigger the regime of Chapter III, excluding – for example – mere violations of contractual provisions.⁶²⁷ On the other hand, Prott – disputing Merryman's construction of the notion⁶²⁸ – submitted that 'protection' must be interpreted in the broad sense, referring to any measure enacted by a state to protect an adequate representation of its national cultural heritage from dispersion.⁶²⁹ It should be remarked that Prott – reacting to Merryman's submissions – explained that the terminology 'protection' was used in domestic cultural heritage legislation to refer to many different aspects of cultural heritage law, such as the "protection of access, protection of education of creative artists and of the public in their cultural traditions, protection of minority communities' special requirements for the handling of their cultural creations, as well as protection of the object".⁶³⁰ It remains unclear which interpretation should be favoured. Nevertheless, because Article 5 (3) narrows down the categories of cultural objects that ought to be returned, Prott's interpretation seems to be more adequate.

Finally, it should be remarked that it is possible to endow Article 1 (b) with a broader scope in two ways: 1) by including illegal exports not falling within the ambit Chapter III on the basis of Article 9 (1),⁶³¹ or even by allowing non-state parties to act as requesting states by modulating the implementation through the same provision.⁶³²

(6) Specific instances in which a removal will automatically be considered as an illegal export

Article 5 (2) subjugates cultural objects that have temporarily been exported for a specific purpose to the 'illegally exported' classification when not returned in accordance with the export permit. This provision firstly appeared during the fourth meeting of the CGE in a more intricate form,⁶³³ but a simplified version was kept in the final instrument.

Article 5 UNIDROIT Convention (1995) – (2) A **cultural object** which has been **temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.**

The incorporation of this provision into the regime of Chapter III makes it possible for the requesting state to request the return of the cultural object that has not been returned following the conditions laid down in the permit.⁶³⁴ Nonetheless, the permit must have been established by the same law as the one addressed by Article 1 (b). Furthermore, the qualification 'such as' suggests that the list given in Article 5 (2) is purely illustrative, and that the purpose of the permit is to be determined by the requesting state itself. This is further corroborated by the fact that the convention does not aim to limit the requesting state's plenipotentiary powers in issuing an export licence. In fact, for the purpose of applying Chapter III, the convention gives automatic recognition to a violation of a domestic export licence.

(7) Exceptions to the regime of Chapter III

Article 7 (1) creates two exceptions to the regime of Chapter III of the convention.⁶³⁵

Article 7 UNIDROIT Convention (1995) – (1) The **provisions of this Chapter shall not apply** where:

(a) the **export of a cultural object is no longer illegal at the time at which the return is requested**; or

⁶²⁴ As pointed by the drafting committee encharged during the DC with proposing a workable draft convention. See Presidenza del Consiglio dei Ministri, (1996), p. 278.

⁶²⁵ Merryman, (2000), p. 272.

⁶²⁶ UNIDROIT, (1993), Study LXX – Doc. 38 (Misc. 4), p. 10.

⁶²⁷ UNIDROIT, (1993), Study LXX – Doc. 38 (Misc. 4), p. 10.

⁶²⁸ See the criticisms of Merryman as discussed in Prott, *Commentary on the Unidroit Convention*, (1997), p. 24.

⁶²⁹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 24; see also Prott, (1989), pp. 235-236 for more discussion about the notion of 'protection'.

⁶³⁰ Prott, (2005), p. 226.

⁶³¹ UNIDROIT Secretariat, (2001), p. 550.

⁶³² Prott, *Commentary on the Unidroit Convention*, (1997), p. 81.

⁶³³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 54.

⁶³⁴ Forrest, (2010), p. 209.

⁶³⁵ Bengs, (1996), p. 534.

(b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.

Although qualified as unnecessary and merely reflective of overcautiousness,⁶³⁶ paragraph a of Article 7 (1) excludes the regime of Chapter III when the export has ceased to be illegal at the time the requesting state initiates the return proceedings in a foreign jurisdiction.⁶³⁷ This provision was firstly discussed in the SG, where it was recalled that export laws “are subject to change” and could create a “conflict of law in time”.⁶³⁸ Thenceforth, the members of the SG included a similar provision to Article 7 (1) (a) in the PDC during the third session of the group.⁶³⁹ This provision made it possible to neutralize the effects of a violation of domestic export legislation, when the said export is no longer considered illegal.⁶⁴⁰ In fact, there was little support for a measure that would lead to expropriation when the owner had returned the object in order for it to be promptly legally exported.⁶⁴¹ Therefore, for the request for return to be successful, it is thus particularly important that the violated legislation has not been repealed at the time the request for the return is introduced,⁶⁴² or that the violation still persists.

Article 7 (1) (b) was elaborated on a different rationale than paragraph a: to ensure the free circulation of art and to protect contemporary artists in disposing of their art⁶⁴³ – both instances contributing to the promotion of contemporary art and of creativity altogether⁶⁴⁴ –, it was advocated that contemporary art should not be subjected to export restrictions.⁶⁴⁵ This exemption ensures non-interference with an artist’s professional career⁶⁴⁶ and the respect for author’s rights, notably through the application of the *droit de suite*.⁶⁴⁷ The rationale for the exclusion of works produced by living artists is that the regulation of the art trade should not affect the creator’s possibilities to diffuse his work.⁶⁴⁸ Such a limitation would have the unavoidable consequence of discouraging artists from outwardly expressing their creativity, and consequently leave them with a sense of repression.⁶⁴⁹ This significant derogation to Chapter III recognizes the importance of having art produced by living artists cross borders, in order to reach the broadest audience – and to achieve the widest recognition – possible. This is even more so considering that the acknowledgment of an artist’s work might often be dependant upon foreign appreciation and recognition.⁶⁵⁰ Broad prospects also enable the artist to have his work analysed and scrutinized by art critics, and, therefore, helping him to achieve his full potential. What is more, the CGE recognized during its first session that if states were to impose restrictions upon the sale of the works of living artists in other states, it was unlikely that other states would be inclined to pronounce on the return of the object.⁶⁵¹ If export restrictions were authorized during the lifetime of the artist, or within the fifty years following his death, this would only encourage the flouting of this legislation. Consequently, a foreign state would not acknowledge the export prohibition because this would conflict with internationally recognized legitimate interests of the artist or of his family members.⁶⁵²

⁶³⁶ Forrest, (2010), p. 215.

⁶³⁷ After the second session of the CGE, the delegation of Israel proposed including a clarification in this regard concerning the time of the request. It advanced that this time should be the day on which the request for return is lodged with the court or other competent authority of the requested state. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of governmental delegations on the Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Israel), Study LXX – Doc. 35, Rome, February 1993, p. 5.

⁶³⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 25.

⁶³⁹ UNIDROIT, (1990), Study LXX – Doc. 18, p. 25; during the same session, the provision was renumbered to become Article 7 of the Preliminary draft Convention. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 26.

⁶⁴⁰ UNIDROIT, (1990), Study LXX – Doc. 18, p. 25.

⁶⁴¹ Prot, *Commentary on the Unidroit Convention*, (1997), p. 69.

⁶⁴² UNIDROIT, (1990), Study LXX – Doc. 18, p. 26.

⁶⁴³ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 48.

⁶⁴⁴ Bergé, (2000), p. 244; Prot, *Commentary on the Unidroit Convention*, (1997), p. 69.

⁶⁴⁵ There was already strong support for this exception amongst the SG: “There was, on the other hand, strong support for special treatment being accorded to the work of living artists, possibly extended for a certain period after their death which, following the precedent of some of the copyright conventions, might be fixed at fifty years or a shorter period if that were felt to be more appropriate. In the opinion of some members of the group the creations of living artists should be excluded totally from the application of any future uniform rules although others, while agreeing to such an exclusion in respect of export prohibitions, felt that it would be illogical and, indeed, unwarrantable to introduce a distinction between living and dead artists in connection with stolen or otherwise illegally misappropriated objects”. See UNIDROIT, (1989), Study LXX – Doc. 10, p. 17. Nevertheless, the members of the SG seemed unable to decide upon the length of time applicable to this exception. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 17. These consideration found their way into article 4 (2) of the *Preliminary draft Convention on the restitution and return of cultural objects* in February 1989. See UNIDROIT, (1989), Study LXX – Doc. 11, p. 5.

⁶⁴⁶ Prot, *Commentary on the Unidroit Convention*, (1997), p. 69.

⁶⁴⁷ Bergé, (2000), p. 244.

⁶⁴⁸ Bator, (1982), p. 308.

⁶⁴⁹ Bator, (1982), p. 308.

⁶⁵⁰ Prot, *Commentary on the Unidroit Convention*, (1997), p. 69.

⁶⁵¹ UNIDROIT, (1991), Study LXX – Doc. 23, p. 36.

⁶⁵² UNIDROIT, (1990), Study LXX – Doc. 18, p. 24.

The time limitation constraining the scope of Article 7 (1) (b) stretches to cover either the lifetime of the artist, or fifty years following his death. With regard to the last limitation, other time constraints were proposed during the elaboration of the convention, ranging from five years to one hundred years.⁶⁵³ Despite an *a priori* agreement on this point within the SG,⁶⁵⁴ and further support in the CGE,⁶⁵⁵ the DC finally settled on fifty years.⁶⁵⁶ This time span matches Article 7 of the 1886 *Berne Convention for the Protection of Literary and Artistic Works* – in its latest version of 28 September 1979⁶⁵⁷ – as well as as other national copyright legislation for artistic creations.⁶⁵⁸ As pointed out by a member of the CGE during its first session, the rationale for adopting a period of fifty years – which parallels the periods laid down in copyright conventions – is that, because the period of fifty years laid down in the Berne convention was to ensure that the heirs of the artist could profit from the sales of the deceased artist's work after his death, a similar advantage should be conferred on cultural objects for the purpose of Chapter III.⁶⁵⁹ This length of time makes it possible for the artist's successors to make the work of their parent known on the international plane.⁶⁶⁰ Article 7 (1) (b) ensures, therefore, that free market principles are applied to these objects, instead of protecting the cultural interests of the state of origin.⁶⁶¹ In cases in which the said state fears being stripped of the works of its artists because of the long period of fifty years – within which the export cannot be restricted –, the members of the SG recommended that this state would acquire the works of the artist within this period.⁶⁶² This could be achieved by means of purchase or through donation, coupled to fiscal exonerations or deductions.⁶⁶³

Finally, it is important to note that the exception contained in Article 7 (1) (b) is only applicable in case of export (i.e. Chapter III), but is not relevant for contemporary cultural objects subject to theft (i.e. Chapter II).⁶⁶⁴ During the third session of the SG, it had been proposed to extrapolate the present exception to the regime of Chapter II.⁶⁶⁵ Other participants rejected this proposition, substantiating their deprecation by referring to the clear lack of compatibility between the objective pursued by export restrictions and the interests of the artist or of his family members:⁶⁶⁶ whilst in case of theft, the future convention would serve the needs of the dispossessed artist / family members, the same could not be concluded with regard to export restrictions, which would only frustrate the artist in projecting his work onto the international market.⁶⁶⁷

Exception to the exception

An apparent problem with the formulation of Article 7 (1) (b) pertains to anonymous works, for which the determination of the lifetime or of the moment of the death proves impossible to discover.⁶⁶⁸ While no solution to this problem could be foreseen for religious cultural objects, Article 7 (2) aims at solving this last issue for tribal and indigenous groupings.⁶⁶⁹

⁶⁵³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 69; during the third session of the SG, one of its members qualified the period of fifty years as absurd. In her opinion, a period of twenty years would be more appropriate. The other members of the group believed that a period shorter than fifty years would seriously violate the rights of artists, impairing the international movement of cultural objects and making the acceptance of the convention utterly difficult to achieve. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 23; this period of fifty years was also criticized as being too long amongst the CGE (see for example UNIDROIT, (1991), Study LXX – Doc. 23, p. 37). Instead, it was believed that making a parallel with copyright protection was unfit for the present situation because the question was not one of protection of the right of the artists, but of authorization of the removal of the object from the territory where the artist was active. Furthermore, many cultural objects addressed by the future instrument – such as ethnographic objects – were in general not protected by copyright legislation. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 37. Therefore, a period of twenty years was preconized, in line with many domestic laws relating to artistic heritage (*idem*).

⁶⁵⁴ The SG concluded during its third session that the scenario prescribed by copyright legislation was to be followed, and opted for a period of the lifetime of the artist or fifty years after his death. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 24.

⁶⁵⁵ See for example UNIDROIT, (1991), Study LXX – Doc. 23, p. 37 where it was advanced that the use of a shorter period would lead to a clash between existing copyright conventions and the future convention.

⁶⁵⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 69.

⁶⁵⁷ Crevdson, (1992), p. 48; UNIDROIT, (1990), Study LXX – Doc. 18, p. 23.

⁶⁵⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 23.

⁶⁵⁹ UNIDROIT, (1991), Study LXX – Doc. 23, p. 37; in the Loewe Preliminary draft Convention, Article 4 (2) (b) made it possible to exclude cultural objects illegally exported from the obligation of return laid down in Article 4 (1) when the object was exported by its creator or by the donee or heir to the creator. UNIDROIT, (1988), Study LXX – Doc. 3, p. 3.

⁶⁶⁰ UNIDROIT, (1990), Study LXX – Doc. 18, p. 23.

⁶⁶¹ Forrest, (2010), p. 214.

⁶⁶² UNIDROIT, (1990), Study LXX – Doc. 18, p. 23.

⁶⁶³ UNIDROIT, (1990), Study LXX – Doc. 18, p. 23.

⁶⁶⁴ Jolles, (1997), p. 60.

⁶⁶⁵ UNIDROIT, (1990), Study LXX – Doc. 18, p. 24.

⁶⁶⁶ UNIDROIT, (1990), Study LXX – Doc. 18, p. 24.

⁶⁶⁷ UNIDROIT, (1990), Study LXX – Doc. 18, p. 24.

⁶⁶⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 69.

⁶⁶⁹ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 69-70.

Article 7 UNIDROIT Convention (1995) – (2) Notwithstanding the provisions of sub-paragraph (b) of the preceding paragraph, **the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.**

The negotiations that led to this special regime for ethnographic objects were not easy, as many delegates were not familiar with the issues regarding tribal and indigenous communities.⁶⁷⁰ Because it involves dealing with the interests of living cultures, the ‘ethnographic materials question’ is more complex than other problems relating to cultural property.⁶⁷¹ Article 7 (2) in its final form results in the application of the regime of Chapter III for ethnographic objects, provided these have been created by a member of a tribal or indigenous group, and are used for traditional or ritual purposes.⁶⁷² The restriction posited by article 7 (1) (b) is, consequently, not relevant for this category of objects. In other words, as coined by Prott, Article 7 (2) constitutes an “exception to the exception”⁶⁷³ as it revokes the exception laid down in Article 7 (1) (b). Following Article 7 (2), the object must be returned to the tribal or indigenous community from which it originated, and not to a museum or any other person.⁶⁷⁴ The obligation to return the object to the community that produced it was proposed by the Canada (cf. CONF. 8/C.1/W.P. 35) and supported by the Australian, American and Bolivian delegations during the DC.⁶⁷⁵ The reason for exonerating this class of objects from Article 7 (1) (b) stems from the societal ramifications that the removal of such item – through theft or illegal export – may have upon the groupings or the communities concerned.⁶⁷⁶

(2) Territorial scope

The territorial scope of the convention is regulated by Article 29 of the *Vienna Convention on the Law of Treaties* (1969), hereinafter VCLT.

Article 29 Vienna Convention on the Law of Treaties (1969) – **Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.**

Following Article 29 VCLT *in fine*, the territorial scope of the convention is limited to the territorial boundaries of the state concerned.⁶⁷⁷ Following the same article, it is, nonetheless possible to restrict the application of a convention when this is made possible by the provisions thereof. In line with this provision, Article 14 of the 1995 convention entitles contracting states to limit the application of the convention to one or more of its territorial units.

Article 14 UNIDROIT Convention (1995) – (1) If a **Contracting State has two or more territorial units**, whether or not possessing different systems of law applicable in relation to the matters dealt with in this Convention, it may, **at the time of signature or of the deposit of its instrument of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them**, and may substitute for its declaration another declaration at any time.

Article 14 – provision that is more commonly referred to as territorial clause⁶⁷⁸ – is specifically designed for states composed of several territorial units, such as federations.⁶⁷⁹ This article is not particularly innovative, as it

⁶⁷⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 70. UNESCO, Australia and Canada were particularly interested in this matter.

The interest of these two countries in this issue is not surprising given the high degree of recognition that these groupings have acquired in these two countries; for more information about Canada on the subject, please consult Tünsmeier, V., *Repatriation of Indigenous Heritage* (PhD), Maastricht University, forthcoming.

⁶⁷¹ Seligman, T. K., “What Value in Surplus Cultural Property?”, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 133.

⁶⁷² Prott, *Commentary on the Unidroit Convention*, (1997), p. 70.

⁶⁷³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 70.

⁶⁷⁴ Presidenza del Consiglio dei Ministri, (1996), p. 213.

⁶⁷⁵ As discussed in Presidenza del Consiglio dei Ministri, (1996), pp. 213 and 215.

⁶⁷⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 70; Schneider, (1996), p. 149.

⁶⁷⁷ See also Karagiannis, S., “The Territorial Application of Treaties”, in: D. Hollis (ed), *The Oxford Guide of Treaties*, (Oxford University Press: Oxford, 2012), pp. 305-306: “Indeed, a State party that refuses to apply treaty provisions to the whole of its territory would usually not be deemed to act ‘in good faith’. The logic of Article 29 thus parallels Article 31’s rule of interpretation, which relies heavily on both the good faith and ‘ordinary meaning’ principles.” and p. 317: “First of all, it is important to differentiate territorial application from the material application of treaty provisions that happen to relate to territory. Waldock, in particular, emphasized this distinction: [...] The ‘territorial application’ of a treaty signifies the territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and the performance of the obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, [...], it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope”.

⁶⁷⁸ Karagiannis, (2012), p. 315.

⁶⁷⁹ UNIDROIT Secretariat, (2001), p. 556.

has its roots in Articles IX and X of the draft LUAB⁶⁸⁰ and it has, additionally, been used in prior international instruments such as the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (CISG).⁶⁸¹ It was first proposed by the Dutch delegation taking part in the DC because of its overseas territorial units.⁶⁸² Furthermore, during the conference, it was advanced that the qualification ‘territorial’ should be interpreted broadly and might not only be confined to geographical contours.⁶⁸³ Therefore, Article 14 makes it possible for the state adhering to the convention to determine whether the instrument will be applicable in all of its territorial units, or only in some of them.⁶⁸⁴ Nevertheless, the state relying upon this first paragraph must notify the depositary of the convention by means of a declaration to this effect, as is specified in the second paragraph of Article 14:⁶⁸⁵

Article 14 UNIDROIT Convention (1995) – (2) These declarations are to be **notified to the depositary and are to state expressly the territorial units to which the Convention extends.**

The legal implications of the issuance of such a declaration are further regulated by the third paragraph of the article. This section explains how the language of the convention must be understood in relation to the territorial units to which the declaration is addressed.⁶⁸⁶

Article 14 UNIDROIT Convention (1995) – (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:

- (a) the territory of a Contracting State in Article 1 shall be construed as referring to the territory of a territorial unit of that State;
- (b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;
- (c) the Contracting State where the cultural object is located in Article 8 (1) shall be construed as referring to the territorial unit of that State where the object is located;
- (d) the law of the Contracting State where the object is located in Article 8 (3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and
- (e) a Contracting State in Article 9 shall be construed as referring to a territorial unit of that State.

Without the required declaration, paragraph 4 specifies that the convention is applicable to all of the territorial units of the adhering state.⁶⁸⁷

Article 14 UNIDROIT Convention (1995) – (4) If a Contracting State makes **no declaration under paragraph 1** of this article, **this Convention is to extend to all territorial units of that State.**

(3) Temporal scope

As noted by the representatives taking part in the work of the CGE, as a basic tenet of public international law, Article 28 VCLT establishes that conventions do not have an automatic retroactive effect,⁶⁸⁸ except if a different intention can be established or observed from the wording of the treaty.⁶⁸⁹ In accordance with this general rule, Article 10 clarifies that the 1995 convention does not work *ex post facto* and, therefore, limits itself to cases that have arisen after 1 July 1998,⁶⁹⁰ which is the date of its objective entry into force.⁶⁹¹ The question of retroactivity

⁶⁸⁰ See UNIDROIT, *The International Protection of Cultural Property – Unidroit draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables* (LUAB, 1974), Study LXX – Doc. 9, Rome, January 1989, pp. 3 and 4.

⁶⁸¹ Karagiannis, (2012), p. 315 referring to Article 93 (1) thereof.

⁶⁸² See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.2/W.P. 1 Corr.), p. 318.

⁶⁸³ UNIDROIT Secretariat, (2001), p. 556.

⁶⁸⁴ UNIDROIT Secretariat, (2001), p. 556.

⁶⁸⁵ UNIDROIT Secretariat, (2001), p. 556.

⁶⁸⁶ UNIDROIT Secretariat, (2001), p. 556.

⁶⁸⁷ UNIDROIT Secretariat, (2001), p. 556.

⁶⁸⁸ UNIDROIT, (1992), Study LXX – Doc. 30, p. 48; Prott, (1998), p. 213; Dopagne, F., ‘Article 28 Non-retroactivity of treaties’, in: O. Corten, P. Klein (ed), *The Vienna Conventions on the Law of Treaties – A Commentary – Volume 1* (Oxford University Press: Oxford, 2011), p. 719.

⁶⁸⁹ See Article 28 of the *Vienna Convention on the Law of Treaties* (1969). Renold notes that giving retroactive effect to a convention is contrary to Article 28 of the Vienna convention (see Renold, (1997), p. 24). This affirmation is, nonetheless, not correct since Article 28 begins with the words ‘Unless a different intention appears from the treaty or is otherwise established, [...]’, wording which is apparently ignored by Renold in his analysis. For the possibility to embed the treaty with retroactive effect see, for example, Dopagne, (2011), p. 725.

⁶⁹⁰ The CGE conceded that this article did nothing else than ‘endorse the well recognised principle laid down in Article 28 of the Vienna Convention on the Law of Treaties that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party”, and to that extent Article 10 might be regarded as unnecessary’. Article 10 was considered as

of the convention was not particularly idle: representatives of states that had suffered from plunder and spoliation of their cultural heritage – and / or of their archaeological materials – hoped that the convention would have a retroactive application.⁶⁹² While source states had a clear predilection for retroactivity,⁶⁹³ it was vital to other states that the drafted instrument should only apply to future situations.⁶⁹⁴ Giving retrospective working to the convention would have a considerable negative impact upon the ratification of the convention by states that would have had to give back previously stolen or illegally exported cultural objects.⁶⁹⁵ Nonetheless, states that had lost part of their cultural heritage in circumstances where they could not resist the asportation would not be able to accept any formulation that would seem to legitimize the takings, including provisions on non-retroactivity of the convention.⁶⁹⁶ The issue was, therefore, qualified as one of “high political sensitivity”.⁶⁹⁷ The SG advanced that it was more important to reach an agreement regarding future situations – whilst at the same time giving recognition to anteceding missappropriations – than to have no agreement at all.⁶⁹⁸ Additionally, in order to secure consensus about the future regulatory regime and to ensure certainty in ascertaining a new conduct for market stakeholders, a non-retroactive instrument was perceived as desirable.⁶⁹⁹ Furthermore, the ICPRCP had specifically been established to deal with problems preceding the adoption of the UNIDROIT convention.⁷⁰⁰

Whilst the discussion as to the temporal application of the convention had not been settled during the drafting process,⁷⁰¹ it was left to the appreciation of the DC.⁷⁰² During the conference, the agreement reached was to specify that the convention would be non-retroactive, and this agreement was incorporated in both the Preamble⁷⁰³ and in the substantive provisions of the convention (more specifically in the conditionality of Articles 10 (1) and 10 (2), as discussed below).⁷⁰⁴ Recital 6 of the Preamble clarifies that the convention is designed for future situations.

Recital 6 Preamble to the UNIDROIT Convention (1995) – **AFFIRMING** that the **adoption of the provisions of this Convention for the future** in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention.

This stance of non-retroactivity made it possible for states that had a constitutional obligation to abide by the principle of non-retroactivity to become a party to the convention.⁷⁰⁵ In fact, the drafters – with the exception of a few experts representing countries with a rich cultural and archaeological patrimony⁷⁰⁶ – never intended to create a convention that could have a retrospective effect.⁷⁰⁷ Furthermore, from the ‘Explanatory Report with

particularly important from a political point of view, a reason why it was deemed necessary to maintain this article in the convention. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, p. 43. See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 57.

⁶⁹¹ Jayme, E., ‘Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?’, 11 *Uniform Law Review*, (2006), p. 394; Prott, (1998), p. 213; Carducci, (2006), p. 96; Klein, (1999), p. 270; Jolles, (1997), p. 60; Fraoua, (1997), p. 38; Lenzner, (1994-1995), p. 496; the objective entry into force is the entry into force of the convention after a certain amount of ratifications has been reached.

⁶⁹² Droz, (1997), p. 271; see also UNIDROIT, (1989), Study LXX – Doc. 14, p. 27 where the members of the SG recognized that the non-retroactivity of the future instrument was a serious concern to developing countries.

⁶⁹³ Fox, (1993), p. 265; see also the proposal made for a partial retroactivity in UNIDROIT, (1994), Study LXX – Doc. 48, p. 58.

⁶⁹⁴ See Presidenza del Consiglio dei Ministri, (1996), p. 107; UNIDROIT Secretariat, (2001), p. 490.

⁶⁹⁵ UNIDROIT, (1994), Study LXX – Doc. 48, p. 58, where it is also noted that a retroactive application of the convention would also have created constitutional problems, as it would have interfered with property rights guarantees or with the general principle of law of non-retroactivity of the law, or it would have conflicted with fundamental provisions of some states’ private law. See also Presidenza del Consiglio dei Ministri, (1996), p. 108; Prott, *Commentary on the Unidroit Convention*, (1997), p. 78; UNIDROIT Secretariat, (2001), p. 548; Fox, (1993), p. 266; Valgaeren, (2005-2006), p. 618; UNIDROIT, (1989), Study LXX – Doc. 14, p. 27.

⁶⁹⁶ Presidenza del Consiglio dei Ministri, (1996), p. 108.

⁶⁹⁷ Presidenza del Consiglio dei Ministri, (1996), p. 108.

⁶⁹⁸ UNIDROIT, (1989), Study LXX – Doc. 14, p. 27.

⁶⁹⁹ Droz, (1997), p. 271.

⁷⁰⁰ UNIDROIT, (1989), Study LXX – Doc. 14, p. 27.

⁷⁰¹ The first concerns about the non-retroactivity of the future instrument were raised during the second session of the SG. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 27; see Presidenza del Consiglio dei Ministri, (1996), p. 108.

⁷⁰² Droz, (1997), p. 271.

⁷⁰³ The non-retroactivity of the convention was deemed so important that the preamble was to reaffirm this non-retroactive effect. UNIDROIT Secretariat, (2001), p. 490.

⁷⁰⁴ UNIDROIT Secretariat, (2001), p. 548; Calvo Caravaca, (2004), p. 91; some participants to the CGE believed that there was no need for a provision to specify that the convention was not retroactive, as the Vienna convention was sufficiently specific in this regard. Other participants disagreed with this position and supported that the lack of statement rejecting retroactivity in the regime of the convention would be seen as problematic for their government. See Presidenza del Consiglio dei Ministri, (1996), p. 42.

⁷⁰⁵ UNIDROIT Secretariat, (2001), p. 490.

⁷⁰⁶ Droz, (1997), p. 271; Renold, (1997), p. 24; Hughes and Wright, (1994), pp. 223, 239; see for example UNIDROIT, (1990), Study LXX – Doc. 19, p. 37.

⁷⁰⁷ Prott, (1998), p. 213; there has been strong opposition to the retroactive effect of the convention, see Hughes and Wright, (1994), p. 239; allowing a retroactive application to the convention would have had the negative effect of rendering its ratification or signature by

model provisions and explanatory guidelines⁷ provided with the *Model Provisions on State Ownership of Undiscovered Cultural Objects*, it appears that both the secretariats of UNESCO and UNIDROIT have recently confirmed that the convention is not intended to have a retroactive effect.⁷⁰⁸ The exact implications of the principle of non-retroactivity to Chapters II and III are further nuanced by Article 10 of the convention.

Chapter II – Theft

Originally, UNIDROIT intended to create a regime of international uniform law.⁷⁰⁹ Nevertheless, the convention – in its final version – does not have an *erga omnes* application for stolen cultural objects.⁷¹⁰ Instead, the created regime only relatively harmonizes the rules applicable in the field.⁷¹¹ In fact, a lot of discussion had been devoted to the question of whether the treaty was to cover all stolen cultural objects, irrespective of when the theft took place.⁷¹² This discussion was generated due to an apparent contradiction in Article 10 (1) of the convention, which in its first subparagraph requires for the theft to have taken place in a contracting state post adherence, whilst imposing no such requirement in the second subparagraph:

Article 10 UNIDROIT Convention (1995) – (1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

The clear contradiction between subparagraphs (a) and (b) has generated much uncertainty about the provision.⁷¹³ In fact, in the early stages of elaboration of the convention, the drafters only intended to give effect to the rules of Chapter II in contracting states: in the draft version of the convention produced by the CGE, the convention was set to regulate the restitution of cultural objects “removed from the territory of a contracting state”.⁷¹⁴ This terminology was challenged by certain states present during the DC, as it would have implied selectivity based upon participation in the regime of the convention in cases relating to stolen cultural objects.⁷¹⁵ Nonetheless, theft was seen as a crime reprimanded to such a broad extent that it should not matter where an object had been stolen for Chapter II to be applicable.⁷¹⁶ But for this explanation, Article 10 should not be considered in the light of the territoriality of the theft. Instead, Prott – who played a prominent role as Chief of UNESCO’s International Standards Section (Division of Physical Heritage) in representing UNESCO

states that have acquired certain objects in a dubious manner impossible. These states would have become reluctant to ratify the instrument if ratification meant that they had to return or restitute objects that they have acquired prior to the enactment of the UNIDROIT convention. See Bergé, (2000), p. 233; Prott, *Commentary on the Unidroit Convention*, (1997), p. 78; there were proposals to include partial retroactivity in the document but none of these proposals were adopted in the final version. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 79. See for example the proposal by the Finnish delegation to constrain the non-retroactivity clause to Chapter II, and not to Chapter III. UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Working papers submitted during the third session of the committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 38 (Misc. 1), Rome, April 1993, p. 5.

⁷⁰⁸ See Expert Committee on State Ownership of Cultural Heritage, ‘Model Provisions on State Ownership of Undiscovered Cultural Objects – Explanatory Report with model provisions and explanatory guidelines, endorsed by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in its Seventeenth session’, Paris, UNESCO Headquarters, on 30 June – 1 July 2011, CLT-2011/CONF.208/COM.17/5, p. 5.

⁷⁰⁹ Fraoua, (1997), p. 39; in the explanatory report of the Preliminary draft Convention on stolen or illegally exported cultural objects approved by the Unidroit study group on the international protection of cultural property, it was advanced that the SG was of the opinion that the convention should apply to all instances of theft, irrespective of where the theft took place and irrespective of ratification of the convention by the state in which the theft took place. This was notably accepted because theft was universally condemned (see UNIDROIT, (1990), Study LXX – Doc. 19, p. 16).

⁷¹⁰ Fraoua, (1997), p. 39 and footnote 24; it is important to note that it has been submitted that the convention has an *erga omnes* territorial application to support its impact and, hence, its ratification. See Calvo Caravaca and Caamiña Domínguez, (2009), p. 165. As demonstrated below, this affirmation is disputable as Chapter II can only have a quasi-*erga omnes* effect.

⁷¹¹ Fraoua, (1997), p. 39.

⁷¹² See, for example, Sidorsky, (1996), p. 25.

⁷¹³ In her 1997 contribution *Commentary on the UNIDROIT Convention*, Prott seemed particularly troubled about the role played by Article 10 (1) (b), where she appears puzzled about the purpose behind this rule. See Prott, *Commentary on the Unidroit Convention*, (1997), pp. 80-81 for some hypotheses as to the function of this subparagraph; for his part, Forrest has qualified Article 10 (1) (b) as an ‘obscure provision’. See Forrest, (2010), p. 217.

⁷¹⁴ UNIDROIT Secretariat, (2001), p. 492; interestingly, the terminology of the draft convention had already made its way into Directive 93/7/EEC with regard to illegal exports, which was the reason why the Directive adopted the qualification of ‘unlawful removal’ instead of ‘illegal export’ (UNIDROIT Secretariat, (2001), p. 492).

⁷¹⁵ UNIDROIT Secretariat, (2001), p. 492.

⁷¹⁶ See UNIDROIT, (1990), Study LXX – Doc. 18, p. 8; see Renold, (1997), p. 23; UNIDROIT Secretariat, (2001), p. 492.

throughout the establishment of the convention –,⁷¹⁷ submitted that Article 10 (1) needs to be read narrowly and that it should only be considered as to the ‘temporal range’ of the convention.⁷¹⁸ In her opinion, the reason not to consider the wording of Article 10 (1) for the territorial scope of the convention is that the article is unclear and that there are no indications in the *travaux préparatoires* to understand what exactly was meant in this regard.⁷¹⁹ This lack of information results from the fact that Article 10 (1) was added by market states amidst the informal working group established by the Mexican delegation, which took place during the last days of the DC.⁷²⁰

Nevertheless, in an attempt at elucidating this unclearness, the following hypotheses can be put forward: firstly, it should be remarked that market states exercised quite some influence in trying to restrict the scope of the convention throughout its creation, and that it has been the most pronounced with regard to Article 10 (1).⁷²¹⁻⁷²² This influence can notably be observed by the fact that the chapeau of Article 10 (1), in many respects, resembles a provision on the non-retroactivity of the convention that had been introduced by the SG,⁷²³ and that was kept untouched by the CGE until its last meeting that took place right before the DC.⁷²⁴ This provision – which read: “This Convention shall apply only when a cultural object has been stolen, or removed from the territory of a Contracting State contrary to its export legislation, after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim is brought for the restitution or return of such object”⁷²⁵ – was in fact reintroduced almost verbatim in the chapeau of Article 10 (1) (a) through the informal working group in order to ensure the non-retroactivity of Chapter II. Because market states had been particularly fond of the idea of non-retroactivity, and because the provision to this effect had been taken out before the DC, it is most likely that the participating market states pressurized the WG to reintroduce the provision in Article 10 (1) (a). Secondly, in a spirit of compromise, the *quid pro quo* that may have been negotiated by source states could have been to provide Chapter II with an *erga omnes* effect, which market states had hitherto opposed. As such, source states may have broadened the scope of the convention so as to include cultural objects stolen in non-contracting states. In other words, whilst market states obtained their non-retroactivity clause, source states settled for a broadening of the instances of theft covered by Chapter II that is not limited to the territorial confinements of contracting states.

Provided that these hypotheses reflect the choices made during the WG, the explanation provided by Droz is particularly instructive in understanding how Article 10 (1) ought to be applied. Following Droz, two cumulative elements must mandatorily be met for the situation to be regulated by Chapter II: firstly, the regime of Chapter II must be applied when the theft takes place after the convention has entered into force in the state where the claim of restitution is introduced (cf. the chapeau of Article 10 (1)).⁷²⁶ The entry into force refers to the subjective entry into force of the convention – meaning the entry into force in the state where the claim is introduced –, and not to the objective entry into force.⁷²⁷ Secondly, it is particularly important to be able to

⁷¹⁷ Prot, *Commentary on the Unidroit Convention*, (1997), p. 12.

⁷¹⁸ Prot, *Commentary on the Unidroit Convention*, (1997), pp. 79 and 81.

⁷¹⁹ Prot, *Commentary on the Unidroit Convention*, (1997), p. 81; in the explanatory report of the draft convention entitled ‘Projet de Convention d’Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés’, it is possible to distil that Article 10 (1) appears to be the result of compromises between the participants of the CGE. On the one hand, the member of the SG present during its third session were of the opinion that theft was a crime reprehensible in all the states of the world, thus justifying subsuming all thefts under the regime of the future instrument, irrespective of the question of adhesion (see UNIDROIT, (1990), Study LXX – Doc. 18, p. 8). This opinion was shared by a majority of the CGE’s participants, who believed that the convention should be applied to all instances of theft because of the overall moral and legal repression of thefts in domestic laws (see Renold, (1997), p. 23). On the other hand, the minority of the CGE’s participants pushed for the exclusive application of the convention to thefts that have taken place in state parties to the convention (see Presidenza del Consiglio dei Ministri, (1996), p. 23). Subsequently, the issue was picked up by the informal working group established by the Mexican delegation at the Diplomatic Conference leading to the final draft text submitted to the Plenum (see section A. 2. ‘Preparatory work’ above). It appears that the CGE’s minority view was added in Article 10 (1) (a), and that the majority view was included in subparagraph b of the same article. Nevertheless, since there exist no report of the negotiation that took place during the informal working group, it is difficult to perceive exactly what its members meant with this construction.

⁷²⁰ Prot, *Commentary on the Unidroit Convention*, (1997), p. 80.

⁷²¹ As noted by Renold, this was notably because of the insistence of the United States’ delegation to limit the scope of the convention. See Renold, (1997), p. 24; the United States delegation was a proponent of applying the convention only to situations that occurred after the convention entered into force in the territories of the two state parties concerned with the theft or the illegal export. UNIDROIT, (1992), Study LXX – Doc. 30, p. 49. See also the proposal to this effect submitted by the US delegation for the fourth session of the CGE, in UNIDROIT, (1993), Study LXX – Doc. 47 (Misc. 32), p. 37.

⁷²² For example, the question of retroactivity of Chapter II of the convention was utterly important having regard to the international character of claims in restitution: the situation in which the theft would precede the adoption of the convention in state parties, but where the international character of the theft would materialize after the convention entered into force in the two respective states seemed troublesome. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 48.

⁷²³ See notably the discussion in UNIDROIT, (1990), Study LXX – Doc. 18, pp. 39-40.

⁷²⁴ See UNIDROIT, (1994), Study LXX – Doc. 48, p. 60.

⁷²⁵ See Presidenza del Consiglio dei Ministri, (1996), p. 107 for the provision.

⁷²⁶ Droz, (1997), p. 271; Prot, *Commentary on the Unidroit Convention*, (1997), p. 81; UNIDROIT Secretariat, (2001), p. 550; this condition had already been added during the third session of the SG. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 39.

⁷²⁷ UNIDROIT, (1990), Study LXX – Doc. 18, p. 39 where the distinction between objective and subjective entry into force is discussed.

demonstrate a connection between the theft and the regime of the convention. Two *points de rattachement* are possible: 1) it is either sufficient that the theft took place in a contracting state, as long as this theft materialized after the subjective entry into force explained above (chapeau of Article 10 (1) read in conjunction with paragraph (a));⁷²⁸ or, 2) the object is stolen in a non-state party but finds its way into the territory of a contracting state in which the convention has entered into force. In this case, the mere fact that it has its whereabouts in the territory of this state party is sufficient for the convention to be applied (chapeau of Article 10 (1) read in conjunction with paragraph (b)).⁷²⁹

Nevertheless, the exact implications of subparagraph (b) are disputed. Prott attempts at further nuancing the second connecting factor, basing her reasoning upon the following premise: in her opinion, it is most unlikely that a citizen from a state that has no link with the convention is able to benefit from its regime when the object is found in a contracting state.⁷³⁰ Therefore, to Prott, the scenario posited by Article 10 (1) (b) would only make sense for a theft that took place during loans in non-contracting states.⁷³¹ This would notably be the case when the owner of the cultural object domiciled in a contracting state lends the item to a party located in a non-contracting state and the object is stolen during the loan.⁷³² Article 10 (1) (b) would then seem to allow the owner to rely upon the provisions of the convention when the object would be located again within the convention's sphere of influence – thus in a contracting state –, despite the fact that it was stolen in a state that had no ties with the convention at all.⁷³³ Nonetheless, at the same time, Prott does not discard the possibility that Chapter II might have a wider application.⁷³⁴ Contrary to Prott, Droz seems to accept a broader – *erga omnes* – application of Chapter II in specifying that any stolen cultural object which makes its way to the territory of a contracting state falls within the ambit of the convention, provided the time requirement is complied with. On the one hand, Prott's restrictive argument makes sense when approached from the perspective of contracting states, although it does not square with the consensus that theft should be reprimanded, irrespective of where it was committed. On the other hand, Droz's broad interpretation sits well with the intention of the drafters, but would deprive the requirement of participation to the regime of the convention laid down in Article 10 (1) (a) of any relevancy. It would furthermore dissuade states from becoming parties to the convention⁷³⁵ if they were able to benefit from its provisions without having to accept its obverse obligations.

All things considered, interpreting Article 10 (1) (b) seems thus to have become a catch-22 situation. Hence, it remains unsettled whether it would be impossible for a citizen from a state that is not party to the convention to benefit from its provisions when the stolen object falls within the convention's sphere of influence. In between Prott's and Droz's extremes, it is possible to advance an intermediate interpretation: recalling the above, it should not be forgotten that Article 10 resulted from the informal working group in which the Mexican delegation had tried to accommodate the interests of market and source states in order to avoid a deadlock. Because Article 10 (1) is the result of a compromise reached within the said working group, both market and source states must have been able to reconcile their views on the provision. Supposing that market states pushed for the limitation of Chapter II to future thefts by recycling the SG provision on non-retroactivity – as explained above –, the *quid pro quo* for source states could have entailed a wider application of the convention. This could mean that a cultural object stolen in a non-contracting state after the entry into force of the convention in the contracting state where the claim in restitution is brought (cf. chapeau Article 10 (1)) could be caught by the provisions of the convention once it enters into the territory of another contracting state (cf. Article 10 (1) (b)). In practice, this could happen when the stolen object is acquired by a possessor domiciled in a contracting state and is later on lent to a museum located in another contracting state. The movement of the stolen object between contracting states would suffice to reaffirm those states' commitments to tackle cultural property theft through the means put forward by the convention, and thus for the claimant from a non-contracting state to be able to rely successfully on Chapter II. This construction of Article 10 (1) would imply the existence of quasi-*erga omnes* rights in the application of Chapter II, enabling cultural objects stolen in non-contracting states to fall within the regime of the convention.⁷³⁶ This interpretation is sensible as it will be

⁷²⁸ Droz, (1997), p. 271; see also UNIDROIT Secretariat, (2001), p. 550 specifically requiring that both states be party to the convention and for the regime of the convention to have entered into force in these two states for the claim in restitution to be governed by Chapter II.

⁷²⁹ Droz, (1997), pp. 271-272; See also UNIDROIT Secretariat, (2001), p. 550.

⁷³⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 81.

⁷³¹ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 80-81.

⁷³² Prott, *Commentary on the Unidroit Convention*, (1997), p. 81.

⁷³³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 81.

⁷³⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 81.

⁷³⁵ See Presidenza del Consiglio dei Ministri, (1996), p. 156.

⁷³⁶ It is important to note that Prott in her *Commentary to the Unidroit Convention* advanced that it is possible that the convention could be applied to all stolen cultural objects, irrespective of whether the convention had entered into force in the state where the theft took place. In substantiating her argument, Prott submits: "Such a rule would not have been adopted without precedent: The Protocol to the Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954 (the "Hague Convention"), provides that Contracting Parties will take into custody cultural property imported into their territory either directly or indirectly from any occupied

impossible for a citizen of a non-contracting state to initiate proceedings on the basis of Chapter II directly against a possessor residing in a contracting state, thus giving meaning to the convention's participation requirement and to Article 10 (1) (a). At the same time, it accommodates the general agreement to fight cultural property theft irrespective of where the theft has taken place. Furthermore, this interpretation is in line with Articles 31 and 32 of the VCLT.⁷³⁷ Paragraph (b), therefore, constitutes an exception to paragraph (a), as it entitles a claimant from a non-contracting state to rely on Chapter II when the stolen object moves to another contracting state, which often happens in case of loans. Through this construction, Article 10 (1) (b) gives a quasi-*erga omnes* application to Chapter II's provisions. Put differently, although market states limited the temporal scope of Chapter II during the informal working group, source states broadened the territoriality of instances of theft.

Nonetheless, this intermediate interpretation does not – *prima facie* – sit well with the wording of Article 3 of the convention, which requires in its fourth and fifth paragraphs contracting states to make a specific choice with regard to the length of the absolute period for “cultural objects forming an integral part of a monument or archaeological site, or belonging to a public collection of a contracting state”. In fact, a distinction should be made between the general provision on limitation of action found in Article 3 (3) and the special regime of Article 3 (4)-(8). Article 3 (3) seems to apply irrespective of participation in the regime of the convention. Instead, Article 3 (4)-(8) conspicuously refers to cultural objects stemming from contracting states.⁷³⁸ *Ergo*, our intermediate interpretation entails that a non-contracting state might benefit from the regime of the convention, with the exception of the special rules designed for public collections, as laid down in Article 3 (4)-(8). Therefore, a non-contracting state cannot benefit from Article 3 (4)-(8) and will only be able to rely on Article 3 (3). This interpretation is particularly sensible considering that non-contracting states would have no interest in becoming party to the convention if they could benefit from Chapter II in its entirety. Thus, by limiting the reliance upon the rules of Chapter II for non-contracting states, this intermediate interpretation is able to explain why non-contracting states would still be incentivized to become party to the convention.

In summary, it should be noted that a common premise of Article 10 (1) (a) and (b) is that the theft must have taken place after the convention has entered into force in the state where the claim is initiated.⁷³⁹ In cases where the object is stolen in a state party and reclaimed in another state party, the solution appears particularly straightforward.⁷⁴⁰ The interpretation of Article 10 (1) (b) given by Protz is also appropriate when a cultural object – that has a connection with a contracting state – is on loan in a non-contracting state. In more complicated cases, for instance where the theft took place in a non-contracting state and where there is no direct connection with the convention, the application of Article 10 (1) (b) could prove problematic, as explained above.⁷⁴¹ Irrespective of the difficulties flowing from the latter scenario, it is sufficient to stress here that the predominant view is that Chapter II is applicable to all stolen cultural objects – irrespective of where these objects have been stolen.⁷⁴²

territory and will return the objects to the competent authorities in the occupied territory. The obligation is not limited to the territory of other Parties to the Convention.” See Protz, *Commentary on the Unidroit Convention*, (1997), p. 80.

⁷³⁷ As demonstrated by the interpretations given by Protz and Droz, a good faith interpretation of the provision in accordance with the ordinary meaning to be given to the terms in their context and the light of the convention's object and purpose (cf. Article 31 (1)) results in patent contradictions. Unfortunately, neither the text, Preamble and annex, nor the context (cf. Article 31 (2) and (3) VCLT) or the object and purpose of the convention are salient in explaining Article 10 (1). Instead, because an interpretation of this provision on the basis of Article 31 VCLT remains obscure, supplementary means of interpretation – such as the preparatory work or such as the circumstances within which the convention has been concluded – have to be relied upon (cf. Article 32 VCLT). Because the negotiations that took place within the informal working group were not reported, the preparatory work is in fact of little avail in understanding Article 10 (1). Nonetheless, the circumstances of the conclusion of Chapter II coupled with the purpose of the convention allude to the proposed intermediary position: considering the consensus about the need to reprimand theft and provide adequate remedies to dispossessed owners – consensus that is adjacent to the purpose of effectively tackling the illicit traffic in cultural property –, it seems that an intermediate perspective is to be favoured when addressing the relevancy of Chapter II to cultural objects stolen in a non-contracting state.

⁷³⁸ See notably the second sentence of Article 3 (5), which gives recognition to the choice operated under either Article 3 (4) or (5) in the relation between two contracting states; Article 3 (6), which requires a declaration that is by definition only relevant for contracting states; as well as Article 3 (7), linking the notion of public collection to the cultural objects owned by either a **Contracting State**, a regional or local authority of a **Contracting State**, a religious institution in a **Contracting State**, or an institution that is established for an essentially cultural, educational or scientific purpose in a **Contracting State** and is recognised in that State as serving the public interest. Furthermore, Article 3 (8) also requires that sacred or communally important cultural objects belonging to and used by a tribal or indigenous community in a **Contracting State** as part of that community's traditional or ritual use be subsumed under the regime applicable to public collections (of a contracting state (cf. Article 3 (7)).

⁷³⁹ This conditionality was supported by market states. See as a matter of example point 5 of the proposal by the delegation of the United States of America in a working paper submitted for the first session of the CGE in UNIDROIT, (1991), Study LXX – Doc. 22, p. 19.

⁷⁴⁰ Forrest, (2010), p. 217.

⁷⁴¹ Forrest, (2010), p. 217.

⁷⁴² See notably Sidorsky, (1996), p. 25 and Renold, (1997), p. 21.

Chapter III – Illegal Export

As clarified above, Chapter III will straightforwardly be applied if the cultural object is exported from a contracting state after the convention has entered into force in the territory of both the requesting and the requested states. One difficulty in this regard is worth mentioning here: the requesting state might encounter problems in proving the time at which the illegal export took place.⁷⁴³ In anticipation of this difficulty, it was proposed to introduce a provision to the effect that the convention would be applicable when it is impossible to determine the moment of the illegal export;⁷⁴⁴ during the DC, the Israeli delegation proposed creating a presumption of illegal export post entry into force of the convention when the requesting state fails to prove the exact date of the export.⁷⁴⁵ This proposal would have led to an automatic application of Chapter III – even for illegal exports that had taken place before the entry into force of the convention in the two respective states –, thereby giving an extensive scope to Chapter III. Consequently, this proposal was rejected.⁷⁴⁶ It might, nonetheless, be possible for contracting states to alleviate this difficulty by having recourse to Article 9 (1).⁷⁴⁷

Uncertainties about when the illegal act took place

In practice, the convention could be applied to situations that took place before it came into existence: cultural objects of lesser importance stolen or illegally exported before the entry into force of the convention in the states concerned that are not documented as such might be reclaimed on the basis of Chapter II and / or Chapter III, whenever it would be virtually impossible to disprove that the object has been stolen, illegally exported, or even acquired at a different moment than the one submitted by the claimant.⁷⁴⁸ With regard to archaeological theft, the moment of the removal is often unclear because the theft remains unknown to a source state up until the moment it surfaces on the market. Furthermore, although the convention does not operate retroactively, it could have an indirect effect for situations that occurred prior to the enactment of the convention, but that would have to be settled after the convention had entered into force.⁷⁴⁹ In fact, it is not uncommon for new private law instruments to influence the practices of courts – even in non-state parties –, to the extent that these courts would be inclined to follow the line of reasoning of the latest instruments in adjudicating upon situations that materialized beforehand and that they must resolve after the entry into force of the new rules.⁷⁵⁰

Legitimization of past illegal transactions

It must be added that the convention's non-retroactivity does not mean that it legitimizes illegal transactions that took place before its enactment;⁷⁵¹ while there was no intention to establish an *ex post facto* regime, disagreements as to the need to state this specifically in the convention blotted the discussions of the SG.⁷⁵² Although the Loewe preliminary draft contained an article that expressly stated that it would not work retrospectively,⁷⁵³ misunderstandings as to this provision led to its exclusion.⁷⁵⁴ In the course of amending later drafts, it had been decided to leave a specific non-retroactivity clause aside⁷⁵⁵ but, ultimately, concerns as to the misinterpretation of this particular omission led the members of the informal WG to reproduce a similar clause in the wording of Article 10 (3).⁷⁵⁶ The American delegation was a proponent of this inclusion.⁷⁵⁷

⁷⁴³ Presidenza del Consiglio dei Ministri, (1996), p. 251; Protz, *Commentary on the Unidroit Convention*, (1997), p. 82.

⁷⁴⁴ Presidenza del Consiglio dei Ministri, (1996), p. 251.

⁷⁴⁵ Protz, *Commentary on the Unidroit Convention*, (1997), p. 82.

⁷⁴⁶ Protz, *Commentary on the Unidroit Convention*, (1997), p. 82.

⁷⁴⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 82.

⁷⁴⁸ Jolles, (1997), p. 60.

⁷⁴⁹ UNIDROIT, (1989), Study LXX – Doc. 14, p. 28.

⁷⁵⁰ UNIDROIT, (1989), Study LXX – Doc. 14, p. 28.

⁷⁵¹ Calvo Caravaca, (2004), p. 91; see also the commentary of UNESCO, in UNIDROIT, (1992), Study LXX – Doc. 25, p. 1 where UNESCO noted already after the first session of the CGE that it was not the intention of the future instrument to change the legal status of acts that took place before the future convention's entry into force. Instead, recalling that situations that arose after the adoption of the 1970 UNESCO convention will be governed by it, UNESCO considered it important for future situations to be regulated by the (soon to become) convention from this point onwards. See also *ibidem*, p. 11 where UNESCO emphasized that the purpose of the future instrument was not to provide an amnesty to illegal acts that preceded the adoption of the convention. Instead, it made clear that these acts fall outside of the ambit of the future convention. See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 59 where it is specified that it was never the intention to deprive states from using diplomatic channels or bilateral agreements to recover their property taken prior to the adoption of the convention.

⁷⁵² Protz, *Commentary on the Unidroit Convention*, (1997), p. 78.

⁷⁵³ Protz, *Commentary on the Unidroit Convention*, (1997), p. 79; Schneider, (1996), p. 150.

⁷⁵⁴ See for example the discussion before the second session of the CGE in UNIDROIT, (1991), Study LXX – Doc. 23, p. 43; Protz, *Commentary on the Unidroit Convention*, (1997), p. 79.

⁷⁵⁵ Protz, *Commentary on the Unidroit Convention*, (1997), p. 79 explaining that this idea was dropped during the fourth meeting of the CGE.

⁷⁵⁶ This clause was essential for the participation of certain states and to reassure laymen that had no particular knowledge about the principle of non-retroactivity of international conventions. See Protz, *Commentary on the Unidroit Convention*, (1997), pp. 78 and 82; See also UNIDROIT, (1991), Study LXX – Doc. 23, p. 43 and Presidenza del Consiglio dei Ministri, (1996), p. 250.

Article 10 UNIDROIT Convention (1995) – (3) **This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention** or which is excluded under paragraphs (1) or (2) of this article, [...]

Article 10 (3) guarantees the right of every state that adheres to the convention to be entitled to pursue claims for the restitution or requests for the return of cultural objects that had been stolen or illegally exported before the entry into force of the convention for that state.⁷⁵⁸ In fact, the inclusion – or even the omission – of a statement foreseeing the non-retroactive character of the convention's regime could, in both ways, have been understood as the implicit legitimization of all prior thefts or illegal exports. This conclusion was sound and legitimate considering that the UNIDROIT regime would create rules for future cases and could thus be seen as exonerating previous thefts or illegal exports – an interpretation that was ultimately considered undesirable.⁷⁵⁹ Therefore, source states pushed for the inclusion of a provision specifying this non-legitimization.⁷⁶⁰ This was, *inter alia*, due to fears that the non-retroactive application of the convention could be understood as an implicit approval of prior illicit activities in their territorial boundaries.⁷⁶¹ Subsequently, Recital 6 of the Preamble⁷⁶² takes account of this non-approval:

Recital 6 Preamble UNIDROIT Convention (1995) – **AFFIRMING that the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention, [...]**

Alongside Recital 6 of the Preamble, Article 10 (3) reiterates this non-approval in a similar language.⁷⁶³

Article 10 UNIDROIT Convention (1995) – (3) **This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, [...]**

Furthermore, it was noted during the DC that the legal status of an illegal act that took place before the adoption of the convention remains unchanged.⁷⁶⁴ Consequently, the convention does not alter the illegal status of these transactions and it is possible to rely on other remedies, as clarified by Article 10 (3) *in fine*.

No limitation on the right to resort to other remedies for prior illegal transactions

Article 10 (3) *in fine* provides that the convention does not intend to limit the possibility to resort to other mechanisms for the restitution or the return of stolen or illegally exported cultural objects that exist alongside the regime of the convention.

Article 10 UNIDROIT Convention (1995) – (3) [...] **nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.**

Other mechanisms – such as private law remedies, diplomatic offices, inter-institutional agreements, the ICPRCP,⁷⁶⁵ or the procedures prescribed by the 1970 UNESCO convention –, constitute parallel channels that state parties can still rely upon when seeking the restitution or return of their cultural materials for illegal situations that took place before the adoption of the 1995 convention.⁷⁶⁶ Aside from litigation or arbitration, it is

⁷⁵⁷ Renold, (1997), p. 24.

⁷⁵⁸ Fraoua, R., 'Arab States and the 1995 UNIDROIT Convention', in UNIDROIT, Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, (UNESCO Headquarters, Paris, 19 June 2012), forthcoming.

⁷⁵⁹ Klein, (1999), p. 270; such an interpretation would also have meant that theft that took place during the holocaust would be legitimate. This is of course and interpretation *ad absurdum* when considering the efforts made to restitute looted art following WWII, such as the Washington Principles or the Terezin Declaration. See for example Lubina, (2009), *op. cit.* but also a summary of several initiatives to achieve a better restitution (available on the looted art in Europe website at the following link: <http://www.lootedartcommission.com/international-principles>, last retrieved on 01.03.2018).

⁷⁶⁰ Renold, (1997), p. 24; UNIDROIT Secretariat, (2001), p. 552.

⁷⁶¹ UNIDROIT Secretariat, (2001), p. 552.

⁷⁶² The inclusion of the non-legitimation of past transactions was added during the third session of the SG. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 37. See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 57 and p. 59.

⁷⁶³ Klein, (1999), p. 270.

⁷⁶⁴ Presidenza del Consiglio dei Ministri, (1996), p. 107.

⁷⁶⁵ Presidenza del Consiglio dei Ministri, (1996), p. 107; Fraoua, (2012), forthcoming; UNESCO Handbook, (2006), p. 13.

⁷⁶⁶ See UNIDROIT, (1992), Study LXX – Doc. 25, p. 11, where UNESCO specified that it was possible to have resort to other private law remedies, to diplomatic means, to inter-institutional arrangements or the the procedures made available by the ICPRCP. See also UNIDROIT, (1992), Study LXX – Doc. 50, p. 49 and UNIDROIT, (1994), Study LXX – Doc. 48, p. 59. See also 'Comments by International Organizations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, pp. 82-83; UNIDROIT Secretariat, (2001), p. 552.

also possible to have recourse to negotiation, conciliation or mediation through the offices of the ICPRCP.⁷⁶⁷ Furthermore, additional procedures may be of avail: despite its focus on criminal justice, the European Convention on *Mutual Assistance in Criminal Matters* of 20 April 1959 foresees of mechanisms of restitution and return in cases where the cultural object has been stolen or illegally removed from the territory of a state party.⁷⁶⁸ This instrument is particularly helpful in promptly regaining possession of the object, without incurring expensive private law proceedings.⁷⁶⁹ Similarly, the United Nations *Convention Against Transnational Organized Crime* (2000) provides restitution and return mechanisms for trafficked cultural property handled by criminal organizations.⁷⁷⁰ Nonetheless, these conventions can only be of direct avail in criminal proceedings and cannot, therefore, be applied when there exist a contention between an innocent acquirer and a dispossessed owner, making their use limited in the present context. When the conflict relates to these two innocent parties, it is alternatively possible to have recourse to the *ICOM-WIPO Art and Cultural Heritage Mediation*,⁷⁷¹ created by both the ICOM and the World Intellectual Property Organization and Mediation Center. This mechanism provides an alternative forum of mediation for disputes about cultural property.

The utility of the third subparagraph of Article 10 can be questioned: in fact, it has been criticized as flowing from an overzealous exercise of carefulness in constraining the scope of the convention to future situations.⁷⁷² It has, consequently, been qualified as unnecessary,⁷⁷³ since the ratification of the convention would not have – either implicitly or explicitly – affected the right to remedies pertaining to situations that have taken place before its adoption, or excluded the possibility to make use of alternative mechanisms to resolve previous illegal transactions.

(4) Personal scope

Because the convention aims to tackle the entire illicit traffic in cultural property, it instates means of corrective justice for theft and illegal export of cultural objects belonging to both private parties and public authorities.⁷⁷⁴ Whilst it deals with the two aspects in one instrument, concerns as to the need to conspicuously differentiate between the two scenarios appeared in the early stages of the convention's development.⁷⁷⁵ The need for clarity is particularly striking since states have often merely adopted tailored-made rules to protect their own national cultural heritage, excluding privately held cultural objects from their regulatory regimes.

Chapter II – Theft

In case of theft, the convention – although it neither clearly states who can bring a claim,⁷⁷⁶ nor specifies what qualifications are needed for *locus standi* – is directed at restitution for private parties (natural and legal persons),⁷⁷⁷ states⁷⁷⁸ and their authorities,⁷⁷⁹ provided they have been dispossessed of their property as a result of theft.⁷⁸⁰ What is more, an important innovation of this instrument stems from the introduction of a distinction between national interests and the interests of sub-national entities.⁷⁸¹ It therefore appears to be possible for sub-national entities – such as tribal and indigenous groups – to rely upon Chapter II. This is implicit from Article 3 (8) *juncto*

⁷⁶⁷ Since 1978, states have been able to resort to the ICPRCP so as to increase the pace of restitutions. More specifically, states parties to the 1970 convention can avail themselves of its help. During the 33rd session of the General Conference of UNESCO, a resolution was adopted adding Mediation and Conciliation to the mandate of the ICPRCP. Subsequently, the Rules of Procedure for Mediation and Conciliation were approved by it in order to complement its work. The provision of the UNIDROIT convention about arbitration made the formal adoption of the Rules of Procedure of the Committee more acceptable. See Shyllon, (2012), forthcoming.

⁷⁶⁸ Siehr, (2003), p. 559.

⁷⁶⁹ Siehr, (2003), p. 559.

⁷⁷⁰ INTERPOL, 'Protecting Cultural Heritage – An Imperative for Humanity', (United Nations, 22 September 2016), p. 8, available at <https://www.interpol.int/News-and-media/Publications2/Leaflets-and-brochures/Protecting-Cultural-Heritage>, last retrieved on 01.03.2018.

⁷⁷¹ Anfruns, J., 'The Role of Museums', in UNIDROIT, Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, (UNESCO Headquarters, Paris, 19 June 2012), forthcoming. More information about this ICOM-WIPO partnership can be found at <http://www.wipo.int/amc/en/center/specific-sectors/art/icom/>, last retrieved on 01.03.2018.

⁷⁷² Forrest, (2010), p. 218.

⁷⁷³ UNIDROIT, (1994), Study LXX – Doc. 48, p. 60 (referring back then to paragraph 2 of Article 10, which was later on changed to paragraph 3); Renold, (1997), p. 24.

⁷⁷⁴ UNIDROIT Secretariat, (2001), p. 498; Hoffman, B., 'How Unidroit Protects Cultural Property: Part I', 213 (41) *New York Law Journal*, (3 March 1995), p. 2; Kuitenbrouwer, (2005), p. 601.

⁷⁷⁵ UNIDROIT, (1989), Study LXX – Doc. 10, p. 6.

⁷⁷⁶ Siehr, (1997), p. 309.

⁷⁷⁷ Roca-Hachem, (2005), p. 540.

⁷⁷⁸ Whenever the state is the owner or the bailee of the object, it can then claim the object back on its own motion. Siehr, (1998), p. 675;

Roca-Hachem, (2005), p. 540.

⁷⁷⁹ Droz, (1997), p. 247.

⁷⁸⁰ Carducci, (2006), p. 99.

⁷⁸¹ Forrest, (2010), p. 198.

Article 3 (1), (3) and (4),⁷⁸² allowing access to the remedy of restitution for cultural objects stolen from these collectivities. Nonetheless, the convention falls short of specifically defining these tribal and indigenous groupings. Instead, following Protz, a definition can be found in the aggregate analysis of the many resolutions adopted by the United Nations.⁷⁸³

Albeit the drafters' intention was to give a broad ambit to Chapter II, there is disagreement as to whom can rely upon the mechanism posited in this chapter. Two readings are possible: at first, it has been argued that on the basis of the principle of reciprocity, only state parties to the document and their nationals are entitled to the advantages created thereby.⁷⁸⁴ This means that any state party to the convention or any legal or natural person residing within its territorial confinements can institute proceedings on the basis of Chapter II when the conditions described above have been met.⁷⁸⁵ A second interpretation submits that – provided the claim falls within Article 10 (1) (b) – the participation of the state where the theft took place in the regime of the convention is not salient to reliance upon Chapter II.⁷⁸⁶ As such, this seems to imply that an individual from a non-contracting state will be able to invoke the rules of this chapter if the stolen object is found within the territory of a contracting state that is not the state party where the claim in restitution is introduced.⁷⁸⁷ This second interpretation must be preferred for several reasons: a) because of the important impetus to reprehend both theft⁷⁸⁸ and the illegal commerce in cultural goods and b) because including cultural objects stolen from third countries seems to be a rational application of the convention⁷⁸⁹ considering the consensus reached by the drafters to reprimand theft worldwide.⁷⁹⁰ Not only would it be sound, but this would additionally remove incentives to steal cultural objects in non-contracting states.⁷⁹¹

What is more, recalling that the convention can also be relied upon by states, this application can additionally be used *mutatis mutandis* for cultural objects that have been stolen from a government, as a state's claim under these circumstances is not usually considered to be much more different than an individual's claim.⁷⁹² Furthermore, it is possible for the victims of a theft to mandate a state in initiating the restitution proceedings: provided the state is not the owner or bailee of the object claimed back, private property interests can be enforced by a state in a contention involving private parties.⁷⁹³ It is thus possible for a state to represent a private party that is not willing to initiate proceedings for the restitution of a stolen cultural object. In case of clandestine excavations, the owner whom is entitled to reclaim the item can either be the state of excavation – when a patrimonial law has vested the ownership in the said state –, or, depending upon how the ownership is allocated within the domestic laws of the state of excavation, the excavator, finder or owner of the piece of land where the object was found.⁷⁹⁴

⁷⁸² These provisions are analysed in detail in 'Chapter 4 – The Unidroit Compromise' below.

⁷⁸³ Protz proposed the same analogy for the terms 'indigenous peoples', for which she refers to an extract from the UN Document E/CN.4/Sub.2/1994/2, attached in Appendix VI of her 1997 contribution *Commentary on the Unidroit Convention*. This document refers to both the definitions of UN Special Rapporteur Jose Martinez Cobo given in his *Study of the Problem of Discrimination against Indigenous Populations* and to Article 1 of the International Labour Organisation (ILO) Convention No. 169. Protz's proposal is confirmed by the Secretariat of the Permanent Forum on Indigenous Issues of the Division for Social Policy and Development of the Department of Economic and Social Affairs of the United Nations. See Secretariat of the Permanent Forum on Indigenous Issues, 'Workshop on Data Collection and Disaggregation for Indigenous Peoples – The Concept of Indigenous Peoples', (New York, 19-21 January 2004), PFII/2004/WS.1/3. See also Department of Economic and Social Affairs, 'State of the World's Indigenous Peoples', (United Nations: New York, 2009), ST/ESA/328, pp. 4-7, http://www.un.org/esa/socdev/unpfi/documents/SOWIP/en/SOWIP_web.pdf, last retrieved on 01.03.2018.

⁷⁸⁴ See for example the consensus reached by the CGE that a country that wants to benefit from the regime of the convention must be party to it, in UNIDROIT, (1994), Study LXX – Doc. 48, p. 6; Fraoua, (1997), p. 39.

⁷⁸⁵ Calvo Caravaca, (2004), p. 96; UNIDROIT Secretariat, (2001), p. 506.

⁷⁸⁶ See for example UNIDROIT, (1994), Study LXX – Doc. 48, p. 7.

⁷⁸⁷ Fraoua, (1997), p. 39.

⁷⁸⁸ Presidenza del Consiglio dei Ministri, (1996), p. 23; Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 32;

⁷⁸⁹ Renold, (1997), p. 21; although this point was controversial and caused disagreement between the different delegations present at the conference. See Protz, *Commentary on the Unidroit Convention*, (1997), p. 80 and Presidenza del Consiglio dei Ministri, (1996), p. 23.

⁷⁹⁰ See specifically the commentary a representative of the CGE, who understood the draft convention as requiring for the object to be stolen in a state party to the convention. A number of representatives rejected this interpretation of the draft convention because theft was reprehended worldwide and that limiting the restitution of stolen cultural objects to the objects stolen in contracting states would result in an increase in purloiners in non-contracting states. See UNIDROIT, (1994), Study LXX – Doc. 48, p. 7. See also Presidenza del Consiglio dei Ministri, (1996), p. 23.

⁷⁹¹ Presidenza del Consiglio dei Ministri, (1996), p. 23.

⁷⁹² Contrary to the 1970 convention that required inter-governmental actions for return of stolen or illegally exported cultural objects, the 1995 convention entitles states to bring the matter directly before a foreign domestic court. Shyllon, (2012), forthcoming.

⁷⁹³ Siehr, (1998), p. 675; Calvo Caravaca submits that, in his opinion, a state can initiate proceedings for a stolen object that is the property of an individual because of the nature of the convention. For him, since the UNIDROIT convention attempts to fight theft of cultural goods, the more parties that are involved in the process of restitution, the more efficiency is given to this instrument. See Calvo Caravaca, (2004), p. 96; the UNIDROIT Secretariat confirms that it is possible for a state to represent a private party in a restitution procedure if that private party is unable or does not wish to undertake an action in restitution. See UNIDROIT Secretariat, (2001), p. 506.

⁷⁹⁴ UNIDROIT, (1993), Study LXX – Doc. 42, p. 4.

Chapter III – Illegal Export

Preliminarily, it should be remarked that the request for return is not a claim *sensu stricto*,⁷⁹⁵ but merely a request. This means that the applicant is not referred to as a claimant but must instead be qualified as a petitioner.⁷⁹⁶

Contrary to the provisions of Chapter II, a request for return can only be instigated by states. As established above, Chapter III instates a system of interstate cooperation and is, therefore, not open to individuals.⁷⁹⁷ The return can either be mandated by the state of origin of the illegally exported cultural good, or can be requested by an individual through the assistance of a state,⁷⁹⁸⁻⁷⁹⁹ provided that this state is party to the convention and qualifies as a requesting state. Furthermore, tribal or indigenous communities might be entitled to the return of an ethnographic object that was produced within their respective community and that ought to be used for traditional or ritual purposes (cf. Article 7 (2) discussed above).⁸⁰⁰ Nonetheless, these communities will require the support of the state to formulate the request for return.

⁷⁹⁵ It is also germane to point at the wording of Article 1 of the 1995 convention, which refers specifically to international claims for the return of illegally exported cultural objects.

⁷⁹⁶ Office Fédéral de la Culture (Suisse), (1998), p. 71.

⁷⁹⁷ Bergé, (2000), p. 231; Protz, *Commentary on the Unidroit Convention*, (1997), p. 53.

⁷⁹⁸ Calvo Caravaca, (2004), p. 99.

⁷⁹⁹ It is also possible for an individual to request the restitution of his stolen property through Chapter II of the convention. See Calvo Caravaca, (2004), p. 99.

⁸⁰⁰ See notably Article 5 (3) (d) and 7 (2) of the convention. See also Protz, *Commentary on the Unidroit Convention*, (1997), p. 70; Forrest, (2010), p. 143.

Summary

Contextualisation – The 1995 UNIDROIT convention is the successor to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* in fighting the illicit trafficking of cultural property in times of peace. It was adopted due to a feeling that the 1970 convention had failed to appropriately address the illicit traffic of cultural materials. This was notably due to the lack of specificity of its provisions and because of difficulties in implementing the document. Furthermore, the obligation to pay compensation to an innocent acquirer laid down in Article 7 (b) (ii) thereof was deemed particularly problematic because of discrepancies in rules on third-party protection between common and civil law jurisdictions. What is more, there were no directly applicable rules on the restitution of stolen cultural objects in the 1970 regime. Therefore, UNESCO believed that it was possible to find a new compromise to tackle the illicit trafficking of cultural property through means of private law, an aspect that was key to Article 7 (b) (ii) of the 1970 convention. UNESCO did not have the mandate to regulate private law considerations and turned to UNIDROIT – an institute specializing in the harmonization of private law – to draft the future convention.⁸⁰¹

Preparatory work – Less than a decade before UNESCO approached UNIDROIT, the latter had concluded a study on a uniform law with regard to acquisitions in good faith of corporeal movables: the *Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables*, also known as LUAB. This document served as basis for the work of UNIDROIT. The making of the 1995 convention was marked by several stages: two expert studies by Reichelt (1987-1988), three sessions of a Study Group (1988-1990), four meetings of a Committee of Governmental Experts (1991-1994) and a Diplomatic Conference (7-24 June 1995). The DC was composed of nineteen sessions of the Committee of the Whole, and one Plenum, during which a vote was held on the final version of the convention. Throughout the various sessions of the Committee of the Whole, the clash of interests between market and source states was particularly pronounced. Difficulties in accommodating the views of both groups led the negotiations into a deadlock, ten days after the beginning of the DC. In an attempt to overcome this standstill, the Mexican delegation established an informal Working Group to draft a document acceptable to both categories of states. This group produced a viable text and a Preamble to submit before the Plenum for a final vote. On 23 June 1995, the Plenum adopted the text produced by the informal working group. The 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* thus came into existence on 23 June 1995. It was then open for signature and ratification on the following day. The convention is the private law complement of Article 7 (b) (ii) of the 1970 UNESCO convention. Although absent from Article 7 (b) (ii) of the UNESCO convention, archaeological theft was added to the regime of the 1995 convention during its elaboration.⁸⁰²

Objectives pursued – The UNIDROIT instrument is set to regulate the demand side of the art and antiquities markets by addressing the question of good faith acquisitions of cultural objects. Directly, the convention strives for: the restitution of stolen, unlawfully excavated or lawfully excavated but unlawfully retained cultural objects to its rightful owner; the return of an illegally exported cultural object to the state of export; the establishment of common minimal rules to ensure restitution and return as just described; making civil suit for restitution and return available; reconciling conflicting private law rules regarding stolen cultural objects (including also the tort / property law divide); obviating abuses of domestic rules on third-party protection and guaranteeing the fair and transparent exchange of cultural objects whilst ensuring compliance with due diligence throughout their acquisitions. Indirectly, the convention attempts at thwarting the illicit traffic in cultural property by regulating the demand side of the art market. In doing so, it focuses on the end-of-the-chain-of-transactions phase where the criminal origin of stolen or illegally exported cultural objects is laundered. The regulation of this end of the chain is considered imperative in the fight against the illicit trafficking of cultural property due to the opacity and the connivance of the art market in handling cultural objects with dubious origins. In fact, the convention attempts to alter the practices of market stakeholders and create a gradual change of mentality by making the sale of cultural objects of dubious origins more difficult. With these expected changes, the convention introduces specific rules for cultural objects, which help to differentiate these items from other goods and, therefore, to create a *lex specialis* for cultural property. Furthermore, the convention addresses the illicit traffic through the lenses of the many victims, thus including for example individual and indigenous / ethnic communities. Therefore, it attempts to improve the preservation of the cultural heritage in the interest of all, to enhance the diffusion of culture and to promote comprehension between people in order to further both the progress of civilization and the well-being of humanity. The convention recognizes the importance of the licit market in cultural materials and thus attempts to

⁸⁰¹ Cf. section A. 1. above.

⁸⁰² Cf. section A. 2. above.

thwart the illicit trade without affecting the lawful commerce. What is more, it constitutes a further step in international cooperation in the realm of cultural property protection, although it is not considered to be the *ultimum remedium* to fight the illicit traffic in cultural materials. Finally, its existence bears witness to the fact that international cooperation exists in the protection of domestic cultural heritage and that an intermediate position between cultural nationalism and cultural internationalism is possible.⁸⁰³

Structure – The convention is composed of one Preamble, five chapters (with a total of twenty one articles) and one annex. Its most important operative parts are Chapter II and Chapter III, respectively addressing the cultural property theft – including archaeological theft – (Chapter II) and the illegal export of cultural objects (Chapter III). Compared to other instruments in the field, it has a clear structure and is drafted in simple terms.⁸⁰⁴

Conceptualization – Because the 1995 convention ensures private law means of restitution or return for all cultural objects that have been stolen, illegally exported or unlawfully excavated, or lawfully excavated but unlawfully retained, it is important to clarify its ambit. In appreciating the applicability of the convention, two notions common to Chapters II and III need to be considered, i.e. ‘cultural objects’ and ‘claims of an international character’.⁸⁰⁵

Cultural objects – In respect of the notion of ‘cultural objects’, it should be emphasized that although the convention refers to ‘cultural objects’, ‘cultural property’ and ‘cultural heritage’ throughout its regime, it is exclusively concerned with the theft and illegal export of ‘cultural objects’. The drafters of the convention clearly preferred the use of this terminology because it was less value-laden and emotionally charged than other terms such as ‘cultural heritage’. Moreover, the definition of ‘cultural objects’ matches almost faithfully the definition of ‘cultural property’ laid down in Article 1 of the 1970 convention, with the exception of the designation requirement. This last aspect was left outside of the present definition because the 1995 convention has a different function than its 1970 counterpart, as the former instrument addresses the illicit traffic in cultural property in its entirety. Nonetheless, the coherence between the definitions of both conventions promotes uniformity. The definition of cultural objects posited in Article 2 of the 1995 convention is composed of two elements: an interest-oriented qualification⁸⁰⁶ coupled with an item-oriented categorization.⁸⁰⁷ It remains unsettled whether the item-oriented list attached in the annex is exhaustive or not. Nevertheless, the definition applies equally to both Chapter II and Chapter III of the convention. Additionally, its breadth is further refined for the purpose of Chapter III by Articles 1 (b), 5 (3) and 7. Although the convention foresees of a broad conceptualization to encompass all products of the illicit traffic in cultural materials, the definition laid down in Article 2 has been criticized as being too broad, ‘open and dynamic’ and can be interpreted both restrictively and extensively due to its vagueness, or could lead to the impossibility of applying the convention at all. This breadth constitutes an important impediment to the adherence to the convention.⁸⁰⁸

International character – With regard to the international character of the claim, the convention is applicable for claims of an international character for the restitution of stolen cultural objects,⁸⁰⁹ or for the return of illegally exported cultural objects.⁸¹⁰ In case of theft (cf. Chapter II), the mere crossing of a border is sufficient to trigger the regime of the convention, even if the stolen object transits back to the state where it was stolen. Purely internal situations – i.e. where no cross-border movement is effectuated – are not governed by the regime of the convention. Therefore, Chapter II is said to create a discriminatory regime: the application of the convention to claims embedded with an international character imply that foreign owners may often be advantaged compared to domestic owners, depending on the domestic protection afforded to owners by the contracting state. If the domestic law of the contracting state affords more protection than the regime of the convention – in accordance with Article 9 (1) –, foreign owners do not, comparatively, benefit from a more favorable regime of restitution. *A contrario*, if the domestic law protects a third party against the claim of the owner after the expiration of a few years, the regime of the convention affords more protection to a foreign owner. In case of illegal export (Chapter III), the mere act of illegally exporting the cultural object is sufficient for the claim to be embedded with an international character.⁸¹¹

⁸⁰³ Cf. section A. 3. above.

⁸⁰⁴ Cf. section A. 4. above.

⁸⁰⁵ Cf. section B. 1. above.

⁸⁰⁶ Cf. the first sentence of Article 2 of the convention.

⁸⁰⁷ Cf. Article 2 *in fine* and annex of the convention.

⁸⁰⁸ Cf. section B. 1. (1) above.

⁸⁰⁹ Cf. Article 1 (a) of the convention.

⁸¹⁰ Cf. Article 1 (b) of the convention.

⁸¹¹ Cf. section B. 1. (2) above.

Material scope – With regard to the material scope of the convention, it should be noted that Chapter II is concerned with international claims in restitution of stolen cultural objects.⁸¹² Restitution is to be understood as a means of correcting an illegal act, with the ultimate purpose of bringing the parties back to the *status quo ante*. Restitution is, therefore, closely linked to *restitutio in integrum*, and constitutes a means of corrective justice. Restitution for the purpose of Chapter II is limited to theft, provided it occurs within the circumstances foreseen by Article 10. The notion of ‘stolen’ has been left undefined in the convention. Therefore, the inclusion of other criminal acts – such as fraud or conversion – is not foreseen by its regime. It is, nevertheless, possible for contracting states to include these criminal acts in their incorporation of the regime of the convention, through the means of Article 9 (1). The interpretation of the notion of ‘stolen’ is left to the court seized with a contention governed by the convention. In interpreting the notion, it remains unclear whether judges must rely upon the *lex fori*, the *lex loci delicti* or any other conflict-of-law rule, such as the *lex causae*, although practice demonstrates that courts tend to recognize a theft qualified as such by the *lex loci delicti* as a *fait accompli* for the purpose of recovery actions. Irrespective of the method used, the concept needs not to be interpreted in accordance with a specific domestic meaning, but must be interpreted autonomously for the purpose of the convention.

Chapter III of the convention is concerned with international requests for return of illegally exported cultural objects.⁸¹³ Illegal export means that the cultural object has been removed from the territory of a contracting state contrary to that state’s law regulating the export of cultural objects, which has been enacted for the purpose of protecting that state’s cultural heritage.⁸¹⁴ Return implies thus the obligation to physically return a displaced cultural object to ensure the integrity of the site or of the cultural context from which it has been removed. In focusing on the integrity of the site or on the cultural context in which the object was removed, return – as prescribed in Chapter III of the convention – requires that one of the interests listed in Article 5 (3) be significantly impaired. This mechanism takes the interests of both requesting and requested state into consideration. Unlike Chapter II, the ultimate objective of Chapter III is the preservation of the cultural heritage of a contracting state. Chapter III differs from Chapter II as the former is a mechanism of judicial and administrative cooperation, reflecting solidarity between contracting nations when a specific internationally recognized interest so requires. Instead, Chapter II is concerned with restitution of stolen objects to dispossessed owners. Return does not address questions of ownership, but is concerned with the physical whereabouts of cultural objects. It has been argued that return of a cultural object constitutes a special kind of expropriation, as it might deprive the possessor obliged by the request for return of his possession. Based on the idea of strict reciprocity, both the requesting state and the requested state must be party to the convention in order for Chapter III to be applicable to the illegal export in question. It is, therefore, not possible for a third state to request the return of the illegally exported cultural object to the benefit of the state of export. Furthermore, strict reciprocity requires that the cultural object be removed from the territory of the requesting state.⁸¹⁵ In order to determine the illegality of the removal, Article 1 (b) refers to a violation of the domestic “laws regulating the export of cultural objects enacted specifically to protect its cultural heritage” of the requesting state. Three cumulative conditions must therefore be fulfilled: 1) there must be a violation of a legally binding domestic rule; 2) this domestic rule must regulate the export of cultural objects and 3) the rule must have been enacted for the purpose of protecting the requesting state’s cultural heritage. The first condition requires the protection of cultural objects from removal by means of legally binding rules. These rules can either be of a legislative or administrative nature. Furthermore, the illegality of the export must be assessed in light of the legislation in force at the time of the export. A peculiarity of Article 1 (b) stems from the fact that, to determine the illegality of the removal, this article makes specific reference to the *lex originis*. Through the reference to this law, contracting states are to decide for themselves what cultural objects are to be protected from illegal exports. The innovative aspect of this mechanism stems from the fact that domestic courts will apply the public law of the requesting state. Nonetheless, the court of the requested state will have to determine whether the law of the requesting state complies with the two conditions given below and whether it has been violated. The second condition requires that the violated legally binding rule be directed at the protection of national cultural heritage. The laws targeted are the norms adopted for the purpose of protecting the cultural heritage of the requesting state, and not the domestic laws in which the cultural value of the object exported is merely incidental to the breach. The third condition is that the object addressed must be part of the requesting state’s cultural heritage and that it needs to be protected. To comply with this third condition, a requesting state will have to demonstrate that the object – whose return is requested – is part of its cultural heritage and that the object required protection. Regarding the first element, the convention does not define the concept of cultural heritage, and it is likely that this might

⁸¹² Cf. Article 1 (a) of the convention.

⁸¹³ Cf. Article 1 (b) of the convention.

⁸¹⁴ Cf. Article 1 (b) *in fine* of the convention.

⁸¹⁵ Cf. Article 10 (2) of the convention.

become a point of contention when the fringes of the domestic law are unclear. With respect to the second element, many export laws are retentionist and not protective in nature.

Chapter III is only directed at violations of law protecting the cultural heritage of the requesting state. The exact implications of this qualification are unsettled: Merryman submits that protection must be construed narrowly and only encompass measures adopted to protect cultural objects in need of safeguarding. Following Prott, the meaning of protection must be construed broadly. It should thus refer to any measure enacted by a state to safeguard an adequate representation of its national cultural heritage from dispersion. In domestic cultural heritage laws, protection thus refers to a multitude of different aspects relating to cultural heritage law, such as the “protection of access, protection of education of creative artists and the public in their cultural traditions, protection of minority communities’ special requirements for the handling of their cultural creations, as well as protection of the object”. Because Article 5 (3) already serves as a filter to narrow down the categories of cultural objects subject to the regime of Chapter III, there seems to be no reason to construct the meaning of protection strictly. Instead, Prott’s interpretation seems preferable. Finally, Article 9 (1) permits broadening the scope of Article 1 (b) by allowing more situations of illegal export to fall within the scope of Chapter III, or by allowing non-contracting states to be entitled to rely upon the said chapter.

Article 5 (2) assimilates the non-return of a temporarily exported cultural object – an object that is not returned in accordance with a temporary export permit issued by the requesting state on the basis of its laws regulating the export of the object for the purpose of protecting its cultural heritage – to an illegal export. The export must firstly have been authorized by the requesting state, and a temporary export permit must have been issued by it. As such, the convention gives international recognition to the non-return of a cultural object temporarily exported in accordance with a domestic export license. Article 7 (1) posits two exceptions to the regime of Chapter III. Paragraph (a) specifies that Chapter III shall not apply when the export has ceased to be illegal at the time the request for return is lodged with the court of the requested state. The drafters did not intend to expropriate an owner that had returned the object on time for it to be promptly legally exported afterwards. Therefore, it is important for the export still to be illegal at the time the request for the return is formulated or that the legislation violated has not been repealed. Paragraph (b) excludes contemporary art from the regime of Chapter III for the purposes of ensuring the free circulation of art and to protect contemporary artists. The work of artists exported during their lifetime or within fifty years following their death is, therefore, excluded from the regime of Chapter III. This exclusion serves to promote contemporary art and creativity, ensures the non-interference with an artists’ professional career and respect for author rights. The rationale for this exclusion is that the regulation of the trade should not obstruct living artists from diffusing their work, which would otherwise discourage them from expressing their creativity and give them a sense of repression. Furthermore, the exclusion recognizes the importance of cross-border movement of the works of living artists because this helps them to achieve the widest recognition of their talent, which often results from foreign appreciation of their work. What is more, living artists may also receive foreign criticism, which helps them to improve their work and achieve their full potential. Additionally, other contracting states would likely refuse to enforce export restrictions imposed upon the work of living artists as this would violate the internationally recognized rights of artists or their family members. The period of fifty years following the death of the artist matches Article 7 of the *Berne Convention for the Protection of Literary and Artistic Work*. This parallel with Article 7 is made because under this article, the heirs of the artists may still profit from his work after his death for a period of fifty years. Consequently, the period of fifty years laid down in the UNIDROIT convention allows the heirs of the artist to promote the latter’s work worldwide. Article 7 (1) (b) thus ensures the free trade in the objects addressed instead of protecting the cultural interest of the state of origin. Article 7 (2) creates an exception to the exception laid down in Article 7 (1) (b). This is notably because the latter article is difficult to apply to the work of anonymous artists, including notably those made for religious purposes, which often remain anonymous. Article 7 (2) was specifically designed to accommodate the rights of tribal and indigenous groupings. The cultural objects made by these groups raise specific problems because they belong to living communities that often use these items in their rituals or spiritual ceremonies. Therefore, Article 7 (2) derogates from Article 7 (1) (b), as it specifies that Chapter III applies to cultural objects created by tribal or indigenous groups and used for traditional or ritual purposes. Article 7 (2) thus constitutes an exception to the exception laid down in Article 7 (1) (b), as it will be possible to demand the return of an illegally exported cultural object, even though the artist is still alive, or within the period of fifty years after his death. Furthermore, the object is to be returned directly to the group to which it belongs, and not to the requesting state. The return to the community stems from the idea that the removal of the object from these groups can jeopardize their very existence.⁸¹⁶

Territorial scope – Regarding the territorial scope, the UNIDROIT convention is applicable upon the territory of the contracting state, in accordance with Article 29 of the 1969 VCLT. This territorial application flows from the

⁸¹⁶ Cf. section B. 2. (1) above.

fact that the convention obliges the court or other competent authority of the contracting state to apply the convention to claims in restitution of stolen cultural objects or request for return of illegally exported cultural objects that fall within the ambit of the convention (as explained throughout the present chapter). Nevertheless, it is possible for a contracting state to limit the territorial scope of the convention to one or more of its territorial units,⁸¹⁷ provided a declaration to this effect is notified to the depositary of the convention, which for the purpose of the 1995 convention is the Italian state.⁸¹⁸ The third paragraph of Article 14 explains how the declaration must be interpreted in applying Article 14 (1). If no declaration is made by the adhering state, Article 14 (4) prescribes the territorial application of the convention to the entire territory of the contracting state concerned.⁸¹⁹

Temporal scope – As to the temporal scope of the convention, it is not retroactive.⁸²⁰ The convention is applicable to acts that take place after 1 July 1998, which is the date of its objective entry into force. The question of retroactivity of the convention was of high political sensitivity during its creation. It was clearly opposed by source states, which were proponents of a retroactive application of the future convention; Market states, however, clearly opposed any retrospective application. At last, it was decided that the convention ought to regulate future situations and not to apply to antecedent thefts or illegal exports. Therefore, attention needs to be drawn to Article 10 of the convention, which explains which instances of theft and illegal export will fall within the convention's ambit.⁸²¹ The exact implications of Article 10 (1) (b) for non-contracting states are unsettled. Due to disagreement over the interpretation of this provision, it remains particularly unclear whether Chapter II entails *erga omnes*, quasi-*erga omnes* or *inter-partes* rights for claimants. Regarding illegal export, it suffices for the cultural object to be illegally exported after the convention has entered into force in both the territories of the requesting and requested states. Difficulties might be encountered when it is unclear when the cultural object was exported.

The non-retroactivity of the convention does not mean that it legitimizes illegal acts that took place before its adoption.⁸²² Furthermore, Article 10 (3) does not legitimize illegal acts that materialized after the entry into force of the convention but that do not fall within the ambit of Article 10 (1) or (2). Instead, Article 10 (3) *in fine* allows states or other persons to make use of remedies available outside of the framework of the convention for thefts or illegal exports that took place before its entry into force. These other remedies include – but are not limited to – private law remedies, diplomatic offices, inter-institutional agreements, the ICPRCP or UNESCO procedures prescribed by the 1970 convention. Furthermore, the ICPRCP also provides support for purpose of negotiation, mediation or conciliation. The *ICOM-WIPO Art and Cultural Heritage Mediation* can also provide an appropriate remedy. Finally, instruments prescribing assistance in criminal matters might also be of avail when the object is found in the hands of criminals.⁸²³

Personal scope – Regarding the personal scope of the convention, it is relevant to both private persons and public entities because the convention tackles illicit trafficking of cultural property in general. This approach is unusual considering that states often adopt legislation directed at their own cultural heritage, often leaving privately owned cultural property unprotected. More specifically, Chapter II may be relied upon by natural and legal persons or states and their public law authorities. Sub-national entities, such as indigenous or tribal groups, may also make use of Chapter II. Furthermore, it is possible for an individual to mandate a state to claim the stolen object for him when the state is not itself the owner or a bailee. Nevertheless, it remains unclear whether individuals or authorities originating from non-contracting states may rely on Chapter II. As explained above, preference is given to an interpretation where the convention can be used for any theft, irrespective of where it took place. In case of archaeological theft, either the state of excavation, the finder or the owner of the plot of land where the object was excavated can base their claims upon Chapter II depending on how the ownership is attributed to them by domestic law. For Chapter III, it is only possible for contracting states to rely upon the mechanism of return prescribed. This is notably due to the fact that Chapter III instates a system of interstate cooperation, from which individuals cannot derive any rights. It is, nonetheless, possible for an individual to achieve recovery by having his state petition the return. When the cultural object is one that falls within the scope of Article 7 (2), the return can be operated for the benefit of tribal or indigenous communities. Finally, because the request for return does not qualify as claim for the purpose of the convention, the requesting state is, therefore, to be considered as a petitioner and not as a claimant.⁸²⁴

⁸¹⁷ Cf. Article 14 (1) of the convention.

⁸¹⁸ Cf. Article 14 (2) of the convention.

⁸¹⁹ Cf. section B. 2. (2) above.

⁸²⁰ In accordance with Article 28 VCLT.

⁸²¹ Respectively Article 10 (1) and 10 (2) of the convention.

⁸²² Cf. Article 10 (3) of the convention and Recital 6 of the Preamble to the 1995 convention.

⁸²³ Cf. section B. 2. (3) above.

⁸²⁴ Cf. section B. 2. (4) above.

PART II
CULTURAL PROPERTY THEFT

Chapter 2 |

CULTURAL PROPERTY THEFT – UNDERSTANDING THE
PARADOX (I) - BELGIUM, FRANCE AND THE NETHERLANDS

CHAPTER 2 | CULTURAL PROPERTY THEFT – UNDERSTANDING THE PARADOX (I) - BELGIUM, FRANCE, THE NETHERLANDS

Introduction	98
A. Belgium	100
1. Basic concepts	100
(1) Ownership, possession and detention	100
(2) Theft.....	103
(3) Cultural object	103
(4) Legal remedy.....	104
(5) Prescription.....	105
2. Contextualization	106
(1) Voluntary and involuntary loss of possession.....	106
(2) Nemo plus iuris ad alium transferre potest quam ipse habet.....	107
3. Operationalization	107
(1) Third-party protection – acquisitions in good faith (voluntary loss of possession).....	108
(2) Third-party protection – acquisitions in good faith (involuntary loss of possession)	116
(3) Third-party protection – acquisitions in bad faith.....	118
4. Legal effects.....	118
(1) Third-party protection – acquisition in good faith (voluntary loss of possession)	118
(2) Third-party protection – acquisition in good faith (involuntary loss of possession).....	119
(3) Third-party protection – acquisition in bad faith.....	120
B. France	121
1. Basic concepts	121
(1) Ownership, possession and detention	121
(2) Theft.....	125
(3) Cultural object	125
(4) Legal remedy.....	127
(5) Prescription.....	128
2. Contextualization	132
(1) Voluntary and involuntary loss of possession.....	132
(2) Nemo plus iuris ad alium transferre potest quam ipse habet.....	133
3. Operationalization	133
(1) Third-party protection – acquisition in good faith (voluntary loss of possession)	133
(2) Third-party protection – acquisition in good faith (involuntary loss of possession).....	154
(3) Third-party protection – acquisition in bad faith.....	156
4. Legal effects	157
(1) Third-party protection – acquisition in good faith (voluntary loss of possession)	157
(2) Third-party protection – acquisition in good faith (involuntary loss of possession).....	157
(3) Third-party protection – acquisition in bad faith.....	158
C. The Netherlands	160
1. Basic concepts	160
(1) Ownership, possession and detention	160
(2) Theft.....	163
(3) Cultural object	163
(4) Legal remedy.....	164
(5) Prescription.....	166
2. Contextualization	167
(1) Voluntary and involuntary loss of possession.....	167
(2) Nemo plus iuris ad alium transferre potest quam ipse habet.....	168
3. Operationalization	169
(1) Third-party protection – acquisitions in good faith (voluntary loss of possession).....	169
(2) Third-party protection – acquisitions in good faith (involuntary loss of possession)	179
(3) Third-party protection – acquisitions not in good faith	182
4. Legal effects	184
(1) Third-party protection – acquisition in good faith (voluntary loss of possession)	184
(2) Third-party protection – acquisition in good faith (involuntary loss of possession).....	185

(3) Third-party protection – acquisition not in good faith.....	185
Summary	187

Introduction

In the introductory chapter to the present research, discrepancies in the outcomes of contentious cases dealing with ownership disputes as to stolen cultural objects were alluded to.¹ As a matter of recap, it can be submitted that – depending on the choice-of-law rules prescribed by the *lex fori* and, more importantly, upon the applicable law dictated by the choice-of-law rule applied – the outcome will either favour the dispossessed owner or the good faith acquirer in keeping the stolen object. Thenceforth, differences between the laws applied by the courts seized by a contention lead to paradoxical results in situations that are *de facto* marked by similarities: in fact, the said differences enable thieves to make an astute use of the discrepancies in substantive laws in order to dispose of the products of their illegal activities. This in turn makes it possible for them to swindle stolen cultural objects easily, and in doing so to launder the illicit origin of these items. The astuteness is further reckoned by taking into consideration differences in the rules dealing with: the loss of possession of owners, the standards of good faith expected from third-party acquirers, the allocation of burden of proofs and the possibilities to acquire ownership through means of market overt.² Consequently, it is generally conceded that the mere existence of discrepancies between domestic private laws considerably impairs any efforts to tackle the illicit traffic in stolen cultural property at the international level. This is notably the reason why the drafters of the convention established a *lex specialis* for the acquisition of stolen cultural objects in Chapter II.

In order to illustrate the paradoxical outcomes resulting from this system and to explain how Chapter II remedied these discrepancies, Part II of the present contribution analyses the differences in the private law regimes of six states. Whilst Chapter 2 will lay down the rules relevant to solving the so-called ‘eternal triangle of property law’ in three European Jurisdictions – Belgium, France and The Netherlands –, its findings are to be further compared with the analysis of the three American jurisdictions – New Jersey, California and New York – dealt with in Chapter 3 below. The comparative study of these six jurisdictions will provide an illustration of the discrepancies in solutions to similar problems at the epicentre of the paradox that Chapter II is set to rectify. Adjacently, this overview will help to understand the regime laid down by the 1995 UNIDROIT convention and illustrate the important contribution brought by Chapter II to tackling cultural property theft. Both aspects will be dealt with in detail in Chapter 4 below.

Before delving into the main thrust of the subject, a few preliminary remarks must be formulated to further nuance the scope of Chapter 2: firstly, in the three European legal systems scrutinized, the restitution of stolen cultural objects is a problem that falls almost exclusively within the ambit of private law and, more particularly, under the umbrella of property law.³ As such, – despite the existence of specific domestic rules applicable to certain categories of cultural objects that benefit from a special protection – the present contribution focuses solely upon the rules of property law applicable to movable corporeal objects in general. This means that, for example, the regime applicable to cultural objects recognized as belonging to the national cultural heritage of a state, classified as such and subjected to special regulation, are excluded from the present overview. Following this line of reasoning, domestic rules adopted in order to implement the 1970 UNESCO convention, European Community Directive 93/7/EEC and European Union Directive 2014/60/EU, will, for example, also be excluded from the present overview. The focus on general rules of property law is justified having regard to the object and purpose of the present comparative analysis, which is to explain the paradoxical outcome resulting from the international sale of stolen cultural objects and the ensuing private law implications for dispossessed owners and innocent third parties. With this setting in mind, it should be recalled that the *leges speciales* excluded are of little or limited relevancy in the present context for two reasons: a) since the purpose of the present comparative analysis is to illustrate the added value of the regime of Chapter II, this research aims at addressing the rules applicable to cultural objects in general. Cultural objects are more often than not subsumed under the private law regimes applicable to all movable corporeal objects; b) many of the special rules applicable to important categories of cultural objects are embedded with a public law character and – due to this nature – are often not given legal effect by foreign courts. Secondly, recalling the above, the situations contemplated by the present analysis relate exclusively to acquisitions *a non domino* of stolen cultural objects: when a third party acquires a stolen cultural object from a non-owner, a triangular situation ‘owner – thief – innocent third party’ materializes. Since Chapter II undertakes to regulate this triangular situation, attention will only be devoted to the resolution of the said scenario when comparing the UNIDROIT approach with the domestic solutions vetted.

¹ Cf. Introductory Chapter, section B. (1).

² Brunner, C. J. H., ‘Gestolen Roerende Zaken en het Europees Privaatrecht’, in: P. J. I. M. de Waart, G. A. L. Droz, F. Rigaux, C. J. H. Brunner, *Kunsthandel (Inclusief Antiquiteiten) en de Bescherming van Nationaal Cultureel Erfgoed*, Mededeling Nederlandse Vereniging voor Internationaal Recht, (Kluwer: Deventer, November 1994), p. 107.

³ Schönenberger, B., *The Restitution of Cultural Assets – Causes of Action – Obstacles to Restitution – Developments*, (Stämpfli Publishers Ltd: Berne / Eleven International Publishing: Utrecht, 2009), p. 56.

Therefore, the present disquisition is not concerned with acquisitions *a domino*, but focuses exclusively upon the above-mentioned triangular situation. Furthermore, it should be emphasized that amidst scenarios of acquisitions *a non domino*, a distinction must be drawn in the three jurisdictions studied between situations of voluntary and of involuntary loss of possession by the dispossessed party. As noted in 1994 by Brunner, the distinction between voluntary / involuntary loss of possession plays a prominent role in the protection of the dispossessed owner in Code states.⁴ Because Chapter II addresses the private law consequences of the misappropriation of cultural objects through theft, the focus of the present comparative analysis is laid upon acquisitions *a non domino* following from an involuntary loss of possession through means of theft. Nonetheless, scenarios of acquisition *a non domino* stemming from a voluntary loss of possession are discussed to the extent that the rules share commonality with the contemplated regimes. Thirdly, for the sake of consistency and expediency, this comparative analysis does not attempt to provide a comprehensive analysis of the domestic rules scrutinized. Instead, it aims to illustrate concisely the resolution of the ubiquitous triangular problem in order to compare these solutions to Chapter II of the 1995 convention. Furthermore, it is worth specifying that the said chapter has not been designed to reform domestic private law regimes, but instead it instates a *lex specialis* for the transfer of stolen cultural objects, and more particularly to ensure the principle of restitution.⁵ Henceforth, the present research approaches the domestic legal regimes accordingly and will not cover ancillary aspects which have been left unregulated by the 1995 convention, such as contractual remedies against the person that has transferred the stolen item to the possessor obliged by the claim in restitution. Fourthly, certain specificities addressed by the regime of Chapter II – such as donations or questions relating to fixtures – will not be dealt with throughout the comparative analysis. This exclusion stems from the emphasis of the research upon the aforementioned triangle, as the present overview attempts to provide a concise presentation of domestic responses to the contemplated dilemma without discussing all foreseeable scenarios. What is more, it is important to emphasize that despite the fact that these domestic solutions are marred with procedural technicalities, the present contribution does not tackle most of these procedural considerations. Consequently, the *caveat lector* rule applies and the reader is invited to consult further literature for more information about procedural aspects relevant to the resolution of the triangular situation studied, e.g. whether prescription is applicable by operation of law or whether it must be invoked in front of the court. Fifthly, the triangular situation studied is characterized by a kaleidoscope of scenarios. For example, it may be possible that a stolen cultural object has passed through several hands after the theft. Subsequently, different rules might apply depending on how many changes in possession – i.e. third, fourth, fifth hand, etc. – have taken place after the theft. The present research focuses exclusively on the core rules of third-party protection applicable to the basic scenario in which a stolen cultural object is transferred to an innocent acquirer, without considering all possible alternative scenarios. It is, therefore, recommended to approach the present analysis with caution considering that the legal field scrutinized is fraught with technicalities and that the present contribution does not attempt at discussing all envisageable situations. Finally, for the sake of simplification, the present research assimilates the owner dispossessed by theft to the claimant and the possessor of the stolen object as the defendant.

⁴ Brunner, (1994), p. 112.

⁵ For more details on this point, see both ‘Chapter 1 – Presentation and applicability’ and ‘Chapter 4 – The Unidroit compromise’ of the present research.

A. Belgium*

Hitherto, Belgium has not become a party to the 1995 UNIDROIT convention.⁶ Consequently, it has not yet instated a *lex specialis* for the transfer and the acquisition of cultural objects in its private law regime.⁷ As such, with the exception of certain objects belonging to the public domain and of the rules implementing Directives 93/7/EEC and 2014/60/EU addressed at national treasures, the transfers relating to most cultural objects fall within the ambit of the Belgian Civil Code (*Code civil belge / Belgisch Burgerlijk Wetboek*),⁸ hereinafter BCC. The contemplated regime is laid down in books II and III – respectively named ‘Goods and modifications of property’ (*Des biens et des différentes modifications de la propriété / Goederen en beperkingen van eigendom*) and ‘Different means by which property can be acquired’ (*Des différentes manières dont on acquiert la propriété / Wijze van eigendomsverkrijging*) – of the BCC.⁹

In order to appreciate the insights of both books devoted to resolving the eternal triangle of property law, section A.1 will, at first, address the basic concepts of relevance to the present disquisition. To do so, key notions relevant to regulating the triangular situation will be explained, including: the notions of ownership, possession and detention, theft, the delimitation of the categories of objects subjected to the present rules, the legal means available to a dispossessed person to recover cultural objects that have been stolen and periods of limitation to recover the said object. Secondly, section A.2 will place the discussion in context by laying down core values forming the bedrock of the contemplated rules. Subsequently, section A.3 will explain how the Belgian private law apparatus regulates the triangular scheme addressed and, thus, both the interconnectivity and operationalization of the key concepts and core values laid down in the first two sections. As such, it will explain how the different notions defined interact with one another and how Belgian law balances the rights and obligations of the parties concerned in the set context. Finally, section A.4 will explain the legal effects flowing from the application of the described legal apparatus and the resulting consequences for the parties involved.

1. BASIC CONCEPTS

Because the present discussion will explain how Belgian private law balances the rights and obligations of a dispossessed ‘owner’ as against the rights and obligations of a good faith ‘possessor’, these two notions must first be explained and then be distinguished from the concept of detention.

(1) Ownership, possession and detention

Article 544 BCC provides a classical, but still relevant, definition of ownership (*propriété / eigendom*).¹⁰

Article 544 BCC – Ownership is the right to enjoy and dispose of things in the most absolute manner, provided one does not exercise this right in a way prohibited by statutes or regulations.

A person that enjoys the right of ownership is called an owner. The owner is given three powers in exercising his ownership: the *usus* – also known as the faculty to use the object upon which the ownership is vested –, the *fructus* – a right to acquire the fruits stemming from the property –, and the *abusus* – giving to the owner the

* There exists no official translation of the Belgian Civil Code. Therefore, the articles of this Code that are of relevance to the present discussion have been translated by the author.

⁶ In 2012, Belgium pondered the question of whether or not to adhere to the 1995 Unidroit convention and studied the merits of a possible ratification. The findings of the study that was commissioned by the Flemish Kunsten en Erfgoed department and the Walloon Direction du Patrimoine Culturel were published at the end of the same year (see the finalized report: Kunsten en Erfgoed, Direction du Patrimoine Culturel, ‘Opportunité en gevolgen van de toetreding door België tot het UNIDROIT 1995-verdrag inzake gestolen of illegaal uitgevoerde cultuurobjecten / Opportunité et conséquences de la ratification par la Belgique de la CONVENTION UNIDROIT de 1995 relative aux biens culturels volés et illicitement exportés’, Study relating to the adhesion of the Kingdom of Belgium to the Unidroit Convention on stolen or illegally exported cultural objects (1995), report finalized in 2012). For more arguments as to why Belgium is not a party to the convention, see <http://www.unidroit.org/english/conventions/1995culturalproperty/1meet-120619/answquest-ef/belgique.pdf>, last retrieved on 01.03.2018.

⁷ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 56.

⁸ Cauffman C., Sagaert, V., “National Report on the Transfer of Movables in Belgium”, in: W. Faber and B. Lurger, *National Reports on the Transfer of Movables in Europe*, Volume 4, (Sellier: Munich, 2011), p. 202; the Belgian Civil Code finds its historical roots in the French Civil Code because of Belgium’s affiliation to France when the Code Napoleon was introduced in 1804. Consequently, despite the recent reforms in French private law (see below), there is a great degree of similarity – and sometimes coherence – between the property law regimes of these two states (*idem*).

⁹ It should be noted that, at the time of writing, the regime of property law laid down in Book 3 of the Belgian Civil Code is being reformed. The proposed regime can be found at the following url: https://justitie.belgium.be/sites/default/files/voorontwerp_van_wet_goederenrecht.pdf, last retrieved on 13.08.2018. The Explanatory Memorandum to the reform can be found at the following url: https://justitie.belgium.be/sites/default/files/memorie_van_toelichting_goederenrecht.pdf, last retrieved on 13.08.2018.

¹⁰ Cauffman and Sagaert, (2011), p. 202. This definition has not been changed since 1804 (*idem*).

faculty to dispose of the item.¹¹ Furthermore, Article 544 BCC creates a right of enjoyment of the property in the most extensive manner possible, albeit it constraints this right to the fringes of the law.¹² In fact, Article 544 BCC posits a contradiction: although the first part of the definition of this article might suggest the presence of plenipotentiary faculties for owners, the absoluteness of ownership has in reality waned through legal restrictions.¹³ Recognizing this inherent relative absoluteness,¹⁴ some scholars have become exponents to an alternative understanding of ownership: the right would best be described as a general¹⁵ discretionary right¹⁶ to dispose of an object,¹⁷ including the right to keep or sell it.¹⁸ What is more, ownership is a general right that implies a quasi-unfettered faculty to make decisions with respect to the item,¹⁹ albeit within the boundaries of the law.²⁰⁻²¹ The overarching nature given by this interpretation provides an inherent continuous character to the right, concurrently rendering the right imprescriptible. This means that it cannot disappear by non-user or by mean of extinctive prescription.²²

Next to the notion of ownership, Belgian law also gives legal effects to the concept of possession (*possession / bezit*). Article 2228 BCC defines this notion in the following manner:²³

Article 2228 BCC – Possession is the detention or the enjoyment of a thing or of a right that one holds or that one exercises for oneself, or by another who holds it or exercises it in one's name.²⁴

Following this definition, possession constitutes an exercise of factual control over a thing for oneself. As corroborated by the Belgian *Cour de Cassation*, possession is a factual situation creating legal effects.²⁵ It is thus neither considered to be a right *in rem*, nor a right *in personam*, but rather a legal fact with legal effects.²⁶ As such, unlike rights, it cannot be transferred from one possessor to another by operation of law.²⁷ Similar to ownership, possession implies a behaviour that is concurrent to the one exercised by an owner upon his property,²⁸ irrespective of right-bearing. This entails that possession instates a presumption of ownership.²⁹

In order to speak of possession as laid down in Article 2228 BCC, two cumulative conditions must be met: possession is recognized *de jure*³⁰ when both a factual element (*corpus*) and a cognitive element (*animus*)³¹ can be imputed to the same person. To qualify as possession, it is important that both *corpus* and *animus* are reunited in one person – the possessor – who will be considered to have exclusive control over the object.³²

¹¹ Cauffman and Sagaert, (2011), p. 204.

¹² Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 56.

¹³ Dekkers-Dirix, R., *Handboek Burgerlijk Recht*, Deel II, (Intersentia: Antwerpen / Oxford, derde editie, 2005), p. 59; this decrease in vigor is best illustrated by the constraint of prohibition of abuse of rights, which forbids the use of an object with the aim of causing damage to another. For a more thorough explanation as to the interpretation of this abuse of rights doctrine, see Cauffman and Sagaert, (2011), p. 204.

¹⁴ See for example Dekkers-Dirix, (2005), p. 59, where the existence of absolute rights in Belgian law is discredited.

¹⁵ The qualification of general right means that the owner is entitled to do whatever he wants with the property, except what has been explicitly prohibited. By way of contrast, other rights can be exercised to the extent authorized by law. See Dekkers-Dirix, (2005), p. 60.

¹⁶ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 57.

¹⁷ This right to dispose of the object is also known as the right of *abusus*. See Dekkers-Dirix, (2005), pp. 59 and 60.

¹⁸ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 56.

¹⁹ In fact, the owner can dispose of the object without having to provide justification to others. See Dekkers-Dirix, (2005), p. 59.

²⁰ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 57.

²¹ A notorious example of a limitation exercised by law and peculiar to cultural property relates to the constraints applicable to objects classified as belonging to the public domain. Dekkers-Dirix, (2005), p. 60.

²² Dekkers-Dirix, (2005), pp. 59-60; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 57.

²³ Sagaert, V., *Beginnelsen van Belgisch Privaatrecht V – Goederenrecht*, (Wolters Kluwers: Mechelen, 2014), p. 633; Cauffman and Sagaert, (2011), p. 207.

²⁴ A few remarks need to be formulated with regard to Article 2228 BCC: firstly, the definition is problematic since it attempts to explain possession by submitting that it is a type of detention. Since both concepts are to be clearly distinguished in Belgian law, this definition is confusing. Secondly, Article 2228 BCC does not explicitly identify detention as a factual situation to which Belgian law gives legal effects. Thirdly, this article fails to highlight the extraordinary character of possession. See Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 58.

²⁵ Sagaert, (2014), p. 635.

²⁶ Cauffman and Sagaert, (2011), p. 206; Sagaert, V., Tilleman, B., Verbeke, A. L., *Vermogensrecht in Kort Bestek*, (Intersentia: Antwerpen, 3de editie, 2013), p. 231.

²⁷ Sagaert, (2014), pp. 635, 647.

²⁸ Dekkers-Dirix, (2005), pp. 93 and 536.

²⁹ Cauffman and Sagaert, (2011), p. 210.

³⁰ Although it is possible for a possession to have materialized *de facto*, for the sake of legal certainty this possession must comply with the conditions mentioned to be given effect in a legal framework and, thus, to be worthy of legal protection. See Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

³¹ Dekkers-Dirix, (2005), pp. 538, 542; Cauffman and Sagaert, (2011), p. 207; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 58; Sagaert, (2014), p. 633.

³² Dekkers-Dirix, (2005), p. 542.

The *corpus* – also known as *corpus possessionis*³³ – is present when the possessor has factual control over an object.³⁴ To assess the presence of this factual control, the court seized with a contention will appreciate *in concreto* the behaviour of – and material acts exercised by – the person holding the item, which must coincide with the exercise of factual control inherent to the right of ownership.³⁵ Two material acts that have been recognized as proof of factual control over the object are predicated in the definition of possession itself: both the detention of the object³⁶ or its enjoyment are assimilated to an exercise of factual control.³⁷⁻³⁸ But for these two material acts, it is not required that the *corpus* is always under the direct factual control of the possessor: following the adage *possessio animo suo, corpore alieno*, it is sufficient for a possessor to have indirect possession of the object.³⁹ This means that – as already clarified by Article 2228 BCC *in fine* – the possession remains despite the fact that detention of the object has been given to another person.⁴⁰ The possibility for possession to exist – even though another person holds the object – presupposes that possession is not only present when factual control is exercised, but also when the cognitive element – the *animus* – can be discerned in the possessor.

The *animus* – referred to as *animus possessionis* – implies that the possessor has the intention to have factual control over the object for himself, but not for another,⁴¹ and that this volition is always present when exercising the said control.⁴² In other words, the possessor must have the *animus rem sibi habendi*. Furthermore, this *animus* must always be present in the person of the possessor and – contrary to the *corpus* – it cannot be exercised indirectly.⁴³ As such, Belgian law considers the *animus domini* as the prominent characteristic of possession.⁴⁴ To unveil its presence, objective standards of determination are applied:⁴⁵ if it is clear that the factual control over the object is merely temporary, then no *animus domini* can be inferred from this interim exercise.⁴⁶ This translates into the truism that a possessor must not believe that his factual control is temporary.⁴⁷ The *causa detentionis* upon which the detentor has acquired the object will thus be determinative in establishing the presence of the *animus*.⁴⁸ If the said *causa* includes an obligation of restitution *ab initio*, it is clear that there is no *animus* present for the purpose of establishing possession.⁴⁹ To help proving the presence of the *animus*, Article 2230 BCC creates a rebuttable presumption of possession for oneself.

Article 2230 BCC – One is always presumed to possess for oneself, and in the quality of owner, unless it is proved that one began to possess for another.

Because of the presumption established by Article 2230 BCC, whenever a claimant contests the possession of the one exercising factual control over the object, he will have to rebut the presumption that the *animus rem sibi habendi* is present.⁵⁰ As such, the claimant has the burden of proving that there is no possession if he wants to divest the person exercising factual control from the benefits inherent to possession (as explained below).⁵¹ It is important to note that the *animus* must be clearly distinguished from good faith; although it is a constitutive element of possession, the requirement of good faith is a separate aspect that does not affect the presence or absence of possession.⁵²

Finally, possession must not be confused with detention (*détention / houderschap*), as a detentor will not be able to benefit from measures of third-party protection designed for possessors. The difference between these two notions remains in the exercise of *animus* as described above; a detentor is a person to whom the owner, or the possessor, has provisionally and physically entrusted the object, or a person to whom the law has authorized

³³ Dekkers-Dirix, (2005), p. 536; Cauffman and Sagaert, (2011), p. 207; Sagaert, (2014), p. 633.

³⁴ Sagaert, (2014), p. 633; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

³⁵ Sagaert, (2014), p. 633; because of the factual character of this assessment, it is impossible for the *Cour de Cassation* to review it.

³⁶ Detention is defined as a factual holding of an object in one's hands that does not amount to a detention for someone else. See Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

³⁷ Enjoyment implies that the object is put to economic use. See Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

³⁸ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

³⁹ It is thus possible to exercise the *corpus* either directly or indirectly. Sagaert, Tilleman and Verbeke, (2013), p. 230; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

⁴⁰ Sagaert, (2014), p. 633.

⁴¹ Sagaert, (2014), p. 634; Cauffman and Sagaert, (2011), p. 207.

⁴² Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 59.

⁴³ Cauffman and Sagaert, (2011), p. 208; Sagaert, (2014), p. 635 and Sagaert, Tilleman and Verbeke, (2013), p. 231.

⁴⁴ Cauffman and Sagaert, (2011), p. 207.

⁴⁵ Cauffman and Sagaert, (2011), p. 208.

⁴⁶ Cauffman and Sagaert, (2011), p. 208.

⁴⁷ Dekkers-Dirix, (2005), p. 536.

⁴⁸ Sagaert, (2014), p. 634.

⁴⁹ Sagaert, (2014), p. 634.

⁵⁰ Cauffman and Sagaert, (2011), p. 209.

⁵¹ Cauffman and Sagaert, (2011), p. 209.

⁵² Boufflette, S., *La Possession*, (Larcier: Bruxelles, 2010), pp. 53 and 59.

the use of the object belonging to someone else.⁵³ The detentor does not have the *animus rem sibi habendi* as he has no intention to possess.⁵⁴ Consequently, he cannot benefit from the protection afforded to possessors⁵⁵ – including from acquisitive prescription⁵⁶ –, unless he derives his detention from one that enjoys the protection or unless he becomes the possessor afterwards.⁵⁷

(2) Theft

Theft (*vol / diefstal*) is defined in Article 461 of the Belgian Criminal Code (*Code pénal belge / Belgisch Strafwetboek*), hereinafter BCrC.⁵⁸

Article 461 BCrC – Whomever subtracts fraudulently a thing that does not belong to him is guilty of theft. (An act of fraudulent subtraction of a thing belonging to another for the purpose of temporary usage is assimilated to theft).

Article 461 BCrC provides a broad definition of the notion of theft, as it merely requires the fraudulent appropriation of the property of another – even for temporary use – by someone who is not entitled to hold it.⁵⁹ This notion is relevant to the application of Articles 2279 and 2280 BCC, as will be explained below. It should be noted that certain types of misappropriations that do not, strictly speaking, constitute theft on the basis of Article 461 BCrC are assimilated to it for the purpose of the second paragraph of Article 2279 BCC (cf. below).⁶⁰ Nevertheless, the definition of theft cannot be extended to other types of crimes, such as abuse of confidence and swindle, because these crimes presuppose the voluntary transfer of possession from the owner to the defrauding party.⁶¹ Because theft results from an involuntary loss of possession (as explained below), it is not possible to assimilate abuse of confidence or swindle to it. Furthermore, in order to speak of theft for the purpose of applying the rules of private law described below, there is no need to know the identity of the thief or for the thief to have been successfully prosecuted.⁶² As a synopsis, it is sufficient for a theft to have taken place for the remedy of revindication to be of avail to the dispossessed owner.

(3) Cultural object

But for a few exceptions that are not addressed by the present research (cf. the reservations made in the introduction above), Belgian private law has not differentiated cultural objects from other types of property. In fact, Belgian private law applies its general rules relevant to the transfer of movables to the transfer of cultural objects. In doing so, a first distinction between corporeal and incorporeal objects must be drawn. Corporeal objects (*choses / zaken*) are things that can be subjected to the five senses.⁶³ Within the category of corporeal objects, Belgian private law makes a distinction between movable and immovable goods (cf. Article 516 BCC).⁶⁴ Movables (*biens meubles / roerende goederen*) are considered a residual category of immovables (*biens immeubles / onroerende goederen*)⁶⁵ and, therefore, everything that is not immovable is movable by means of exclusion. Article 517 BCC defines immovables by distinguishing three categories:

Article 517 BCC – Things are deemed immovable either by their nature, or by their destination, or by the object to which they are applied.

Henceforth, immovables can either be immovable by nature (*immeuble par nature / onroerend uit hun aard*),⁶⁶ by destination (*immeuble par destination / onroerend door bestemming*)⁶⁷ or by assimilation to the object to which they are

⁵³ See Dekkers-Dirix, (2005), p. 539 and ff.; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 60 and Cauffman and Sagaert, (2011), pp. 208-209; Sagaert, (2014), p. 635.

⁵⁴ See Dekkers-Dirix, (2005), p. 539 and ff.; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 60 and Cauffman and Sagaert, (2011), pp. 208-209; Sagaert, (2014), pp. 633, 635.

⁵⁵ See Dekkers-Dirix, (2005), p. 539 and ff.; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 60 and Cauffman and Sagaert, (2011), pp. 208-209.

⁵⁶ Sagaert, (2014), p. 636.

⁵⁷ Sagaert, (2014), p. 633; for more details about the transition from the status of detentor to possessor, see Sagaert, (2014), pp. 637, 638 and 647. See also Sagaert, Tillemans and Verbeke, (2013), pp. 231 and 232.

⁵⁸ Cauffman and Sagaert, (2011), p. 305.

⁵⁹ Cauffman and Sagaert, (2011), p. 305.

⁶⁰ Cauffman and Sagaert, (2011), p. 305. For example, misappropriation by certain family members will not *prima facie* amount to theft, but will qualify as such for the purpose of the application of the second sentence of Article 2279 BCC. See Article 462 BCrC.

⁶¹ Cauffman and Sagaert, (2011), p. 305.

⁶² Dekkers-Dirix, (2005), p. 100.

⁶³ Dekkers-Dirix, (2005), p. 9; Sagaert, Tillemans and Verbeke, (2013), p. 32.

⁶⁴ Sagaert, Tillemans and Verbeke, (2013), p. 23.

⁶⁵ Sagaert, Tillemans and Verbeke, (2013), pp. 23 and 31.

⁶⁶ See Articles 518-523 BCC for an enumeration of goods assimilated to immovables by their nature.

⁶⁷ See Articles 524-525 BCC for an enumeration of goods assimilated to immovables by their destination.

applied (*immeuble par l'objet auquel ils s'appliquent / onroerend door het voorwerp waarop zij betrekking hebben*).⁶⁸ In the present context directed at movable cultural objects, the category of immovables by destination requires further discussion: immovables by destination are governed by the regime applicable to immovables⁶⁹ and are, therefore, not to be considered as movables. A movable object can be assimilated to an immovable by destination when three conditions are fulfilled: a) there is unity in ownership, meaning that the owner of the immovable upon which the movable to be assimilated to the category of immovable by destination is affected also owns the immovable by destination;⁷⁰ b) the owner has the intention to attach the movable perpetually to the immovable. As such, the intention is mirrored in the effective and perpetual fixation of the movable to the immovable;⁷¹ what is more, c) additional objective conditions are to be fulfilled: the movable attached must be a movable by nature;⁷² it must be attached to an immovable by nature⁷³ and finally, – in case of economic exploitation of the premises – the goods attached must be affixed in a durable manner.⁷⁴ Paragraphs (1) and (3) of Article 525 BCC list specific categories of movable (cultural) objects that are considered as immovables by destination: paintings or ornaments that are affixed to an immovable by the use of cement, lime or plaster and that cannot be removed without breaking and deteriorating the object, or without breaking or deteriorating the support upon which they are fixed. Furthermore, statues for which a specific niche has been built – and which are placed in the said niche – are assimilated to immovables by destination, even though their removal would not result in any damage or deterioration to such statues (cf. Article 525 (4) BCC). That being said, it is important to recall that a movable cultural object that complies with these conditions must be considered as immovable by destination. Consequently, it is subject to the rules applicable to immovables and is, therefore, excluded from the ambit of the rules contemplated. Otherwise, objects that are attached to an immovable but that can, for example, be removed without damaging either the soil or the immovable to which it is attached, or the object itself, are assimilated to movables.⁷⁵

In accordance with the above, it should be recalled that everything that is not immovable is movable by definition. Movables can either be considered movable by nature (*meuble par nature / roerend uit hun aard*) or by the destination given by law (*meuble par détermination de la loi / roerend door wetsbepaling*) (see Article 527 BCC). Nevertheless, whilst cultural objects undisputedly fall within the ambit of the first category of movables, they fall short of qualifying as movables by determination given by law (cf. Articles 529-532 BCC).⁷⁶ Article 528 BCC defines movables by nature:⁷⁷

Article 528 BCC – Are movables by their nature, the bodies that can be transported from one place to another, either by their own means, such as animals, or the bodies that can be moved to another location by the effect of an external force, such as inanimated things.

Following Article 528 BCC, the movable nature of a corporeal object is determined by its faculty to be moved.⁷⁸ The cultural objects contemplated by the present research fall within the scope of Article 528 BCC and are, consequently, movables by nature. Put differently, the objects that are subjected to the rules of private law scrutinized are exclusively to be qualified as corporeal movable objects.⁷⁹

(4) Legal remedy

To protect ownership, the most important petitory action of avail to the recovery of a stolen cultural object is the action in revindication (*revendication / revindicatie*).⁸⁰ An action in revindication of a stolen object is an action by which a dispossessed owner demands the restitution of an item to a third party who asserts having acquired it.⁸¹ The *Cour de Cassation* has further qualified this remedy as an action to ensure the recognition – or the protection – of the right of ownership that rests upon a movable or immovable object.⁸² This entails that an owner dispossessed by means of theft does not, in principle, lose ownership of the object.⁸³ Instead, he can reclaim the

⁶⁸ See Article 526 BCC for an enumeration of the goods assimilated to immovables by assimilation to the object to which they are applied.

⁶⁹ Clippele, M. -S., 'Quand l'art ouvre la voie au droit: le palais Stockel', *Journal des tribunaux*, (26 janvier 2013), 4-N°6506, p. 51.

⁷⁰ Clippele, (2013), p. 51.

⁷¹ Clippele, (2013), p. 51.

⁷² Clippele, (2013), p. 51.

⁷³ Clippele, (2013), p. 51.

⁷⁴ Clippele, (2013), p. 51.

⁷⁵ Dekkers-Dirix, (2005), p. 10.

⁷⁶ See Articles 529-532 BCC, which provide an enumeration of the goods that are classified as movable by determination given by law.

⁷⁷ Dekkers-Dirix, (2005), p. 9.

⁷⁸ Dekkers-Dirix, (2005), pp. 10 and 25.

⁷⁹ Sagaert, Tilleman and Verbeke, (2013), p. 239.

⁸⁰ Cauffman and Sagaert, (2011), p. 206.

⁸¹ Dekkers-Dirix, (2005), p. 165; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 58.

⁸² Dekkers-Dirix, (2005), p. 165; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 58.

⁸³ Cauffman and Sagaert, (2011), p. 305.

object by means of revindication.⁸⁴ Nonetheless, in order to successfully exercise an action in *rei vindicatio*, the claimant must prove his ownership to the object (as prescribed by Article 1315 BCC).⁸⁵ This action is not limited to owners but can also be relied upon by the possessor or detentor to whom the owner has entrusted the object.⁸⁶ A revindication is exclusively a petitory action, and can only be exercised against the actual possessor or detentor of the item.⁸⁷ In other words, the recognition, or protection, can be exercised against any third party that is either in possession or in detention of the object to force the said party to hand it back.⁸⁸ Therefore, the owner might have recourse to the remedy of revindication against either the thief⁸⁹ or – even though the identity of the thief remains unknown⁹⁰ – the current possessor or detentor.⁹¹

(5) Prescription

Prescription is defined in Article 2219 of the Belgian Civil Code.

Article 2219 BCC – Prescription is a means of acquisition or of liberation triggered by the passage of a certain lapse of time, and subject to the conditions established by law.

Prescription serves an important role as it is specifically meant for bringing finality to procedures when memories wane, witnesses disappear, evidence is destroyed and ink fades.⁹² There exists two types of prescription in Belgian private law: acquisitive and extinctive prescription.⁹³ Both mechanisms are regulated by the provisions laid down in Articles 2219-2280 BCC. The mechanism of extinctive prescription entails that a person that does not exercise his right might be deprived of the possibility of doing so after a certain period of time.⁹⁴ The period of extinctive prescription for petitory action is prescribed by Article 2262 BCC.

Article 2262 BCC – All petitory actions prescribe after thirty years, without there being a need for the one that invokes the prescription to produce a title, or without it being possible to oppose the exception of bad faith against him.

But for this general rule, the enforcement of the right of ownership through the action of revindication is not subjected to any time constraints. Because of the imprescriptible nature of ownership in Belgian law, it is impossible for the right of revindication – the right that is coterminous to the right of ownership – to prescribe by means of extinctive prescription under Article 2262 BCC.⁹⁵ Despite this imprescriptible attribute, ownership may expire only when another possessor has himself acquired ownership by means of acquisitive prescription.⁹⁶ Acquisitive prescription – also referred to as *usucapio*⁹⁷ – entails the acquisition of a right through the temporary factual exercise (i.e. the possession) of the said right.⁹⁸ Acquisitive prescription operates by the expiration of either a short limitation period (cf. Article 2279 BCC) or a long limitation period (cf. Article 2262 BCC). Despite the lack of specificity in its language Article 2262 BCC does not only prescribe means of extinctive prescription, but also posits a (long) independent period of acquisitive prescription of thirty years.⁹⁹ The acquisitive / extinctive character of Article 2262 BCC is best illustrated by the case of *République Islamique d'Iran contre V. D.*,¹⁰⁰ – also known as the Khurvin case – quashed by the *Cour de Cassation* on 4 October 2012. In this case, the Court of Appeals of Brussels had erred in deciding that Iran's claim for the restitution of Iranian artefacts introduced against an individual – who had acquired these artefacts through bequeathal – had prescribed through the application of Article 2262 BCC.¹⁰¹ In fact, the *Cour de Cassation* reached a different conclusion after reviewing the quality of the possession of one of the defendant's parents on the basis of Iranian law. The court understood

⁸⁴ Cauffman and Sagaert, (2011), p. 305.

⁸⁵ Dekkers-Dirix, (2005), p. 92, 166; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 58.

⁸⁶ Dekkers-Dirix, (2005), p. 101, where it is specified that a possessor or a detentor may use the claim in revindication because both stand guarantor for the object towards the owner; see also Cour d'appel de Bruxelles, 17^{ème} chambre, 2002/AR/1209, 1^{er} mars 2004.

⁸⁷ Dekkers-Dirix, (2005), p. 101. As noted by Dekkers, the revindication is a petitory action which retrieves the object from where it is located. It is, therefore, not possible to instate a claim in revindication where the object is not located (*idem*).

⁸⁸ Dekkers-Dirix, (2005), p. 165; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 58.

⁸⁹ It is important to note that a thief is considered as the possessor of the object since the *causa detentionis* upon which he has acquired the possession does not contain an obligation of restitution. See Sagaert, (2014), p. 636.

⁹⁰ Cauffman and Sagaert, (2011), p. 305.

⁹¹ Dekkers-Dirix, (2005), p. 91.

⁹² Dekkers-Dirix, (2005), pp. 497-498; Sagaert, (2014), p. 632.

⁹³ Sagaert, (2014), p. 631; Sagaert, Tilleman and Verbeke, (2013), p. 230.

⁹⁴ Sagaert, (2014), p. 632; Cauffman and Sagaert, (2011), p. 308; Sagaert, Tilleman and Verbeke, (2013), p. 230.

⁹⁵ Dekkers-Dirix, (2005), p. 169.

⁹⁶ Sagaert, (2014), p. 632; Dekkers-Dirix, (2005), p. 169.

⁹⁷ Dekkers-Dirix, (2005), pp. 158, 535.

⁹⁸ Sagaert, (2014), p. 631.

⁹⁹ Sagaert, (2014), pp. 656 *juncto* 652.

¹⁰⁰ République Islamique d'Iran c. V. D., N°C.11.0686.F, 4 October 2012.

¹⁰¹ République Islamique d'Iran c. V. D., N°C.11.0686.F, 4 October 2012, C.11.0686.F/31.

that the defendant's mother had not validly entered into possession and that her detention failed to meet the requirements necessary to qualify as possession, as prescribed by Article 36 of the Iranian Civil Code.¹⁰² Consequently, the *Cour de Cassation* inferred that the defendant could not rely upon the acquisitive prescription of Article 2262 BCC, because his mother had never acquired possession on the basis of Iranian law and that reliance upon this article was impossible because possession was a precondition to acquiring ownership through means of acquisitive prescription.¹⁰³ Furthermore, the Brussels' Court of Appeal had clearly erred in deciding that the revindication had expired through means of extinctive prescription on the basis of Article 2262 BCC, as the right of ownership and its auxiliary action in revindication could never prescribe by means of non-user.¹⁰⁴

Acquisitive prescription, as posited by Article 2219 BCC *juncto* Articles 2262 and 2279 BCC, thus presupposes the existence of possession as elucidated by Article 2228 BCC.¹⁰⁵ This means that, as long as nobody takes possession of the object, the right of ownership and the adjacent action in revindication cannot be constrained, irrespective of how many years lapse.¹⁰⁶ Nonetheless, the period of time prescribed to acquire ownership by possession through means of acquisitive prescription will be determined by the exercise of good faith – or a lack thereof – during the acquisition. In the former case, the acquisition can be instantaneous (cf. Article 2279 BCC) or will occur after thirty years in the case of bad faith acquisition (cf. Article 2262 BCC). In other words, the availability of the remedy of revindication is limited in time:¹⁰⁷ the specific length during which a revindication is possible will be concomitant with the exercise of good faith – or the lack thereof – prescribed to acquire by means of prescription.¹⁰⁸ The application of this distinction is discussed in more details below.

Suffice it to specify for the moment that a dispossessed owner, a possessor or a detentor will all have an effective remedy to the theft of a movable object, but that this remedy can be constrained by the establishment of a new right of ownership through means of acquisitive prescription. In fact, as long as nobody has acquired ownership of the object through means of acquisitive prescription, the remedy of revindication remains open to the dispossessed person. Furthermore, the length of time required to acquire ownership through means of acquisitive prescription will depend upon the presence or the absence of good faith during the acquisition of the object.

2. CONTEXTUALIZATION

In order to properly contextualize the present discussion, section 2 firstly elaborates upon the distinction between voluntary and involuntary loss of possession. Secondly, the *nemo dat quod non habet* principle – as an important tenet of Belgium property law – will be addressed. Thus, before explaining the balancing of interests between dispossessed persons and *bona fide* acquirers of stolen cultural property – tackled in section 3 below –, these two concepts – forming the premises upon which the described rules have been developed – need to be explained.

(1) Voluntary and involuntary loss of possession

In order to frame the discussion properly, the distinction between voluntary and involuntary loss of possession needs to be addressed. Belgian law recognizes two different manners for the owner's possession to be disassociated from his ownership: either through voluntary dispossession (*dépossession volontaire / vrijwillig bezitsverlies*), or through involuntary loss of possession (*dépossession involontaire / onvrijwillig bezitsverlies*).¹⁰⁹ On the one hand, a voluntary loss of possession materializes when the owner voluntarily entrusts his property to someone else – for example through contractual means¹¹⁰ – and this person disposes of the item by giving or selling it to a third party.¹¹¹ In this case, the said third party enters into possession *a non domino* following a voluntary loss of possession by the owner. Such a voluntary loss of possession thus entails the transfer of possession resulting from the owner's volition. Involuntary loss of possession, on the other hand, does not result from the owner's volition, as he never intended to risk losing his property by entrusting it to another person.¹¹²

¹⁰² *République Islamique d'Iran c. V. D.*, N°C.11.0686.F, 4 October 2012, C.11.0686.F/27.

¹⁰³ *République Islamique d'Iran c. V. D.*, N°C.11.0686.F, 4 October 2012, C.11.0686.F/27 and C.11.0686.F/28.

¹⁰⁴ *République Islamique d'Iran c. V. D.*, N°C.11.0686.F, 4 October 2012, C.11.0686.F/31.

¹⁰⁵ Sagaert, (2014), p. 650.

¹⁰⁶ Dekkers-Dirix, (2005), p. 169.

¹⁰⁷ Cauffman and Sagaert, (2011), p. 305.

¹⁰⁸ Cauffman and Sagaert, (2011), p. 305.

¹⁰⁹ Cauffman and Sagaert, (2011), p. 299.

¹¹⁰ Cauffman and Sagaert, (2011), p. 299.

¹¹¹ In this scenario, this person has committed an abuse of confidence against the owner, an act defined in Article 491 BCrC. See Sagaert, Tilleman and Verbeke, (2013), p. 232.

¹¹² Cauffman and Sagaert, (2011), p. 299.

In other words, because in case of theft there has been no voluntary loss of possession of the object, the dispossession is contrary to the will of the owner.¹¹³

The distinction between voluntary / involuntary loss of possession is particularly important because – depending upon the type of dispossession – the degree of protection regarding *a non domino* acquisitions that a third party will benefit from will differ.¹¹⁴ In case of voluntary loss of possession – i.e. if a third party acquires the object from one whom the owner entrusted with the item –, the third party will be strongly protected. This, in turn, merely leaves the dispossessed owner with a recourse against the one he trusted on the basis of their relative contractual obligations.¹¹⁵ In fact, the protection given to a *bona fide* third party acquiring *a non domino* will be instantaneous.¹¹⁶ The first sentence of Article 2279 BCC allows for an instantaneous protection of the third party for the sake of ensuring commercial transactions, provided certain conditions are complied with.¹¹⁷ These are addressed below. The instantaneous character of the protection is not only justified by commercial considerations, but also because in case of voluntary loss of possession, the owner has contributed to the situation by transferring possession of the object to someone that was not trustworthy.¹¹⁸ Involuntary dispossession – recognized by the second sentence of Article 2279 BCC in the instances of theft or loss of the object – is regulated differently: the protection afforded to a third party acquiring in good faith *a non domino* is protracted for three years so as to give to the owner the possibility to retrace the stolen property. If the third-party acts in bad faith, the period is further prolonged. Hence, the distinction between voluntary and involuntary loss of possession plays an important role in the length of acquisitive prescription posited by Article 2279 BCC.¹¹⁹ The implications of the distinction between voluntary / involuntary loss of possession will be addressed in more detail below.

(2) Nemo plus iuris ad alium transferre potest quam ipse habet

The *nemo plus iuris ad alium transferre potest quam ipse habet* principle – hereinafter referred to as the *nemo dat quod non habet* rule – translates as meaning that one cannot transfer more than one has himself.¹²⁰ In the present context, this means that a thief has – legally speaking – acquired no property right upon the stolen item through his act of thievery. The lack of any rights upon the object implies that when transferring it to a third party, the thief cannot convey any right upon the stolen thing to the transferee. Since Belgian law adheres to the *nemo dat* principle, it is technically impossible for a possessor that has acquired an object from a thief or subsequent possessor – i.e. *a non domino* – to acquire ownership through the said acquisition.¹²¹ This has serious repercussions for the third party recipient – e.g. the purchaser, heir or donee – that is unaware of the theft and genuinely believed that he acquired ownership from the owner. More conspicuously, a feeling of injustice may particularly arise when the acquisition by a *bona fide* third party was for value. Thenceforth, the sacrosanctity of the *nemo dat* principle is limited through rules on third-party protection to afford safeguards to innocent acquirers;¹²² despite the recognition and applicability of the *nemo dat* principle, Article 2279 BCC plays a key role in protecting acquirers that have innocently obtained an object from a non-owner. In other words, a good faith acquirer of a corporeal moveable can rely upon the protection afforded by Article 2279 BCC when he has obtained an object *a non domino*.¹²³

3. OPERATIONALIZATION

Following the determination of the key concepts and core values forming the main thrust of the studied situations, the present section analyses the manner in which Belgian property law regulates the private law implications of the triangular configuration analysed. The starting point of this analysis can be found in Article 2279 BCC, which reads as follows:

¹¹³ Dekkers-Dirix, (2005), p. 100.

¹¹⁴ Cauffman and Sagaert, (2011), p. 299; Dekkers-Dirix, (2005), p. 99.

¹¹⁵ Cauffman and Sagaert, (2011), p. 299.

¹¹⁶ Sagaert, (2014), p. 681.

¹¹⁷ Sagaert, (2014), p. 670.

¹¹⁸ Sagaert, (2014), p. 682.

¹¹⁹ Sagaert, (2014), p. 681.

¹²⁰ See for example, Cauffman and Sagaert, (2011), p. 308, reiterating the role of the *nemo dat* principle in discussing the probative role of acquisitive prescription.

¹²¹ Cauffman and Sagaert, (2011), p. 308.

¹²² Cauffman and Sagaert, (2011), p. 244.

¹²³ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 56.

Article 2279 BCC – As far as movables are concerned, possession equals title.

Nevertheless, one who has lost a thing or from whom a thing has been stolen may claim back its ownership for three years following the day of its loss or theft, against the person in whose hands he finds it; that person can exercise his recourse against the person from whom he obtained it.

Article 2279 BCC is composed of two sentences that have different implications for the protection of third parties in good faith. The first sentence of this article has implications in case of voluntary loss of possession, whilst the second sentence will play a role in case of involuntary loss of possession. The functioning of both sentences is addressed below.

(1) Third-party protection – acquisitions in good faith (voluntary loss of possession)

Article 2279 BCC – As far as movables are concerned, possession equals title. [...]

Possession in the context of the first sentence of Article 2279 BCC plays a crucial role in affording third-party protection and is embedded with two functions, a probative and a prescriptive function.¹²⁴ The probative function instates a presumption of ownership to the benefit of the possessor that has acquired *a domino*, as reflected in the adage “possession equals title”.¹²⁵ Consequently, recalling the limitations to the present research posited above and because the probative function is only relevant in case of acquisition *a domino*, this function will not be further addressed.

The second function of possession in the context of Article 2279 BCC concerns situations of acquisition *a non domino* and is acquisitive in nature. Under Belgian law, acquisitive prescription is a means of acquiring ownership of an object¹²⁶ serving two specific purposes: a probative and an acquisitive purpose.¹²⁷ Firstly, regarding the probative purpose, proving ownership requires meticulously demonstrating the provenance of the object, meaning that it was transferred legally from the owner – or from a person that had received the authority from the owner to sell the object – to the actual possessor.¹²⁸ Nevertheless, the exercise of retracing the provenance of the good might prove particularly difficult to realize in pragmatic terms because of the intricacies intertwined with the retrieval of a complete and undisputed provenance of the said object. Henceforth, the probative purpose of acquisitive prescription helps to alleviate the difficulties associated with such an exercise.¹²⁹ In other words, it suffices for the possessor to demonstrate that he has been in possession for the period of time required to acquire ownership by means of acquisitive prescription in order to prove ownership of the object.¹³⁰ Secondly, acquisitive prescription serves, as its name suggests, an acquisitive purpose: the effect of the *usucapio* is that after a certain lapse of time, a possessor acquires ownership of the said property, to the detriment of the original owner.¹³¹ This means that the possessor becomes the legal owner, and that this newly instated ownership right cannot be further challenged by the previous owner.¹³² It should be noted that despite the impossibility to transfer what one does not have – as derived from the *nemo dat* principle –, the acquisitive prescription of Article 2279 BCC makes it possible for a *bona fide* third party to acquire ownership *a non domino* by operation of law.¹³³ Hence, the acquisitive prescription of Article 2279 BCC constitutes an important exception to the *nemo dat* principle.¹³⁴ As already clarified above, in case of acquisition in good faith, the period required to prescribe can either be instantaneous (cf. Article 2279, first sentence, BCC) or protracted by three years (cf. Article 2279, second sentence, BCC), depending upon the voluntary / involuntary character of the loss of possession: it is instantaneous in case of voluntary loss of possession and acquisition by a third party in good faith (as discussed in the present section) and protracted by three years in case of involuntary loss of possession and acquisition by a third party in good faith (as will be discussed in section (2) below). In order to explain the rules applicable in case of involuntary loss of possession through theft, it is important to first address the instantaneous character of the acquisitive prescription in case of voluntary loss of possession.

¹²⁴ Sagaert, (2014), p. 680 ; Sagaert, Tilleman and Verbeke, (2013), p. 240.

¹²⁵ Cauffman and Sagaert, (2011), p. 210.

¹²⁶ Dekkers-Dirix, (2005), p. 535.

¹²⁷ Sagaert, (2014), p. 651; Cauffman and Sagaert, (2011), pp. 209-210.

¹²⁸ Cauffman and Sagaert, (2011), pp. 308-309; Sagaert, (2014), pp. 652-653.

¹²⁹ Cauffman and Sagaert, (2011), p. 309; Sagaert, (2014), p. 653.

¹³⁰ Sagaert, (2014), p. 653.

¹³¹ Cauffman and Sagaert, (2011), pp. 308, 309.

¹³² Dekkers-Dirix, (2005), p. 551.

¹³³ Sagaert, (2014), p. 671.

¹³⁴ Sagaert, (2014), p. 671.

Conditionality of instantaneous acquisitive prescription

In order to benefit from the acquisitive effect of the first sentence of Article 2279 BCC, it is not required for the possessor to produce an instrument.¹³⁵ Furthermore, there is no need for the possessor to have acquired for value to benefit from the protection of the said article.¹³⁶ Instead, three general conditions relating to possession and to the object of possession must be met for the purpose of acquiring ownership through means of acquisitive prescription: 1) the prescription must relate to the type of corporeal movables that can be appropriated by means of acquisitive prescription; 2) the person relying on the acquisitive prescription must have had real possession for himself and the possession must not be impaired¹³⁷ and 3) good faith exercised throughout the acquisition of the object will play an important role in determining the period necessary to acquire through prescription, and is, as such, constitutes an additional condition to acquisitive prescription.¹³⁸

1) Nature of the good

Acquisitive prescription is applicable to all movable, and more generally to all property rights that relate to objects subjected to trade.¹³⁹ In the present context, it suffices to establish that this article applies to all corporeal movable objects that do not fall within a special category of protected corporeal movables, as mentioned above.¹⁴⁰ More conspicuously, the regime of Article 2279 BCC cannot be applied to the following types of corporeal movables: non-individualized objects,¹⁴¹ movables considered accessories to immovables,¹⁴² movables by anticipation,¹⁴³ movables falling within the public domain¹⁴⁴ and registered movables¹⁴⁵ are all excluded from the regime contained in Articles 2279 and 2280 BCC.

2) Quality of the possession

Acquisitive prescription relies on possession to materialize:¹⁴⁶ in order to acquire through *usucapio*, the possessor must have possession as of right,¹⁴⁷ also termed possession *pro suo*. The possession must thus firstly comply with the definition of Article 2228 BCC (cf. above).¹⁴⁸ Failure to demonstrate this type of behaviour results in deficient possession,¹⁴⁹ which in turn makes it impossible to acquire property through prescription. Furthermore, in order to acquire ownership post acquisition *a non domino*, the possessor must have a real possession (*possession réelle / werkelijke bezit*) and the possession must be free of defects (*possession utile / deugdelijk bezit*).¹⁵⁰

Real possession

Possession is considered real when the person has material possession, expressed by the factual control over the object.¹⁵¹ This material possession is important to notify third parties – and more importantly the dispossessed owner – that a real transfer of possession has taken place.¹⁵² Therefore, a majority of the doctrine submits that the possession must be *corpore suo* in order to have real possession.¹⁵³ The determination of the real character of the possession is consequently facts-based.¹⁵⁴ Nonetheless, if the possession results from a transfer *constituto possessorio*, it is considered that there is no real possession.¹⁵⁵ What is more, by handing over the object to the

¹³⁵ Sagaert, (2014), p. 679.

¹³⁶ Sagaert, (2014), p. 677.

¹³⁷ Sagaert, (2014), p. 672; Dekkers-Dirix, (2005), pp. 91, 551.

¹³⁸ Sagaert, (2014), p. 672; Dekkers-Dirix, (2005), pp. 91, 551.

¹³⁹ Cauffman and Sagaert, (2011), p. 310.

¹⁴⁰ Sagaert, (2014), p. 672.

¹⁴¹ Sagaert, (2014), p. 674.

¹⁴² Cauffman and Sagaert, (2011), p. 298.

¹⁴³ Cauffman and Sagaert, (2011), p. 298; Sagaert, (2014), p. 676.

¹⁴⁴ Cauffman and Sagaert, (2011), p. 298, citing the judgment of the Cour de Cassation of 2 October 1924, *Pasicrisie* 1924, I, 530; Sagaert, (2014), p. 675.

¹⁴⁵ Registered objects are movables that require registration in order to be validly transferred, or to be embedded with ownership rights.

See Cauffman and Sagaert, (2011), p. 224; Sagaert, (2014), p. 676 and Sagaert, Tilleman and Verbeke, (2013), p. 240.

¹⁴⁶ Dekkers-Dirix, (2005), p. 536.

¹⁴⁷ Dekkers-Dirix, (2005), p. 543.

¹⁴⁸ Sagaert, (2014), p. 650.

¹⁴⁹ Dekkers-Dirix, (2005), p. 543.

¹⁵⁰ Cauffman and Sagaert, (2011), p. 301.

¹⁵¹ Cauffman and Sagaert, (2011), p. 301.

¹⁵² Cauffman and Sagaert, (2011), p. 301.

¹⁵³ See Boufflette, (2010), p. 126. For the minority view that accepts the possibility to have real possession in case the object is transferred *corpore alieno*, see *ibidem* pp. 126, 127.

¹⁵⁴ Cauffman and Sagaert, (2011), p. 301.

¹⁵⁵ Cauffman and Sagaert, (2011), p. 301; Sagaert, (2014), pp. 648, 678.

dispossessed owner, the real possession is discarded and the possessor will not be able to rely upon Article 2279 BCC.¹⁵⁶

Possession *pro suo*

Possession *pro suo* means that the person holding the object exercises possession as of right:¹⁵⁷ a possession upon the object must be discerned – reuniting *corpus* and *animus* in one person.¹⁵⁸ Regarding the *animus*, it should be recalled that Article 2230 BCC creates a presumption that the possessor exercises possession for himself (*animus pro suo habendi*), but this presumption is *juris tantum* and is thus rebuttable.¹⁵⁹

Article 2230 BCC – One is always presumed to possess for himself, in the title of an owner, if it has not been proven that one has started possessing for another.

Consequently, it is possible for a claimant to rebut this presumption and demonstrate that the person is not a possessor, but merely a detentor.¹⁶⁰ Discarding the presence of possession will lead to the impossibility for the detentor to acquire ownership through means of acquisitive prescription.

Possession free of defects

In order to acquire through means of acquisitive prescription, it is important that the possession be free of defects¹⁶¹ and, thus, for the possessor to hold the object in accordance with Article 2229 BCC.¹⁶²

Article 2229 BCC – In order to prescribe, possession must be continuous and uninterrupted, peaceful, public, unequivocal and as an owner.

To be free from defects, the possession of an acquirer *a non domino* must be a) continuous, b) undisturbed,¹⁶³ c) public¹⁶⁴ and d) unambiguous.¹⁶⁵ It should be remarked that both the conditions about ‘interruption in the possession’ and about the ‘possession in the capacity of owner’ are not to be considered as defects in possession. Regarding the first of these two conditions, it is not to be assimilated to a defect in possession because an interruption in possession has the effect of discarding the existence of the possession itself.¹⁶⁶ Similarly, when possession is not in the capacity of an owner – or of the title bearer of a right *in rem* – then there is no possession, but merely a detention.¹⁶⁷

With respect to the other conditions listed, failing to hold the object in conformity with the four remaining conditions results in a defective possession.¹⁶⁸ Therefore, it results in the failure to acquire through means of acquisitive prescription.¹⁶⁹ As such, although a possession might come into being, a defective possession will make it impossible to acquire ownership irrespective of the presence of good or bad faith.¹⁷⁰ The party asserting the deficiency of the possession – often the person revindicating – must bring the proofs necessary to this determination.¹⁷¹ Consequently, the requirement that possession is free of defects cannot be considered as a constitutive element of possession, although it is a *conditio sine qua non* to acquisitive prescription.¹⁷²

¹⁵⁶ Cauffman and Sagaert, (2011), p. 301.

¹⁵⁷ Cauffman and Sagaert, (2011), p. 301; Boufflette, (2010), p. 126.

¹⁵⁸ Boufflette, (2010), p. 126.

¹⁵⁹ Cauffman and Sagaert, (2011), p. 302.

¹⁶⁰ Cauffman and Sagaert, (2011), p. 302.

¹⁶¹ Sagaert, (2014), p. 641. As noted by Sagaert, a possession that is deficient is suspicious and does not, therefore, deserve to be protected (*idem*).

¹⁶² Dekkers-Dirix, (2005), p. 543; Cauffman and Sagaert, (2011), p. 311; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 60; Sagaert, (2014), p. 641.

¹⁶³ Meaning peaceful and, therefore, not created by means of violence. See Cauffman and Sagaert, (2011), p. 302.

¹⁶⁴ Meaning not hidden. See Cauffman and Sagaert, (2011), p. 303.

¹⁶⁵ Cauffman and Sagaert, (2011), p. 302.

¹⁶⁶ In this regard, see Boufflette, (2010), p. 60 where the different types of interruption and their implications upon possession are explained. See also Article 2243 BCC for an interruption of more than a year.

¹⁶⁷ See Boufflette, (2010), p. 60.

¹⁶⁸ Sagaert, (2014), p. 641.

¹⁶⁹ Cauffman and Sagaert, (2011), p. 311; Sagaert, (2014), p. 645; Sagaert, Tillemans and Verbeke, (2013), p. 234.

¹⁷⁰ Sagaert, (2014), pp. 641 and 645. The presence of a defect will make it impossible to acquire through means of short or long acquisitive prescription (*ibidem*, p. 645).

¹⁷¹ Dekkers-Dirix, (2005), p. 543; Cauffman and Sagaert, (2011), p. 303; Boufflette, (2010), p. 61; Sagaert, (2014), p. 645. Sagaert notes that there exists no presumption that possession is free of defects, because it is for the asserting party to prove his allegations. The practical effect of this imputability of the burden of proof generates a *de facto* presumption that the possession is free of defects (*idem*); Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/6.

¹⁷² Sagaert, (2014), pp. 641 and 645.

a) continuous possession

Possession is not continuous if the possessor does not exercise acts of possession at times when a conscientious owner would exercise these acts.¹⁷³ Continuity presupposes a regular possession tantamount to the type of possession exercised by a normal and diligent owner.¹⁷⁴ It is thus not required from the possessor to manifest himself at any time. Instead, he is to use the object: i) for the purpose for which it was created and ii) similarly to an owner.¹⁷⁵ What is more, an abnormal gap in possession will affect the acquisition through means of *usucapio*. This abnormal gap is fact-related and – because the continuity of possession is presumed under Article 2234 BCC – it must be proved by the party asserting the gap; to help a possessor prove continuity, Article 2234 BCC creates a presumption of continuous possession.¹⁷⁶

Article 2234 BCC – The current possessor that proves having possessed previously, is presumed to have possessed in the period inbetween the antecedent and the actual possession, unless the contrary can be proven.

If the possession is restored for the in-between period, the period of *usucapio* continues to run.¹⁷⁷ Contrary to other defects in possession, a lack of continuity is a defect that is absolute in nature, instead of relative.¹⁷⁸ This absolute character means that it is possible for anyone to identify this defect¹⁷⁹ and to invoke it.¹⁸⁰

There seems to be disagreement between scholars as to the requirement that the possession be continuous for the purpose of acquiring on the basis of Article 2279 BCC. In fact, some scholars have suggested that the requirement of continuity is otiose in the context of instantaneous acquisition laid down in Article 2279 BCC:¹⁸¹ to their understanding, since the acquisition based on Article 2279 BCC is instantaneous, it seems of little practical effect that the possession be continuous. Whilst there is some merit to this assertion in case of acquisition *a non domino* flowing from a voluntary loss of possession, the requirement of continuity is more readily acceptable when discussing exceptions applicable in cases of theft and loss (cf. the second sentence of Article 2279 BCC) or in case of bad faith acquisition (cf. Article 2262 BCC).

b) peaceful possession

A peaceful possession translates into the taking of possession by the person without the use of force.¹⁸² Additionally, undisturbed possession also requires the possessor to respond as a normal diligent possessor – or as *bonus pater familias*¹⁸³ – to acts of violence performed by others during the possession.¹⁸⁴ For both scenarios, Article 2233 BCC clarifies that violence can never be constitutive of a possession leading to acquisitive prescription:

Article 2233 BCC – Neither can acts of violence be constitutive of a possession that is capable of operationalizing into acquisitive prescription. A possession free of defect can only come into being when the violence has ceased.

Doctrine has unanimously interpreted violence by extrapolating Articles 1112 to 1114 BCC – both provisions dealing with violence in Belgian contract law – to the interpretation of Article 2233 BCC.¹⁸⁵ Failure to possess without violence will result in defective possession.¹⁸⁶ In case of instantaneous acquisition, only the violence exercised at the time of the taking of possession will be relevant.¹⁸⁷ When the acquisition is not instantaneous –

¹⁷³ Sagaert, (2014), p. 644; Sagaert, Tilleman and Verbeke, (2013), p. 234.

¹⁷⁴ Cauffman and Sagaert, (2011), p. 311.

¹⁷⁵ Dekkers-Dirix, (2005), p. 544.

¹⁷⁶ Sagaert, (2014), p. 644 ; Sagaert, Tilleman and Verbeke, (2013), p. 234.

¹⁷⁷ Dekkers-Dirix, (2005), p. 544.

¹⁷⁸ Sagaert, (2014), p. 644; Sagaert, Tilleman and Verbeke, (2013), p. 234.

¹⁷⁹ Sagaert, (2014), p. 644.

¹⁸⁰ Boufflette, (2010), p. 62.

¹⁸¹ Cauffman and Sagaert, (2011), p. 303; Sagaert, (2014), p. 678; See also Boufflette, (2010), p. 60.

¹⁸² Sagaert, (2014), p. 644; Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁸³ The notion of *bonus pater familias* is best understood as the behaviour that a reasonable person would have adopted in the same circumstances. More specifically, it can be defined as the type of man that is prudent, conscientious and diligent. See for example the definition provided in Cornu, G., *Vocabulaire Juridique*, (Association Henri Capitant, Quadrige / PUF: Paris, 7^{ème} édition, 2005), p. 118, keyword: Bon père de famille. Although this dictionary addresses the concept in French law, the notion is embedded with a similar meaning in Belgian law.

¹⁸⁴ Cauffman and Sagaert, (2011), p. 311; Sagaert, (2014), pp. 643-644. The mere fact that a third party exercises violence against the property is not sufficient to conclude that the possession is defective. Instead, it is the lack of reaction from the possessor that will raise doubts as to the non-defective character of the possession (*ibidem*, p. 644). See also Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁸⁵ Lecocq, P., *Manuel du Droit des Biens – Tome 1 – Biens et Propriété*, (Larcier: Bruxelles, 2012), paragraph 19.

¹⁸⁶ Sagaert, (2014), p. 644.

¹⁸⁷ Sagaert, (2014), p. 678.

such as in cases of theft or loss or in case of acquisition in bad faith –, the presence of violence at its inception or during the possession cannot lead to acquisitive prescription. What is more, the prescription only starts running from the moment the violence has stopped (cf. Article 2233 BCC).¹⁸⁸ Furthermore, violence is a relative concept that can only be invoked by the victim of the act of violence.¹⁸⁹

As a matter of example, theft is considered as an act of violence by which the thief entered into possession of the object by violent means, which discards any acquisitive prescription to his benefit.¹⁹⁰ This means that he will never have a possession free of defect entitling him to acquire through acquisitive prescription and that a revindication against a thief is always possible.¹⁹¹

c) public possession

The public character of the possession does not require a public display of the object, but instead requires that the possessor does not hide it from those who might have an interest in terminating the possession.¹⁹² This means that intentionally hiding the object from any person who has an interest in knowing about the existence of the possession – and that could undertake actions to put an end to it – would result in qualifying the possession as not being public.¹⁹³ This leads to the conclusion that the public character of possession is a relative notion¹⁹⁴ that can only be invoked by the parties having an interest in knowing about the possession.¹⁹⁵ This public nature will be assessed based upon the interactions between the parties concerned. It is to the judge adjudicating upon the facts to appreciate the surreptitious character of the possession.¹⁹⁶ Furthermore, determining whether the object is purposely being hid must also be assessed in light of the item's nature.¹⁹⁷ Certain types of objects do not lend themselves to being held publicly.¹⁹⁸ Ostensibly, a hidden possession results from bad faith, and – despite the fact that the acquirer might know about the illegal origin of the object acquired – the ensuing possession must be free of the said defect in order to acquire ownership on the basis of Article 2279 BCC.¹⁹⁹ It is, nonetheless, important to note that when the acquisition of the right of ownership flows from the instantaneous protection afforded by Article 2279 BCC, the requirement of public possession becomes otiose.²⁰⁰ Nonetheless, when the acquisitive prescription is not instantaneous, the requirement of public character remains a particularly important element to comply with. In the case of *B. M. c. Staatliche Kunstsammlungen Dresden*²⁰¹ – reviewed in 2009 by the Belgian *Cour de Cassation* –, the relative character of the requirement of public possession was highlighted.

In this case, a painting created in 1611 by Jan Brueghel the elder entitled “Ebene mit Windmühlen” was stolen during World War II from the *Staatliche Kunstsammlungen Museum* – hereinafter SKM – in Dresden. In 2001, it was found in the hands of a Belgian possessor, B. M. Whilst the fate of the painting in the years following the war remained unknown, B. M. asserted that his father had purchased the painting from the Director of the University of Lvov – Ukraine – in 1960 or thereabouts.²⁰² Although B. M. was unable to produce a proof of this transaction,²⁰³ the laws applicable in the 1960s in the Soviet Union did not authorize the acquisition of paintings by individuals. At the death of B. M.'s father in 1983, his son – also the possessor at the time of the proceedings – inherited the painting.²⁰⁴ The bequeathal took place in New York, as both parties were



¹⁸⁸ Dekkers-Dirix, (2005), p. 545; Sagaert, (2014), p. 644.

¹⁸⁹ Sagaert, (2014), p. 644; Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁹⁰ Sagaert, (2014), p. 644.

¹⁹¹ Sagaert, (2014), p. 684.

¹⁹² Sagaert, (2014), p. 641; Sagaert, Tilleman and Verbeke, (2013), p. 233. See also *Cour de Cassation, B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/16.

¹⁹³ Sagaert, (2014), p. 641. As noted by Sagaert, it is important that the possession or acts of possession be seen by the parties that could act to stop the running of the period of prescription (*idem*); Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁹⁴ Sagaert, (2014), p. 642; Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁹⁵ Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁹⁶ Sagaert, (2014), p. 643; Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁹⁷ Sagaert, (2014), p. 643; Sagaert, Tilleman and Verbeke, (2013), p. 233.

¹⁹⁸ Dekkers-Dirix, (2005), p. 545 and Cauffman and Sagaert, (2011), p. 311; this point is particularly interesting, because the lack of openness and notoriousness inherent in possessing a cultural object led the New Jersey Supreme Court – in *O’Keeffe v. Snyder* – to conclude that cultural objects should be subjected to tailor-made rules instead of the doctrine of adverse possession. This conclusion was reached due to the lack of public display inherent to private collections. For more details about this case, see *O’Keeffe v. Snyder*, 170 N.J.Super 75, 405 A.2d 840, (July 27, 1979), at 844 and ‘Chapter 3 – Understanding the Paradox (II) - New Jersey, California and New York’ below.

¹⁹⁹ Cauffman and Sagaert, (2011), p. 303.

²⁰⁰ Sagaert, (2014), p. 678.

²⁰¹ *Cour de Cassation, B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009.

²⁰² *Cour de Cassation, B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/4 and C.080183.N/9.

²⁰³ *Cour de Cassation, B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/9.

²⁰⁴ *Cour de Cassation, B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/4.

living there at the time. Throughout the following years, B. M. attempted to sell the painting through the offices of Christie's New York, and, at the same time, inquired into the provenance of the painting with the Art Loss Register. However, these first attempts at retrieving the provenance of the painting remained unfruitful. In 2001, B. M. made another attempt to sell the Brueghel, albeit this time through the services of a jeweller and, incidentally, of a car wash owner. Because of the questionable setting of the transaction, the Belgian authorities seized the painting. This act of confiscation then resulted in legal proceedings.

During these proceedings, the SKM – the respondent in the appeal proceedings – advanced that the possession of B. M. – the corresponding appellant in the same proceedings – was deficient, because of want of public possession. In discussing this aspect before the Court of Appeal of Antwerp, B. M. averred that he had held openly and publicly as he – *inter alia* – contacted both Christie's New York and the Art Lost Register, respectively in 1983 and 2001.²⁰⁵ Additionally, he submitted that the painting had hung for more than forty years on both the wall of his father's house and the wall of his own domicile.²⁰⁶ This painting was not hidden to visitors, who could admire the displayed picture at any time whilst visiting either B. M. or his father.²⁰⁷ In deciding upon the matter, the Antwerp Court of Appeal advanced, on the one hand, that the mere fact that the B. M.'s possession of the painting was unbeknownst to the dispossessed owner was not sufficient to conclude that the object had been held in secrecy.²⁰⁸ In fact, to substantiate this argument, the court referred to Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.²⁰⁹ It then held that there was no legal obligation forcing natural persons to publicly unveil their belongings, except for tax collection purposes or in the acceptance of political mandates.²¹⁰ On the other hand, the same Court of Appeal concluded that the B. M.'s possession was not free of defect as it was secret,²¹¹ due to two elements: the choice of the channel for selling the painting and the low demand price. As such, it considered that the selling of a painting of such high value through a jeweller and through the services of the exploitant of a carwash – instead of transacting through the means made available by specialized auction houses – was indicative of surreptitiousness.²¹² Furthermore, although B. M. estimated the value of the painting at 1.250.000 euros, the low demand price of 500.000 dollars also played a decisive role in the decision reached by the Court of Appeal.²¹³ Consequently, the court found that the possessor had clearly failed to hold the object publicly in relation to the museum and that it, therefore, could not rely upon the protection of Article 2279 BCC for want of possession free of defect.²¹⁴ This approach raises considerable questions as to the assessment of the secrecy of the transaction as the two elements raised by the Antwerp court are more indicative of the absence of good faith instead of the surreptitious character of the possession. Reacting to the Court of Appeal's appreciation, the *Cour de Cassation* did not criticize the approach adopted. Instead, it submitted that the fact that the possession was only public to certain persons does not mean that it is to be considered as non-surreptitious towards others that have an interest in seeing the possession or acts of possession.²¹⁵ More conspicuously, the *Cour de Cassation* clarified that the mere fact that the possession was known to certain persons through the sale, it did not mean that the possession could not be seen as surreptitious as against the Museum,²¹⁶ ultimately leaving this point to be decided by the judge adjudicating upon the facts.²¹⁷

d) unambiguous possession

It is widely accepted that an ambiguous possession will not allow the possessor to acquire ownership of the object through means of acquisitive prescription under Article 2279 BCC.²¹⁸ The possession is ambiguous when there is doubt as to the intention to possess for oneself, or as to the exclusiveness of the possession.²¹⁹ It is also submitted that it is ambiguous when it can be interpreted in several ways.²²⁰ This means that possession is tainted by ambiguity when it can be interpreted as representing different types of claims concurring with one another.²²¹

²⁰⁵ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/5-6.

²⁰⁶ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/6.

²⁰⁷ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/6.

²⁰⁸ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/6.

²⁰⁹ Text available at the following link: http://www.echr.coe.int/Documents/Convention_ENG.pdf, last retrieved on 01.03.2018.

²¹⁰ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/6-7.

²¹¹ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/4.

²¹² Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/4.

²¹³ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/4.

²¹⁴ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/5.

²¹⁵ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/16.

²¹⁶ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/16.

²¹⁷ Cour de Cassation, B. M. c. *Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/16.

²¹⁸ Sagaert, (2014), p. 643; Cauffman and Sagaert, (2011), p. 303.

²¹⁹ Cauffman and Sagaert, (2011), pp. 302, 311; Sagaert, Tilleman and Verbeke, (2013), p. 233.

²²⁰ Dekkers-Dirix, (2005), pp. 545-546; Sagaert, (2014), p. 643; Sagaert, Tilleman and Verbeke, (2013), p. 233.

²²¹ Sagaert, (2014), p. 643.

As such, possession in the quality of an owner and a possession blotted by temporariness are reflective of two different – although concurring – claims upon the same object, rendering possession for the purpose of acquisitive prescription ambiguous. Similarly, the use of an object by co-owners is often assimilated to an ambiguous possession – i.e. since the use by one is not indicative of possession for oneself – for which it is impossible to acquire ownership through Article 2279 BCC.²²² An ambiguous possession must not be confused with bad faith, as the former notion will discard acquisitive prescription, whilst the latter will not do so. Instead, bad faith discards the short period of acquisitive prescription (see below) and leads to the application of a longer period.²²³

3) Possession in good faith

So far, it has been established that it is possible to acquire ownership to an object acquired *a non domino* on the basis of Article 2279 BCC, provided that 1) the object is of the type that can be acquired by means of acquisitive prescription and 2) there is a real and *pro suo* possession that is free of defects. The presence of good faith is an important addition to this equation. Despite Article 2279 BCC's lack of explicitness, in order to benefit from the instantaneous acquisitive prescription, it is generally accepted that the possessor must have acted in good faith when he acquired the stolen object.²²⁴ But for this textual shortcoming, doctrine – in its unanimity – has constructed the requirement of good faith as an implied condition to the said article.²²⁵ In justifying this construction, it has been advanced that the requirement of good faith for the purpose of Article 2279 BCC can be extrapolated from Article 1141 BCC.

Article 1141 BCC – When the thing that one has obliged himself to give or to deliver successively to two persons is merely movable, the one of the two parties that has been put in real possession is favored and will remain the owner, notwithstanding the fact that the title of this party is posterior in date to the title of the other party, provided nonetheless that the possession is in good faith.

Article 1141 BCC settles the question of ownership flowing from a situation in which a vendor sells the same object to several buyers. In regulating this intricate scenario, the article favours the buyer that first takes possession, provided he acts in good faith at the time of this taking of possession. Furthermore, the requirement of good faith for the purpose of acquiring under Article 2279 BCC has also been distilled from the *ratio legis* of the Belgian Civil Code.²²⁶

Standard of good faith

Good faith is defined in Article 550 BCC in the following manner:

Article 550 BCC – A possessor is in good faith when he possesses as an owner, on the basis of a title translatable of ownership, whose defects he does not know. The possessor is no longer in good faith when these defects are known to him.

Good faith is present when the possessor has acquired possession as of right upon the object from another and did not now – nor ought to have known at the time of the acquisition – that this person was not the owner, or that the *causa detentionis* was invalid.²²⁷ As such, good faith implies that the possessor does not know, nor ought to have known, that he has not become the owner of the item.²²⁸ If the acquirer has any doubts as to the faculty of disposal of the transferor during the acquisition, it will be concluded that the acquisition has not been conducted in good faith.²²⁹ Furthermore, a too credulous appreciation of the situation by the acquirer could also lead to the conclusion that the said acquisition did not take place in good faith.²³⁰ In a synopsis, good faith stems from the reasonable belief that a possessor has in considering that he is the genuine right-holder of the object and that he has acquired from the real owner²³¹ or, at the least, from someone that was entrusted by the said owner with the faculty to alienate the object at the time of the transaction.²³² Thenceforth, good faith must relate to a belief as to the presence of the faculty of alienation of the transacted object in the transferor at the time of the acquisition of

²²² Sagaert, (2014), p. 643.

²²³ Sagaert, (2014), p. 643 ; Sagaert, Tilleman and Verbeke, (2013), p. 232.

²²⁴ Sagaert, (2014), p. 678; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²²⁵ Cauffman and Sagaert, (2011), p. 300; Sagaert, (2014), p. 678.

²²⁶ Cauffman and Sagaert, (2011), p. 300.

²²⁷ Sagaert, (2014), pp. 638, 639 and 678; Sagaert, Tilleman and Verbeke, (2013), p. 232.

²²⁸ Sagaert, (2014), p. 638; the possessor is considered to have been in good faith when he honestly believed that he acquired the object from the owner. See Dekkers-Dirix, (2005), p. 98, also referring to Article 550 BCC.

²²⁹ Sagaert, (2014), p. 638; Dekkers-Dirix, (2005), p. 98.

²³⁰ Sagaert, (2014), p. 638; Sagaert, Tilleman and Verbeke, (2013), p. 232.

²³¹ Dekkers-Dirix, (2005), p. 98.

²³² Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 60.

the possession by the acquirer,²³³ and not *per se* upon a belief that the alienator is the owner of the object.²³⁴ What is more, Article 550 BCC requires the presence of a *justa causa detentionis* – that is a legal transaction – in the acquisition by the possessor. Therefore, the object must have been transferred by an act of *traditio* of ownership.

Article 2269 BCC specifically requires that the good faith is present at the time of the acquisition of the object, and thus at the inception of the possession.²³⁵

Article 2269 BCC – It is sufficient for good faith to have existed at the time of the acquisition.

In accordance with the adagium *mala fides superveniens non nocet*, if the possessor only discovers that the transferor was not the right-holder after the acquisition, the good faith is not affected by this belated discovery.²³⁶ This notably stems from the idea that the possessor handled correctly during the acquisition.²³⁷

Good faith is presumed for the purpose of acquiring an object by means of acquisitive prescription.²³⁸ Article 2268 BCC instates a general presumption of good faith to the benefit of the acquirer:²³⁹

Article 2268 BCC – Good faith is always presumed, it is to the one that advances bad faith to prove it.

Because of this presumption of good faith, the burden of proof is imputed to the dispossessed person, also the claimant in the proceedings. It will thus be for the one that contests the argument that ownership has been acquired through means of acquisitive prescription to demonstrate the lack of good faith:²⁴⁰ e.g. a dispossessed owner will not only have to prove his ownership but also the bad faith of the possessor if the short acquisitive prescription stands in his way.²⁴¹ To challenge the presumption of good faith, the claimant will have to prove that the acquisition by the defendant relying upon the acquisitive prescription did not live up to the standard of good faith expected. In turn, this will shift the burden of proof to the defendant who will then have to demonstrate that he acted in good faith throughout the acquisition. The reversal of the presumption is a question of fact that is left to the discretion of the judge assessing the facts.²⁴²

In case the presumption is successfully rebutted, the establishment of good faith by the defendant is a question of fact that is left to the appreciation of the judge seized.²⁴³ Good faith, for the purpose of Article 2279 BCC, thus amounts to the appreciation of the subjective knowledge of the acquirer,²⁴⁴ but with an objective standard of measurement: to be considered as having acted in good faith, it is not sufficient for the possessor to state that he did not know that the alienator lacked the faculty to dispose, but, instead, he must demonstrate that he ought not to have known of a lack of faculty to alienate.²⁴⁵ In vetting whether the acquirer ought not to have been aware, regard is given to the circumstances of the acquisition and the standard used is the one of inexcusability,²⁴⁶ or in its Latin form, *culpa levis in abstracto*.²⁴⁷ In other words, elements that could have influenced the knowledge of the acquirer – such as a low purchase price or the character of the transacting parties²⁴⁸ – are garnered and computed into the good faith equation. For example, the character of the parties can considerably affect the standard of good faith imputed to an acquirer: a specialist might be subjected to an obligation of inquiry regarding the seller,²⁴⁹⁻²⁵⁰ whilst this might not be required from a dilettante. Furthermore, doubts can be raised as to the good faith of the acquirer in situations when the seller's identity is kept secret from the latter, often through the intervention of a middleman acting for the seller.²⁵¹ Correspondingly, if the circumstances of acquisition make the acquirer doubt – or should make him doubt – about the presence of a faculty to dispose in

²³³ Sagaert, (2014), p. 679.

²³⁴ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 60; Cauffman and Sagaert, (2011), p. 300.

²³⁵ Dekkers-Dirix, (2005), p. 98.

²³⁶ Sagaert, (2014), pp. 639, 640 and 679; Sagaert, Tilleman and Verbeke, (2013), p. 232.

²³⁷ Dekkers-Dirix, (2005), p. 98.

²³⁸ Cauffman and Sagaert, (2011), p. 311.

²³⁹ Cauffman and Sagaert, (2011), p. 300; Sagaert, (2014), p. 679; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), pp. 61-62; Dekkers-Dirix, (2005), p. 98.

²⁴⁰ Cauffman and Sagaert, (2011), p. 300.

²⁴¹ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 62.

²⁴² Sagaert, (2014), p. 639.

²⁴³ Sagaert, (2014), p. 639; Sagaert, Tilleman and Verbeke, (2013), p. 232.

²⁴⁴ Sagaert, Tilleman and Verbeke, (2013), p. 232.

²⁴⁵ An *a contrario* reasoning is applied to determine whether a person acted in bad faith during the acquisition. If a person knew or ought to have known that the alienator lacked the faculty to dispose, then that person might be considered as having acted in bad faith at the time of the acquisition. See Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), pp. 60-61.

²⁴⁶ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), pp. 60-61.

²⁴⁷ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁴⁸ Sagaert, (2014), p. 639; Dekkers-Dirix, (2005), p. 98.

²⁴⁹ Sagaert, (2014), pp. 639, 679.

²⁵⁰ This obligation does not exist for bad faith acquisitions. Sagaert, (2014), p. 639.

²⁵¹ Dekkers-Dirix, (2005), p. 98.

the alienator, it might be concluded that the acquisition was not made in good faith and, therefore, in bad faith.²⁵² Thus, in order to prove bad faith, it is sufficient to demonstrate that the acquirer had doubts, or ought to have had doubts, as to the faculty to dispose of the alienator at the moment of the physical transfer of the object.²⁵³ Additionally, if the possession existed without *justa causa detentionis*, the acquisition is considered not to have materialized in good faith.²⁵⁴

In the case of *B. M. c. Staatliche Kunstsammlungen Dresden*²⁵⁵ discussed above, the Court of Appeals did not only conclude that the possession was defective because of want of public holding, it also held that the B.M.'s possession was not carried out in good faith.²⁵⁶ The Court of Appeals reached this conclusion because B.M. had explicitly recognized that the painting was in the possession of the Museum in Dresden during WWII, that it had disappeared in the same period, and further confessed knowing about the troublesome provenance of the painting.²⁵⁷ What is more, a sticker from the Museum glued on its frame corroborated its turmoiled origins, as was cognised by the possessor.²⁵⁸ Consequently, B. M. could not benefit from the protection afforded by the short acquisitive prescription contained in Article 2279 BCC against the dispossessed museum. As such, all unusual circumstances casting doubt upon the entitlement of the alienator to dispose will affect the exercise of good faith.²⁵⁹ This does not mean that the acquirer must thoroughly investigate whether the alienator has the faculty to dispose, but implies that red flags are taken into consideration in the assessment of good faith.²⁶⁰ Henceforth, whilst it is generally accepted that for non-registered movables the acquirer can rely upon the alienator's possession,²⁶¹ when the circumstances of acquisition bring a prudent person in doubts as to the transferor's faculty to alienate, a duty of inquiry is further prescribed.²⁶²

Duty to inquire into the alienator's capacity to dispose

To determine the knowledge of the acquirer as to the alienator's faculty to dispose, an additional duty of inquiry imposed on the acquirer in good faith²⁶³ is expected when the circumstances so require.²⁶⁴ This duty does not mean that he must undertake comprehensive research about the transferor in order to demonstrate that the latter is the owner.²⁶⁵ Instead, the duty's standard is not cast in iron but merely requires from the acquirer to undertake further research about the transferor's faculty to dispose. The duty to conduct further inquiries is flexible and mutates on the basis of two variables: the nature of the object and the character of the acquirer.²⁶⁶ With regard to the last variable, it is considered that if the parties to the sale are professionals, a higher standard of inquiry will be imputed upon their cognition.²⁶⁷ Furthermore, compliance with the duty must be assessed in light of what a prudent and reasonable person would do in the same circumstances. This means that the standard must be assessed *in concreto*.²⁶⁸

Finally, it should be remarked that, with the exception of the cases discussed above, there are no other cases dealing specifically with the acquisition of cultural objects on the basis of Article 2279 BCC.

(2) Third-party protection – acquisitions in good faith (involuntary loss of possession)

As an exception to the regime of instantaneous acquisition discussed above, the second sentence of Article 2279 BCC foresees a specific regime for involuntary loss of possession resulting from theft.²⁶⁹

²⁵² Cauffman and Sagaert, (2011), p. 300.

²⁵³ Cauffman and Sagaert, (2011), p. 300; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 62.

²⁵⁴ Sagaert, (2014), p. 638. Nevertheless, the possessor is exempted from producing a proof of the *justa causa detentionis* as this *justa causa* is presumed. See Lecocq, (2012), paragraph 49. See also Sagaert, (2014), p. 679, citing Hof van Cassatie, 20 december 1974, *Arr.Cass.* 1975, 478, *RCJB* 1976, noot C. Renard en *RW* 1974-75, 1.835.

²⁵⁵ Cour de Cassation, *B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009.

²⁵⁶ Cour de Cassation, *B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/5.

²⁵⁷ Cour de Cassation, *B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/5, C.080183.N/10.

²⁵⁸ Cour de Cassation, *B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/5, C.080183.N/10.

²⁵⁹ Cauffman and Sagaert, (2011), p. 300.

²⁶⁰ Cauffman and Sagaert, (2011), p. 300.

²⁶¹ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶² Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶³ Sagaert, (2014), p. 639 where it is explained that this obligation to inquire is imposed upon a possessor in good faith but not upon a possessor in bad faith.

²⁶⁴ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶⁵ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶⁶ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶⁷ Cauffman and Sagaert, (2011), p. 300; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶⁸ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 61.

²⁶⁹ It is important to note that the second sentence of Article 2279 BCC concerns both situations of loss and of theft. Nonetheless, only the latter situation is analysed because of the focus of the present research upon instances of theft.

Article 2279 BCC – [...] Nevertheless, one who has lost a thing or from whom a thing has been stolen may claim his property back during the three years following the day of the loss or theft, against the person in whose hands he finds it; that person can [in turn] exercise his recourse against the one from whom he obtained it.

Following the second sentence's wording, the dispossessed owner of a stolen object can claim it back from anyone in whose hands he finds it within a period of three years starting to run from on the day of the theft. As such, the second sentence of Article 2279 BCC suspends the instantaneous acquisition by a acquirer in good faith and makes it possible for a dispossessed person to reclaim a stolen object for a period of three years, which starts to run from the day of the theft.²⁷⁰ This exception is justified by the involuntary character of the loss of possession;²⁷¹ contrary to a situation of voluntary loss of possession, the dispossessed owner has no share of responsibility in the resulting conundrum.²⁷² Therefore, he is entitled to reclaim within a period of three years. In other words, no fault imputable to him justifies the instantaneous protection of the possessor in good faith in case of theft.²⁷³

The right to exercise the revindication expires after a period of three years, as prescribed by Article 2279 BCC.²⁷⁴ The period of three years cannot be assimilated to a period of prescription, but merely to an expiration period.²⁷⁵ This expiration period – also referred to as prefix period²⁷⁶ – is immutable and can under no circumstances be suspended, interrupted²⁷⁷ or even extended.²⁷⁸ As such, this period has a working that differs considerably from prescription.²⁷⁹ The difference between the two is notably mirrored by the fact that, following Article 2260 BCC, periods of prescription are to be calculated in full days, whilst the expiration period of Article 2279 BCC runs from the day of the theft itself. Furthermore, this period will run irrespective of who acquires the object during the said period.²⁸⁰

Exception to the exception – market overt

Article 2280 BCC provides an exception of market overt – i.e. *marché ouvert* – to the three years rule post-theft posited by the second sentence of Article 2279 BCC.

Article 2280 BCC – If the present possessor of a lost or stolen thing bought it at a fair or at a market, or in a public sale, or from a merchant who sells the same things, the original owner cannot get the thing back without reimbursing the purchase price to the possessor.

Provided the dispossessed owner successfully reclaims the object within the three year period, the latter is obliged to reimburse the price paid and other ancillary costs to the good faith purchaser that acquired it by way of market overt, as prescribed by Article 2280 BCC.²⁸¹ This is notably because it is considered that the acquisition in case of market overt raises fewer suspicions to purchasers.²⁸²

In order to fall within this exception of market overt, it is thus important that the object has been acquired at a market, at an auction or from a dealer usually selling similar goods. Regarding the last category, it is particularly important to establish that the dealer mainly deals in the type of goods concerned.²⁸³ Furthermore, case law has clarified that acquisitions from bric-a-brac dealers do not fall within the ambit of Article 2280 BCC.²⁸⁴ Additionally, in order to benefit from the protection contained in Article 2280 BCC, it is of paramount importance that the possessor must have acquired the object in good faith.²⁸⁵ If he acted in bad faith at the time of the acquisition, he cannot benefit from the protection afforded by Article 2280 BCC.²⁸⁶

²⁷⁰ Cauffman and Sagaert, (2011), p. 305; Dekkers-Dirix, (2005), pp. 100-101; Sagaert, (2014), p. 684.

²⁷¹ Sagaert, (2014), p. 681.

²⁷² Sagaert, Tilleman and Verbeke, (2013), p. 240; Dekkers-Dirix, (2005), p. 100.

²⁷³ Sagaert, (2014), p. 684.

²⁷⁴ Dekkers-Dirix, (2005), p. 531.

²⁷⁵ Dekkers-Dirix, (2005), p. 532.

²⁷⁶ Lecocq, (2012), paragraph 50.

²⁷⁷ With the obvious exception of an interruption due to the exercise of the right of revindication by the owner.

²⁷⁸ Dekkers-Dirix, (2005), p. 102; Cauffman and Sagaert, (2011), p. 305; Sagaert, (2014), p. 684.

²⁷⁹ Dekkers-Dirix, (2005), pp. 532-533 for an overview of these differences; Sagaert, (2014), p. 684.

²⁸⁰ Cauffman and Sagaert, (2011), p. 305.

²⁸¹ Sagaert, (2014), p. 685; Cauffman and Sagaert, (2011), p. 305.

²⁸² Dekkers-Dirix, (2005), p. 100.

²⁸³ Cauffman and Sagaert, (2011), p. 306.

²⁸⁴ Van Den Abbele, (2009), p. 28.

²⁸⁵ Cour de Cassation, *B. M. c. Staatliche Kunstsammlungen Dresden*, Nr. C.08.0183.N, 19 juin 2009, at C.080183.N/5, C.080183.N/10; Van Den Abbele, (2009), p. 28; See also Cour de Cassation, *B.V. c. J. G.*, Nr C.09.0538. F, 16 décembre 2010, at C.09.0538/5.

²⁸⁶ Van Den Abbele, (2009), p. 28.

(3) Third-party protection – acquisitions in bad faith

If the acquisition by the possessor was not carried out in good faith, the mechanics of acquisitive prescription take on a new dimension. As such, the right of ownership cannot be acquired after the expiration of a short period of acquisitive prescription (i.e. instantaneously²⁸⁷), – or even after a fixed period of three years²⁸⁸ – on the basis of Article 2279 BCC. Instead, for the purpose of acquisitive prescription, the difference between good or bad faith resides in the length required to acquire through prescription;²⁸⁹ the period of acquisitive prescription barring the owner from successfully bringing an action in revindication is longer in case of bad faith acquisition.²⁹⁰ In fact, both Articles 2279 and 2280 BCC do not protect *mala fide* acquirers, who may then only acquire ownership of the object after a period of thirty years (cf. Article 2262 BCC),²⁹¹ provided that their possession is real, *pro suo* and complies with the conditions laid down in Article 2229 BCC (as explained above).²⁹² Therefore, the distinction between good and bad faith is particularly important in deciding which party is protected and when this protection will be afforded.

In accordance with Article 2260 BCC, the period of thirty years starts running from the day following the day of the first taking of possession by another person,²⁹³ and is calculated per full day.²⁹⁴ This specifically excludes the day of the taking of possession from the calculus, albeit weekends or sabbatical days are not to be deducted.²⁹⁵ As clarified by Article 2261 BCC, the period expires when the last day of prescription has passed.²⁹⁶ This considerably simplifies the equation, as it will be possible to count from one day of a specific year to the expiration of the same day after the amount of years of acquisitive prescription.²⁹⁷ It is, additionally, possible to join the periods of possession of previous possessors on the basis of Article 2235 BCC.²⁹⁸ Nevertheless, contrary to the rules applicable in case of good faith acquisitions, it is here possible to suspend – and therefore extend –²⁹⁹ or interrupt³⁰⁰ the thirty year period.

4. LEGAL EFFECTS

To recapitulate the above, the good / bad faith distinction in the acquisition by a third party will play an important role regarding the length required to acquire by means of prescription; whilst a possessor in good faith can benefit from an instantaneous acquisitive prescription in situation of voluntary dispossession³⁰¹ – or from a protracted instantaneous acquisitive prescription after three years in case of involuntary dispossession through means of theft³⁰² –, a bad faith possessor with a real, *pro suo* and non-defective possession will have to wait thirty years if he wants to acquire the object through means of prescription.³⁰³⁻³⁰⁴ This is the case irrespective of whether the acquisition followed from a voluntary or involuntary loss of possession. The exact legal implications flowing from the described rules are addressed in the present section.

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)

As specified above, for cases where a third party acquired a non-stolen cultural object *a non domino* through means of real possession, *pro suo*, free of defects, and who acted in good faith during the acquisition, protection afforded through means of acquisitive prescription is instantaneous.³⁰⁵ This entails that the third party acquires a right of ownership upon the item by means of instantaneous acquisitive prescription at the time of entering into

²⁸⁷ Cf. section A. 3. (1) above.

²⁸⁸ Cf. section A. 3. (2) above.

²⁸⁹ Sagaert, (2014), pp. 640-641.

²⁹⁰ Sagaert, (2014), pp. 641, 678.

²⁹¹ Cauffman and Sagaert, (2011), p. 305.

²⁹² Sagaert, (2014), p. 640; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 125.

²⁹³ Dekkers-Dirix, (2005), p. 506.

²⁹⁴ Dekkers-Dirix, (2005), p. 506.

²⁹⁵ Dekkers-Dirix, (2005), p. 507.

²⁹⁶ Dekkers-Dirix, (2005), p. 507, citing Article 2261 BCC.

²⁹⁷ Dekkers-Dirix, (2005), p. 507.

²⁹⁸ Sagaert, (2014), p. 653 ; See also Dekkers-Dirix, (2005), pp. 168, 547 and 548.

²⁹⁹ Cauffman and Sagaert, (2011), p. 305; See also articles 2251-2259 BCC.

³⁰⁰ Dekkers-Dirix, (2005), p. 508; Following Article 2242 BCC, the period of prescription contained in Article 2262 BCC can be interrupted by means of a natural or civil interruption. See Cour de Cassation, *République Islamique d'Iran c. V. D.*, C.11.0686.F., 4 octobre 2012, at C.11.0686.F./9; a natural interruption entails that the possessor has lost the enjoyment of the object for more than a year because of another person (cf. Article 2243 BCC). See Dekkers-Dirix, (2005), p. 508; a civil interruption requires subpoenaing the possessor to interrupt the running of the period of prescription. See in this regard Article 2244 BCC.

³⁰¹ Cf. section A. 3. (1) above.

³⁰² Cf. section A. 3. (2) above.

³⁰³ Cf. section A. 3. (3) above.

³⁰⁴ Cauffman and Sagaert, (2011), p. 208.

³⁰⁵ See Sagaert, (2014), p. 681.

possession.³⁰⁶ Consequently, the previous owner cannot oppose the ownership of this third party,³⁰⁷ thereby ensuring commercial legal certainty.³⁰⁸ In other words, the right of ownership of the dispossessed owner is lost – through means of acquisitive prescription to the benefit of the possessor³⁰⁹ – and the revindication is discarded.³¹⁰ Any subsequent person acquiring the object from the afore-mentioned possessor is also protected.³¹¹ It will then only be possible for the dispossessed owner to have recourse to the contractual obligations undertaken with the party to whom he entrusted the object to seek redress.³¹² Nonetheless, failure to possess the object in accordance with the set conditions will result in the non-protection of the third party, entitling the dispossessed person to reclaim the object from the said party. Hence, the dispossessed person's claim in revindication will be successful.

(2) Third-party protection – acquisition in good faith (involuntary loss of possession)

In case of involuntary loss of possession through theft and where the third party has acquired the object in good faith, two different legal effects might flow from the situation: either the claim in restitution is belated and the victim of the theft cannot reclaim the object, or the claim was timely introduced and it is possible for the said owner to regain possession, thus imposing his right of ownership against the possessor. When the dispossessed owner is unable to recover his object within three years following the theft, the possessor that has a real possession, *pro suo*, free of defects and that was in good faith at the time of the acquisition acquires a right of ownership upon the stolen object,³¹³ a right that becomes irrevocable.³¹⁴ This means that the only protection afforded to *bona fide* third parties acquiring stolen objects is the one found in Article 2279 BCC, protecting possessors in good faith that are in possession at the expiration of three years after the theft.³¹⁵ Article 2279 BCC *in fine* demonstrates a specific choice by the legislator to enable the revindication of stolen cultural objects for a period of three years against a possessor in good faith.³¹⁶ After this period has passed, the dispossessed owner is barred from enforcing his supposedly 'imprescriptible' right of ownership through means of revindication against the possessor in good faith, who will then acquire ownership. It is thus possible for an acquirer *a non domino* to obtain ownership of a stolen corporeal movable through the mechanism of acquisitive prescription contained in Article 2279 BCC,³¹⁷ albeit this acquisition will be postponed for three years instead of being instantaneous. Throughout this regime, the legislator has decided to impute the risk of insolvability of the thief upon the dispossessed owner after this period has expired.³¹⁸ Consequently, if a claim in revindication is not introduced within the said period, the object is freed from any prior ownership claim so as to ensure legal certainty in commercial transactions.³¹⁹ When the revindication is exercised within the prescribed fixed period of three years, the action in revindication is then founded and the plaintiff is entitled to recover the object. Correspondingly, the defendant must hand back the item to the claiming owner³²⁰ and direct its grievances against the transferor from whom he acquired the object.³²¹ The restitution is then effectuated by physically handing back the good to the owner.³²²

Finally, it is important to note that in case of acquisition through market overt, the possessor that is entitled to reimbursement of the purchase price has a right of retention until reimbursement has been

³⁰⁶ Sagaert, Tilleman and Verbeke, (2013), p. 240.

³⁰⁷ Sagaert, (2014), p. 632.

³⁰⁸ Sagaert, (2014), p. 670; in this situation, the legislator decided to sacrifice the right of the dispossessed person to favour the legal certainty of commercial transactions. Furthermore, it is also often advanced that the dispossessed person has entrusted the object to the wrong party, and has, thus, contributed itself to the loss of the object. See Sagaert, (2014), p. 682 and Sagaert, Tilleman and Verbeke, (2013), p. 240.

³⁰⁹ Sagaert, (2014), p. 632.

³¹⁰ Boufflette, (2010), p. 134; Lecocq, (2012), paragraph 49.

³¹¹ Sagaert, (2014), p. 682.

³¹² Sagaert, Tilleman and Verbeke, (2013), p. 240.

³¹³ Sagaert, Tilleman and Verbeke, (2013), p. 240.

³¹⁴ Sagaert, (2024), p. 685; Sagaert, Tilleman and Verbeke, (2013), p. 240 where it is submitted that the possessor then definitively becomes the owner.

³¹⁵ Cauffmann and Sagaert, (2011), p. 305; Dekkers-Dirix, (2005), pp. 100-101; Sagaert, (2014), p. 684.

³¹⁶ Dekkers-Dirix, (2005), pp. 101-102.

³¹⁷ Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 56; Cauffmann and Sagaert, (2011), pp. 209, 298.

³¹⁸ Sagaert, (2014), p. 685; Sagaert, Tilleman and Verbeke, (2013), p. 241.

³¹⁹ Dekkers-Dirix, (2005), p. 101.

³²⁰ Dekkers-Dirix, (2005), p. 170.

³²¹ Sagaert, (2014), p. 684; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 63; See for example *Hof van beroep te Antwerpen*, arrest nr N-19840222-1, 22 februari 1084, where a painting purchased by an art dealer from another art dealer was handed to the dispossessed owner by the former after having realised that it was stolen in order to avoid the initialisation of the revindication by the latter. The court noted that the seller was then obliged to refund the purchase price to the buyer.

³²² Dekkers-Dirix, (2005), p. 170.

effectuated.³²³ This reimbursement includes: the price paid, contractual costs for the acquisition of the object,³²⁴ as well as any necessary and useful expenses undertaken that have contributed to inflate its value.³²⁵ Any interests charged by the purchaser are cancelled-out through the enjoyment of the good by the purchaser.³²⁶

(3) Third-party protection – acquisition in bad faith

At the expiration of thirty years of a real, *pro suo* and non-defective possession, it is possible for a bad faith possessor to acquire ownership upon the object by means of acquisitive prescription. Although this idea might appear unappealing, the acquisitive effect of Article 2262 BCC results from the need to provide legal certainty to society.³²⁷ In other words, the long period of prescription conferring a right of ownership after thirty years ensures the general interest above private interests.³²⁸ If the owner instated the revindication before the expiration of this period, he is entitled to the recovery of the stolen item.

³²³ Sagaert, (2014), p. 685-686.

³²⁴ Dekkers-Dirix, (2005), p. 103; Van Den Abbele, (2009), p. 28.

³²⁵ Cauffman and Sagaert, (2011), p. 306; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 63.

³²⁶ Dekkers-Dirix, (2005), p. 103; Cauffman and Sagaert, (2011), p. 306; Kunsten en Erfgoed, Direction du Patrimoine Culturel, (2012), p. 63; Van Den Abbele, (2009), p. 28, footnote 125.

³²⁷ Sagaert, (2014), p. 657.

³²⁸ Dekkers-Dirix, (2005), p. 507.

B. France*

By way of contrast to Belgium, France has signed the 1995 convention but has not yet ratified it.³²⁹ Consequently, the current regime applicable to the transfer of cultural objects that do not benefit from a special protection in French law is the regime of private law applicable to movable goods in general. This entails that the rules of the French Civil Code (*Code civil français*) – hereinafter FCC – are applicable to regulating the vetted conundrum. More specifically, Book 3 of the FCC, entitled ‘Different means by which ownership is acquired’ (*Des différentes manières dont on acquiert la propriété*) is to be applied to the triangular situation studied. Nevertheless, whilst the actual system applicable in Belgium finds its roots in the French *Code Napoléon* of 1804 – witnessing of a high degree of coincidence between the Belgian and the French Civil Codes – it is important to remark that the regime of prescription of the FCC has recently been subjected to an important reform. In 2008, the French Civil Code was amended by law *LOI n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*, enacted on 17 June 2008. This law has – *inter alia* – introduced important substantive reforms to the FCC regarding prescription periods. Because of this recent amendment, the changes brought about by it will be taken into consideration throughout the present analysis. That being said, to systematically approach the domestic legal systems addressed, section B analyses the rules of French private law using the same methodology as the one applied above regarding Belgian law. Thus, similar to the analysis of the Belgian rules scrutinized above, this section will, at first, discern the basic concepts addressed (section B.1) and contextualize the discussion (section B.2). Subsequently, both the concepts and context will be operationalized (section B.3). At last, the legal implications of these rules will be explained (section B.4).

1. BASIC CONCEPTS

(1) Ownership, possession and detention

Similar to Belgian law, the notion of ownership (*propriété*) is laid down in Article 544 FCC.

Art. 544 FCC – Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.

* The translations of the French Civil Code into English used for the purpose of the present research were taken from the official translation provided by the French government on the website www.legifrance.org. This translation can be retrieved at the following url: http://www.legifrance.gouv.fr/Media/Traductions/English-en/code_civil_20130701_EN, last retrieved on 01.03.2018.

³²⁹ France was particularly proactive in contributing to the fight against the illicit traffic in cultural property: it actively contributed to the negotiations of the 1995 convention and signed the document right after its promulgation; subsequently, it implemented Directive 93/7/EEC and ratified the 1970 UNESCO convention in 1997; in 2002, the French National Assembly voted upon a ratification of the 1995 convention. Nevertheless, this progress waned when the French Senate had to decide about the ratifying act. In fact, a legislative draft never made it before the Senate (see Hershkovitch, C., ‘Cause and consequences of the absence of ratification by France of the 1995 Unidroit Convention, The 1995 Unidroit Convention: a strong influence’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming. Following Hershkovitch, France has refrained from ratifying the convention for several reasons: firstly, the move towards the ratification of the 1995 convention was put to a halt through the forces of the art market. Private stakeholders expressed important reservations as to the convention. For example, the *Syndicat National des Antiquaires* – hereinafter SNA – advanced that the convention represent a particular risk to the French art market and that its adoption would shake up the foundation of French law, notably the notion of *possession vaut titre*. This adage is accompanied with a presumption of good faith during the acquisition of an object, a presumption that has often been relied upon by art professionals in their dealings. In the opinion of many French art dealers, the convention runs counter to the presumption of good faith and would affect their practices. Furthermore, merchants in aesthetic goods pointed at the difficulties encountered in the determination of the provenance of the goods handled. In this regard, proposals were brought forward to establish a well-updated database that could be specifically used for mercantile purposes, in order to make it possible for an art dealer to exercise due diligence (as required by the convention) through a proper research of the provenance of the object. The stance of public stakeholders was less clear-cut: most acquisitions by public museums took place at a period where reliance upon the presumption of good faith was prominent. It was, furthermore, advanced that the irreversible and intrusive changes brought by the convention concerning this presumption were at odds with the interests of many French museums. As Hershkovitch clarified, it was, nevertheless, noticeable that the behavior of the art market drastically changed once the negotiations for the convention began. This is, notably, demonstrated by the actual application of good practices by these museums during the acquisition of cultural objects; during an acquisition, the seller needs to provide adequate documentation to the museum as to the provenance of the item. Through these good practices, the museum exercises its obligation of due diligence as is provided for by the convention. As such, the convention, although not applicable in France, already exercises a certain degree of influence in its territory. This renders the movement towards the ratification of the convention easier. Secondly, the idea that the convention instates two mandatory regimes for stolen and illegally exported cultural objects was not popularly received in France. The obligation to return the object in both instances was viewed as problematic. Consequently, France decided to stay away from the UNIDROIT convention and, instead, ratified the 1970 instrument. See Hershkovitch, (2012), forthcoming.

Although Article 544 FCC does not specifically provide an explanation as to what the right of ownership entails, it lays down the powers conferred to legal subjects in their relations with things.³³⁰ But for this lack of specificity, it is, nonetheless, possible to identify the same three attributes of the right of ownership than the ones that are found in Belgian law: ownership implies the right to use a thing (*usus*), the right to enjoy the thing (*fructus*) and the right to dispose of the thing (*abusus*).³³¹ The *usus* makes it possible for a subject of law – and at his discretion – to use a corporeal thing in any desired manner or not to use it at all.³³² This right to use – although particularly extensive in nature – is constrained by measures adopted in the general interest.³³³ It should be noted that, despite the contradictory wording of Article 544 FCC – i.e. allowing the exercise of ownership in the most absolute manner by condemning, at the same time, the use of the right of ownership in manners prohibited by laws – there is a growth of restrictions, witnessed by an increase of imposed or highly recommended usages of certain types of objects.³³⁴ The second attribute, the *fructus*, entails the right to acquire a benefit out of the thing.³³⁵ It implies that the owner can either enjoy the benefits of a good, or decide to generate revenues from the item.³³⁶ The *abusus*³³⁷ confers the right to dispose of the thing on the owner,³³⁸ an attribute that constitutes a particularly important facet of ownership. It entails that it is possible for the owner to create juridical acts relating to the thing, or to modify, alienate, abandon or even destroy the thing.³³⁹ It is, furthermore, impossible to discard the *abusus*, which is an inherent attribute of the right.³⁴⁰

Alongside these attributes, it is important to note that the right of ownership has other properties. For example, as a corollary to its absolute character mentioned in Article 544 FCC,³⁴¹ ownership is exclusive, meaning that it has a privative function.³⁴² Subsequently, it is impossible to have more than one right of ownership upon a thing.³⁴³ This exclusivity of ownership, also present in Belgian law, materializes in the right to exclude others from using or disposing of the thing.³⁴⁴ In other words, this right constitutes a plenary right conferring omnipotent faculties to one person.³⁴⁵ This is not to say that more than one person cannot hold this unique right altogether, or that the attributes of ownership cannot be allocated to different persons.³⁴⁶ What is more, ownership is a perpetual right in French private law.³⁴⁷ The perpetual character of this right means, that, instead of being relative to the life span of an individual, it will remain in existence up until the destruction of the object upon which it exists.³⁴⁸ As such, the right survives the death of an owner and passes through to the heirs.³⁴⁹ Concurrently, the perpetual character of ownership means that the right cannot be lost through non-user.³⁵⁰ In other words, a prolonged non-usage of the thing will never lead to the loss of ownership.³⁵¹ This flows from the omnipotent nature of the right, prescribing the unfettered usage of a thing as well as the possibility not to make use of it at all.³⁵² Another important attribute of ownership that correlates to its perpetual character stems from the fact that the right of ownership is considered imprescriptible in French private law,³⁵³ as is specified by Article 2227 FCC. Finally, the right of ownership is not plenipotentiary and knows certain

³³⁰ Mathieu, M.-L., *Droit Civil – Les biens*, (Sirey, 3^e édition, 2013), p. 73.

³³¹ Mathieu, (2013), p. 76.

³³² Mathieu, (2013), p. 76.

³³³ Mathieu, (2013), p. 76.

³³⁴ Mathieu, (2013), p. 76.

³³⁵ Mathieu, (2013), p. 77.

³³⁶ Mathieu, (2013), p. 77.

³³⁷ Mathieu, (2013), p. 78.

³³⁸ Mathieu, (2013), p. 78.

³³⁹ Mathieu, (2013), p. 78.

³⁴⁰ Mathieu, (2013), pp. 78–79.

³⁴¹ Bergel, J. L., Bruschi, M., Cimamonti, S., *Traité de Droit Civil – Les biens*, (Librairie Générale de Droit et de Jurisprudence (L.G.D.J.), 2^e édition, 2010), p. 109.

³⁴² Mathieu, (2013), p. 76.

³⁴³ Mathieu, (2013), p. 79; Bergel, Bruschi and Cimamonti, (2010), p. 109.

³⁴⁴ Mathieu, (2013), p. 79. It is consequently possible for the owner to exclude anyone from interfering with the right of ownership, when the said interference is sought by others performing acts opposing the ownership or trying to appropriate unduly the object (*idem*). As such, the owner can deprive any other person from acquiring a benefit from the object, even though this acquisition would not be detrimental to him (see Bergel, Bruschi and Cimamonti, (2010), p. 109).

³⁴⁵ Mathieu, (2013), p. 79.

³⁴⁶ Mathieu, (2013), p. 79.

³⁴⁷ Mathieu, (2013), p. 80; Bergel, Bruschi and Cimamonti, (2010), p. 111; Zenati-Castaing, F., Revet, T., *Les Biens*, (Presses Universitaires de France: Paris, 3^{ème} édition, 2008), p. 379, where both commentators submit that it is more accurate to consider that the right of ownership is not subjected to time limitations.

³⁴⁸ Mathieu, (2013), pp. 80–81; Bergel, Bruschi and Cimamonti, (2010), pp. 111, 115.

³⁴⁹ Mathieu, (2013), p. 81.

³⁵⁰ Mathieu, (2013), p. 81; See also Zenati, F., Fournier, S., 'Essai d'une théorie unitaire de la prescription', 2 *Revue Trimestrielle de Droit Civil*, (avril-juin 1996), p. 345 and Zenati-Castaing and Revet, (2008), p. 380.

³⁵¹ Mathieu, (2013), p. 81.

³⁵² Mathieu, (2013), p. 81.

³⁵³ Zenati-Castaing and Revet, (2008), p. 380.

restrictions.³⁵⁴ In other words, freedom of action is the rule, whilst restrictions are the exception.³⁵⁵ This means that the owner can do whatever is not prohibited.³⁵⁶ The French legislator or French executive branch can exclusively adopt constraints to the right of ownership.³⁵⁷ These limitations are numerous and case law has added a further qualification to Article 544 FCC *in fine*: not only should the exercise of a right of ownership not be illegal but, furthermore, it should not create a *nuissance* to the rights of third parties.³⁵⁸ Nonetheless, it must be stressed that because of their exceptional nature, restrictions must be interpreted narrowly.³⁵⁹

Alongside ownership, French private law also recognizes and gives legal implications to the notion of possession (*possession*). Despite criticisms as to its confusing wording,³⁶⁰ the notion of possession is defined in Article 2255 FCC.³⁶¹

Article 2255 FCC – Possession is the detention or enjoyment of a thing or of a right that we hold or that we exercise by ourselves, or by another who holds it or who exercises it in our name.

Possession can be defined rudimentarily in the material control exercised over a tangible thing.³⁶² It is important to note that this material control is factual in nature.³⁶³ Similar to Belgian law, this means that possession constitutes a legal fact that is given legal effects and, therefore, cannot be transferred from one person to another. More specifically, in the present context, a possessor is one that is not an owner but that exercises the prerogatives belonging to the right of ownership upon a thing.³⁶⁴ Possession can, nonetheless, be best explained as the exercise of a right independent of the question of right bearing (*titularité*).³⁶⁵ Since possession will often be assimilated to ownership, it is predicated that possession is a presumption of ownership,³⁶⁶ because there exists no absolute proof of ownership, possession can play an important role in instating the existence of this right.³⁶⁷ Similar to possession in Belgian law, the French notion of possession is composed of both *corpus* and *animus*.³⁶⁸ The *corpus* materializes in concrete (factual) acts of exercise of the right and, on the one hand, witnesses of the exercise of the said right.³⁶⁹ On the other hand, the *animus* mirrors the intention (i.e. cognition) of the possessor and thus determines the type of right concerned.³⁷⁰

The *corpus* can be defined as the aggregate garnering of all material acts witnessing a factual control over a thing performed by one subject of law.³⁷¹ It is not only to be found in acts of usage of the thing, but the notion must be given a broad interpretation.³⁷² This, in turn, is tantamount to asking the question of whether a *bonus pater familias*³⁷³ – bearer of the relevant right – would have performed similar acts upon the object.³⁷⁴ In order to establish that there is a *corpus*, there is no need to continually exercise acts of usage upon the item.³⁷⁵ It is also possible for a possessor to transfer the thing to another, and thus not exercise acts of usage upon it for a certain period of time.³⁷⁶ This scenario – also known as *possessio animo suo, corpore alieno* – does not wane or extinguish the possession over an object.³⁷⁷ Instead, the holder will be considered as undertaking acts of usage upon the thing in the name of the possessor, as prescribed in Article 2255 FCC *in fine*.³⁷⁸ This means that possession is not only to be exercised directly, but it can also be exercised indirectly. Despite the many problems that this construction can

³⁵⁴ Bergel, Bruschi and Cimamonti, (2010), p. 108.

³⁵⁵ Bergel, Bruschi and Cimamonti, (2010), p. 108.

³⁵⁶ Bergel, Bruschi and Cimamonti, (2010), p. 108.

³⁵⁷ Bergel, Bruschi and Cimamonti, (2010), p. 108.

³⁵⁸ Mathieu, (2013), p. 83, citing Cour de Cassation, 3^{ème} chambre civile, 20 mars 1978, *Bull. Civ.* III, n. 128.

³⁵⁹ Bergel, Bruschi and Cimamonti, (2010), p. 108.

³⁶⁰ Mathieu, (2013), p. 313.

³⁶¹ Bergel, Bruschi and Cimamonti, (2010), p. 147.

³⁶² Dross, W., *Droit des Biens*, (LGDJ – Lextenso édition: Issy-les-Moulineaux, 2^{ème} édition, 2014), p. 197.

³⁶³ Zenati-Castaing and Revet, (2008), p. 647.

³⁶⁴ Dross, (2014), p. 197.

³⁶⁵ Dross, (2014), p. 198.

³⁶⁶ Bergel, Bruschi and Cimamonti, (2010), p. 177.

³⁶⁷ Bergel, Bruschi and Cimamonti, (2010), p. 177.

³⁶⁸ Dross, (2014), p. 198.

³⁶⁹ Dross, (2014), p. 198.

³⁷⁰ Dross, (2014), p. 198.

³⁷¹ Mathieu, (2013), p. 314.

³⁷² Dross, (2014), p. 199.

³⁷³ The notion of *bonus pater familias* is best understood as the behaviour that a reasonable person would have adopted in the same circumstances. More specifically, it can be defined as the type of man that is prudent, conscientious and diligent. See for example the definition provided in Cornu, (2005), p. 11, keyword: Bon père de famille.

³⁷⁴ Dross, (2014), p. 199.

³⁷⁵ Dross, (2014), p. 200.

³⁷⁶ Dross, (2014), p. 200.

³⁷⁷ Dross, (2014), p. 200.

³⁷⁸ Dross, (2014), p. 200.

raise,³⁷⁹ it is important to remember that the mere transfer of the object to another for a certain period of time does not result in negating the presence of *corpus*. In order to determine the existence of *corpus*, it has been established above that acts of usage will be considered, although this does not exclude the possibility for other aspects to be taken into consideration. More specifically, French case law has also subsumed the conclusion of juridical acts under the elements constitutive of the notion of *corpus*,³⁸⁰ provided that such juridical acts are reflective of the acts of usage inherently present in the concept unveiled.³⁸¹ When isolated, these acts cannot lead to the conclusion that they form sufficient proof of the exercise of *corpus*.³⁸² Thenceforth, the conceptualization of this notion has a material connotation; having regard to the circumstances of acquisition, establishing whether the person relying upon the notion of possession would have acted similarly to the bearer of the right becomes determinative.³⁸³⁻³⁸⁴ Failure of the deeds of the holder to live up to the set standard implies a lack of *corpus*, and results thus – axiomatically – in concluding that there is no possession at all.³⁸⁵ This means that the *corpus* is fundamental to possession, as a lack of it negates its very existence.³⁸⁶ Domestic judges have been given a power of discretion in appreciating whether the acts performed are sufficient to discern the required *corpus*.³⁸⁷

The *animus* is best explained as the intention of the possessor to behave as the owner of the thing, or to have possession as of right.³⁸⁸ This means that the intention to behave like an owner required by the definition of possession not only entails that the subject of law must behave like the owner of the thing – *sensu stricto* –, but also implies more generally that he has possession as of right.³⁸⁹ Henceforth, the *animus* is indicative of the type of right that the holder is exercising upon the object³⁹⁰ and is – following Article 2270 FCC – immutable.³⁹¹ Consequently, this aspect is the cognitive element of possession³⁹² and is more subjective than the notion of *corpus*. Nonetheless, for the purpose of discerning the *animus*, it is not important that the possessor believes he is exercising a right, but instead, it is sufficient for the possessor to have the will to exercise a right.³⁹³ What is more, the *animus* must be wielded directly by the possessor,³⁹⁴ in accordance with the *animus* constitutive of possession in Belgian law. Because of the subjective character of the *animus*, it might prove particularly difficult to demonstrate its very existence or its content. To remedy this difficulty, the French Civil Code has instated a presumption in favour of the possessor in Article 2256 FCC,³⁹⁵ in the same vein as Article 2230 BCC.

Article 2256 FCC – One is always presumed to possess for oneself, and as owner, if it is not proved that one began by possessing for another.

Article 2256 FCC instates a presumption of possession in capacity of owner to the benefit of the possessor of the object, although a rebuttable presumption.³⁹⁶ At last, it is the objectively ascertainable use of the object that will be indicative of the validity of the aforementioned presumption.³⁹⁷ This entails that sharing the use of the object between several possessors may rebut the presumption and, consequently, will be indicative of a lack of *animus*.³⁹⁸ The presumption could also be rebutted by means of confession by the possessor that he is not the owner of the thing.³⁹⁹ What is more, the concept of *animus* must be clearly distinguished from the notion of good faith, which will only be relevant after the existence of possession has been established.⁴⁰⁰ Good faith must,

³⁷⁹ Dross points out the problems that this representation raises, for example, regarding the notion of bare ownership. In his opinion, it is erroneous to consider that a bare owner effectuates acts of usage upon the thing through the detentor of the object. Furthermore, such a conceptualization would obscure the very distinction between these notions. See Dross, (2014), p. 201.

³⁸⁰ Dross, (2014), p. 199.

³⁸¹ Dross, (2014), p. 199.

³⁸² Dross, (2014), p. 200.

³⁸³ Dross, (2014), p. 200.

³⁸⁴ Dross, (2014), p. 200.

³⁸⁵ Dross, (2014), p. 199.

³⁸⁶ Dross, (2014), p. 199.

³⁸⁷ Dross, (2014), p. 199; due to the factual nature of the said connotation, this determination will not be subjected to the power of review by the *Cour de Cassation* because of its inability to review facts (*ibidem*, p. 200).

³⁸⁸ Mathieu, (2013), p. 319.

³⁸⁹ Mathieu, (2013), p. 317.

³⁹⁰ Dross, (2014), p. 205.

³⁹¹ Dross, (2014), p. 209-210.

³⁹² Dross, (2014), p. 205.

³⁹³ Dross, (2014), p. 206.

³⁹⁴ See Djoudi, J., 'Possession', *Répertoire de droit immobilier*, (mars 2011 (actu. décembre 2016)), § 23, with one exception arising when the possessor's sanity is regarded as unsound.

³⁹⁵ Dross, (2014), p. 206.

³⁹⁶ Dross, (2014), p. 207.

³⁹⁷ Dross, (2014), p. 207.

³⁹⁸ Dross, (2014), p. 207.

³⁹⁹ Dross, (2014), p. 207.

⁴⁰⁰ Mathieu, (2013), p. 319.

therefore, never be assimilated to the *animus*.⁴⁰¹ More conspicuously, the existence of good or bad faith is not relevant to the *animus* required for the possession.⁴⁰² At last, it is important to remark that both *corpus* and *animus* must be united for the possession to exist, similar to the concept of possession found in Article 2228 BCC.

Finally, and in concordance with Belgian private law, possession must be differentiated from detention because of the latter's inherent obligation to hand back the object after the expiration of a determined period of time.⁴⁰³ Detentors that acquired the object with a valid *causa detentionis* and whom recognize that they have to hand back the thing lack the necessary *animus rem sibi habendi*.⁴⁰⁴ Consequently, they are, therefore, referred to as precarious detentors (*détenteurs précaires*).⁴⁰⁵ In the French Civil Code, the distinction is particularly important since, contrary to possession, a detention cannot benefit from the mechanism of *usucapio*.⁴⁰⁶ Article 2266 FCC specifies that if one holds the object for another, it is impossible to acquire that object through prescription, irrespective of the time lapsed.⁴⁰⁷

Article 2266 FCC – Those who possess for another cannot ever acquire ownership by prescription, whatever the time elapsed may be.

(2) Theft

Theft is defined in Article 311-1 of the French Criminal Code (*Code pénal français*) – hereinafter FCrC – as the fraudulent subtraction of a thing owned by someone else.⁴⁰⁸

Article 311-1 FCrC – Theft is the fraudulent appropriation of a thing belonging to another person.

The notion of theft refers specifically to the fraudulent appropriation of a corporeal movable⁴⁰⁹ belonging to another person – who will then behave like the owner of the thing – either for temporary or permanent use.⁴¹⁰ This fraudulent appropriation must have taken place either without the knowledge of the owner or against his will.⁴¹¹ This entails that situations of voluntary loss of possession – such as abuse of confidence and of swindle – are not to be classified as theft.⁴¹² A dispossession by violence is also assimilated to theft.⁴¹³ Finally, it should be emphasized that the present definition of theft is borrowed from the regime of private law relevant to the contemplated rules⁴¹⁴ because Articles 2276 and 2277 FCC – discussed below – prescribe specific rules in case of involuntary loss of possession through theft.⁴¹⁵

(3) Cultural object

Similar to Belgium, France has not instated a specific category for cultural materials for the purpose of the private law rules contemplated. This entails that cultural objects fall within the regime applicable to goods in

⁴⁰¹ Mathieu, (2013), p. 320.

⁴⁰² Dross, (2014), p. 206.

⁴⁰³ Dross, (2014), p. 208.

⁴⁰⁴ Djoudi, (2011 (actual. 2016)), § 18.

⁴⁰⁵ Mathieu, (2013), pp. 314-315.

⁴⁰⁶ Dross, (2014), p. 208, citing articles 2266 and 2261 FCC.

⁴⁰⁷ Mathieu, (2013), p. 316.

⁴⁰⁸ Bergel, Bruschi and Cimamonti, (2010), p. 280; Reboul-Maupin, N., *Droit des biens*, (Daloz, 4^e édition, 2012), p. 326.

⁴⁰⁹ The definition is only applicable in cases dealing with movables, because theft presupposes the physical removal of an object. This means, nevertheless, that where composites of an immovable are removed (i.e. movables by anticipation) then they can also be subsumed under the category of movables that can be misappropriated by theft. See Cornu, M., Wallaert, C., Fromageau, J., *Dictionnaire comparé du droit du patrimoine culturel*, (CNRS Éditions: Paris, 2012), p. 978

⁴¹⁰ Cornu, Wallaert and Fromageau, (2012), p. 286; Djoudi, J., 'Revendication', *Répertoire de droit immobilier*, (avril 2008 (actu. avril 2016)), § 115.

⁴¹¹ Djoudi, (2008 (actual. 2016)), § 115, citing Cour de Cassation, Chambre criminelle, 18 novembre 1837, S. 1838. 1. 366 ; 12 décembre 1984, Bull. crim. n° 403.

⁴¹² Zenati-Castaing and Revet, (2008), p. 377, citing respectively Cour de Cassation, 1^{ère} chambre civile, 9 janvier 1996, Bull. civ. I, n° 22 for abuse of confidence and Cour d'appel de Paris, 10 décembre 1904, D., 1906.2.61 for swindle. See also Valette, V., 'Les protections du propriétaire et du possesseur d'un objet d'art volé', *Recueil Dalloz*, (2007), p. 132, citing the same source for abuse of confidence and Cour de Cassation, Chambre civile, 19 juin 1928, DP 1929, 1, p. 45 for swindle.

⁴¹³ Djoudi, (2008 (actual. 2016)), § 115.

⁴¹⁴ Zenati-Castaing and Revet, (2008), p. 377 citing Cour de Cassation, Chambre civile, 16 juillet 1884, D. 1885.1.232; Cour de Cassation, 1^{ère} chambre civile, 27 février 1980, D. 1980.IR.419.

⁴¹⁵ As a peculiarity of the French criminal rules, it is worth mentioning that French law punishes more harshly the theft of certain categories of cultural objects: following Article 311-4-2 FCrC, theft is punished more severely when it relates to cultural objects that are part of the public domain (Cornu, Wallaert and Fromageau, (2012), p. 978): Law n. 2008-696 of 15 July 2008 has rendered the theft of certain categories of cultural objects more severely punishable by making the theft of said objects an aggravating circumstance in assessing the crime (*ibidem*, p. 979).

general, although there exists no specific definition of goods in French law.⁴¹⁶ Sharing this commonality with the rules of Belgian private law, the regime laid down in the French Civil Code under scrutiny distinguishes – *inter alia* – movables from immovables, both considered as subcategories of corporeal objects. Following Article 516 FCC, goods can either be movable or immovable.⁴¹⁷ What is more, movables are identified by means of residual categorization in the same vein as in Belgian private law: everything that is not immovable is movable.⁴¹⁸ To distinguish between the two, it is therefore important to first establish which types of corporeal things are considered immovable. Similar to Article 517 BCC, Article 517 FCC distinguishes three types of immovables:

Article 517 FCC – Things are immovable, either by their nature or by their destination, or by the object to which they are applied.

Article 517 FCC categorizes things as immovables by their nature,⁴¹⁹ by their destination⁴²⁰ or by the objects to which these are applied.⁴²¹ In the context of the transfer of cultural objects and in a similar fashion to Belgian law, attention is to be devoted to the category of immovable by destination. Immovables by destination are movables that become immovable by the affectation given to the thing⁴²² and are, technically, subsumed under the regime applicable to immovables because of the said affectation.⁴²³ Nonetheless, three conditions have to be complied with for the movable goods to be assimilated to this category: firstly, Article 524 FCC requires that the owner of the immovable be the owner of the movable subjected to the regime of immovable by destination.⁴²⁴ This implies that the object must have been allocated to the immovable by its owner,⁴²⁵ either for the purpose of economically exploiting the immovable, or in perpetuity.⁴²⁶ In case of economic exploitation, it is important that the movable affected has been adjoined to the immovable by the owner of both the business and of the immovable within which this business operates.⁴²⁷ In case of perpetual affectation, it is also required that the person owns both the immovable and the movable attached to it. Secondly, there needs to be a material – or intellectual – link between the immovable and the allocated movable.⁴²⁸ A material link is established when there exists an intention by the owner to perpetually attach the movable to the immovable.⁴²⁹ The intellectual link entails that the movable plays a productive role in the activity exercised within the immovable.⁴³⁰ Furthermore, Article 525 FCC posits certain presumptions of perpetual attachment,⁴³¹ which – similar to Article 525 BCC – specifically requires that the removal of the movable damages or deteriorates the support upon which it is affixed.⁴³² Nevertheless, this last condition seems not to be determinative, as it might also be possible to demonstrate that the destination of the thing was immovable even though an affixation between the thing and the immovable is not present.⁴³³ In doing so, it will be important to denote the apparent immovable character of the affixation:⁴³⁴ a painting that has been permanently fixed in a staircase of a castle can be considered as an immovable by destination.⁴³⁵ Nevertheless, a statue merely apposed upon a pedestal without further means of

⁴¹⁶ Gasser, J.-M., 'La classification des biens immeubles et meubles en droit français', in: C. Baldus and P.-C. Müller-Graff, *Droit privé européen: l'unité dans la diversité – Convergences en droit des biens, de la famille et des successions?* (Sellier European Law Publishers: München, 2011), p. 259.

⁴¹⁷ Gasser, (2011), p. 260; Cornu, Wallaert and Fromageau, (2012), p. 636.

⁴¹⁸ Bergel, Bruschi, and Cimamonti, (2010), p. 29.

⁴¹⁹ Articles 518-523 FCC enumerates the different types of immovables by nature.

⁴²⁰ See Articles 524-525 FCC, which provide a list of immovables that are considered as immovables by destination.

⁴²¹ See Article 526 FCC for an enumeration of the things considered as immovables due to the object to which they apply.

⁴²² Cornu, Wallaert and Fromageau, (2012), p. 637.

⁴²³ There exists, nonetheless, one important exception prescribed by Article L622-1 of the French Patrimonial Code (*Code du Patrimoine*) for immovables by destination stemming from a classified immovable or that are classified immovables by destination. These immovables by destination fall within the regime applicable to movables. See Clippele, M.-S., "Quand l'art ouvre la voie au droit: le palais Stoclet", *Journal des tribunaux*, 26 janvier 2013, 4-N°6505, p. 51. See also Cornu, Wallaert and Fromageau, (2012), p. 637.

⁴²⁴ Reygrobellet, A., Denizot, C., "Fonds de commerce", *Dalloz action*, (2^e éd., 2012), points 17.32-17.33.

⁴²⁵ Reygrobellet and Denizot, (2012), at 17.33.

⁴²⁶ Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 96-21912, 13 avril 1999.

⁴²⁷ Reygrobellet and Denizot, (2012), at 17.33, citing Cour de Cassation, 3^e chambre civile, 29 oct. 1984, no 82-14.037, Bulletin civil III, no 177; RTD civ. 1985. 739, observations Giverdon et Salvage-Gerest.

⁴²⁸ Reygrobellet and Denizot, (2012), at 17.34.

⁴²⁹ Reygrobellet and Denizot, (2012), at 17.35.

⁴³⁰ Reygrobellet and Denizot, (2012), at 17.36.

⁴³¹ Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 96-21912, 13 avril 1999.

⁴³² See for example Cour de Cassation, 3^{ème} chambre civile, N° de pourvoi 90-12782, 3 avril 1991, concerning the removal of a mirror from a chimney. Following the *Cour de Cassation*, the Court of Appeal of Colmar had properly justified its decision in establishing – within its margin of discretion – that the detachment of the mirror's points of fixation would have damaged the wall upon which it was affixed and that the mirror constituted an ornamental ensemble with the chimney, for which – despite an apparent discrepancy in style between the two – the mirror's removal would affect the harmony of the combined pieces.

⁴³³ Reygrobellet and Denizot, (2012), at 17.35; See for example, Cour de Cassation, 3^{ème} chambre civile, 3 juillet 1968.

⁴³⁴ Reygrobellet and Denizot, (2012), at 17.35.

⁴³⁵ See Cour d'appel de Lyon, Chambre civile 01 B, N° 10/02877, 13 mars 2012.

permanent affixation is not *per se* to be assimilated to an immovable by destination.⁴³⁶ The presence of this link is a factual question left to the appreciation of domestic courts.⁴³⁷ Thirdly, the use of the movable in the exploitation of the immovable must be essential to the said exploitation.⁴³⁸ Finally, once there exists an act of separation between the immovable and the immovable by destination, the immovable by destination regains its movable nature.⁴³⁹

Provided that the object is not immovable or is not to be considered as immovable by destination, it is subsumed under the regime applicable to movables.⁴⁴⁰ Article 527 FCC establishes two types of movable property.

Article 527 FCC – Property is movable by its nature or as provided by legislation.

This article specifies that movable property is considered to be either movable by nature, or that its movable character is determined by law.⁴⁴¹ The second category is described in Articles 529-532 FCC and – due to its lack of relevancy for cultural objects – it is excluded from the present analysis. What is more, Article 528 FCC explains what is to be understood by the qualification movable by nature: goods are deemed movable by nature when these can be moved from one place to another,⁴⁴² either by themselves (e.g. animals), or by the exercise of an external force foreign to the object itself.⁴⁴³ In accordance with its semantics, the French conception of movables is thus based on the physical criterion of movability, similar to the Belgian appreciation of the said concept.⁴⁴⁴ Things that cannot be moved are, consequently, immovable.⁴⁴⁵ For example, a fresco – although initially to be considered immovable by nature – from the moment it is separated from its apse is considered to be movable by nature.⁴⁴⁶ For the purpose of the present analysis of the contemplated regime of French law, cultural objects are to be subsumed under the category of movable corporeal things.

(4) Legal remedy

An action in revindication (*revendication*) is a petitory action⁴⁴⁷ available to the dispossessed owner against a third party that has detention of his good;⁴⁴⁸ as established by the *Cour de Cassation*, a revindication is an action by which the claimant – invoking his ownership upon the thing – demands the restitution of a good from a person who holds it.⁴⁴⁹ An owner that has been dispossessed by theft will make use of this mechanism to reclaim the stolen object that is found in the hands of a possessor that acquired it *a non domino*.⁴⁵⁰⁻⁴⁵¹ The action is limited to

⁴³⁶ Cour de Cassation, 3^{ème} chambre civile, 3 juillet 1968.

⁴³⁷ Reygrobellet and Denizot, (2012), at 17.35, citing Cour de Cassation, Chambre des requêtes, 31 juill. 1879, DP 1880. 1. 273 ; S. 1880. 1. 409 – Cour de Cassation, Chambre des requêtes, 2 août 1886, DP 1887. 1. 293 ; S. 1886. 1. 417.

⁴³⁸ Reygrobellet and Denizot, (2012), at 17.37.

⁴³⁹ In this regard, see Cour d'appel de Lyon, Chambre civile 01 B, N° 10/02877, 13 mars 2012. In this case, the municipality of Champigny sur Marne agreed, during the summer of 1999, to sell a castle in which a painting had been permanently fixed in its staircase to a company. Subsequently, the painting was stolen from the staircase – before the sales agreement was formalized in November 1999 –, leading the two contracting parties to review the sales agreement. Thus, the parties agreed to operate a reduction in the purchase price if the painting could not be recovered by the seller within a specifically set period of time. In 2001, the picture (re)appeared at auction and both parties to the aforementioned sales agreement brought proceedings for the recovery of the stolen work of art. On the one hand, the buyer was unsuccessful in recovering as he had not acquired ownership of the painting and was deemed as not having an interest in the lodged action. On the other hand, the municipality of Champigny sur Marne was also unable to recover the painting because it had failed to timely introduce the action in *revindication*. In this regard, the *Cour d'appel* determined that: a) the act of removing the painting constituted a material and juridical act of separation of the immovable by destination from the immovable upon which it was vested. Consequently, the status of the painting was reverted to one of movable by nature, in line with the case law of the *Cour de Cassation* (see Gaillard, A., 'La séparation d'un meuble par destination – C.A. Lyon, 1^{ère} chambre civile, Section B, 13 mars 2012, n. 10-02877', available at: <http://bacaly.univ-lyon3.fr/index.php/droit-des-biens/235-la-separation-d-un-immeuble-par-destination>, last retrieved on 01.03.2018, discussing the objectivist approach used by the *Cour de Cassation* (citing Cour de Cassation, 3^{ème} chambre civile, 26 juin 1991, D. 1993.3, note I.Freij-Dalloz, JCP 1992.II.21825, note Barbière, RTD civ. 1992.14, obs. F. Zénati)); and b) because more than three years had expired before the owner introduced the action in *revindication* for the recovery of the movable property, the action failed (see below).

⁴⁴⁰ Reygrobellet and Denizot, (2012), at 17.31.

⁴⁴¹ Cornu, Wallaert and Fromageau, (2012), p. 636.

⁴⁴² Bergel, Bruschi and Cimamonti, (2010), pp. 29-30; Cornu, Wallaert and Fromageau, (2012), p. 636.

⁴⁴³ Bergel, Bruschi and Cimamonti, (2010), pp. 29-30.

⁴⁴⁴ Dross, (2014), p. 277.

⁴⁴⁵ Dross, (2014), p. 277.

⁴⁴⁶ Cour de Cassation, Assemblée plénière, N° de pourvoi 85-10262, 85-11198, 15 avril 1988; Clippele, (2013), p. 51; Cornu, Wallaert and Fromageau, (2012), p. 637.

⁴⁴⁷ There exists no possessory action for movable goods in French private law. For more details about this assertion, see Djoudi, (2008 (actual. 2016)), § 13.

⁴⁴⁸ Bergel, Bruschi and Cimamonti, (2010), p. 499; Cornu, Wallaert and Fromageau, (2012), p. 888; Djoudi, (2008 (actual. 2016)), § 1.

⁴⁴⁹ See Cour de Cassation, 3^{ème} chambre civile, N° de pourvoi 72-13758, 16 avril 1973: "attendu que la revendication est l'action par laquelle le demandeur, invoquant sa qualité de propriétaire, réclame à celui qui le détient, la restitution d'un bien."

⁴⁵⁰ Bergel, Bruschi and Cimamonti, (2010), p. 280 ; Djoudi, (2008 (actual. 2016)), § 114.

the dispossessed owner or any person keeping the object for the owner.⁴⁵² Nevertheless, a possessor of a stolen good cannot rely upon a revindication but, instead, may rely upon other unavowed possessory actions.⁴⁵³ Nevertheless, unlike Belgian law, the detentor of the object that is stolen cannot use the revindication but must, instead, act through the possessor.⁴⁵⁴ Thenceforth, this action is used to make the owner's right of ownership known – hence to have the right recognized by the third party – and, subsequently, to enable the owner to retake possession of the thing.⁴⁵⁵ Revindication is adjacent to the right of ownership⁴⁵⁶ and is the most extensive action available to an owner⁴⁵⁷ that can be used to recover any property.⁴⁵⁸ In order to initiate an action in revindication, the owner will have to prove the right he is invoking⁴⁵⁹ and that he has been dispossessed by theft.⁴⁶⁰ To prove his right of ownership, the person can prove a prior regular possession that satisfies the conditions of acquisitive prescription laid down in the first sentence of Article 2276 FCC.⁴⁶¹ This means that the presumption of ownership laid down in the first sentence of the said article will be of avail to the dispossessed owner whose possession existed before the act of dispossession.⁴⁶² Furthermore, it should also be emphasized that the party asserting his right of revindication must also demonstrate that the claimed property is the same as the one that has been stolen.⁴⁶³ Although not explicitly established in the above, the obligation to demonstrate the theft, the ownership upon the disputed object and that the said object is the one that was stolen is also required in Belgian law. Finally, following the wording of Article 2276 FCC and in concordance with Article 2279 BCC, an action in revindication can be exercised against any person in possession of the object. This entails that the claimant may bring an action in revindication against a thief or any other possessor or detentor, provided this person exercises factual control over the object.

(5) Prescription

French law also recognizes the institution of prescription but, unlike Belgian law, the French Civil Code does not contain a general definition of this notion. Nonetheless, similar to Belgian law, prescription serves several purposes, which are addressed below. In accordance with Belgian private law, French private law knows of two types of prescription: acquisitive and extinctive prescription, both respectively defined in Articles 2258 and 2219 FCC. The extinctive prescription regime is regulated by Articles 2219-2254 FCC and is followed by the regime regulating acquisitive prescription in Articles 2258-2277 FCC.

Following Article 2219 FCC, extinctive prescription is a means to extinguish a right prescribed by law.

Article 2219 FCC – Extinctive prescription is a mode of extinction of a right that results from the inaction of its holder during a certain period of time.

This mechanism entails that if the right is not exercised within a certain period of time, it will be lost and will become non-justiciable.⁴⁶⁴ Nonetheless, because of the imprescriptible nature of the right of ownership, the

⁴⁵¹ This means that a person that is victim of swindle or abuse of confidence cannot rely upon the mechanism of revindication. See Djoudi, (2008 (actual. 2016)), § 114, citing Cour de Cassation, Chambre civile, 6 juillet 1886, DP 1887. 1. 25; Cour de Cassation, Chambre civile, 19 juin 1928, DH 1928. 448; Cour d'appel de Paris, 1^{ère} chambre A., 7 mai 1991, D. 1991. Somm. 306, observations Robert.

⁴⁵² See Djoudi, (2008 (actu. 2015)), § 123 where it is advanced that a bailee is entitled to rely upon the action because he acts as a guarantor towards the owner.

⁴⁵³ Dross, (2014), pp. 213-214, and more particularly footnote 13; See also Zenati, F., 'Revendication mobilière par l'acquéreur a non domino', *Revue Trimestrielle de Droit Civil*, (1990), p. 521.

⁴⁵⁴ Djoudi, (2008 (actual. 2016)), § 124, citing Cour de Cassation, Chambre civile, 5 mai 1874, S. 1875. 1. 49, note Labbé.

⁴⁵⁵ Bergel, Bruschi and Cimamonti, (2010), p. 499; Cornu, Wallaert and Fromageau, (2012), p. 888; Djoudi, (2008 (actual. 2016)), § 1.

⁴⁵⁶ Djoudi, (2008 (actual. 2016)), § 1.

⁴⁵⁷ Mathieu, (2013), p. 363.

⁴⁵⁸ Djoudi, (2008 (actual. 2016)), § 94, citing Cour de Cassation, 1^{ère} chambre civile, 7 février 1989, Bull. civ. n° 57, RTD civ. 1990. 109, observations Zénati.

⁴⁵⁹ Mathieu, (2013), pp. 349, 363; Bergel, Bruschi and Cimamonti, (2010), p. 500; Djoudi, (2008 (actual. 2016)), §§ 1, 116 and 122, citing Cour de Cassation, 3^{ème} chambre civile, 1^{er} juin 1977, *ibid.*, 1978. 161, observations Giverdon, Cour d'appel de Paris, 30 mars 1990, JCP 1990. II. 21584, note Barbiéri and Cuilleron, Revendication des meubles perdus ou volés et protection possessoire, RTD civ. 1986. 504; See for example Cour d'appel d'Aix-en-Provence, Chambre 01 A, N° 12/20691, 24 septembre 2013 in which the ownership of two ebony statues, each representing an elephant, was disputed. In this case, the claimant was unable to prove a right of ownership upon the statues and his claim in revindication was, therefore, rejected. See also Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N° 173/2012, 11/05505, 22 février 2012.

⁴⁶⁰ Djoudi, (2008 (actual. 2016)), § 116.

⁴⁶¹ Bergel, Bruschi and Cimamonti, (2010), p. 280; Reboul-Maupin, (2012), p. 359.

⁴⁶² Bergel, Bruschi and Cimamonti, (2010), p. 280.

⁴⁶³ See in this regard Cour d'appel de Paris, Pôle 02, 2^{ème} chambre, N° 11/08156, 24 janvier 2014 where the Republic of Turkey was unable to demonstrate that the tile – supposedly belonging to the Eyüp mosque – that it was attempting to retrieve was similar to the ones that were stolen from the mosque in 1919; Djoudi, (2008 (actual. 2016)), § 122, citing Cour d'appel de Grenoble, 20 juillet 1949, D. 1952. 551, note Grevesic.

⁴⁶⁴ Mathieu, (2013), p. 81; Cornu, Wallaert and Fromageau, (2012), p. 805.

mechanism of revindication is not subject to extinctive prescription.⁴⁶⁵ The *Cour de Cassation* pronounced this exoneration for the first time back in 1905 for immovable property⁴⁶⁶ and almost a century later, affirmed the rule with regard to movables.⁴⁶⁷ This imprescriptibility of the action has been reiterated and confirmed throughout French case law many times since.⁴⁶⁸ This means that the mechanism of extinctive prescription plays no role with regard to revindication.

Recently, a lot of confusion has appeared with the introduction of the 2008 *LOI n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*, law modifying the provisions of the FCC about prescription in civil matters. With the 2008 reform, former Article 2262 FCC has been replaced by Article 2224 FCC for actions relating to movables and by Article 2227 FCC for actions relating to immovables.

Article 2262 FCC (pre 2008 amendment) – All actions, either real or personal, prescribe by thirty years without there being a need by the one alleging this prescription to show some title in support, or without it being possible to oppose to him an exception inferred from bad faith.

Both Articles 2224 and 2227 FCC (post-2008 reform) read as follows:

Article 2224 FCC – Personal actions or movable rights of action prescribe in five years from the day the holder of a right knew or should have known the facts enabling him to exercise his right.

Article 2227 FCC – The right of ownership is imprescriptible. Subject to that reservation, real actions concerning immovables prescribe in thirty years from the day when the holder of a right knew or should have known the facts enabling him to exercise his right.

Article 2227 FCC specifies that the right of ownership is imprescriptible,⁴⁶⁹ but at the same time it establishes that real actions relating to immovables can prescribe after thirty years, running from the day the holder of the right knew or should have known the sufficient facts so as to initiate legal proceedings. For actions relating to movables, Article 2224 FCC has transformed the rigid extinctive prescription period of thirty years that was contained in Article 2262 FCC (pre-2008 amendment) into a flexible period of five years running from the moment at which the person entitled to the right was, or should have been, aware of the facts required to exercise this right. The above-mentioned confusion stems more specifically from the first sentence of Article 2227 FCC,⁴⁷⁰ and from an apparent contradiction between this sentence and Articles 2224 and 2227 *in fine* FCC. If the right of ownership is imprescriptible because of its perpetual character, the actions in revindication for both movables and immovables adjacent to this right should axiomatically be considered as imprescriptible. Henceforth, the solution laid down in Article 2224 FCC for movables appears to contradict the imprescriptible nature of ownership posited by Article 2227 FCC, and of its correlating means of implementation: the action in revindication. Despite this apparent contradiction, it is questionable whether Article 2224 FCC is applicable to the action in revindication of movables for two reasons: firstly, as established above – and now confirmed by Article 2227 FCC – the right of ownership is imprescriptible. The codification of this imprescriptibility in this article seems thus to consolidate the imprescriptible character of the action in revindication due to its ancillary status to the right of ownership. In other words, since ownership is imprescriptible so is the revindication. Secondly, the position of Article 2227 FCC in section 2 of the second chapter of Title XX of the French Civil

⁴⁶⁵ Mathieu, (2013), p. 81 ; See also Zenati-Castaing and Revet, (2008), p. 665 but also *ibidem*, pp. 380 and 381 where it is also submitted that the right of ownership is exempted from the regime of extinctive prescription; Robert, A., 'L'action en revindication n'est pas susceptible de prescription extinctive', *Recueil Dalloz*, (1993), p. 306.

⁴⁶⁶ See Zenati-Castaing and Revet, (2008), pp. 381-382, citing Cour de Cassation, Chambre des requêtes, 12 juillet 1905, *DP*, 1907.1.141, rapp. Potier; S., 1907.1.273, note A. Wahl.

⁴⁶⁷ Bergel, Bruschi and Cimamonti, (2010), p. 114, citing Cour de Cassation, 1^{ère} chambre civile, 2 juin 1993, *Bull. Civ.*, I., n. 197, *D.* 1993, Som. 306, observations A. Robert; *RTD civ.* 1994, p. 389, obs. F. Zénati; See also Zenati-Castaing and Revet, (2008), p. 382 (citing the same sources); Henry, X., Jacob, F., Tisserand, A., Venandet, G., Wiederkehr, G., *Méga Code Civil*, (Dalloz: Paris, 5^{ème} édition, 2003), p. 2264; See also Robert, (1993), p. 306, citing Tribunal civil de la Seine, 1^{er} Juin 1949, *D.* 1949.350, note Ripert.

⁴⁶⁸ Mathieu, (2013), pp. 81-82; Bergel, Bruschi and Cimamonti, (2010), p. 113. The facts of the case relate to the non-exercise of a right of ownership for a period of almost fifty years. Although the owner had not exercised his possession since 1854, he made use of an action in revindication against a possessor in 1901. The *Cour de Cassation* pointed at the impossibility to lose the right of ownership, even through the non-usage of the said right, and, henceforth, at the impossibility for the action in revindication to prescribe. For the court, as long as a possessor has not acquired through acquisitive prescription, it is possible to exercise the action in revindication; regarding the imprescriptible nature of ownership, the reader is invited to consult Zenati and Fournier, (1996), pp. 347-348 for more information as to why ownership is not subject to the regime of prescription. In this extract, Zenati and Fournier theorize that ownership is a relation between a person and the object subject to the ownership, and cannot therefore be the subject of an acquisition through prescription. Instead, it merely constitutes a legal effect flowing from the said acquisition. This explanation justifies why ownership can never prescribe; see also Zenati-Castaing and Revet, (2008), pp. 381-382 ; or Robert, (1993), p. 306, citing the 1905 decision above-mentioned, but also Cour de Cassation, Chambre civile, 22 juin 1983, *JCP éd. N* 1986.II.263, note Barberi and Cour d'appel de Paris, 26 février 1987 and 3 octobre 1990.

⁴⁶⁹ Mathieu, (2013), p. 82.

⁴⁷⁰ Bergel, Bruschi and Cimamonti, (2010), p. 114.

Code – instead of section 1 – is indicative of the hierarchy between the two articles: following the adage *lex specialis derogat legi generali*, the position of Article 2227 FCC indicates that this article must be given precedence over Article 2224 FCC. This, therefore, means that the modifications brought about by the 2008 law – and notably those of Article 2224 FCC – are not applicable to the action in revindication. Instead, this action remains imprescriptible because of the perpetual nature of the right of ownership⁴⁷¹ and, consequently, is subjected to the same regime as the one that was applicable before 2008.⁴⁷²

Alongside extinctive prescription, French law also knows of an acquisitive prescription, commonly referred to as *usucapio*. Article 2258 FCC provides a general definition of this concept.⁴⁷³

Article 2258 FCC – Acquisitive prescription is a means of acquiring a thing or a right as (sic) [corrigendum: through] the effect of possession without there being a need by the one alleging it to show some title in support, or without it being possible to oppose to him an exception inferred from bad faith.

Article 2258 FCC makes it possible for the possessor of an object to acquire a right of ownership over a thing after the expiration of a specific period of time, subject to the caveat that the said possession complies with certain requirements. A period of acquisitive prescription for movables can be either short (immediate in case of good faith acquisition (cf. Article 2276 FCC)), or long (thirty years in case of bad faith acquisition (cf. Article 2272 FCC)). The length of the said period is, in fact, thirty years, albeit exceptions providing for a shorter period exist when the possessor acts in good faith.⁴⁷⁴ Irrespective of the length applied, it is important to recall that – similar to Belgian law – an action in revindication never prescribes through means of extinctive prescription. Nonetheless, the said revindication cannot be exercised once the object has been acquired by another through means of acquisitive prescription.⁴⁷⁵ Henceforth, despite the fact that French law considers ownership to be sacred, inviolable and imprescriptible, possession by another person can result in divesting a dispossessed owner of his right of ownership by means of acquisitive prescription.⁴⁷⁶ A corollary to this affirmation is that if no one has acquired ownership through means of acquisitive prescription, the right of revindication remains.⁴⁷⁷ This is notably illustrated by a case decided by the *Cour d'appel de Paris* in 1990 – and reviewed by the *Cour de Cassation* in 1993 – about a collection of various works of art and paintings originating from the gallery of the famous art dealer Ambroise Vollard.

In 1939, the notorious French art dealer Ambroise Vollard entrusted a collection of items and paintings from his gallery to a Yugoslavian national named Erich Slomovich. After Vollard's death – on 22 July 1939 –, Slomovich stored part of the borrowed collection in a safe located at the *Société Générale* in Paris, France. In 1940, he took the remainder of the collection for exhibition purposes to Zagreb, Kingdom of Yugoslavia (nowadays Croatia). Following Slomovich's disappearance during the Second World War, the safe located at the *Société Générale* remained unopened until 1946, after which its contents were transferred and kept in a crate until 1977. Subsequently, the *Société Générale* inventoried the items and obtained legal authorization to sell these at a public auction. The sale was to be organized in 1981. Reacting upon the publicized event, Louis Sebastian – heir to Vollard's estate – initiated legal proceedings for the revindication of the items auctioned. Concurrently, Slomovich's heirs joined the pending proceedings to reclaim the items and at the same time to challenge Sebastian's claim.

In exercising its power of revision, the *Cour de Cassation* confirmed that the non-user of the right of ownership cannot lead to its extinction and that, therefore, the action in revindication could not prescribe by means of extinctive prescription.⁴⁷⁸ Instead, the crux of the discussion related to the possible reliance by the Slomovichs upon the mechanism of acquisitive prescription through possession.⁴⁷⁹

⁴⁷¹ Reboul-Maupin, (2012), p. 315.

⁴⁷² This conclusion is further confirmed by Bergel, Bruschi and Cimamonti because Article 537 of the *Proposition de réforme de livre II du Code civil relatif aux biens*, established by the Association Henri Capitant, reaffirmed the imprescriptible status of the right of ownership in anticipation to the 2008 reforms. See Bergel, Bruschi and Cimamonti, (2010), p. 115. See also the proposal to be found at the following link: http://fdv.univ-lyon3.fr/publication/gazette/FLAvant-projet_de_reforme_du_droit_des_biens.pdf, last retrieved on 01.03.2018.

⁴⁷³ Reboul-Maupin, (2012), p. 325.

⁴⁷⁴ Dross, (2014), p. 219.

⁴⁷⁵ Robert, (1993), p. 306; Terré, F., Simler, P., *Droit civil – Les biens*, (9^e édition, Dalloz: Paris, 2014), p. 428; Atias, C., *Droit Civil les Biens*, (12^e Édition, LexisNexis: Paris, 2014), p. 251.

⁴⁷⁶ Mathieu, (2013), pp. 327, 332; See also Zenati-Castaing and Revet, (2008), p. 382.

⁴⁷⁷ Robert, (1993), p. 306.

⁴⁷⁸ See Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 90-21982 91-10429 91-10971 91-12013, 02 juin 1993. See also Robert, (1993), p. 306.

⁴⁷⁹ See Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 90-21982 91-10429 91-10971 91-12013, 02 juin 1993, notably the discussion of the court relating to the '*troisième moyen, pris en sa seconde branche*'.

The changes introduced by Law 2008-561 of 17 June 2008 mentioned above have brought some further confusion as to the presence of good faith in the context of acquisitive prescription. A misunderstanding seems to have occurred from the choice of words used in the authentic version of Article 2258 FCC:

Article 2258 Code civil français – La prescription acquisitive est un moyen d'acquérir un bien ou un droit par l'effet de la possession sans [...] qu'on puisse lui opposer l'exception déduite de la mauvaise foi.

Although the authentic version of the article specifies that it is not possible to oppose the exception inferred from bad faith against the person that alleges the acquisitive prescription, this formulation is ambiguous. In fact, it has prompted some commentators to question whether Article 2258 FCC still requires the exercise of good faith for the purpose of acquiring by means of acquisitive prescription.⁴⁸⁰ More particularly, since bad faith apparently cannot be relied upon anymore, this would imply that possessors may acquire immediately on the basis of Article 2276 FCC, even though they did so in bad faith.⁴⁸¹ As will be explained below, before the 2008 changes were made, both doctrine and case law required possession to be in good faith in order to acquire the object through means of acquisitive prescription on the basis of former Article 2279 FCC (now Article 2276 FCC).⁴⁸² The proposed reading of Article 2258 FCC would thus have the result of discarding the implied good faith requirement constructed in Article 2276 FCC for the purpose of acquiring by means of instantaneous acquisitive prescription. Nonetheless, this reading is incorrect for the following reasons: firstly, based upon a parsimonious assessment of Article 2258 FCC, it is the opinion of the present author that the French formulation is misleading and that the English translation used here is more accurate. Article 2258 FCC translates:

Article 2258 FCC – Acquisitive prescription is a means of acquiring a thing or a right as (sic) [corrigendum: through] the effect of possession [...] without being possible to oppose an exception inferred from bad faith.

As clarified by this translation, acquisitive prescription can materialize without it being possible to invoke an exception to this prescription inferred from bad faith. Put differently, no bad faith exception can oppose the mechanism of acquisitive prescription. This reading is particularly sensible if one accepts that Article 2258 FCC stands on its own and should thus be read independently from Article 2276 FCC. In other words, it should be understood that Article 2258 FCC merely specifies that acquisitive prescription is generally possible even though an acquisition is in bad faith. Reading the provision in the context of Article 2276 FCC instead creates the impression that a bad faith exception cannot be invoked to oppose an instantaneous acquisitive prescription on the basis of Article 2276 FCC. Such a reading would have the undesirable effect of assuming that bad faith acquisitions can – similar to good faith acquisitions – benefit from the prescription contained in Article 2276 FCC, since a bad faith exception cannot be invoked against the possessor. When read as such, the distinction drawn between good faith acquisition (cf. Article 2276 FCC) and bad faith acquisition (cf. Article 2272 FCC) would cease to exist. Although this interpretation seems particularly undesirable, it is doubtful that the French legislator had any intention to abolish the distinction. Secondly, to confirm the proposed independent reading of the new Article 2258 FCC, it should also be remarked that it resembles Article 2262 FCC (pre-2008 amendment) in many ways. This article provided:

Article 2262 Code civil français (pre amendement de 2008) – Toutes les actions, tant réelles que personnelles, sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi.

Article 2262 FCC (pre 2008 amendment) – All actions, either real or personal, prescribe by thirty years without there being a need by the one alleging this prescription to show some title in support, or without it being possible to oppose to him an exception inferred from bad faith.

Under former Article 2262 FCC, alongside the extinctive prescription of the action, it was generally conceded that the possessor whose possession was not defective could also acquire ownership by means of acquisitive prescription,⁴⁸³ notwithstanding the presence of bad faith during an acquisition.⁴⁸⁴ Therefore, former Article 2262 FCC stood – *inter alia* – for the proposition that bad faith is no argument against extinctive / acquisitive prescription. Consequently, although the formulation borrowed from former Article 2262 FCC by the new

⁴⁸⁰ See for example Reboul-Maupin, (2012), p. 325.

⁴⁸¹ Reboul-Maupin, (2012), p. 325.

⁴⁸² Reboul-Maupin, (2012), p. 325.

⁴⁸³ Henry, Jacob, Tisserand, Venandet and Wiederkehr, (2003), p. 2265, citing Cour de Cassation, 3^{ème} chambre civile, 6 Novembre= 1975: “[...] Mais attendu que la possession qui remplit les conditions exigées par la loi pour conduire à l'usucapion, même abrégée, suffit à rendre le possesseur propriétaire à l'expiration du délai légal qu'il ait ou non acquis ses droits du même auteur que le revendiquant; [...]”.

⁴⁸⁴ Henry, Jacob, Tisserand, Venandet, and Wiederkehr, (2003), p. 2265.

Article 2258 FCC might appear confusing in the context of defining acquisitive prescription in general,⁴⁸⁵ this formulation does not discard the requirement implied in Article 2276 FCC that the acquisition must be carried out in good faith for the purpose of acquiring an object through means of short acquisitive prescription. Instead, the presence of bad faith during the acquisition merely entails that it is not possible to rely upon short periods of acquisitive prescription (as addressed below). Thenceforth, it seems that the French version of Article 2258 FCC should be rephrased, as it is not “l’exception [à la prescription acquisitive] déduite de la mauvaise foi” – referring to an existing exception of bad faith, and therefore referring to Article 2272 FCC – that may not be invoked, but more specifically “une exception [à la prescription acquisitive] déduite de la mauvaise foi”. In other words, Article 2258 FCC should refer to ‘an exception inferred from bad faith’ – as is the case in the English translation –, instead of its actual French wording mentioning ‘the exception inferred from bad faith’. Hence, following the wording of Article 2258 FCC, it is possible for one that exercises a right by means of possession to become the bearer of the right through this exercise,⁴⁸⁶ irrespective of good or bad faith – elements which only influence the length of the period of possession.

2. CONTEXTUALIZATION

After having explained the key operative notions that will serve as the basis to the analysis of the French private law rules contemplated, attention will now be devoted to two tenets forming the bedrock of these rules: the distinction between voluntary and involuntary loss of possession and the principle of *nemo dat quod non habet*. It should be stressed that these two principles were also recognized and followed by the rules of Belgian private law discussed above. Subsequently, this contextualization is followed by an explanation of the operationalization of the various elements described in sections 1 and 2 (cf. section 3) with the same pragmatism as for Belgian law.

(1) Voluntary and involuntary loss of possession

Analogous to the clarifications made above about Belgian law, the distinction between voluntary / involuntary loss of possession is a particularly important point in understanding the rules of third-party protection in case of acquisitions *a non domino*. In fact, in the context of revindication of movables from a third party that has been acquired *a non domino*, situations of voluntary and involuntary loss of possession (respectively *dépossession volontaire et involontaire*) must be clearly distinguished.⁴⁸⁷ In the former case, the loss of possession is due to the act of the owner, while in the latter case the loss of possession is not imputable to him. Voluntary loss of possession includes, notably, the voluntary handing of the object to another person – i.e. by lending or entrusting the object to someone else –, followed by a transfer of the item to a third party, and thus resulting in a breach of trust by means of abuse of confidence or fraud against the first party.⁴⁸⁸ In case of voluntary loss of possession – and when a *bona fide* third party acquires the object *a non domino* through Article 2276 FCC, in accordance with the rules laid down below – the dispossessed owner will not be able to revindicate the object because of the instantaneous acquisitive effect of Article 2276 FCC; only those that have voluntarily undertaken to risk their ownership by entrusting the object to another must be confronted by the strict regime of instantaneous protection benefiting *bona fide* third parties that have acquired the object *a non domino*.⁴⁸⁹ Taking this risk may result in being instantaneously deprived of a claim in revindication against the said third party.⁴⁹⁰ Nonetheless, similar to Belgian law, French law makes two particularly important exceptions to this instantaneous acquisition for situations of involuntary loss of possession in cases of loss and theft. In line with the analysis of Belgian law given above, in the present context, only the situation of theft needs to be addressed. Theft is considered as a means of involuntary loss of possession⁴⁹¹ for which corrective mechanisms have been prescribed in the second sentence of Article 2276 FCC. In the same vein as in Belgian private law, in case of involuntary loss of possession, the protection of purchasers in good faith *a non domino* – and more generally in commercial transactions – has not appeared to be so important as to deprive an owner from the possibility of reclaiming his object.⁴⁹² It is, thenceforth, possible for the dispossessed owner to successfully reclaim the stolen property from a *bona fide* third party that has acquired *a non domino*, although this possibility is constrained by a time limitation of

⁴⁸⁵ Perhaps the ambiguity of the provision stems from the fact that a bad faith exception is mentioned in an article defining acquisitive prescription, noting furthermore that this definition of acquisitive prescription given by Article 2258 FCC was introduced for the first time during the 2008 amendments.

⁴⁸⁶ Dross, (2014), p. 225; Cornu, Wallaert and Fromageau, (2012), p. 805.

⁴⁸⁷ Dross, W. ‘Le destin singulier de l’article 2279 du code civil’, *Revue Trimestrielle de Droit Civil*, Sirey, (2006), retrieved on www.dalloz.fr, p. 7.

⁴⁸⁸ Bergel, Bruschi and Cimamonti, (2010), p. 280; Dross, (2006), p. 7.

⁴⁸⁹ Dross, (2014), p. 244.

⁴⁹⁰ Dross, (2006), p. 7.

⁴⁹¹ Rebolu-Maupin, (2012), p. 326; see also for example Cour d’appel de Paris, 1^{ère} chambre A., 7 mai 1991, D. 1991. Somm. 306, observations Robert.

⁴⁹² Dross, (2014), p. 244.

three years. The operationalization of the distinction between voluntary / involuntary loss of possession is explained in more detail below.

(2) Nemo plus iuris ad alium transferre potest quam ipse habet

Similar to Belgian law, French law recognizes and follows the *nemo plus iuris ad alium transferre potest quam ipse habet* principle.⁴⁹³ As explained above, it entails that it is not possible for a person to transfer more than what he has himself to another. This further implies that it is impossible for a thief to transfer a right of ownership upon a stolen object to another person. Redolent of Belgian law, the strict application of the *nemo dat* principle in the present context entails that a third-party acquirer, whom acted in good faith, must suffer the consequences of the theft. This, in fact, creates the same feeling of injustice when the acquisition of the item by the said third party was for value. Nevertheless, the *nemo dat* tenet is tempered by the application of rules on the protection of acquisitions *a non domino* by third parties in good faith. These rules are laid down in Article 2276 FCC (formerly Article 2279 FCC).

3. OPERATIONALIZATION

In accordance with the methodology used to analyse Belgian law, the present section will explain the functioning of the key concepts and core principles respectively laid down in sections B. 1 and B. 2 above. Similar to Belgian law, the starting point of this analysis can be found in the mechanism of prescription laid down in Article 2276 FCC.

Article 2276 FCC – In regard of movable property, possession is equal to title.

Nevertheless, a person who has lost a thing, or from whom a thing has been stolen, can claim it back within three years starting to run from the moment of the loss or from the theft.

Compared to Article 2279 BCC, Article 2276 FCC is based upon the same dual construction distinguishing voluntary and involuntary loss of possession: the first sentence has implications for third parties in good faith that have acquired either *a domino* or *a non domino* in case of voluntary loss of possession, whilst the second sentence concerns situations involving acquisitions *a non domino* by a third party in case of involuntary loss of possession. The operationalization of the above will begin respectively with the first sentence of Article 2276 FCC (i.e. voluntary loss of possession) and then – with the same methodology as for Belgian law – move on to explain the exception in case of theft (i.e. involuntary loss of possession). As was the case in Belgian law, these two scenarios need to be appreciated in the light of good and bad faith.

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)

Article 2276 FCC – In regard of movable property, possession is equal to title.

Similar to Belgian law, the exercise of possession in the context of Article 2276 FCC can have two functions:⁴⁹⁴ one probative and the other acquisitive.⁴⁹⁵ The first function of possession in light of Article 2276 FCC is probative in nature and, similar to Belgian law, is only relevant in case of acquisition *a domino*. Therefore, because the present analysis focuses upon the rules applicable in case of acquisition *a non domino*, the probative function of possession in relation to Article 2276 FCC is excluded.

The second function of possession in the context of Article 2276 FCC relates to the possibility to acquire ownership upon a thing through the passage of time.⁴⁹⁶ This acquisitive function of Article 2276 FCC is, more particularly, operated by means of acquisitive prescription and is applicable when the object was acquired *a non domino*.⁴⁹⁷ In case of acquisition *a non domino*, the first sentence of Article 2276 FCC has thus been embedded with an acquisitive function,⁴⁹⁸ which gives this sentence a substantive – and not just a procedural – connotation.⁴⁹⁹ As such, this acquisitive function results in favouring the possessor of the object over the rightful

⁴⁹³ Dross, (2006), p. 1.

⁴⁹⁴ Mathieu, (2013), p. 327.

⁴⁹⁵ Reboul-Maupin, (2012), p. 324; Bergel, Bruschi and Cimamonti, (2010), p. 277; Mathieu, (2013), p. 337.

⁴⁹⁶ Mathieu, (2013), p. 330; Dross, (2014), p. 219.

⁴⁹⁷ Reboul-Maupin, (2012), p. 324; Dross, (2006), p. 1; as noted above, acquisitive prescription is defined in Article 2258 FCC. In fact, by its actual position in 'Chapter 2 – acquisitive prescription' found in 'Title XXI – possession and acquisitive prescription' of the French Civil Code, Article 2258 FCC is of general application to the chapter's three subsections. Consequently, the position of the article is determinative of its interaction with the other articles found in Title XXI of the FCC, notably the subsections contained in Chapter 2, including Article 2276 FCC. This means that the definition of acquisitive prescription laid down in Article 2258 FCC is operationalized for movables in Article 2276 FCC.

⁴⁹⁸ Dross, (2006), p. 1.

⁴⁹⁹ Reboul-Maupin, (2012), p. 324.

bearer of the ownership right.⁵⁰⁰ Possession is, thus, a mean of acquiring property⁵⁰¹ that is detrimental to the bearer of a right.⁵⁰² The rationale for allowing derogations to the right of ownership through means of possession is that social peace is guaranteed by ensuring the best allocation of resources, notably by favouring effective utility instead of abstract relations between subjects of law and objects.⁵⁰³ This means that a person that is not the owner, but that can distil utility from an object should be favored over an owner that disregards his belongings;⁵⁰⁴ by embedding the possession with a right of ownership through means of acquisitive prescription, the rights of the owner are sacrificed for the sake of ensuring security of transactions relating to corporeal movables.⁵⁰⁵ This has drastic consequences for the owner and, therefore, can only stem from a lack of attention and care from him towards his property, and – in cases where an acquisition results from the longer period of prescription – where the lack of care that is judged to be too long.⁵⁰⁶ French law considers that society allocates goods in the most efficient way, and thus prescribes the present mechanism of distributive justice as a means of correcting inefficiencies and of preserving social peace.⁵⁰⁷ This entails that preference is given to possessions that serve a function towards social peace, instead of securing otiose ownerships.⁵⁰⁸ Regarding the long period of acquisitive prescription, if the possessor behaves like an owner without his possession being challenged by the owner, it will be converted into ownership through the passage of time.⁵⁰⁹ Acquisitive prescription is possible because the legal situation is brought in line with its factual counterpart after the expiration of a long period of time. Thus, French law recognizes and gives echo to factual situations that endure for a long period of time so as to ensure social peace.⁵¹⁰ Next to the substantive connotation just described, acquisitive prescription is also embedded with a procedural connotation: when the acquisitive prescription has operated its effects, the possessor's position is bolstered and Article 1350 (2) FCC creates a presumption of ownership to his benefit.⁵¹¹ This presumption imputes the burden of proving the contrary to the other party, as the possessor is not obliged to produce any title justifying his possession.⁵¹²

Similar to Belgian law, although the French rules recognise and apply the *nemo dat* principle, Article 2276 FCC constitutes an important exception to the said principle. In fact, it is possible for a good faith possessor to acquire ownership upon the thing through means of instantaneous acquisitive prescription (cf. the first sentence of Article 2276 FCC) or after a period of three years in case of theft (cf. the second sentence of Article 2276 FCC). Nevertheless, in order to acquire an object through acquisitive prescription, it is important for the possession to comply with several specific conditions, which will be addressed in detail below.

Conditionality of instantaneous acquisitive prescription

The acquisitive prescription of movables – as constructed within Article 2276 FCC – has been fine-tuned through case law,⁵¹³ meaning that the possessor of a movable object who acquires *a non domino* can only directly⁵¹⁴ acquire a right of ownership it subject to certain specific conditions.⁵¹⁵ Compliance with these conditions constitutes the *conditio sine qua non* to acquiring a right of ownership upon the object through Article 2276 FCC.⁵¹⁶ In a similar fashion to Belgian law, the conditions instated relate to 1) the nature of the good; to 2) the quality of the possession and, finally, 3) the presence of good faith during the acquisition.⁵¹⁷

⁵⁰⁰ Dross, (2014), p. 219.

⁵⁰¹ Reboul-Maupin, (2012), p. 323.

⁵⁰² Dross, (2014), p. 225.

⁵⁰³ Mathieu, (2013), p. 327.

⁵⁰⁴ Mathieu, (2013), p. 327.

⁵⁰⁵ Mathieu, (2013), p. 340.

⁵⁰⁶ Dross, (2014), p. 219.

⁵⁰⁷ Dross, (2014), p. 226.

⁵⁰⁸ Mathieu, (2013), p. 326.

⁵⁰⁹ Dross, (2014), p. 219.

⁵¹⁰ Dross, (2014), p. 226.

⁵¹¹ See Grimonprez, B., 'Prescription acquisitive', *Répertoire de droit civil Dalloz*, V^o, (janvier 2010 (actualisation juin 2016)), § 155.

⁵¹² Grimonprez, (2010 actual. 2016), § 155.

⁵¹³ Mathieu, (2013), p. 337.

⁵¹⁴ Bergel, Bruschi, and Cimamonti, (2010), p. 270.

⁵¹⁵ Dross, (2006), p. 3; Bergel, Bruschi and Cimamonti, (2010), p. 270.

⁵¹⁶ Renold, M. A., "Stolen Art: the Ubiquitous Question of Good Faith", in: The International Bureau of 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 [et al.]: The Hague [et al.], 2004), p. 260.

⁵¹⁷ Cornu, Wallaert and Fromageau, (2012), p. 805.

1) Nature of the good

Firstly, the movable thing subjected to acquisitive prescription must be a thing that can be appropriated.⁵¹⁸ This, by nature, excludes immovables or certain categories of intangible things.⁵¹⁹ Secondly, movables by anticipation are also excluded from the regime of Article 2276 FCC.⁵²⁰ In fact, Article 2276 FCC is only applicable to corporeal movables that are individualized.⁵²¹ This, in turn, refers to corporeal movables that can be subjected to a manual *traditio*, or in other words a passing of possession by hand.⁵²² Furthermore, certain categories of objects are also discarded from the equation; it is noteworthy to specify that French law excludes certain specific categories of tangible movables from the scope of Article 2276 FCC. As such, family souvenirs,⁵²³ registered movables,⁵²⁴ movables belonging to the public domain⁵²⁵ and all inalienable goods⁵²⁶ are all excluded from the scope of Article 2276 FCC.⁵²⁷

2) Quality of the possession

Once it is established that the goods are of the type that can be appropriated and that can be handled, it is required that the possession be embedded with specific qualities. Because possession is one of the prerequisites of the acquisitive function of Article 2276 FCC, it is generally required that the good faith acquirer has effective and genuine possession of the object.⁵²⁸ More precisely, the possession must be effective (*possession effective*), genuine (*possession véritable*) and free of defects (*possession utile*).

Effective possession

The effectiveness of the possession is reflected in the effective *traditio* of the object and in its material detention by the possessor.⁵²⁹ The effective *traditio* means that the acquisitive effect of the first sentence of Article 2276 FCC will only be applicable if the good faith possessor is put into possession by a transferor with effective possession upon the object.⁵³⁰⁻⁵³¹ With respect to the material detention by the possessor, the possession may not remain with another – a situation known as *possessio corpore alieno* – or else the acquirer will not be able to rely on the aforementioned protection.⁵³² Similarly, he will not be protected if the possession remains with the transferor that has effective possession (i.e. in case of *constitutum possessorium*).⁵³³ Furthermore, to be effective the possession cannot be a precarious detention⁵³⁴ and, as such, cannot stem from temporary arrangements with the possessor – such as an authorized detention – because this precarious holding would lack the *animus* required to qualify as effective possession.⁵³⁵ Nonetheless, this does not exclude the possibility for possession to be exercised through a detentor,⁵³⁶ since an effective possession can also be exercised *solo animo*,⁵³⁷ another reason why an act of detention by another does not affect the possession. In such cases, it is sufficient for the possessor to have the

⁵¹⁸ Rebol-Maupin, (2012), p. 324.

⁵¹⁹ Rebol-Maupin, (2012), p. 324; Bergel, Bruschi and Cimamonti, (2010), pp. 270, 272; Dross, (2014), p. 242; for a more detailed analysis of this exclusion, see Djoudi, (2008 (actual. 2016)), §§ 88-89.

⁵²⁰ Djoudi, (2008 (actual. 2016)), §§ 88 and 94.

⁵²¹ Mathieu, (2013), p. 338, citing Cour de Cassation, 1^{ère} chambre civile, 6 mai 1997, *Bull. Civ. I*, n. 144.

⁵²² Mathieu, (2013), p. 338.

⁵²³ Dross, (2014), p. 228.

⁵²⁴ Djoudi, (2008 (actual. 2016)), § 90, with the exception of cars.

⁵²⁵ Dross, (2014), p. 228; Djoudi, (2008 (actual. 2016)), § 91.

⁵²⁶ Djoudi, (2008 (actual. 2016)), § 92.

⁵²⁷ Mathieu, (2013), p. 338.

⁵²⁸ Dross, (2014), p. 245.

⁵²⁹ Bergel, Bruschi and Cimamonti, p. 273; See also Djoudi, (2008 (actual. 2016)), § 98, citing Cour de Cassation, Chambre civile, 12 décembre 1921, DP 1922. 1. 28 ; Terré et Simler, n° 434.

⁵³⁰ Dross, (2006), p. 15; Brunner, (1994), p. 111.

⁵³¹ The lack of effective possession of the transferor must raise red flags to the purchaser, as this lack of possession could tarnish the possessor's good faith. See Dross, (2006), p. 15. See also the analysis of the requirement of good faith given below.

⁵³² Brunner, (1994), p. 111; Djoudi, (2008 (actual. 2016)), § 98.

⁵³³ Brunner, (1994), p. 111; Djoudi, (2008 (actual. 2016)), § 98, citing Mazeaud et Chabas, t. 2, 2^e vol. n° 1529.

⁵³⁴ Mathieu, (2013), p. 338; Rebol-Maupin, (2012), p. 325.

⁵³⁵ Bergel, Bruschi and Cimamonti, (2010), p. 273; for an example in which the precarious character of the possession of furniture was established, see Cour d'appel de Bordeaux, 1^{ère} chambre civile, section B, N° 13/03833, 7 Octobre 2015. In this case, the claimant sold an immovable to the defendant and agreed to leave – temporarily – some of her furniture behind. Upon request to give the furniture back, the defendant submitted that he had purchased the immovable along with its content. The claimant succeeded in establishing that both parties had agreed to a temporary loan, but failed to establish specifically upon which pieces of furniture the agreement was established. For another example of the impossibility of proving that the possession was precarious because of a lack of proof of the precariousity of the possession, see Cour d'appel de Colmar, 2^{ème} chambre civile, section A, N° 173/2012, 11/05505, 22 février 2012.

⁵³⁶ Mathieu, (2013), p. 338.

⁵³⁷ Djoudi, (2008 (actual. 2016)), § 99, citing Cour de Cassation, 1^{ère} chambre civile, 16 janvier 1980, *Bull. Civ. I*, n° 31, RTD civ. 1980.

785, observation Giverdon, D. 1983, IR 16, observations Robert.

object at his disposal when needed.⁵³⁸ The possibility to be considered in possession despite the lack of material detention upon the object by the possessor has also been recognized by the French courts.⁵³⁹ This was notably the conclusion reached by the *Cour de Cassation* regarding a stolen painting acquired by an innocent purchaser, who had subsequently brought it for consignment in a store.⁵⁴⁰ The fact that the possessor had entrusted the painting to another – who himself had entrusted the painting to a third party – for the purpose of being sold was not sufficient to conclude that he had lost the effective possession upon the disputed painting.⁵⁴¹ Finally, if the possession of the transferor is not effective, it is clear that the possessor cannot benefit from the acquisitive effect laid down in Article 2276 FCC.⁵⁴²

Genuine possession

Alongside the ‘effective possession’ requirement, it is important that the possession is also genuine. In order for the possession to be genuine, the possessor must possess *animo domini*, and must therefore possess as of right.⁵⁴³ A precarious detention of the object is, therefore, not sufficient to establish a genuine possession.⁵⁴⁴ The genuine character of the possession must be assessed at the time of the entry into possession.⁵⁴⁵ Furthermore, the presumption of possession for oneself laid down in Article 2256 FCC (discussed above) is also operative in the establishment of a genuine possession.⁵⁴⁶ This presumption entails that the burden of disproving the genuineness of the possession is imputed upon the party challenging the possession.⁵⁴⁷

Possession free of defects

Furthermore, once it is established that the possession is effective and genuine, it is still important for it to be free of defects⁵⁴⁸ so as to benefit from acquisitive prescription.⁵⁴⁹ Whether the possession is defective or not depends on compliance with Article 2261 FCC: a possession that complies with all these elements is considered *utile*.⁵⁵⁰

Article 2261 FCC – Acquisitive prescription requires a possession that is continuous, uninterrupted, peaceable, public, unequivocal, and as an owner.

Article 2261 FCC specifies that in order to prescribe through means of possession, the possession must comply with six specific requirements. The first four requirements relate to the *corpus* of possession, whilst the last two conditions are qualifications intertwined with the notion of *animus*.⁵⁵¹ All six requirements are aspects taken into consideration in giving legal effects to the concept of possession.⁵⁵² It results from this observation that a possession that does not comply with these conditions is considered defective and, consequently, devoid of legal effects.⁵⁵³ Specifically, because possession can bar an owner from enforcing his ownership right against the possessor that has acquired through means of acquisitive prescription, the possession must comply with stringent requirements.⁵⁵⁴ As such, the elements of Article 2261 FCC are cumulative and must all be complied with so as to give legal effect to possession.⁵⁵⁵

⁵³⁸ Djoudi, (2008 (actual. 2016)), § 100.

⁵³⁹ Cornu, Wallaert and Fromageau, (2012), p. 805.

⁵⁴⁰ Cornu, Wallaert and Fromageau, (2012), p. 806, citing Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 80-14955, 3 novembre 1981, *Bull. Civ.*, I, n. 324.

⁵⁴¹ See Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 80-14955, 3 novembre 1981, *Bull. Civ.*, I, n. 324.

⁵⁴² Dross, (2006), p. 15.

⁵⁴³ Djoudi, (2008 (actual. 2016)), § 96, citing Cour de Cassation, Chambre civile, 24 juillet 1912, DP 1914. 1. 36; 17 octobre 1993, S. 1935. 1. 121, note Vialleton.

⁵⁴⁴ Djoudi, (2008 (actual. 2016)), § 96, citing Cour de Cassation, Chambre civile, 24 juillet 1912, DP 1914. 1. 36; 17 octobre 1993, S. 1935. 1. 121, note Vialleton.

⁵⁴⁵ Djoudi, (2008 (actual. 2016)), § 96, citing Cour de Cassation, 1^{ère} chambre civile, 4 janvier 1972, *Bull. Civ.*, I, n° 4.

⁵⁴⁶ Djoudi, (2008 (actual. 2016)), § 96.

⁵⁴⁷ Djoudi, (2008 (actual. 2016)), § 96, citing Cour de Cassation, Chambre civile, 8 décembre 1987, D. 1989. somm. 29, observations Robert and Cour de Cassation, 1^{ère} chambre civile, 30 mars 1999, D. 1999, IR 124.

⁵⁴⁸ Djoudi, (2008 (actual. 2016)), § 101, citing Cour de Cassation, Chambre commerciale, 5 mars 1996, JCP E 1996. I. 584, observation Cabrillac. RTV civ. 1997. 472, observations Crocq and Cour de Cassation, 1^{ère} chambre civile, 14 mai 1996, JCP 1996. I. 3972, observations Périnet-Marquet, RTD civ. 1998. 408, observations Zénati; If the possession is free of defects, it is then said to be *utile*. See Dross, (2014), pp. 201-202.

⁵⁴⁹ Dross, (2014), p. 246; Mathieu, (2013), p. 331; Reboul-Maupin, (2012), p. 325.

⁵⁵⁰ Mathieu, (2013), p. 321.

⁵⁵¹ Dross, (2014), p. 202.

⁵⁵² Mathieu, (2013), p. 321

⁵⁵³ Dross, (2014), p. 201; Mathieu, (2013), p. 321; Bergel, Bruschi and Cimamonti, (2010), p. 273.

⁵⁵⁴ Mathieu, (2013), p. 321.

⁵⁵⁵ Mathieu, (2013), p. 321.

a) continuous and uninterrupted possession

The continuous character of the possession can be explained as follows: since the notion of possession implies that the possessor behaves like the bearer of the right, the possession must have a certain continuous character.⁵⁵⁶ To demonstrate continuity, it is sufficient for the person relying upon possession to demonstrate that he has exercised acts of usage or juridical acts in periods during which the right bearer would have normally acted.⁵⁵⁷ This does not imply that a continuous use of the object is prescribed, as there exists no requirement to permanently use the object.⁵⁵⁸ Instead, it is expected that the possession is exercised at every moment it should have been exercised – as established by the nature of the object – without prolonged abnormal periods of interruption that could be considered as constituting a hiatus in the possession.⁵⁵⁹ In order to help a holder in demonstrating continuity, two further qualifications are particularly important: firstly, – similar to Article 2234 BCC – Article 2264 FCC can be relied upon in order to fill temporal gaps, as it creates a temporal bridge between the different moments during which possession can be established.⁵⁶⁰

Article 2264 FCC – A present possessor, who proves that he possessed at some time in the past, is presumed to have possessed during the intervening time, unless there is proof to the contrary.

This article instates a presumption of continuity of the possession, making it easier for the one invoking it to construct the said continuity.⁵⁶¹ Secondly, through a mechanism of junction of possession, it is possible to join the possession of prior possessor to the actual acts of possession for the purpose of Article 2264 FCC.⁵⁶² Both mechanisms provide flexibility to the possessor in construing continuity.

The uninterrupted nature of the possession implies that the one that possesses must not cease to exercise the right he pretends to have.⁵⁶³ This implies that after having performed acts of usage upon the object, the person refrains from effectuating further acts of usage.⁵⁶⁴ If another exercises this type of acts upon the object – provided these acts are sufficient to consider a loss of *corpus* to the benefit of the new person – this leads to a loss of the possession.⁵⁶⁵ Nonetheless, following Article 2271 FCC, the interruption of possession must be longer than a year to be sufficient to discard the uninterrupted running of the possession.⁵⁶⁶

Article 2271 FCC – *Acquisitive prescription is interrupted when the possessor of a thing is deprived of its enjoyment for more than one year, either by the owner or even by a third person.*

The same period of interruption is required by Article 2263 BCC in case of natural interruption (see above). What is more, a third party occasionally disrupting the possession is not considered sufficient to interrupt it.⁵⁶⁷ Furthermore, a possession without *corpus* – also referred to *possesso solo animo* – is based upon the presumption that the possessor continues to consider himself as the possessor when nothing else points to the contrary.⁵⁶⁸ Therefore, a possession *solo animo* remains as long as it is not brought into jeopardy by a third party's possession.⁵⁶⁹ It is also important to clearly distinguish interruption of possession from discontinuity: discontinuity means that the possession has ceased to exist because of want of continuity in the *corpus*.⁵⁷⁰

Finally, because of the instantaneous character of the acquisition given by the first sentence of Article 2276 FCC for *bona fide* acquisitions, both requirements of continuity and uninterrupted possession are idle for the sake of the first sentence of Article 2276 FCC.⁵⁷¹ Nevertheless, these elements are relevant for non-instantaneous periods of acquisitive prescription.

⁵⁵⁶ Dross, (2014), p. 203.

⁵⁵⁷ Dross, (2014), p. 203.

⁵⁵⁸ Mathieu, (2013), p. 322.

⁵⁵⁹ Dross, (2014), p. 203, footnote 13, citing Cour de Cassation, Chambre civile, 11 janvier 1950, D. 1950, jur., p. 125, note Leonan.

⁵⁶⁰ Dross, (2014), p. 203.

⁵⁶¹ Dross, (2014), p. 203.

⁵⁶² Dross, (2014), p. 203, footnote 14, citing Cour de Cassation, 3^{ème} chambre civile, 9 juillet 2003, n. 02-11612.; Bull. Civ. III, n. 156.

⁵⁶³ Dross, (2014), p. 203.

⁵⁶⁴ Dross, (2014), p. 203, footnote 17.

⁵⁶⁵ Dross, (2014), p. 204.

⁵⁶⁶ Dross, (2014), p. 204; this period of one year is also the period prescribed for a possessory action. Dross, (2014), p. 204, footnote 19.

⁵⁶⁷ Dross, (2014), p. 204, footnote 18, citing Cour de Cassation, 3^{ème} chambre civile, 7 novembre 1978, n. 77-10618; Bull. Civ. III n. 334.

⁵⁶⁸ Dross, (2014), p. 204.

⁵⁶⁹ Dross, (2014), p. 204. Nonetheless, this possession *solo animo* in the context of acquisitive prescription may pose difficulties concerning the public character of the possession (*idem*).

⁵⁷⁰ Dross, (2014), p. 203.

⁵⁷¹ Dross, (2014), p. 246; Rebol-Maupin, (2012), p. 326 (with regard to the continuous character); Dross, (2006), p. 12; Djoudi, (2008 (actual. 2016)), § 101.

b) peaceful possession

The peaceful character of the possession reflects the need for the possession to have materialized and subsisted peacefully, which means that it must exist without any use of force.⁵⁷² More specifically, physical and moral violence must be absent.⁵⁷³ This requirement of peaceful possession, codified in Article 2263 (1) FCC,⁵⁷⁴ is based upon the rationale that things should not be coveted and acquired through an ensuing use of violence.⁵⁷⁵ Thenceforth, both the entering into possession and the entire period of possession must be peaceful.⁵⁷⁶ If force is exercised to acquire the possession or to retain it, this violence will create a defect in possession until it stops, as is made clear by Article 2263 FCC.⁵⁷⁷

Article 2263 FCC – Acts of violence cannot either support a possession leading to prescription.

Effective [corrigendum: A free of defect] possession does not begin until the violence ends.

Similar to Article 2233 BCC, Article 2263 FCC entails that the period of acquisitive prescription will start running anew when the violence ceases to exist, discarding the computing of any prior period of possession without violence that ran before the use of force occurred.⁵⁷⁸ Axiomatically, the existence of violence should also considerably affect the good faith of the possessor⁵⁷⁹ (although this point is addressed in more detail below). The defect of violence can only be invoked by those who are subjected to it, and not by unaffected third parties.⁵⁸⁰ Finally, it must be emphasized that Dross contests the utility of this condition in the present context, since the possessor invoking the first sentence of Article 2276 FCC is an acquirer *a non domino*, which by definition implies a lack of exercised violence.⁵⁸¹

c) public possession

The public exercise of the right is a condition that is particularly important when considering the mechanism of acquisitive prescription.⁵⁸² Because of the important consequences that stem from an acquisitive prescription, the possession must be conspicuous so as to make it possible for the right bearer to take notice of the possession and contest it. This is notably important for him to be able to defeat any acquisition of ownership to the benefit of the possessor through acquisitive prescription.⁵⁸³ Furthermore, it is considered that the concealment of an object is too akin to usurpation to deserve legal protection.⁵⁸⁴ To be free of defects, the said possession may not be clandestine⁵⁸⁵ but, instead, open and certain. Whilst this entails that the possession must be exercised openly, it does not mean that there is an obligation to give notification of the said possession to everyone.⁵⁸⁶ In fact, it is sufficient for the acts of possession to have come to the notification of the owner – and thus not to be kept secret to him – so as to give him sufficient notice of the existing possession.⁵⁸⁷ This relative ‘public character’ provides the means to the owner necessary to defend his rights upon the thing.⁵⁸⁸ It is thus impossible to invoke the acquisitive effect of possession against an owner that has not been put in a position of awareness of the existence of a concurrent possession.⁵⁸⁹ In other words, because of the relativity of the requirement of public character, it will be impossible to invoke this condition against the person whose property has intentionally been kept out of his sight.⁵⁹⁰ More specifically, an owner that is aware of a concurrent possession is, knowingly, running the risk of allowing the possessor to acquire through means of prescription, and thus accepts the risk of losing his property.⁵⁹¹

⁵⁷² Dross, (2014), p. 205.

⁵⁷³ Mathieu, (2013), p. 323, citing Cour de Cassation, 3^{ème} chambre civile, 30 avril 1969, *Bull. Civ.* III, n. 348; 15 février 1995, *Bull. Civ.* III, n. 53; *Deffrénois* 1995. 1117, obs. Atias; *RDI* 1995. 284, observations Bergel.

⁵⁷⁴ Mathieu, (2013), p. 323.

⁵⁷⁵ Mathieu, (2013), p. 322.

⁵⁷⁶ Mathieu, (2013), pp. 322-323.

⁵⁷⁷ Dross, (2014), p. 205; Mathieu, (2013), p. 323.

⁵⁷⁸ Mathieu, (2013), p. 323, citing the second sentence of Article 2263 FCC.

⁵⁷⁹ Dross, (2014), p. 246.

⁵⁸⁰ Dross, (2014), p. 205.

⁵⁸¹ Dross, (2006), p. 12.

⁵⁸² Dross, (2014), p. 202.

⁵⁸³ Dross, (2014), p. 202; Mathieu, (2013), p. 323.

⁵⁸⁴ Dross, (2014), p. 202.

⁵⁸⁵ Bergel, Bruschi and Cimamonti, (2010), p. 274; for the ambiguity, see Mathieu, (2013), p. 339.

⁵⁸⁶ Mathieu, (2013), p. 323.

⁵⁸⁷ Mathieu, (2013), p. 323.

⁵⁸⁸ Mathieu, (2013), p. 323.

⁵⁸⁹ Mathieu, (2013), p. 323.

⁵⁹⁰ Dross, (2014), pp. 202-203.

⁵⁹¹ Mathieu, (2013), p. 323.

In pragmatic terms, the appreciation of the public character of the possession is particularly intricate: from the perspective of the owner, it is unclear whether the appreciation of the cognition must happen by recourse to an objective or a subjective measurement.⁵⁹² From the perspective of the possessor, the *Cour de Cassation* has clarified that the mere fact of hiding the possession from the owner is sufficient to deprive it of its public character.⁵⁹³ In fact, although there seems to be no legal requirement imposing to the possessor the obligation to explicitly notify the owner of the existence of the concurrent possession,⁵⁹⁴ the possession will be considered clandestine when the possessor hides it from those having an interest in knowing about its existence.⁵⁹⁵ The focus given to the appreciation of the public character of the possession seems to be narrowed to the behaviour of the possessor; whilst a surreptitious attitude should be sanctioned by qualifying the possession as defective, a possession that is public but which does not result in giving sufficient notice to the owner should not be considered defective.⁵⁹⁶ This appreciation of the public character of possession results from the need to take the interests of an effective user of the thing into consideration.⁵⁹⁷ Furthermore, the relativity of the public character of possession means that only the person that the possessor tried to deceive can invoke this relative defect.⁵⁹⁸

Similar to the requirement of peaceful possession, Dross advances that the condition of public possession is otiose here because the *bona fide* acquisition *a non domino* in case of voluntary loss of possession is instantaneous.⁵⁹⁹ Publicizing the possession is thus, ostensibly, irrelevant for the purpose of the instantaneous acquisitive prescription,⁶⁰⁰ but is important for the longer acquisitive prescription.

d) unequivocal possession

Article 2261 FCC – reproduced above – furthermore requires that possession is unequivocal.⁶⁰¹ Possession is equivocal when there exist doubts upon the genuine willingness to behave like an owner or to exercise a right upon the object as a right bearer.⁶⁰² The equivocal nature of the possession can be observed simply throughout an objective appreciation of the acts and can be established when it is possible to conclude that there is no intention to behave like an owner.⁶⁰³ This is notably the case when there is no correlation between the acts exercised upon the objects and the right that the author pretends to exercise upon it.⁶⁰⁴ Consequently, it will not be sufficient for the possessor to submit that he behaves like the right bearer or like an owner, but he will also have to exercise acts that constitute an outward expression of this intention.⁶⁰⁵ The equivocal character of the possession can only be appreciated by having regard to what third parties perceive, as the equivocacy must be apparent to them and not to the possessor.⁶⁰⁶ Put differently, the equivocacy must be appreciated objectively – instead of subjectively: the possession must be equivocal to others, not just to the possessor.⁶⁰⁷ If possession is objectively equivocal, it is then considered defective⁶⁰⁸ and, therefore, cancelled-out.⁶⁰⁹ Ambiguity in possession is often used by courts to deprive the one relying upon Article 2276 FCC from the acquisitive effect of the said article.⁶¹⁰ For example, the unequivocal character of the possession was discussed before the Cour of Appeals of Paris regarding paintings by the artist Arman.⁶¹¹

In the year 2000, the painter Arman Pierre Fernandez entrusted seven of his panels to a restaurateur, with the purpose of being hung in the latter's recently opened New York restaurant. As the *quid pro quo* to the loan, Arman was entitled to dine in the restaurant whenever he so wished. After the artist's death in 2005 and following the closure of the restaurant in 2006, the restaurateur brought the panels back to France in 2007. He took the

⁵⁹² Mathieu, (2013), p. 323.

⁵⁹³ Mathieu, (2013), p. 323 and Dross, (2014), p. 203, both referring to Cour d'appel de Paris, 5 février 1966, *JCP* 1996, IV, 99.

⁵⁹⁴ Mathieu, (2013), p. 323.

⁵⁹⁵ Mathieu, (2013), pp. 323, 324, citing Cour de Cassation, 1^{ère} chambre civile, 7 juillet 1965, *Bull. Civ. I*, n. 459.

⁵⁹⁶ Mathieu, (2013), p. 324.

⁵⁹⁷ Mathieu, (2013), p. 324.

⁵⁹⁸ Mathieu, (2013), p. 323, citing Cour d'appel de Paris, 5 février 1966, *JCP* 1966 IV, 99.

⁵⁹⁹ Dross, (2006), p. 12.

⁶⁰⁰ Dross, (2006), p. 12.

⁶⁰¹ Bergel, Bruschi and Cimamonti, (2010), p. 274; for the ambiguity, see Mathieu, (2013), p. 339.

⁶⁰² Dross, (2014), p. 208; Mathieu, (2013), p. 325.

⁶⁰³ Mathieu, (2013), p. 326.

⁶⁰⁴ Dross, (2014), p. 208.

⁶⁰⁵ Mathieu, (2013), p. 326; Bergel, Bruschi and Cimamonti, (2010), p. 147.

⁶⁰⁶ Mathieu, (2013), p. 326.

⁶⁰⁷ Dross, (2014), p. 209, footnote 37, citing Cour de Cassation 1^{ère} chambre civile, 13 juin 1963, *Bull. Civ. I*, n. 317.

⁶⁰⁸ Dross, (2014), p. 208.

⁶⁰⁹ Dross, (2014), pp. 208-209.

⁶¹⁰ Dross, (2014), p. 246.

⁶¹¹ Cour de Cassation, 1^{ère} chambre civile, N° de pourvoi 08-19293, 3 février 2010, *Journal du Droit International* (Clunet), n. 4/2010, p. 1272, commentaires T. Vignal.

panels with him to sell them through the services of the company *Camard et associés*. Subsequently, Arman's widow – executor of the latter's inheritance – successfully undertook legal steps to have the paintings seized (*saisie revendication*) by the French authorities. In further proceedings for the annulment of the seizure, the Court of Appeal of Paris decided on 19 June 2008 that French law controlled, and that – unlike the law of New York –, the presumption of the possession contained in Article 2276 FCC (formerly Article 2279 FCC) obliged Arman's widow to prove that the panels had not been donated to the restaurateur. To substantiate her claim before the Court of Appeal, the widow attacked the restaurateur's possession as being defective and argued, more conspicuously, that the latter had a precarious and equivocal possession. In addressing the point of equivocity, the Court of Appeal concluded that the restaurateur had possessed the paintings unambiguously. In reaching this conclusion, it held that the restaurateur had possessed the panels in his business from the year 2000 onwards and took them with him to France in 2007, but also because Arman's widow had not claimed the restitution of the panels at the time of Arman's death.

Interestingly, in the present case the Court of Appeal did not only take the acts of possession of the restaurateur into consideration to assess the unequivocal character of the possession. Instead, the lack of prompt responsiveness of Arman's widow in reclaiming the panels at the death of her husband also weighted in inferring the lack of equivocity in the restaurateur's possession. Although the case of Arman concerns a situation of acquisition *a domino*, it is particularly instructive in understanding how equivocity is measured as against others.

What is more, case law has clarified that, when several persons concurrently exercise acts of possession, this blots the *animus* and the possession is thus considered equivocal.⁶¹² This scenario axiomatically excludes situations of joint ownership, albeit, it will be for the parties to the said ownership to demonstrate that, despite the situation, there is unequivocal possession.⁶¹³ The burden of proof is then imputed to these parties because a presumption of defective possession flows from the situation.⁶¹⁴ Furthermore, whenever it is possible to discern a tolerance of detention by the owner to the benefit of the one advancing his possession, the possession will be discarded and considered to be a mere detention.⁶¹⁵

Finally, the equivocality of possession must be distinguished from the exercise of good faith. This distinction must be drawn because the existence of good faith, or a lack thereof, is appreciated differently.⁶¹⁶ Therefore, it is of paramount importance to understand that good faith – or a lack thereof – has no incidence on the existence of possession – or upon defects in possession – but will merely nuance the effects of the said possession.⁶¹⁷

e) possession in the quality of owner

At last, in order to acquire through means of acquisitive prescription, the possession must be as of right, or – in other words – in the quality of owner. This condition induces confusion in the definition of possession because it prescribes the presence of an *animus* for the possession to be free from defects, although the *animus* is one of the two constitutive elements of possession.⁶¹⁸ This creates, unnecessarily, confusion in the appreciation of the existence of a *possession utile: corpus* and *animus* are indicative of the existence of possession, whilst the additional requirements are relevant to determine the soundness of the possession. Consequently, similar to Article 2229 BCC, it is considered that Article 2261 FCC *in fine* is redundant and, therefore, otiose.⁶¹⁹

3) Possession in good faith

If the possession is effective, genuine⁶²⁰ and is not defective,⁶²¹ good faith remains an important step in determining whether the possessor that has acquired *a non domino* is entitled to instantaneous acquisitive prescription on the basis of Article 2276 FCC.⁶²² Much like Article 2279 BCC, good faith is not prescribed by

⁶¹² Mathieu, (2013), p. 325.

⁶¹³ Mathieu, (2013), p. 325.

⁶¹⁴ Mathieu, (2013), p. 325.

⁶¹⁵ Dross, (2014), p. 246.

⁶¹⁶ Mathieu, (2013), p. 326.

⁶¹⁷ Mathieu, (2013), p. 326.

⁶¹⁸ Mathieu, (2013), p. 325.

⁶¹⁹ Mathieu, (2013), p. 325.

⁶²⁰ If the law discards the possession, or if the possession ceases to exist, it becomes impossible to acquire through prescription. See Mathieu, (2013), p. 331; in this regard, see Cour de Cassation, Chambre criminelle, N° de pourvoi 88-80858, 14 mars 1989 where the possessor had desisted himself of the painting once he was informed that the painting at stake had been stolen, thus tarnishing his effective possession.

⁶²¹ Furthermore, in the same 1989 case, the possessor's possession could have been considered as ambiguous and secret because of his act of desistment, coupled with the fact that he had not inquired into the origin of the painting and that he was not concerned by the fact that the painting was deprived of a certificate of authenticity. See Cour de Cassation, Chambre criminelle, N° de pourvoi 88-80858, 14 mars 1989.

⁶²² Reboul-Maupin, (2012), p. 325; it is important to recall that the element of good faith is only relevant to the possession of the person that has acquired *a non domino*, as was recalled by the Cour d'appel de Nancy, 1^{ère} chambre civile, N° 07/03123, 27 avril 2010.

Article 2276 FCC but it has traditionally been constructed as an important condition to the acquisitive function of this article;⁶²³ despite the lack of specificity of Article 2276 FCC in this regard, both doctrine and case law are unanimous about the need for the acquisition to be in good faith in order to benefit from the acquisitive prescription.⁶²⁴ The present good faith requirement is inspired by two considerations: firstly, following Dross, the *ratio legis* of Article 2276 FCC is to protect innocent acquirers that believed they acquired the object from the real owner.⁶²⁵ Because of the overall objective of protecting commercial transactions, it is axiomatic that only transactions for which the acquirer genuinely believed he obtained the right of ownership over the object should be protected.⁶²⁶ Put differently, the law only protects the interests of an acquirer that deserves it.⁶²⁷ The possession of the transferor – creating a presumption of ownership to the acquirer – legitimizes the acquirer's expectations.⁶²⁸⁻⁶²⁹ It is thus in order to protect a deceived confidence that Article 2276 FCC favours the good faith acquirer.⁶³⁰ Furthermore, good faith is also required in the application of Article 1141 FCC, which covers situations where the owner sells the same object to two different purchasers:⁶³¹ similar to Belgian law, extrapolating the reasoning from Article 1141 FCC and applying it to Article 2276 FCC for situations involving the sale of the same object to two different persons is often effectuated so as to justify the requirement of good faith.⁶³²

Article 1141 FCC – When a thing that one obligated bound oneself to give or to deliver to two persons successively is exclusively movable, the one of the two who has been placed in actual possession is preferred and remains the owner of it, although his title is later in date, provided however that the possession be in good faith.

Following Article 1141 FCC, it is the one taking possession of the object in good faith that will be considered as the new owner.⁶³³ Provided this person is the first buyer, the *nemo dat* principle has been complied with. Nonetheless, if the second purchaser takes possession in good faith, the application of the *nemo dat* rule would imply that he is has acquired nothing, since the right of ownership was sold to the first purchaser. The possession, as per Article 2276 FCC, will then come to avail to the second purchaser, whose possession is now justified and overrides the transfer effect of the purchase agreement with the first purchaser.⁶³⁴ In this kind of situation, it is the taking of possession in good faith that is determinative in correcting the default in title, by prescribing a title acquire by means of possession on the basis of Article 2276 FCC.⁶³⁵

Standard of good faith

Good faith is defined in Article 550 FCC as follows:

Article 550 FCC – A possessor is in good faith when he possesses as owner, under a title translative of ownership, whose defects he does not know. He ceases to be in good faith from the time those defects are known to him.

Similar to Article 550 BCC, Article 550 FCC establishes that good faith stems from the belief that the possessor possesses as of right, based upon a title translative (i.e. *justa causa detentionis* forming the basis of the *traditio*) of ownership, and does not know that this belief is flawed. Doubts as to the genuineness of this belief exclude the good faith in its entirety.⁶³⁶ A lack of good faith will automatically result in the presence of bad faith. In 1886, the *Cour de Cassation* has provided certain guidelines regarding how to ascertain bad faith: it considers an acquisition to be in bad faith when the acquirer knew that he was not dealing with the owner or was aware of the transferor's lack of right to dispose.⁶³⁷ The appreciation of bad faith was, later on, broadened by the *Cour de Cassation* so as to encompass situations where the acquirer should have had serious suspicions in the same

⁶²³ Dross, (2006), p. 14.

⁶²⁴ Dross, (2014), p. 247; Mathieu, (2013), p. 339 and Djoudi, (2008 (actual. 2016)), § 104, citing Cour de Cassation, Chambre des requêtes, 1 février 1893, DP 1894. 1. 278 and Cour de Cassation, 1^{ère} chambre civile, 16 juin 1971, D. 1971. 566, Note A. B. (for case law).

⁶²⁵ Dross, (2014), p. 248.

⁶²⁶ Dross, (2006), p. 14.

⁶²⁷ Dross, (2006), p. 14.

⁶²⁸ Dross, (2006), p. 14.

⁶²⁹ Possession thus functions, as confirmed by the first sentence of Article 2276 FCC, as a strong presumption of ownership. See Dross, (2006), pp. 14 and 15.

⁶³⁰ Dross, (2014), p. 248.

⁶³¹ Dross, (2014), p. 248 ; Djoudi, (2008 (actual. 2016)), § 104.

⁶³² Dross, (2006), p. 14.

⁶³³ Dross, (2006), p. 14.

⁶³⁴ Dross, (2006), p. 14.

⁶³⁵ Dross, (2014), p. 248.

⁶³⁶ Mathieu, (2013), p. 339; Djoudi, (2008 (actual. 2016)), §§ 104 and 106, citing Cour de Cassation, 1^{ère} chambre civile, 23 mars 1965, *Bull. Civ.* I, n. 206.

⁶³⁷ Cour de Cassation, 1^{ère} Chambre Civile, 6 juillet 1886, DP, 1887, 1, 25, cited in Cornu, Wallaert and Fromageau (2012), p. 287, keyword: Bonne foi.

respect during the acquisition.⁶³⁸ This means that a gross and blameworthy imprudence by the acquirer is assimilated to bad faith.⁶³⁹ Consequently, doubts as to the legitimacy of transferor's faculty to dispose present during the acquisition of the object will be tantamount to bad faith.⁶⁴⁰ Additionally, thoughtlessness or negligence during the acquisition results in a lack of good faith.⁶⁴¹ In a similar vein, refraining from asking about the origins of the object might cast doubt over the exercise of good faith.⁶⁴² Finally, had the possessor been aware or could he have been aware at the time of the acquisition of the owner's concurrent right of ownership through means of publicity, it is unlikely that he will be considered to have acted in good faith.⁶⁴³ What is more, Article 550 FCC requires the presence of a *justa causa detentionis*,⁶⁴⁴ which can be explained as a juridical act that – had it been issued by the real owner of the object – would have resulted in the transfer of ownership.⁶⁴⁵ The requirement for a *justa causa detentionis* stems from the idea that acquisitive prescription only serves the purpose of correcting the transferor's lack of capacity to dispose.⁶⁴⁶

Additionally, following Article 2275 FCC, good faith must be specifically appreciated at the time of the acquisition of the object.⁶⁴⁷

Article 2275 FCC – Good faith at the time of acquisition is sufficient.

This means that the possessor who genuinely believed that he was dealing with the owner, will be considered to have acted in good faith from the moment that his possession began.⁶⁴⁸ In accordance with the *mala fides superveniens non impedit usucapionem* rule, the mutation of good faith into bad faith after the acquisition does not affect the qualification that the acquisition was carried out in good faith.⁶⁴⁹ In a similar fashion to Belgium, the determination of the presence of good faith, or the lack thereof, is left to the discretion of the judges deciding upon the substance of the cases,⁶⁵⁰ as was confirmed by the *Cour de Cassation* in 1965.⁶⁵¹ In fact, due to a predilection for a fact-assessment analysis, this power of appreciation escapes the *Cour de Cassation's* power of revision.⁶⁵²

Before inquiring into the standard of good faith applied by French courts, it is important to note that French private law, through the means of Article 2274 FCC, instates a presumption of good faith in favour of the possessor,⁶⁵³ akin to Article 2268 BCC. Article 2274 FCC (formerly Article 2268 FCC) provides:

Article 2274 FCC – Good faith is always presumed, and he who alleges bad faith must prove it.

This article instates a presumption of good faith in favour of the possessor, imputing the burden of proving that the possession is not in good faith to the claimant. This means that the claimant will have the *onus probandi*.⁶⁵⁴

⁶³⁸ Cornu, Wallaert and Fromageau, (2012), p. 287, keyword: Bonne foi.

⁶³⁹ Djoudi, (2016), § 121.

⁶⁴⁰ Cornu, Wallaert and Fromageau, (2012), p. 287, keyword: Bonne foi.

⁶⁴¹ Cornu, Wallaert and Fromageau, (2012), p. 287; See also Robert, A., 'La revendication d'un meuble possédé par autrui', *Recueil Dalloz*, (1991), p. 306, citing Cour de Cassation, Chambre civile 1, 2 février 1965.371; RTD Civ. 1965.676, observation J.-D. Bredin.

⁶⁴² Cornu, Wallaert and Fromageau, (2012), p. 287.

⁶⁴³ Dross, (2014), p. 248.

⁶⁴⁴ Grimonprez, (2010 (actual. 2016)), § 124.

⁶⁴⁵ Grimonprez, (2010 (actual. 2016)), § 124, citing C. Aubry et C. Rau, t. 2, § 218, M. Planiol et G. Ripert, t. 3, no 701, Cour de Cassation, 3^{ème} chambre civile, 15 février 1968, *Bull. civ.* III, no 60, Cour de Cassation, 1^{ère} chambre civile, 13 janvier 1999, no 96-19.735, *Bull. civ.* III, no 13, JCP 1999. I. 175, no 6, observations Périnet-Marquet, Cour de Cassation, 3^{ème} chambre civile, 12 juin 2003, no 01-14.817.

⁶⁴⁶ Grimonprez, (2010 (actual. 2016)), § 124.

⁶⁴⁷ Dross, (2014), p. 248, citing Cour de Cassation, 1^{ère} chambre civile, 27 novembre 2001, n. 99-18335; *Bull. Civ.* I, n.295; D. 2002, p. 671, note J.-P. GRIDDEL et p. 2505, obs. B. MALLET-BRICOUT; Cornu, Wallaert and Fromageau, (2012), p. 288, citing Cour de Cassation, 1^{ère} chambre civile, 27 novembre 2001, D., 2002, 671, commentaire J.P. Gridel, D., 2002 somm. Com. 2505, observations B. Mallet-Bricout; Djoudi, (2008 (actual. 2016)), § 107, citing Cour de Cassation, Chambre des requêtes, 21 novembre 1927, DP 1928. 1. 172; Cour de Cassation, 1^{ère} chambre civile, 4 janvier 1972, *Bull. civ.* I, n° 4; Cour d'appel de Montpellier, 23 janvier 1997, JCP 1997. II. 22958, note Eid. See also *ibidem*, § 126.

⁶⁴⁸ Bergel, Bruschi and Cimamonti, (2010), p. 275; Mathieu, (2013), pp. 339, 340; Dross, (2014), p. 248, citing Cour de Cassation, 1^{ère} chambre civile, 23 mars 1965, *aff. Schiff-Giorgini*, *Bull. Civ.* I, n. 206. See also Djoudi, (2008 (actual. 2016)), § 104, citing Cour de Cassation, Chambre civile, 6 juillet 1886, DP 1887. 1. 25.

⁶⁴⁹ See Grimonprez, (2010 (actual. 2016)), § 138, citing Cour de Cassation, 1^{ère} chambre civile, 18 mai 1955, *Bull. civ.* I, no 308, Cour de Cassation, 3^{ème} chambre civile, 15 mars 1978, *Bull. civ.* III, no 123, RTD Civ. 1979. 153, observations C. Giverdon; Cour de Cassation, 3^{ème} chambre civile, 7 avril 1994, no 92-13.048, Cour de Cassation, 1^{ère} chambre civile, 27 novembre 2001, no 99-18.335, *Bull. civ.* I, no 295, D. 2002. 671, note J. -P. Griedel.

⁶⁵⁰ Reboul-Maupin, (2012), p. 325.

⁶⁵¹ Mathieu, (2013), p. 339, citing Cour de Cassation, 1^{ère} chambre civile, 23 mars 1965, *Bull. Civ.* I, n. 206; see also Dross, (2014), p. 248, citing Cour de Cassation, Chambre criminelle, N° de pourvoi 04-81962, 1 février 2005; *Bull. Crim.* n. 37.

⁶⁵² Reboul-Maupin, (2012), p. 325, citing Cour de Cassation, 1^{ère} chambre civile 1, 23 mars 1965, *Bull. Civ.* I, n. 206. Cour de Cassation, Chambre criminelle, 1 février 2005, Droit et Patrimoine novembre 2005, p. 103, Observation J.-B. Seube.

⁶⁵³ Mathieu, (2013), pp. 339-340; see also Djoudi, (2008 (actual. 2016)), § 105, citing Cour de Cassation, 1^{ère} chambre civile, 13 octobre 1956, *Bull. civ.* I, n° 296.

⁶⁵⁴ Djoudi, (2008 (actual. 2016)), § 105.

This allocation of the burden of proof entails that bad faith is never presumed.⁶⁵⁵ Thus, provided that the presumption of possession in good faith as laid down in Article 2274 FCC can be rebutted, a possessor whose presumed good faith is disproved cannot successfully invoke this article anymore to dismiss a claim in restitution.⁶⁵⁶ If the presumption cannot be rebutted, the possessor will be able to keep the object, as expressed in the adagium *in pari causa melior est causa possidentis*, which translates as meaning that if one of the parties fails to prove his right, then the possessor's cause will be favoured.⁶⁵⁷ A recent decision by the Court of Appeal of Colmar, pronounced on 30 March 2012, highlights the difficulties that can materialize in attempting to rebut the presumption of good faith.⁶⁵⁸

The case concerned a painting that was stolen from an artist – the claimant in the present proceedings – during an exposition organized at a hotel in Cannes, France, on the night of 24-25 May 1979. The stolen painting reappeared on 11 October 2005 in the hands of the defendant, who had put the painting for sale on a specialized website. Having retraced the painting online, the artist initiated restitution proceedings against the seller.

In this case, the claimant was not able to reverse the presumption of good faith established by Article 2274 FCC. In its argumentation, the claimant submitted that the defendant had obtained the painting in bad faith since he had acquired it in 1995 from a retired individual, for the price of 10.000 French Francs and had paid in cash;⁶⁵⁹ notwithstanding the method of payment – that the claimant deemed dubious –, the price paid for the painting was, ostensibly, largely inferior to the actual value of the painting. This devaluation was also witnessed by the high resale price announced in the online advertisement.⁶⁶⁰ Furthermore, the claimant argued that the defendant purchased the painting without a certificate of authenticity, without demanding the issuance of a bill and even without being able to disclose the name of the seller at the time of the present proceedings.⁶⁶¹ To the Court of Appeal, these elements were not sufficient to rebut the presumption of good faith; a 'hand to hand' transaction – without formalities or bills – and cash only transactions were deemed current practices between individuals.⁶⁶² What is more, the difference in the price paid in French francs in 1995 and the price demanded in 2005 – expressed in euros – was attributed to fluctuation in value stemming from the volatility of the art market and could not, therefore, be indicative of bad faith.⁶⁶³ Because ten years had expired between the acquisition and the resale of the painting, the court found it particularly difficult to formulate a viable argument against the resale with high profit.⁶⁶⁴ Furthermore, it held that the fact that the defendant was unable to produce evidences of his stay in Cannes – a stay during which he acquired the painting – ten years after the acquisition could not be used against him.⁶⁶⁵ Finally, the court considered that the unfruitful outcome of parallel criminal proceedings for the crime of fencing corroborated the possessor's lack of bad faith.⁶⁶⁶ Consequently, the Court of Appeal confirmed the decision taken by the *Tribunal de Grande Instance* of Strasbourg that the defendant's possession had not been in bad faith, and that it, hence, resulted in the acquisition of ownership on the basis of Article 2276 FCC.⁶⁶⁷ This case adequately illustrates the difficulties encountered by claimants in rebutting the presumption of good faith posited by Article 2274 FCC; despite the various arguments submitted by the claimant in the present case, both the judge at first instance and the court of appeal found no suspicious circumstances jeopardizing the possessor's presumed good faith.

This is not to say that the presumption is non-rebuttable, although, due to the power of appreciation left to the adjudicating judge, it remains unclear what arguments are needed to rebut the presumption. In certain cases, French courts have discarded the presumption in circumstances where a professional could have suspected that the transferor lacked the faculty to dispose and that the property stemmed from an illicit transaction.⁶⁶⁸ Furthermore, the presumption of good faith has also been rebutted in a situation where it considered that the practices of professionals were highly dubious. In a case decided in 2004 by the Paris Court

⁶⁵⁵ Djoudi, (2008 (actual. 2016)), § 105, citing Cour de Cassation, 3^{ème} chambre civile, 27 octobre 1975, D. 1976, IR 11.

⁶⁵⁶ Bergel, Bruschi and Cimamonti, (2010), p. 275.

⁶⁵⁷ Bergel, Bruschi and Cimamonti, (2010), p. 178.

⁶⁵⁸ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N° 11/00501, 268/2012, 30 mars 2012.

⁶⁵⁹ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N° 11/00501, 268/2012, 30 mars 2012, at 4.

⁶⁶⁰ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N° 11/00501, 268/2012, 30 mars 2012, at 5. It should be noted that the initial price tag of the painting was 16.000 French francs in 1979 (± 7.456 euros in 2012) and that the demand price on the Internet was of 19.000 euros (*ibidem*, at 4).

⁶⁶¹ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 4 and 5.

⁶⁶² Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 4-5.

⁶⁶³ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 5.

⁶⁶⁴ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 5.

⁶⁶⁵ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 5.

⁶⁶⁶ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 5.

⁶⁶⁷ Cour d'appel de Colmar, 2^{ème} chambre civile, Section A, N. 11/00501, 268/2012, 30 mars 2012, at 5.

⁶⁶⁸ Rebul-Maupin, (2012), p. 325, citing for example Cour de Cassation, 1^{ère} chambre civile, 27 novembre 1973, Bull. Civ. I, n. 324.

of Appeal,⁶⁶⁹ the presumption of good faith of two gallery owners who had acquired a bronze by Auguste Rodin and a painting by Marie Laurencin was successfully rebutted. In adjudicating, the Paris court explicitly stated why the presumption of good faith was tarnished: because the objects had been sold through three consecutive sales within a period of ten days; because these had been paid by cheques; and because the transactions had taken place without conducting any inquiries as to their provenance, the court concluded that this practice constituted a laundering of cultural objects.⁶⁷⁰ Consequently, these three elements combined constituted sufficient motive for the court to reverse the presumption of good faith.

Despite these few indications, there are many difficulties in appreciating the question of good faith. Because this concept is fraught with flexibility, it is particularly difficult – not to say virtually impossible – to subtract a concise test for measuring good faith. In general, it can be said that the determination of the exercise of good faith is made by a court through an exercise of objectivization of the acquisition. In assessing a potential lack of good faith, it is consequently possible for a judge to weigh the circumstances or modalities of acquisitions. This means that a court will assess good faith by having regard to certain aspects, including – but not limited to – the object's nature,⁶⁷¹ its value,⁶⁷² a too low purchase price,⁶⁷³ the character of the purchaser⁶⁷⁴ or the circumstances that should have raised suspicions as to the identity of the seller or the origin of the object.⁶⁷⁵ By way of contrast to Belgian law, there is an abundance of case law relating to the acquisition of cultural objects on the basis of Article 2276 FCC. Nevertheless, it should be noted that the appreciation of good faith by French courts has been rendered more stringent throughout the years. Following Renold, the French threshold has considerably changed since 1885.⁶⁷⁶ Several decisions – scrutinized below – exemplify this change and are discussed for the purpose of analysing the *modus operandi* of French domestic courts in their determination of good faith.

The Spanish ciborium

In the 1885 case of *Duc de Frias c. Baron Pichon*,⁶⁷⁷ the issue of good faith acquisition of a stolen cultural object was tabled for the first time before a French judge.

The case concerned a ciborium – also known as the Saint Agnes Cup, or the Royal Golden Cup – given in 1604 by James I of England to the Spanish *Duque* Juan Fernandez de Velasco y Tovar, the fifth Duke of Frias. In 1610, the ciborium was donated by the Duke of Frias to the nunnery of Medina de Pomar (Burgos, Spain) on the condition that it could not be alienated, or, if the nunnery were ever to be dissolved, that it would be handed to the Cathedral of Burgos. The ciborium was classified as *res extra commercium* under Spanish law through the instatement of the aforementioned non-alienation provision.⁶⁷⁸ In 1883, for want of means of subsistence, the nunnery's Abbess – in the hope of fetching a higher price abroad – decided to sell the chalice outside of Spain. The chalice was, eventually, sold to the Baron Pichon in Paris, France. At the time of the sale, the priest entrusted with the ciborium informed Baron Pichon of the prior possession exercised by the Dukes of Frias. In order to ascertain the provenance of the chalice, Baron Pichon corresponded with one of the Duke of Frias, who then discovered that the nunnery flouted the non-alienation provision that was contained in the agreement. In reaction to this violation, the Duke initiated proceedings before the *Tribunal de la Seine* to have the chalice returned.⁶⁷⁹



Although the Duke's claim was dismissed on different grounds, the determination of Baron Pichon's good faith during the acquisition was addressed throughout the proceedings. The lack of research as to the provenance of the object, as well as the low price paid for the chalice did not rebut the presumption of good faith, which the purchaser benefited from.⁶⁸⁰

Le lapin agile

Although the present case deals with the prosecution of individuals for the crime of fencing (as defined in Article 321-1 FCrC), it is important to note that good faith plays a significant role in the determination of the *mens rea* of

⁶⁶⁹ Judgment of the Cour d'appel de Paris, 25 février 2004, reviewed by the Cour de Cassation, Chambre criminelle, N° de pourvoi 04-81962, 1 février 2005.

⁶⁷⁰ See Cour de Cassation, Chambre criminelle, N° de pourvoi 04-81962, 1 février 2005.

⁶⁷¹ Bergel, Bruschi and Cimamonti, (2010), pp. 275-276.

⁶⁷² Bergel, Bruschi and Cimamonti, (2010), pp. 275-276.

⁶⁷³ Dross, (2014), p. 248, citing Cour de Cassation, 1^{ère} chambre civile, 16 juin 1971, n. 69-12843; D. 1971, p. 566, note A. B.; *RTD civ.* 1972, p. 153, observations J.-D. BREDIN.

⁶⁷⁴ Cornu, Wallaert and Fromageau, (2012), p. 287.

⁶⁷⁵ Bergel, Bruschi and Cimamonti, (2010), pp. 275-276.

⁶⁷⁶ Renold, (2004), p. 257.

⁶⁷⁷ Tribunal de la Seine, *Duc de Frias c. Baron Pichon*, 17 Avril 1885, Journal de Droit International Privé (Clunet), 1886, at 593.

⁶⁷⁸ Renold, (2004), p. 257.

⁶⁷⁹ *The Tablet*, 21 March 1885, p. 38.

⁶⁸⁰ Renold, (2004), p. 257.

the crime; in practice, the person prosecuted must prove that he has acquired the object in good faith to disprove the intentional element of the crime of fencing. This is notably because he cannot have had the intention to hold a stolen object if he genuinely believed that he acquired the object from its owner or from a person entitled to dispose of it.⁶⁸¹ Consequently, the assessment of good faith is equally important to fencing cases than to the determination of good faith for the purpose of acquisitive prescription.⁶⁸²

The case of *Le lapin agile*, reviewed in 1989 by the *Cour de Cassation*,⁶⁸³ concerned the theft of a painting by Maurice Utrillo depicting the Montmartre based cabaret “Au lapin agile”. In this case, a couple employed as household staff members in the residence of the painting’s owner stole the painting. It was later on sold by the duo in Spain and, subsequently, retrieved in the hands of an expert and dealer in renowned paintings. This person was then prosecuted for the crime of fencing and found guilty in first instance.

On appeal, the possessor was declared innocent by the Court of Appeal of Versailles on the basis of the following considerations: even though the possessor did not inquire into the painting’s provenance – which lacked a certificate of authenticity – at the time of the acquisition, he had purchased it from a gallery owner in Spain. Additionally, the Versailles Court found that the price paid was “non-negligible”, that the payment and the import of the painting had normally taken place, and that the painting had not been specifically hidden from visitors’ sight (as noted by the inspector entrusted with the case during his visit to the domicile of the possessor). Consequently, the Court of Appeal concluded that the possessor had merely been negligent during the acquisition, but that he had not acted in bad faith.

The elephants round

In this case, reviewed by the *Cour de Cassation* in 1996,⁶⁸⁴ an individual purchased five vases – including one depicting an elephant round by the hand of the artist Émile Gallé – from an antique dealer which, later on, appeared to have been stolen. It should be noted that this case did not concern the restitution of the stolen vases, but – similar to the case about the Utrillo painting – concerned the prosecution of the buyer for the crime of fencing. More specifically, the proceedings were concerned with the determination of bad faith for the purpose of qualifying the crime.

In adjudicating, the Court of Appeal of Bastia established that the buyer was aware of the fact that the vases were stolen and had, consequently, acted in bad faith during the acquisition. The court reached this conclusion because of the following elements: the wife of the antique dealer was unaware of the transaction; the purchase price was paid in cash and had been effectuated through several payments; no traces of the transaction were to be found in the bookkeeping of the purchaser; despite the recognition by the Court of Appeal of Bastia that the market value of the Gallé vase was subject to considerable fluctuation, there was a discrepancy between the purchase price of the vases and their real market value. The court found that the purchaser – whom was deemed to be well aware of the market prices of the Elephant rounds vases by Gallé – had acquired the vase at around fifty percent of the vase’s market value. Conclusively, the aggregate result of these circumstances was that the purchaser had acted in bad faith during the acquisition and was well aware of the fact that the vases were stolen.

The stolen triptych

In a case decided in 1999 by the Court of Appeal of Paris, the court was not easily convinced of a rebuttal of the presumption of good faith.⁶⁸⁵

The case concerned a triptych created by Harry Bates that was stolen between 28 January and 1 February 1985 from the residence of the spouses Delage-Toriel in Droisy, France. The couple retrieved the whereabouts of the triptych in 1991, as it was exposed in the Musée d’Orsay in Paris. On 9 August 1995, the spouses Delage-Toriel initiated an action in revindication on the basis of Article 2279 FCC (now Article 2276 FCC) against the museum. The triptych had been acquired on 6 April 1988 by the French state (*Direction des Musées*) for the Musée d’Orsay in the exercise its right of pre-emption, when its possessor – Zeitoun – introduced a demand for the export of the triptych.

Among the arguments submitted by the Delage-Torielis,⁶⁸⁶ the spouses attacked the French state’s good faith regarding the acquisition of the triptych. More specifically, they advanced that the acquisitive prescription

⁶⁸¹ *Fiches d’orientation Dalloz*, keyword: Recel, point 1.2, 15 décembre 2016, text available at www.dalloz.fr, last retrieved on 01.03.2018.

⁶⁸² See for example *Cour de Cassation, Chambre criminelle, N° de pourvoi 96-85871, 4 juin 1998*.

⁶⁸³ *Cour de Cassation, Chambre criminelle, N° de pourvoi 88-80858, 14 mars 1989*.

⁶⁸⁴ *Cour de Cassation, Chambre criminelle, N° 96-80.430, 12 décembre 1996*.

⁶⁸⁵ *Cour d’appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999*.

enjoyed *prima facie* by the Museum must be discarded if the acquisition was not carried out in good faith.⁶⁸⁷ To rebut the presumption contained in Article 2274 FCC, the spouses argued that the French state had been negligent in not sufficiently verifying the legitimacy of Zeitoun's possession, and that this negligence meant that the acquisition by the state was not carried out in good faith.⁶⁸⁸ In fact, following the claimants, two elements should have raised red flags to the French government: firstly, the date specified on the documentation produced by Zeitoun provided in an attachment to the triptych contradicted the statements made by Zeitoun himself about the year of acquisition.⁶⁸⁹ Whilst he pretended to have acquired the triptych from an antique dealer in 1981, the documents evidenced that the acquisition had actually taken place in 1985.⁶⁹⁰ Secondly, the bill produced by Zeitoun specified that the purchase price was twenty times smaller than the price that was demanded to the French state.⁶⁹¹ To the Delage-Toriel spouses, this considerable price discrepancy in a period of three years should have alerted the French government of the dubious nature of the transaction.⁶⁹² In determining whether the French state had been negligent during the acquisition of the triptych – therefore responding to the submissions brought by the Delage-Toriel duo –, the Paris Court of Appeal established that the price paid when exercising the prerogative of pre-emption was to be determined by the person exporting the item.⁶⁹³ As such, the French state was not expected to verify the purchase price paid by Zeitoun but, instead, it was required to pay the price that was declared on the form for the issuance of an export certificate.⁶⁹⁴ Additionally, the claimant failed to prove that the purchase price of 100.000 euros did not match the market value of the triptych.⁶⁹⁵ Thenceforth, the argument of the spouses about the discrepancy between the purchase price and the sales price could not be sustained.⁶⁹⁶ What is more, the court found that there had been no negligence on behalf of the French state in not undertaking sufficient inquiries as to whether the Bates was stolen because the spouses Delage-Toriel had not spread information about the theft in the period between its disappearance and the acquisition by the French state.⁶⁹⁷ Additionally, the court found that the export demand was, in itself, a sufficient ground to believe that the origin of the object was licit and, therefore, that Zeitoun could dispose of the triptych.⁶⁹⁸ Finally, the court was of the opinion that the mere discrepancy in dates noted on the documents attached to the demand of export could merely be the result of a mistake in transcription.⁶⁹⁹ The court considered this mistake not to be sufficient to demonstrate that the acquisition by the French state was not carried out in good faith and the Delage-Toriel allegations were thereby deemed inconclusive.⁷⁰⁰

The looted Klimt

The case, opposing the Grunwalds to the City of Strasbourg, concerned a gouache entitled “the Erfüllung” (the accomplishment), painted by Gustave Klimt between 1905 and 1909. At the outset of WWII, the gouache was owned by Karl Grunwald – an Austrian art dealer – who was close to the Vienna Secession movement to which Klimt belonged. In fleeing Nazi persecution, Grunwald had the painting – alongside other personal goods – transported from Vienna to France by the firm Seegmuller. On arrival in Strasbourg, the container transporting his personal effects was confiscated by the *Zivilverwaltung* and auctioned during several sales organised between 1942 and 1943. In July 1959, the painting was purchased by the Strasbourg *Musée d'Art Moderne* from an heir of a local painter, Adolphe Graeser. In March 1989, the heirs to Karl Grunwald undertook official steps to recover the painting from the City of Strasbourg, which resulted in the present proceedings.



The case was adjudicated by the Strasbourg *Tribunal de Grande Instance* on 11 January 1999⁷⁰¹ and was confirmed by the Colmar Court of Appeal on 8 December 2000.⁷⁰² In both rulings, the museum was considered to have

⁶⁸⁶ Despite a belated initiation of the action in revindication, the spouses submitted, albeit incorrectly, that the period of prescription laid down in the second sentence of Article 2279 FCC only started running from the moment they identified the possessor. See Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁸⁷ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁸⁸ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁸⁹ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁹⁰ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁹¹ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁹² Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 5.

⁶⁹³ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁶⁹⁴ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁶⁹⁵ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁶⁹⁶ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁶⁹⁷ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁶⁹⁸ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁶⁹⁹ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁷⁰⁰ Cour d'appel de Paris, 1^{ère} chambre, Section A, N. 1998/11048, 24 mars 1999, at 6.

⁷⁰¹ Tribunal de Grande Instance de Strasbourg, 1^{ère} chambre civile, N. 9103533, 11 janvier 1999.

acted in bad faith at the moment of the acquisition of the Klimt because, *inter alia*, it did not inquire into the provenance of the object and because of the low purchase price.⁷⁰³ In fact, in assessing the good faith of the Museum at the time of the acquisition, the French courts took the following elements into consideration : firstly, the purchased price of 50.000 (old) French francs⁷⁰⁴ was considered thirty times lower than the market value of the painting in France at the time of the acquisition. Furthermore, the representatives of the Museum that purchased the painting from Graeser's heir were well aware of 1900 Vienna Art and the *Tribunal de Strasbourg* deemed that both had a sufficient knowledge of the arts of this period to be aware of the notorious reputation of Gustave Klimt. To the said tribunal, it is most unlikely that the purchasers were not acquainted with the artist's reputation. Therefore, it found that they were well conscious of the fact that the painting was worth much more than what they had paid for it. The judge inferred this conclusion from the multitude of expositions on 1900 Vienna Art organized at the end of the 1950s / early 1960s and from the involvement of the museum's representatives in the organization of these expositions. Furthermore, the first instance judge held that it was highly unlikely that Graeser had purchased the painting directly from Klimt, in contradiction to what the museum averred: as revealed by Graeser's bibliography, he had not lived in Vienna at the outset of the twentieth century. As such, there was a mismatch between the story put forward by the Museum and Graeser's biography. What is more, the gouache served as model to a frieze painted by Klimt in the palais Stoclet in Brussels. *Ergo*, it was an important piece and because Klimt sold his works at extremely high prices, it was unlikely that Graeser – who was young and had little notoriety at the time of his supposed acquisition of the *Erfüllung* – could afford to purchase the gouache from Klimt directly. Instead, it was more likely that he had acquired it at a fraction of its value during one of the 1942-1943 auctions. Taken together, these elements convinced the Strasbourg judge that the gouache had never been acquired by Graeser directly from Klimt. Instead, it was more likely that it had been stolen from Karl Grunwald, father of the plaintiffs. Additionally, the version of the facts advanced by the Grunwald – which are give above – could be corroborated by the « SEEG 1023 » number brought on the back of the painting and by the records of the Seegmuller company. Moreover, Karl Grunwald was reknowned as being close to the Vienna Secession. This closeness was also witnessed by the fact that Egon Schiele painted a portrait of Karl Grunwald whilst sitting at his desk (see illustration on the left). Hence, it was more likely that he was the owner of the gouache and that the *Zivilverwaltung* had confiscated the Klimt among Grunwald's personal effect during the war. Consequently, the story put forward by the Grunwald heirs seemed more probable than the version given by the Museum, and the court found that the latter ought to have been aware that Graeser was not the owner of the painting and that the Klimt was most probably stolen.

The Sevillian Gentleman

In another case decided before the Paris Court of Appeal in 2001,⁷⁰⁵ the *Direction des musées de France* was considered to have acted in good faith in acquiring a portrait representing Bernardino Fernández de Velasco, *Duque de Frías*, by the hand of the Spanish painter Bartolomé Esteban Murillo. Although this case is fraught with complexities, a synopsis of the facts is given for the sake of conciseness.



In the present case, Murillo's painting – owned by Suzanne Barou de Lombardière de Canson – was misappropriated by Canson's partner, Pesnel, by means of abuse of confidence. In April 1975, Pesnel entrusted the painting to Birtchansky – an art gallery owner established in Paris – to have it expertized by the Louvre. On 24 April 1975, the museum inspected the Murillo and returned it to an accomplice of Pesnel, Baron Landevoisin, whom the museum believed to be the owner of the painting. More than half a decade later, the Louvre gained interest in acquiring the painting and contacted Birtchansky to obtain the owner's contact details. Birtchansky communicated the name Canson to the Louvre alongside two possible contact addresses. Subsequently, the conservator of the Louvre's paintings department – Rosenberg – sent two letters to the given addresses on 6 March 1981, although without success. In early 1985, Pesnel contacted Christie's Geneva to have both the Murillo and a painting by Van Dyck sold through its auction services. In constructing the provenance of the paintings, Pesnel pretended that both pieces originated from the estate of her grandmother Jeanne Chappuis, who passed away in 1979. The two canvases were then taken to London to be sold by Christie's by the end of April 1985. During the same month, Rosenberg contacted Christie's following its reception of a draft catalogue of the upcoming auction in which the Murillo's sale was advertised. Realizing that the picture had been expertized by the Louvre in 1975, Christie's London noted that Pesnel had illegally exported

⁷⁰² Cour d'appel de Colmar, 2^{ème} chambre civile, Section B, N° 2 B 199900184, 8 décembre 2000; cited in Cornu, Wallaert and Fromageau, (2012), p. 287.

⁷⁰³ Cornu, Wallaert and Fromageau, (2012), p. 287; CNRS, Protection de la propriété culturelle et circulation des biens culturels – Étude de droit comparé Europe/Asie, (Septembre 2008), p. 29.

⁷⁰⁴ It should be noted that this amount equated 4.000 French francs in 2000, as reported by the Court of Appeal of Colmar, in Cour d'appel de Colmar, 2^{ème} chambre civile, Section B, N° 2 B 199900184, 8 décembre 2000, at 6.

⁷⁰⁵ Cour d'appel de Paris, 1^{ère} chambre, section A, N. 2000/12570, 2 avril 2001.

the Murillo and, therefore, withdrew the painting from the sale. Consequently, the Louvre pursued its plans of acquisition by meeting the representatives of Christies and the lawyers of Pesnel on 28 June 1985. Throughout the negotiations, the museum obtained a declaration by the notary of the estate of Jeanne Chappuis – Didier Tornare – , which confirmed that the Murillo originated from the estate of Chappuis and, therefore, that Pesnel was entitled to it by means of inheritance. Consequently, the museum acquired the Murillo on 26 November 1985 from Pesnel. Canson died on 16 September 1986 in horrific circumstances, after she had been sequestered in January 1986 by Pesnel. Ten years later, Jeanne de Canson – the sister of Suzanne de Canson – initiated legal proceedings against the Louvre, demanding the revindication of the painting in the capacity of only legal heir to the estate of her deceased sister. The procedure was further pursued by Jacqueline and Gerard Deschamp, heirs to Jeanne de Canson's estate because she had passed away during the proceedings.

In determining whether the *Direction des Musées* – that had acquired the painting in the name of the Louvre – had been in good or bad faith during the acquisition of the Murillo, the Paris court concluded that the obtention was carried out in good faith for the following reasons: firstly, the allegation that Rosenberg was aware that Canson was the owner of the Murillo because Birtchansky had communicated her name as owner of the painting in 1981 to the Louvre was not retained, as there was no proof that the information provided by Birtchansky was correct. In fact, both letters sent by Rosenberg remained unanswered, making it impossible for him to verify that Canson was the legitimate owner of the Murillo. Secondly, the *Direction des musées de France* had collected precise and concurring information from various sources that corroborated the fact that the Murillo was owned by Pesnel, including a confirmation provided by her lawyers, by Christies and by Maître Tornare.⁷⁰⁶ Although these different parties were fooled by Pesnel, this did not affect the good faith of the *Direction des musées* because it complied with its plight to make the necessary inquiries regarding the 'heir', irrespective of the fact that the information collected was erroneous due to the culprit's misrepresentation.⁷⁰⁷ Thirdly, the information found in the different *catalogues raisonnés* matched the information given to the Louvre. Fourthly, despite the fact that two persons – Pidoux and Krieger – had informed Christie's that the paintings were owned by Canson, this information had not reached the Louvre, who could therefore not be deemed to have been aware of this discrepancy in ownership. Fifthly, the Louvre had requested a notarial declaration – which was then issued by Maître Tornare – specifying that the Murillo was offered for sale by the heir Pesnel. Notwithstanding the fact that Pesnel appeared subsequently not to be heir at all,⁷⁰⁸ the Louvre could not have been aware of her lack of capacity to dispose of the painting because of the certification given by Maître Tornare. Finally, the court also noticed that the purchase price was in conformity with the market value of the painting. Consequently, the *Direction des Musées* could not have been aware that Pesnel was not the owner of the painting and was, therefore, considered to have acted in good faith at the time of the acquisition.

The looted Frans Hals

Another judgment pronounced in 2001 by the Court of Appeal of Paris exemplifies the considerable transition since 1885.⁷⁰⁹



In 1990, a painting by Frans Hals entitled "Portrait d'Adrianus Tegularius, pasteur" was confiscated during the *XV^e biennale des antiquaires au Grand Palais de Paris*. The painting was looted from the Schloss collection in 1943 by a group of men commanded by French Auxilliaires to the Gestapo. After having passed through several hands from 1967 onwards, it was acquired in 1989 at a Christies' auction in London by Newhouse Galleries – an American art gallery represented by Williams – and later exposed by the latter at the biennale. Subsequently, Demartini – heir to the Schloss estate – discovered the painting during the event and undertook official steps to have it confiscated. Furthermore, he lodged a complaint against Williams based on fencing allegations.⁷¹⁰ After a review by the *Cour de Cassation*,⁷¹¹ the proceedings continued until 6 July 2001 with the sentencing of Williams to eight months of incarceration by the Court of Appeal of Paris.

Recalling the above, contrary to the presumption of good faith known in civil matters, the burden of disproving the apparent bad faith by proving that one acted in good faith is imputed upon the accused in criminal cases.⁷¹²

⁷⁰⁶ Cornu, Wallaert and Fromageau, (2012), p. 287.

⁷⁰⁷ Cornu, Wallaert and Fromageau, (2012), p. 287, citing Cour d'appel de Paris, 2 avril 2001, Gazette du Palais, Recueil 2001, sommaire p. 17-18.

⁷⁰⁸ Cornu, Wallaert and Fromageau, (2012), p. 287.

⁷⁰⁹ Renold, (2004), p. 257.

⁷¹⁰ For more information about this case, see France Diplomatie, 'Collection Schloss – Introduction historique', available at http://www.diplomatie.gouv.fr/fr/sites/archives_diplo/schloss/sommaire_ang.html, last retrieved on 01.03.2018.

⁷¹¹ Cour de Cassation, Chambre criminelle, N. de pourvoi 96-85871, 4 juin 1998.

⁷¹² Renold, (2004), p. 257. It should be remarked that the commentary given by Renold – suggesting that it is for the accused to prove good faith and that the presumption of good faith is not operative in criminal cases – might be misleading. This suggestion is not operative considering that the public prosecutor firstly needs to establish the bad faith of the possessor for the purpose of being able to

Thenceforth, Williams had to demonstrate that he had acquired the painting in good faith to disprove that he knew that it had been stolen and, consequently, that he was knowingly selling a stolen painting. In his defence, he was mainly relying on the following elements of the acquisition: the price paid was in conformity with the market value, he had acquired the painting in a renowned auction house and the painting had been on open display during the biennale.⁷¹³ The Court of Appeal rejected the arguments submitted by Williams for several reasons: 1. relying upon the reputation of the auction house did not discharge him from inquiring about the provenance of the painting, as Christies does not guarantee the licit provenance of the objects put up for auction, 2. having regard to his outstanding reputation in his field of expertise, the lack of due diligence in researching the origins of the painting was inexcusable.⁷¹⁴ The court held that undertaking research into previous catalogues would have disclosed the fact that the Nazis had stolen the painting during World War II,⁷¹⁵ 3. furthermore, Williams was well aware of the spoliations of Jewish collections that took place in France during the said war, and knew which authorities were responsible for organizing the restitution of spoiled artworks to the families of the victims,⁷¹⁶ 4. finally, a witness corroborated the suspicions as to the crime of fencing by testifying that Williams was informed about the spoliation of the painting and that he had even expressed his awe as to repeated sales through Christies' despite the illicit origin of the object.⁷¹⁷

La vaccination

On 8 October 1996, a preparatory work by Victor Tardieu entitled "La vaccination" was stolen from the second home of the Tardieu family in Gerberoy, France. It had, subsequently, been brought to Sotheby's Paris in spring 1999 by Combe, an inhabitant of Paris. For undisclosed reasons,⁷¹⁸ the painting was then listed in the catalogue of Sotheby's Singaporean auction house. Upon publication of the catalogue, the listing caught the attention of a member of the Tardieu family. In other words, after the painting's disappearance in 1996, it reappeared at Sotheby's Singapore on 23 September 1999, where it was to be put up for auction on 3 October 1999. Upon revealing the fraudulent origin of the painting to Sotheby's, the same member of the Tardieu family successfully convinced the auction house to withdraw the painting from its sale. Thereupon, the family sought the return and revindication of the painting. In parallel to the revindication, Combe was also prosecuted for the crime of fencing.

In determining whether Combe had been guilty of fencing, the Court of Appeal of Amiens held that he acted in bad faith at the time of the acquisition by computing the following elements: at first, the court noted that there was a clear lack of consistency in the declarations made by the accused. This inconsistency was mirrored by the fact that when he proposed the painting for sale to the Sotheby's agent charged with verifying the painting's authenticity, Combe made up a credible provenance by which he advanced that the Tardieu originated from his family. This made up provenance was soon to be shaken, as later – during a raid conducted at Combe's house – French police forces seized some of Combe's paperwork, which showed that he meticulously documented all the paintings he had in his possession. Amidst the seized documentation, the police found that Combe had put another painting by Victor Tardieu – entitled "La confidence" – for sale through another public auction house. In reaction to this discovery, Combe changed the story he had first put forward and conceded that he had lied to Sotheby's to circumvent fencing suspicions. Instead, he modified his original version and submitted that he had, in fact, purchased both of Tardieu's paintings in 1994 from a bric-a-brac dealer in Montreuil, France – thus two years before the theft took place. Despite these various affirmations, he was unable to produce proofs for the acquisitions, evidence of the restoration, or even to provide the identities of either the seller or the restorator of the paintings. The purchase had, additionally, taken place by paying in cash and without issuance of a bill. What is more, the court noted that – having regard to the particularly detailed documents seized by the police –, it was not common for Combe to engage in obscure transactions as he had been very meticulous with regard to all the other paintings in his possession. The practice used by him regarding the "La vaccination" was therefore at odds with Combe's traditional functional pattern. What is more, the court found that Combe had been particularly creative in making up a familial provenance for the purpose of securing favourable results through the sale at Sotheby's. Furthermore, the court also noted that he had recognized, before it, having lied about this point. Combe also submitted that he had spent a considerable amount of money restoring "La vaccination",

qualify the crime of fencing, which appeared to constitute a difficulty for the public prosecutor in the present case. Providing that the prosecutor succeeds in this matter, it is possible for the accused to disprove the presence of bad faith by showing good faith during the acquisition.

⁷¹³ Cour de Cassation, Chambre criminelle, N° de pourvoi 96-85871, 4 juin 1998.

⁷¹⁴ Cour de Cassation, Chambre criminelle, N. de pourvoi 96-85871, 4 juin 1998; Renold, (2004), p. 258.

⁷¹⁵ Cour de Cassation, Chambre criminelle, N. de pourvoi 96-85871, 4 juin 1998; Renold, (2004), p. 258.

⁷¹⁶ Cour de Cassation, Chambre criminelle, N. de pourvoi 96-85871, 4 juin 1998.

⁷¹⁷ Cour de Cassation, Chambre criminelle, N. de pourvoi 96-85871, 4 juin 1998.

⁷¹⁸ The Court of Appeal held that the choice to sell the painting on the Singaporean market entitled the seller not only to fetch a higher price, but also enables him to dispose of it far away from France where it had been stolen.

which contradicted the justification that he had used to justify the sale of the painting (which – he submitted – would serve to finance his son’s further education). All in all, the inconsistency of his various allegations made him untrustworthy in the eyes of the court. Secondly, the painting also bore marks suggesting that it had been removed from its original support, that it had been rolled, and then remounted on a new frame. The court interpreted these marks as being a sign that it was transported surreptitiously. At last, it noted that it had appeared from the seized documents that Combe was making profits out of the painting business and that he could, thenceforth, not aver inexperience to justify his behaviour in the present situation.⁷¹⁹

The virgin of Saint-Gervasy

In another case decided in 2006, the Court of Appeal of Riom appeared to have been more lenient with the purchaser and considered that he could not have been aware of the illegal origin of the object.



The case concerned a statue representing a XII century Roman virgin acquired from an antiquity dealer by Cortejarena.⁷²⁰ The statue – classified as a historical monument – was stolen from a church in the municipality of Saint-Gervasy, France. It was later recovered by the police in the hands of Cortejarena, who had put it up for sale along with other pieces. The police then handed the statue back to the municipality of Saint-Gervasy, owner of the statue. Cortejarena subsequently initiated legal proceedings to have the purchase price of the statue reimbursed as he had acquired it in good faith from an antiquity dealer.

In assessing Cortejarena’s good faith for the purpose of reimbursement on the basis of Article L. 622-17 of the *Code du patrimoine*, the court conceded that, even if the theft had been made public by means of an official circular in 1983, this could not imply that the purchaser could have been aware of the theft at the time of acquisition in 1999.⁷²¹ Furthermore, the professional character of the purchaser was taken into consideration in weighting the circumstances of acquisition: the Riom court considered Cortejarena to be an expert in the domain of medieval statues, because he had recognized the genuineness of the figure despite a contradictory (and mistaken) prior assessment by Christie’s Amsterdam, that considered the statue to be a XIX century copy of little value.⁷²² The price demanded by Cortejarena was also considered in the assessment of the good faith: the sale price doubled in his hands compared to what he paid for the statue.⁷²³ Ostensibly, the asymmetry of information between the buyer and seller as to the authenticity of the virgin could justify this price inflation. Furthermore, through the use of a third party, Cortejarena was able to retrace the origin of the statue to the church of Saint-Gervasy, and this information was provided on the catalogue of the sale by which he was disposing of the statue.⁷²⁴ In the opinion of the Riom’s Court of Appeal, all these elements pointed to the conclusion that Cortejarena was unaware of the illegal origin of the statue.⁷²⁵ Notwithstanding the controversial nature of this decision compared to other cases, it has been submitted that this judgment appears to be an exception to the rule.⁷²⁶

Rodin and Laurencin

In another case dealing with a transaction between two art dealers of a stolen Bronze by Auguste Rodin and of a stolen painting by Marie Laurencin, the court considered the acquisition not to have been carried out in good faith based on several factors.⁷²⁷

The case concerns the acquisition of a painting – entitled “portrait de femme au chien” by the hand of Marie Laurencin – and of a bronze statue – known as “Bourgeois de Calais”, by Auguste Rodin – by two art galleries, the *société Montjoie Art Transactions* and the *société Bailly*. The two pieces were stolen in the period between 29 October-05 November 1999 and were reported missing to the authorities in early November of the same year. Additionally, both items were listed as stolen on 19 November 1999 in the *Gazette de Drouot*. What is more, the Rodin Museum was informed of the disappearance of the bronze during the same month. The Rodin and the Laurencin reappeared in the hands of an individual who subsequently sold both items to the Tillier gallery – respectively on 10 and 14 December 1999 – through the use of a middleman. On 13 December 1999, the gallery then sold the bronze to Montjoie, who then transferred half of it by sale to the Bailly gallery. On 20 December 2000, another gallery – the Thomire gallery – sold the painting to the Bailly gallery. The latter took the statue to the Rodin

⁷¹⁹ Cour d’appel d’Amiens, Chambre correctionnelle, N° 06/00850, 14 février 2007.

⁷²⁰ Cour de Cassation, Chambre civile 1, N. de pourvoi 04-18185, 16 mai 2006.

⁷²¹ Cornu, Wallaert and Fromageau, (2012), pp. 287-288.

⁷²² Cornu, Wallaert and Fromageau, (2012), p. 288.

⁷²³ Cornu, Wallaert and Fromageau, (2012), p. 288.

⁷²⁴ Cornu, Wallaert and Fromageau, (2012), p. 288.

⁷²⁵ Cornu, Wallaert and Fromageau, (2012), p. 288, citing Cour d’appel de Riom, 3 juin 2004, and corroborated by Cour de Cassation 1^{ère} chambre civile, 16 mai 2006, *D.*, 2006, p. 2365, note B. Mallet-Bricout; *D.* 2007, p. 132-135, note V. Valette.

⁷²⁶ Cornu, Wallaert and Fromageau, (2012), p. 288.

⁷²⁷ Cour de Cassation, Chambre criminelle, N. de pourvoi 04-81962, 1^{er} février 2005; Cornu, Wallaert and Fromageau, (2012), p. 288.

museum on 3 January 2000 to have it looked at professionally, an action that led to the discovery of the actual possession of the stolen object and which resulted in the present proceedings.

In addressing the good faith of the gallerists for the purpose of deciding upon the claim in revindication, the Court of Appeal of Paris took a panoply of elements into consideration: throughout the many sales which followed the theft – and despite a publication in the *Gazette de Drouot* listing both items as stolen since 19 November 1999 –, the professionals concerned had not verified the provenance of the items. Henceforth, they failed to use the necessary diligence that was required to ensure the regularity of their acquisitions. What is more, the court established that the transfer of both the painting and the bronze through three different galleries within a period of ten days was to be assimilated to art laundering. The court further substantiated that both the galleries Bailly and Montjoie did not inquire into the authenticity and provenance of the two items, except for the consultation of the Rodin Museum, which took place only after having acquired the statue. Furthermore, the Paris court noted that payment by cheques and the registration of the items in the gallerists' books were the minimum requirements imposed upon learned professionals and that both these obligations had not been complied with in the present situation (with the exception of the purchase of the items by the galleries Montjoie and Bailly by means of cheque and from other professionals). These circumstances led the court to consider that the two had engaged in a hasty deal. In fact, this hastiness could not be justified but for the sake of making a profitable exchange and of creating the illusion that it was carried out in good faith by invoking the payments by cheques coupled with the acquisition from other gallerists. What is more, the name of the deceased owner of the Rodin was to be found on the statue and this identification stamp was known to the parties concerned: the representative of the Bailly gallery did not fail to bring to the attention of the Rodin Museum that the bronze stemmed from the succession of the deceased and, concomitantly, reminded the museum employee of the fame of the collection from which the statue originated. The court found that in these circumstances a professional dealer was required to inquire into the liquidation of the estate of the deceased in order to determine the reason why the statue left the well-known collection it belonged to. This was all the more important due to the fact that Christie's, Sotheby's and the Rodin Museum were informed of the theft and could have been consulted in the present circumstances. Because the representative of the Bailly gallery knew about the collection to which the Rodin belonged, he should have inquired into how the bronze left the collection. Another suspicious element in this case was that the Thomire gallery had given a description of the painting that did not concord with the details given by the catalogue raisonné of Marchesseau. This led the court to conclude that the acquisition by both the Bailly and the Montjoie galleries were not in good faith.

Trophées de Chasse

This case concerned the acquisition of a stolen painting by Alexandre François Desportes entitled "Trophées de Chasse". Despite an evident lack of factual information as to the situation in the report by the *Cour de Cassation*, the present proceedings related to both the fencing of the painting and to the dispossessed owner's institution of civil action in revindication against the purchaser.⁷²⁸

In its decision, the *Cour de Cassation* reported⁷²⁹ that the Court of Appeal of Aix-en-Provence pointed out that the acquisition was carried out in bad faith. The bad faith could be inferred from the following considerations: firstly, the purchaser – describing himself as a well-advised businessman and well-informed collector – acquired the painting in circumstances that were deemed particularly dubious. In the Court of Appeal's opinion, the painting was acquired hastily and at a particularly low price. Furthermore, the payment had been effectuated in two money transfers before the purchaser had the opportunity to physically see the painting. More specifically, he bought the painting based upon a picture, which made the pre-acquisition verification of both the authenticity and the condition of the painting impossible. What is more, the sales agreement was not formalized on paper and the transaction was effectuated in an opaque manner, i.e. through the use of various middlemen, for which the purchaser had not inquired into their competence and integrity. Additionally, the buyer acquired the painting from an art historian, which could not be considered as a merchant selling similar things in the sense prescribed by Article 2277 FCC. Secondly, it should also be remarked that both the buyer and the expert that assisted him did not investigate the provenance of the painting, although it was a French painting originating from Italy that had recently been acquired in Switzerland. In addressing the question of provenance, the Court of Appeal further noted that retrieving the history and the successiveness of previous ownership is particularly helpful in determining the provenance of a painting. It considered that this process of retrieval was of utmost importance in the context of a future resale: the provenance was deemed particularly relevant to the court because it noted

⁷²⁸ See *Cour de Cassation*, Chambre criminelle, N. 12-82.958, 28 janvier 2014.

⁷²⁹ Because the decision before the *Cour de Cassation* is the only reported decision, the facts of the case are scantily available, making it particularly difficult to provide a comprehensive overview of the situation.

that the painting had been owned by the former owner of Sotheby's – who was also a renowned collector with the finest reputation –, information which would have helped to corroborate the authenticity of the painting and increased its market value. In this regard, although the expert that had assisted the purchaser during the acquisition submitted that both the Art Loss Register and the Louvre were consulted before the acquisition, the defendant was neither able to prove that these consultations took place – and provide the content of these consultations –, nor was he able to demonstrate that these had taken place before the acquisition. Thirdly, the purchaser did not require the production of export documentation, although the issuance of these documents for the painting was mandatory. In fact, it was only after having acquired the painting that the buyer worried about its import in Switzerland. Fourthly, the expert did not notify the police when he discovered that the painting had originated from a theft. What is more, the Court of Appeal noted that the purchaser did not attempt at blocking the payment of the painting after having discovered the canvas' worrying origin. The aggregate accumulation of these circumstances led to the conclusion that the purchaser had not acted in good faith at the time of the acquisition.

Nonetheless, since the presumption of good faith was rebutted, the defendant advanced – although in vain – counterarguments to prove having acted in good faith. In doing so, he argued that the owner had not undertaken to publicize the theft, giving him no viable means to discover that the painting was stolen. Furthermore, he had blocked the painting at customs after he discovered an announcement in the *Gazette de Drouot* that reproduced a picture of the painting and reported it as stolen. The purchaser also contacted the owner of the painting – with the help of the contact details provided in the gazette – through a phone call, announcing that the stolen painting was located in Switzerland. Due to the owner's lack of responsiveness, the purchaser demanded that the customs' officer address a letter to the *Gazette de Drouot* specifying that the former was the legal owner of the painting. It is, furthermore, interesting to note that the purchaser advanced during the proceedings that the owner was lenient in not protecting or insuring his property correctly. This last argument – imputing part of the responsibility upon the dispossessed owner – was deemed irrelevant in addressing the purchaser's good faith at the time of the acquisition.

Good faith – an assessment

Following Renold, contrasted to the 1885 decision, the French standard of good faith in acquiring stolen cultural objects has become considerably more stringent during the last century⁷³⁰ – going from a strong presumption of good faith to an easily rebuttable presumption –, ultimately imposing the *onus probandi* upon the possessor, who will have to prove he has extensively inquired into the provenance of the item.⁷³¹ The same thesis is defended by other commentators, who have established that whilst good faith is presumed the strength of this presumption has waned considerably with regard to acquisitions *a non domino* of stolen cultural objects.⁷³² Despite the affirmations made, there seems to be no consistency in how courts will be satisfied that the presumption of good faith and the good faith itself are tarnished. This is notably due to the fact that the determination of good faith is context and fact-dependent; that the situations within which the acquisitions are made have kaleidoscopic traits; and that the fulcrum of this determination rests in the power of appreciation of the court seized with the contention.⁷³³ It is, consequently, impossible to pinpoint a litmus test applied by French courts in determining the good or bad faith of an acquirer of a stolen cultural object. Despite this impossibility, it is, nevertheless, possible to objectivize the rationale used by the courts addressed in the cases described above. Furthermore, this process of objectivization allows the drafting of a blueprint of factors which French courts have relied upon in assessing the presence or absence of good faith in cases dealing with cultural objects. The list below gives an overview of the factors that courts in the afore-mentioned cases have taken into consideration when addressing such situations.

⁷³⁰ Renold, (2004), p. 259.

⁷³¹ Renold, (2004), p. 258.

⁷³² See Cornu, Wallaert and Fromageau, (2012), p. 287, keyword: Bonne foi.

⁷³³ See for example Cour de Cassation, Chambre criminelle, N. de pourvoi: 04-81962, 1 février 2005 whereby the *Cour de Cassation* confirmed that courts judging as to the contention have the sovereign power to assess the good faith of the possessor for the purpose of applying Article 2279 FCC (now Article 2276 FCC).

Factors relating to the:

Object	<ul style="list-style-type: none"> - Discrepancies in description(s) of the object for the purpose of the sale; - Presence / absence of a certificate of authenticity; - Traces of surreptitious transport of the object on the item itself; - Contradicting evidences on the item; - Path followed by the object; - Regularity of the import; - Reputation collection from which the object originates.
Modalities of payment	<ul style="list-style-type: none"> - Price paid; - Method of payment; - Payment in several tranches; - Presence / absence proofs of payment; - Registration payment in accounts.
Parties	<ul style="list-style-type: none"> - Character of the parties; - Reputation buyer / seller; - Experience buyer / seller; - Knowledge market by buyer / seller; - Knowledge possible origin object by buyer / seller; - Compliance with legal requirements (seller); - No notification of the police after discovery object stolen (buyer / seller); - No cancellation payment after discovering object was stolen when this was possible (buyer); - Inconsistencies in methodology buyer / seller.
Transaction	<ul style="list-style-type: none"> - Presence / absence of written contract; - Hasty transaction(s); - Justification / purpose transaction; - Lack of inquiries into the presence of an export certificate (although the presence of the certificate is a mandatory legal requirement); - Use of encrypted language between buyer and seller.⁷³⁴
Circumstances of acquisition	<ul style="list-style-type: none"> - Inconsistency in information provided by the parties; - Unlikelihood that the transferor's assertions are true; - Consecutiveness of transactions in a short period of time; - Acquisition on pictures (no verification authenticity and condition object); - No verification competence / authority middlemen; - Impossibility to identify middlemen or third parties involved (e.g. restorator).
Research undertaken by the parties	<ul style="list-style-type: none"> - No research as to the authenticity; - No research as to the provenance; - Abstention undertaking steps favourable to increase the value of the object; - Lack of proof consultation database; - Lack of proof consultation database before the acquisition.
Other factors/ circumstances	<ul style="list-style-type: none"> - Painting hidden or on open display; - Demand for the import of the object made; - Spouse of the seller not aware of the transaction; - Account by witness(es).

From the above, it is possible to conclude that – contrary to what has been advanced by Cornu, Wallaert and Fromageau –, the elements that have an impact on the assessment of good faith are not limited to the price, rushed transactions, the non-consultation of available databases, a lack of further investigation in case of doubts and the circulation of information about the theft to spread the word.⁷³⁵ Instead, it seems more appropriate to specify that French courts evaluate good faith by examining all the circumstances of the transaction to determine whether the purchaser knew or ought to have known that the transferor was not entitled to dispose of the cultural object. In other words, the presence of red flags at the time of concluding the agreement concerning the transfer of the object will affect the court's assessment of good faith.

⁷³⁴ See Cour d'appel de Riom, Chambre des appels correctionnels, N° 08/00271, 15 juillet 2008.

⁷³⁵ Cornu, Wallaert and Fromageau, (2012), p. 287.

(2) Third-party protection – acquisition in good faith (involuntary loss of possession)

Similar to the second sentence of Article 2279 BCC, the second sentence of Article 2276 FCC creates an exception for a *non domino* acquisitions of stolen cultural objects following an involuntary loss of possession.

Article 2276 FCC – [...] Nevertheless, one who has lost a thing or from whom a thing has been stolen may claim back its ownership for three years following the day of its loss or theft, against the person in whose hands he finds it; that person can exercise his recourse against the person from whom he obtained it.

But for the theft / loss duality that is contained in this article, since the present research is only concerned by instances of theft, the situation of loss will not be further discussed. A common scenario – also the subject of the present research – when dealing with stolen cultural objects is that the item is sold to a *bona fide* purchaser whom acquired the object *a non domino*. In this situation opposing the dispossessed owner to a possessor in good faith, the second sentence of Article 2276 FCC prescribes that – much like Belgian law – the former will only be able to claim the object back from the latter within a period of three years post-theft.⁷³⁶ Consequently, in cases of theft, the stolen object can be claimed back by the dispossessed owner for a prefix period of three years – starting to run from the day of the theft (cf. the second sentence of Article 2276 FCC)⁷³⁷ – in the hands of anyone, including the acquirer *a non domino* that has complied with the conditions established above and whom should have been instantaneously protected on the basis of the first sentence of Article 2276 FCC.⁷³⁸ The second sentence of Article 2276 FCC derogates from the first sentence of the same article by providing that the *bona fide* purchaser of a stolen object does not acquire an instantaneous protection so as to automatically become its legal owner, but instead he will be subjected to a possible claim in revindication for a period of three years following the theft. Concomitantly, the second sentence of Article 2276 FCC prescribes a period of three years following the theft within which an action in revindication is exercisable, to the benefit of the *verus dominus*.⁷³⁹ It is, therefore, possible for the owner (or a possessor) to reclaim the objects from anyone in possession within the prescribed period of time without further ado.⁷⁴⁰ This derogation finds justification in the involuntary loss of possession by the dispossessed person, to whom French law – in concordance with Belgian law – provides a fair opportunity to recover the object within a period of three years.⁷⁴¹ However, if not exercised within this period posited, the right of revindication will be barred by means of acquisitive prescription in favour of the good faith purchaser. This means that, after this three-year period, it becomes impossible for the dispossessed owner to successfully reclaim an object through legal means, provided that the possessor opposes the demand in revindication by invoking the acquisitive effect laid down by Article 2276 FCC.⁷⁴²

It should be added that the acquisitive effect does not – technically – stem from a prescription because the possessor is vested with a title to the object instantaneously.⁷⁴³ Instead, the period of three years is a prefix period⁷⁴⁴ that – similar to the second sentence of Article 2279 BCC – postpones the instantaneous acquisitive effect of Article 2276 FCC for the duration of the said period.⁷⁴⁵ This set time limitation is the result of striking a proper balance between the interests of the two innocent parties that are victims of the theft.⁷⁴⁶ Consequently, the prefix period cannot be interrupted⁷⁴⁷ or suspended⁷⁴⁸ and is not applicable to possessors that have not acted

⁷³⁶ Bergel, Bruschi and Cimamonti, (2010), p. 280.

⁷³⁷ See also Cour de Cassation, Chambre criminelle, N. de pourvoi 69-90.372, 30 octobre 1969.

⁷³⁸ Mathieu, (2013), p. 341; Bergel, Bruschi and Cimamonti, (2010), p. 279.

⁷³⁹ Mathieu, (2013), p. 341.

⁷⁴⁰ Mathieu, (2013), p. 364 ; the owner may exercise his right of revindication against a detentor at any time after the theft since detention is not protected by the mechanism of acquisitive prescription.

⁷⁴¹ Dross, (2014), p. 244; Mathieu, (2013), p. 341.

⁷⁴² In this regard, the *Cour de Cassation* has declared that two *bona fide* purchasers of several stolen paintings were obliged to hand over the paintings to the dispossessed owner after the prefix period of three years had expired. This was notably the case because of the failure by the former two to invoke the protection afforded by Article 2279 FCC (now Article 2276 FCC). See *Cour de Cassation*, Chambre criminelle, N. de pourvoi 85-92.736, 4 mars 1986.

⁷⁴³ Mathieu, (2013), p. 340.

⁷⁴⁴ In this regard, see Cour de Cassation, Chambre criminelle, N° de pourvoi 77-91.639, 31 mars 1978 whereby the court specified that the period of three years is a prefix period running from the day of the theft. See also Cour de Cassation, Chambre criminelle, N. de pourvoi 85-92.736, 4 mars 1986; See also Djoudi, (2016), § 118.

⁷⁴⁵ See for example Cour de Cassation, Chambre criminelle, N. de pourvoi 85-92.736, 4 mars 1986, whereby the court submitted that the effect of the prefix period is to paralyse, during the three years, the acquisitive effect of the first sentence of Article 2279 FCC (now the first sentence of Article 2276 FCC). See also Djoudi, (2016), § 125.

⁷⁴⁶ Mathieu, (2013), p. 341.

⁷⁴⁷ Similar to Article 2279 BCC, an interruption is axiomatically possible when the owner exercises his right of revindication to recover the stolen object.

⁷⁴⁸ Mathieu, (2013), p. 341; Djoudi, (2016), § 126; reference should also be made to the theories posited by Zenati and Fournier, in which a distinction is made between periods of prescription and prefix periods by providing that the former type of periods are dependent upon the exercise of a possession (and are in fact periods of possession), whilst the latter type is set and runs irrespective of any exercised possession. See Zenati and Fournier, (1996), p. 349 ; See also Cour de Cassation, Chambre criminelle, N. de pourvoi 85-92.736, 4 mars 1986.

in good faith.⁷⁴⁹ Furthermore, it cannot be assimilated to a period of prescription because the period of possession is irrelevant to the running of the prefix period;⁷⁵⁰ the person in possession at the expiration of the said period enjoys the protection of the instantaneous acquisition laid down in the first sentence of the article.

Exception to the exception – market overt

If the dispossessed owner initiates the action in revindication before the expiration of the prefix period of three years, the *bona fide* purchaser that has bought the object in a fair, in a market, in a public auction or bought it from a merchant selling similar goods will have to return the object but is entitled to reimbursement of the purchase price. This rule is embedded in Article 2277 FCC.

Article 2277 FCC – If the present possessor of a lost or stolen thing bought it at a fair or at a market, or in a public sale, or from a merchant who sells the same things, the original owner cannot get the thing back without reimbursing the possessor the price he paid to buy it. [...]

This means that if the object has been acquired by way of market overt, the dispossessed owner entitled to the return of it must repay the purchase price to the possessor.⁷⁵¹ In order for the situation to fall within the scope of Article 2277 FCC, the acquisition must comply with the conditions set above for the instantaneous protection in case of *bona fide* acquisition *a non domino* (voluntary loss of possession). Similar to Belgian law, it is important for the acquisition to have been in good faith and for the possession not to be defective.⁷⁵² It is, consequently, impossible for a bad faith possessor to rely upon the market overt exception.⁷⁵³ The reason for providing a higher incidence of protection to the acquirer in good faith through means of market overt is that – much like Belgian law – there exists a presumption that the circumstances of acquisition are indicative of good faith by the purchaser.⁷⁵⁴ In other words, when a stolen object is acquired through means of market overt, there ought to be no doubts as to the good faith of the purchaser because of the specific circumstances within which the acquisition took place.⁷⁵⁵ It is furthermore assumed that the transaction materialized in a setting where usual commercial activities occur, a setting within which the provenance of the objects is deemed to be trustworthy.⁷⁵⁶ In a market overt setting, good faith thus constitutes an important *conditio sine qua non* for the reimbursement of the price paid in cases concerning the acquisition of stolen cultural objects.⁷⁵⁷ Nonetheless, it should be recalled that good faith is presumed and a presumption is rebuttable.⁷⁵⁸

Whilst meant for ensuring the security of commercial transactions, Article 2277 FCC finds its own limitations in the narrow interpretation given by courts to its provisions:⁷⁵⁹ the term ‘market’ has been interpreted in a particularly restrictive way, as courts have appreciated its fringes as referring to the place where regular commercial transactions with established dealers take place.⁷⁶⁰ This narrow interpretation discards the possibility to subsume flea markets under the present qualification, because of the ease with which individuals can improvise themselves as dealers on flea markets.⁷⁶¹ Furthermore, the qualification ‘merchant who sells the same things’ remains particularly nebulous.⁷⁶² In fact, the term ‘merchant’ must be given a plain meaning, but also the meaning of a dealer exercising a commercial activity of buying and selling goods to generate a profit to his own

⁷⁴⁹ Mathieu, (2013), p. 341.

⁷⁵⁰ Djoudi, (2016), § 125.

⁷⁵¹ Mathieu, (2013), p. 342 ; See also Cour de Cassation, Chambre criminelle, N. de pourvoi 77-91.639, 31 mars 1978.

⁷⁵² In this regard, see Zenati-Castaing and Revet, (2008), p. 378, noting that the possession must be in good faith and free of defects. Although incorrect, both commentators refer to Cour de Cassation, Chambre criminelle, N. de pourvoi 04-81963 (corrigendum : 04-81962), 1 février 2005 ; *Bull. crim.* n° 37 ; *Dr. Et patrimoine*, nov. 2005, p. 103, observations J.-B. Seube for the requirement of good faith. They also refer – correctly this time – to Cour de Cassation, Chambre civile 1, 2 février 1965, *Bull. Civ.*, IV, n° 196 ; *Com.*, 3 décembre 2003, *Bull. civ.*, IV, n° 196 and for the requirement of non-defective possession : “[...] que les acquisitions se sont opérées dans le camion même du transporteur et dans des circonstances dont les irrégularités soulignent la clandestinité”, l’arrêt a nécessairement écarté l’application de l’article 2280 du code civil qui ne peut être invoqué que par un acquéreur dont la possession est exempte de vices”.

⁷⁵³ Djoudi, (2008 (actual. 2016)), § 133, citing Cour de Cassation, Chambre civile 1, 2 février 1965, D. 1965. 371.

⁷⁵⁴ Dross, (2014), p. 245 ; Djoudi, (2008 (actual. 2016)), § 127 where it is noted that the acquisition is considered to have taken place in conditions within which the acquirer has been particularly prudent.

⁷⁵⁵ Dross, (2014), p. 245.

⁷⁵⁶ Djoudi, (2008 (actual. 2016)), § 128.

⁷⁵⁷ Cornu, Wallaert and Fromageau, (2012), p. 286, keyword: Bonne foi.

⁷⁵⁸ See for example Cour de Cassation, Chambre criminelle, N. de pourvoi 96-80.430, 12 décembre 1996.

⁷⁵⁹ Mathieu, (2013), p. 341.

⁷⁶⁰ Mathieu, (2013), p. 341 ; Djoudi, (2008 (actual. 2016)), § 128.

⁷⁶¹ Mathieu, (2013), p. 341 ; Djoudi, (2008 (actual. 2016)), § 128, citing Cour d’appel de Lyon, 8 novembre 2001, JCP 2003. IV. 1203 where the court stated : “Attendu que le terme de “marché” seul susceptible de s’appliquer à l’espèce s’entend d’un lieu où se pratique des transactions régulières avec des commerçants établis et non pas d’un marché aux puces accessible à des vendeurs non commerçants et notoirement connu comme lieu d’écoulement de marchandises volées”.

⁷⁶² Zenati-Castaing and Revet, (2008), p. 378, citing Cour de Cassation, Chambre civile, 24 janvier 1875, S., 1875.1.168 ; Cour de Cassation, 1^{ère} chambre civile, 26 novembre 1956, JCP, 1957.II.9919, note Voirin.

benefit.⁷⁶³ In determining whether the merchant sells similar things, it is important that this element be objectively assessable.⁷⁶⁴ Much like Belgian law, objects acquired through the means of bric-a-brac traders do not fall within the exception contained in Article 2277 FCC.⁷⁶⁵ Similarly, a historian selling a painting cannot be considered as a ‘merchant who sells the same things’.⁷⁶⁶ Nevertheless, paintings acquired from a painting broker will fall within the exception of Article 2277 FCC,⁷⁶⁷ unless the acquisition was made when the broker was acting as middleman for a third party.⁷⁶⁸

(3) Third-party protection – acquisition in bad faith

As posited above, even though an acquisition *a non domino* complies with the constitutory requirements of *corpus / animus*, and the possession is effective, genuine and not defective, the determination of good faith is particularly important in deciding upon the length of the revindication period. More specifically, the distinction between good / bad faith has repercussions for the applicable prescriptions rules;⁷⁶⁹ the presence of good faith is of paramount importance in determining the length of the acquisitive prescription. As explained above, in case of *bona fide* acquisition, it is possible for the acquisitive prescription to be instantaneous⁷⁷⁰ (i.e. voluntary loss of possession⁷⁷¹) or to be protracted by three years in case of theft (i.e. involuntary loss of possession⁷⁷²). Whilst good faith acquisitions of a stolen cultural object will entitle the possessor to acquire a right of ownership after a prefix period of three years running from the day of the theft – a period that cannot be altered by any means because of its prefix character – the situation is considerably different when the claimant can prove that the acquisition was not carried out in good faith. The latter type of acquisition will lead to the application of the longer period of acquisitive prescription of thirty years; despite a complete lack of legal provisions relating to the prescription of movables for acquisitions in bad faith, the length of the period of acquisitive prescription applied to movables is thirty years.⁷⁷³ In fact, Article 2272 FCC prescribes this period specifically for immovables⁷⁷⁴ but its formulation is to be bewailed. In reality, the said period is applicable to both immovables and movables.⁷⁷⁵ Thus, when the possessor cannot acquire ownership after three years following the theft on the basis of the first sentence of Article 2276 FCC because of a want of good faith, it will only be possible to acquire ownership through prescription after a period of thirty years – provided there is possession, that it is effective, genuine and free of defects.⁷⁷⁶ In other words, a revindication against a possessor in bad faith – also including a thief⁷⁷⁷ – will be possible within a period of thirty years.⁷⁷⁸ Consequently, a bad faith possessor can neither rely upon the shortened acquisitive prescriptions laid down in Article 2276 FCC or upon the exception of market overt laid down in Article 2277 FCC.⁷⁷⁹ Thenceforth, it can be concluded that the determination of good or bad faith of the possession has a prominent role in deciding the object’s fate.⁷⁸⁰

⁷⁶³ Djoudi, (2008 (actual. 2016)), § 129.

⁷⁶⁴ Zenati-Castaing and Revet (2008), p. 377, citing Cour d’appel de Poitiers, 25 janvier 1938, DH, 1938. 190.

⁷⁶⁵ Zenati-Castaing and Revet (2008), p. 377 and Djoudi, (2008 (actual. 2016)), § 129, citing Cour d’appel de Pau, 3 juillet 1979, D., 1981. IR. 232, observations Robert.

⁷⁶⁶ See Cour de Cassation, Chambre criminelle, N. de pourvoi 12-82.958, 28 janvier 2014, at 2.

⁷⁶⁷ For the obligation of reimbursement of the price paid for a painting to an antique dealer that acquired it in good faith from a dealer in paintings and that was obliged to give it back, see Cour d’appel de Paris, Pôle 2, Chambre 2, N. 08/05639, 18 Juin 2010.

⁷⁶⁸ In this regard, see Cour de Cassation, Chambre criminelle, N. de pourvoi 77-91639, 31 mars 1978. In 1970, the director of an art gallery purchased a painting in its gallery from a painting dealer acting as middleman. Unbeknownst to him, the painting was stolen and the dispossessed owners reclaimed it several months after the purchase by the gallery director. Amidst the arguments submitted by the parties, the director demanded the reimbursement of the price paid based on Article 2280 FCC because he had acquired the painting from a painting dealer. Nonetheless, the *Cour de Cassation* concluded: “[...] qu’en effet, un courtier n’appartient pas à la catégorie “ des marchands vendant des choses parcellles ”, au sens de l’article 2280, alinea 1er précité, dès lors qu’il agit comme intermédiaire pour le compte de tiers, qui restent les véritables vendeurs”. Thenceforth, the dealer was not considered as a “merchant selling similar things” because he was acting as a middleman for another third party who could not be assimilated to this category. See Zenati-Castaing and Revet, (2008), p. 377 and Djoudi, (2008 (actual. 2016)), § 129.

⁷⁶⁹ Mathieu, (2013), pp. 349 and 364; Cornu, Wallaert and Fromageau, (2012), p. 286.

⁷⁷⁰ Dross, (2014), p. 219; Cornu, Wallaert and Fromageau, (2012), p. 888.

⁷⁷¹ Cf. section B. 3. (1) above.

⁷⁷² Cf. section B. 3. (2) above.

⁷⁷³ Dross, (2014), p. 229.

⁷⁷⁴ Dross, (2014), p. 229.

⁷⁷⁵ Dross, (2014), p. 229 ; Grimonprez, (2010 (actual. 2016)), § 52.

⁷⁷⁶ Reboul-Maupin, (2012), p. 326; Bergel, Bruschi and Cimamonti, (2010), p. 180.

⁷⁷⁷ Djoudi, (2008 (actual. 2016)), § 119

⁷⁷⁸ Mathieu, (2013), p. 341, citing Cour de Cassation, 1^{ère} chambre civile, 7 février 1989, *Bull. Civ.* n. 57; *RTD civ.* 1990. 109, observations Zénati; Paris, 22 mars 1983, *Gaz. Pal.* 1983. 1, somm. 207; voir aussi Cour de Cassation, Chambre civile 7 févr. 1910, *DP* 1910. 1. 201, note Nast; Cour de Cassation, 1^{ère} chambre civile, 15 janv. 1965, *Bull. Civ.* I, n. 30; 29 janvier 1962, *ibid.* I, n. 61.

⁷⁷⁹ Djoudi, (2008 (actual. 2016)), § 121.

⁷⁸⁰ Cornu, Wallaert and Fromageau, (2012), p. 286, keyword: Bonne foi.

Unlike the prefix period found in Article 2276 FCC, the period of thirty years starts running on the day following the taking of possession by the bad faith acquirer⁷⁸¹ because the period of prescription is counted in days and not in hours (cf. Article 2228 FCC which is framed in terms matching that of Article 2260 BCC). Similar to Article 2261 BCC, Article 2229 FCC specifies that the period of prescription is completed at the expiry of the last day of prescription. It means that the calculus is identical to the one used in Belgian law: it suffices to count from one day of a specific year to the same day thirty years later. What is more, for the purpose of calculating the period of acquisitive prescription for acquisitions in bad faith, it is possible to bundle previous periods of possession together to reach the thirty-year threshold.⁷⁸² Nonetheless, this period follows a different pattern than the prefix period prescribed by the second sentence of Article 2276 FCC: unlike the latter, it is possible to interrupt a period of prescription.⁷⁸³ French law differs from Belgian law in that it is possible to interrupt this period but not to suspend it.⁷⁸⁴

4. LEGAL EFFECTS

To summarize the above, it is important to note that – in the same fashion as Belgian law – the determination of the good / bad faith of the acquirer at the time of concluding the agreement with the *a non domino* transferor is determinative in the protection afforded to the innocent third party: when the dispossession by the owner was voluntary, the protection given to a third party is instantaneous.⁷⁸⁵ As a matter of exception, an involuntary loss of possession will only allow a third party, acting in good faith, to be protected after three years running from the day of the theft.⁷⁸⁶ Finally, if the third party acquired the object in bad faith – irrespective of whether the dispossession was voluntary or involuntary –, the third party will only be protected after thirty years of effective and genuine possession that is free of defects.⁷⁸⁷ The legal effects flowing from these three situations are addressed below.

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)

Similar to Belgian law, provided the *bona fide* acquirer has obtained a non stolen cultural object *a non domino* through means of a defect-free, effective and genuine possession, the legal effect of Article 2276 FCC is to provide an instantaneous right of ownership to the possessor.⁷⁸⁸ This right is a new right that bears no relation to the right of ownership of the dispossessed owner.⁷⁸⁹ When the object has been obtained by a *bona fide* acquirer by means of acquisitive prescription, the owner's right of ownership is extinguished and the possessor acquires a new right of ownership.⁷⁹⁰ This entails that the protected possessor may transfer his newly established right to another, similarly to what is possible under Belgian law. Again in accordance with the Belgian regime, it will be for the dispossessed owner to rely on the agreement made with the transferor to seek relief. Concomitantly, the dispossessed owner cannot use the mechanism of revindication against the possessor.⁷⁹¹ Nevertheless, if the good faith possessor does not comply with the conditions of effective and genuine possession that is free of defects, it will be possible for the owner to successfully revindicate the object from the possessor.

(2) Third-party protection – acquisition in good faith (involuntary loss of possession)

Provided the action in revindication is instituted within the prefix period of three years, the possessor will have to give the object back to the claimant. Nevertheless, if the object has been acquired by the possessor in good faith through means of market overt and is reclaimed within the prefix period of three years, the possessor is entitled to the reimbursement of the purchase price. If the price paid is not reimbursed, the possessor has a right

⁷⁸¹ Grimonprez, (2010 (actual. 2016)), §§ 58 and 59, citing the adage *dies a quo non computatur in termino*.

⁷⁸² See notably articles 2264 and 2265 FCC (but also Mathieu, (2013), p. 332).

⁷⁸³ Mathieu, (2013), p. 332; the period of prescription can be interrupted by means of natural interruption or civil interruption, as laid down in Article 2242 FCC. If the possessor loses the possession to the object for a period longer than one year, the running of the period of prescription will be interrupted (*idem*). Correspondingly, a natural interruption means that the enjoyment of the thing by the possessor is put to a halt (*idem*). In this case, the possessor is required to make use of a possessory action within this one-year period, or his inertia might result in the loss of the prerogative of possession (*idem*). A civil interruption can be effectuated by use of legal means available to put a halt to the possession, such as a subpoena (*idem*). Contrary to the natural interruption, there is no need for a material dispossession (*idem*).

⁷⁸⁴ Mathieu, (2013), p. 333.

⁷⁸⁵ Cf. section B. 3. (1) above.

⁷⁸⁶ Cf. section B. 3. (2) above.

⁷⁸⁷ Cf. section B. 3. (3) above.

⁷⁸⁸ Cornu, Wallaert and Fromageau, (2012), p. 805.

⁷⁸⁹ Djoudi, (2016), § 109.

⁷⁹⁰ Dross, (2014), p. 226.

⁷⁹¹ Djoudi, (2016), § 108.

of retention upon the object, a right that ceases to exist when the payment is effectuated.⁷⁹² In other words, the *bona fide* possessor is not obliged to give back the object as long as he has not been reimbursed the price he paid for it.⁷⁹³ Thenceforth, the right of reimbursement constitutes an exception to the revindication favouring the defendant.⁷⁹⁴ It is also possible to obtain the reimbursement when the object has already been returned to the dispossessed owner through the police forces,⁷⁹⁵ although it is impossible for the possessor to demand the restitution of the object on the basis of its right of retention in these circumstances.⁷⁹⁶

After the expiration of this fixed period, the effect of acquisitive prescription is to vest a right of ownership in the possessor,⁷⁹⁷ a right that will have a retroactive effect,⁷⁹⁸ thus instating the ownership from the moment of the taking of possession.⁷⁹⁹ The effect of the acquisition of a right of ownership through acquisitive prescription is that the possessor will be considered as the owner from the first day of entering into possession.⁸⁰⁰ Furthermore, because of the exclusivity of ownership, the right of the dispossessed owner ceases to exist. Nonetheless, acquisitive prescription does not have the effect of cancelling the owner's right of action since this remedy is imprescriptible. Instead, the claim of the owner is barred because of the right of ownership acquired by the possessor.⁸⁰¹ This entails that the dispossessed owner cannot be successful in reclaiming the object in the hands of a *bona fide* possessor after three years post-theft.⁸⁰²

(3) Third-party protection – acquisition in bad faith

As established above, after a period of thirty years of effective, genuine and defect-free possession, the bad faith possessor will acquire ownership by means of acquisitive prescription on the basis of Article 2272 FCC.⁸⁰³ Nevertheless, the legal effect of this acquisition also entails the extinction of the bad faith possessor's right of action in revindication; in 1996, Zenati and Fournier theorized that acquisitive prescription and extinctive prescription are unitary instead of dual in nature.⁸⁰⁴ In their opinion, the acquisitive / extinctive effect of the prescription depends upon the party that relies upon the prescription by means of possession; if the possessor has an obligation towards the one he prescribes against (e.g. acquisition *a domino*), the possession will lead to the extinction of his obligation against the other party after a certain period of time.⁸⁰⁵ Correspondingly, the possessor acquires the liberation of his obligation against the claimant through means of acquisitive prescription.⁸⁰⁶ This theory demonstrates the existence of a nexus between extinctive and acquisitive prescription; the liberation of an obligation through means of extinction of the right of action creates the

⁷⁹² Reboul-Maupin, (2012), p. 327; Djoudi, (2008 (actual. 2016)), § 131, where it is advanced that the right of retention is a real right that is opposable against anyone, citing Cour de Cassation, 1^{ère} chambre civile, 24 septembre 2009, n° 08-10.152, D. 2009. 2275, observations X. Delpech; See also Cour de Cassation, Chambre criminelle, N. de pourvoi 77-91.639, 31 mars 1978.

⁷⁹³ Dross, (2014), p. 245.

⁷⁹⁴ Zenati-Castaing and Revet, (2008), p. 377.

⁷⁹⁵ In this regard, see Cour de Cassation 1^{ère} chambre civile, Commune de Saint-Gervasy c./De Cortejarena, 16 mai 2006, D., 2006, p. 2365, note B. Mallet-Bricout; D. 2007, p. 132-135, note V. Valette. In this case, the *bona fide* acquirer that had acquired *a non domino* – Cortejarena – was entitled to the reimbursement of the price paid even though the statue concerned had already been given back to the authorities and then to the dispossessed owner, the municipality of *Saint-Gervasy*. It was thus possible to claim the reimbursement on the basis of Article 2280 FCC after the retaking of possession by the dispossessed owner. See also Valette, V., 'Les protections du propriétaire et du possesseur d'un objet d'art volé', *Recueil Dalloz*, (2007), p. 132 and ff. where it is argued that the retaking of possession by the dispossessed owner does not discard the *bona fide* possessor's right of reimbursement. Furthermore, reference is made to Cour de Cassation, 1^{ère} chambre civile, 22 novembre 1988, Bull. Civ. I, n° 331; D. 1990, Somm. p. 86, observations A. Robert; RTD civ. 1990, p. 591, obs. F. Zenati; 9 janvier 1996, Bull. civ. I, n° 22; JCP G 1996, I, 3972, n° 6, obs. H. Peerinet-Marquet to support this affirmation; See also Cour d'appel de Paris, Pôle 2, chambre 2, N. 08/05639, 18 juin 2010, where the Court of Appeal of Paris confirmed that the transfer to the police forces does not constitute a transfer of possession, but merely a precarious detention. For one exception to this right to reimbursement, see Cour d'appel de Paris, Pôle 02, Chambre 02, N. 11/20441, 20 décembre 2013 whereby the Court of Appeal discarded the *bona fide* purchaser's right of reimbursement. This was notably because the buyer, informed of the theft by the police, was in a position to cancel the payment of the stolen paintings to the seller but refrained from doing so; see also Djoudi, (2008 (actual. 2016)), § 131.

⁷⁹⁶ Cour de Cassation, Chambre criminelle, N. de pourvoi 10-24.436, 27 septembre 2011. Nonetheless, the possessor entitled to compensation on the basis of Article 2277 FCC that has not yet been reimbursed and that is not physically holding the object any longer can still enforce his right of retention by opposing the sale of the returned object by the dispossessed owner until the reimbursement has been effectuated (*idem*).

⁷⁹⁷ Droz, (1997), p. 242.

⁷⁹⁸ Dross, (2014), p. 226.

⁷⁹⁹ Mathieu, (2013), p. 335, citing Cour de Cassation, 3^{ème} chambre civile, 10 juillet 1996, *Bull. Civ.* III, n. 180; R., p. 287; D. 1998. 509, Note Reboul; Defrénois 1996. 1426, observations Atias.

⁸⁰⁰ Dross, (2014), p. 226.

⁸⁰¹ Bergel, Bruschi and Cimamonti, (2010), p. 276.

⁸⁰² Djoudi, (2016), § 122, citing Cour de Cassation, 1^{ère} chambre civile, 10 mai 1950, D. 1950. 429.

⁸⁰³ See for example Cour de Cassation, 1^{ère} chambre civile, N. de pourvoi D 07-12.290, 19 mars 2009.

⁸⁰⁴ See Zenati, F., Fournier, S., 'Essai d'une théorie unitaire de la prescription', 2 *Revue Trimestrielle de Droit Civil*, avril-juin 1996, pp. 339-353; see also Zenati-Castaing and Revet, (2008), p. 665.

⁸⁰⁵ Zenati and Fournier, (1996), p. 345.

⁸⁰⁶ Zenati and Fournier, (1996), p. 345.

acquisition of this liberation for the one that prescribes.⁸⁰⁷ On the other hand, if there exists no legal relation between the one that prescribes and the other against whom he prescribes (e.g. acquisition *a non domino*), then the prescription is acquisitive in nature.⁸⁰⁸ Correspondingly, possession always leads to acquisitive prescription,⁸⁰⁹ because the possessor either acquires the liberation of his obligation when a legal relationship exists between the possessor and the owner, or acquires the right of ownership upon the object when no such relationship exists. Nevertheless, Zenati and Fournier have advocated that the acquisitive effect of prescription is always adjoined by an extinctive effect,⁸¹⁰ which affects the action⁸¹¹ from a procedural perspective⁸¹² and not the right itself.⁸¹³ This affirmation finds justification in the fact that it would be impossible for one that acquires through prescription to exercise his newly acquired right whilst the owner's right of ownership would be left unaffected by the acquisitive prescription.⁸¹⁴ In fact, not extinguishing the right of action of the previous owner would deprive the acquisitive prescription of any meaning.⁸¹⁵ What is more, it is the action of the previous owner that is extinguished through means of extinctive prescription, and not his right of ownership.⁸¹⁶ This is notably so for two reasons: firstly, former Article 2262 FCC specified that an action was to be extinguished by means of extinctive prescription⁸¹⁷ and, secondly, because the right of ownership is imprescriptible.⁸¹⁸

If the claimant initiates the claim in revindication before the possessor has acquired a right of ownership on the basis of Article 2272 FCC, then the claimant is entitled to recover the property.

⁸⁰⁷ Zenati and Fournier, (1996), p. 345.

⁸⁰⁸ Zenati and Fournier, (1996), p. 345.

⁸⁰⁹ Zenati and Fournier, (1996), pp. 350 and 351.

⁸¹⁰ Zenati and Fournier, (1996), pp. 350-351, where extinctive prescription is depicted as the secondary effect of acquisitive prescription; see also Zenati-Castaing and Revet, (2008), p. 381.

⁸¹¹ Zenati and Fournier, (1996), p. 351; see also Zenati-Castaing and Revet, (2008), p. 381.

⁸¹² Zenati and Fournier, (1996), p. 352.

⁸¹³ See also Zenati-Castaing and Revet, (2008), p. 667.

⁸¹⁴ Zenati and Fournier, (1996), p. 350.

⁸¹⁵ Zenati and Fournier, (1996), p. 350.

⁸¹⁶ Zenati and Fournier, (1996), p. 350.

⁸¹⁷ Before the changes brought about by law 2008-561, it was considered that a bad faith possessor could acquire the ownership of the object by mean of acquisitive prescription after a continuous possession of thirty years, as was prescribed in former Article 2262 FCC. This was possible provided the possession was genuine, effective and not defective. See Henry, Jacob, Tisserand, Venandet and Wiederkehr, (2003), p. 2265, citing Cour de Cassation, Chambre civile 3, N. de pourvoi 75-10759, 15 Juin 1976) and Bergel, Bruschi and Cimamonti, (2010), p. 276 In fact, former Article 2262 FCC instated an extinctive prescription, reached after a period of thirty years starting to run from the moment of the dispossession (see O'Keefe, (1999), p. 102) although it was given a correlative acquisitive effect. See notably Cour de Cassation, Chambre civile 3, N. de pourvoi 75-10759, 15 Juin 1976; See also Zenati-Castaing and Revet, (2008), p. 666.

⁸¹⁸ Zenati and Fournier, (1996), p. 350.

C. The Netherlands*

Similar to France, The Netherlands has been particularly responsive to the UNIDROIT initiative.⁸¹⁹ Despite this, however, it has decided not to ratify the convention and, instead, has adopted a UNESCO Plus solution. Having regard to the introductory reservations made above, this type of implementation will not be addressed in the present chapter. This means that Books 3 and 5 of the Dutch Civil Code (*Burgerlijk Wetboek*) – hereinafter DCC –, regulates the consequences of the triangular situation. Book 3 is entitled ‘Patrimonial Law in General’ (*Algemeen Gedeelte van het Vermogensrecht*) and regulates – among other things – ownership of movables, including the consequences flowing from involuntary loss of possession of movables through theft. Instead, Book 5 entitled ‘Real rights’ (*Zakelijke rechten*) defines ownership and the action in revindication. For the sake of consistency, before explaining the rules regulating the acquisition of stolen cultural objects in the Dutch private law regime studied, it is important to lay down the foundation of the triangular relation analysed throughout this research. The following sections will thus take note of key notions (section C.1) and basic principles (section C.2) relevant to the regulation of the tripartite relation in Dutch law. Subsequently, the regulation of the intricate triangle of property law through Dutch private law will be explained (section C.3). Finally, the legal effects of the rules discerned will be distilled (section C.4).

1. BASIC CONCEPTS

(1) Ownership, possession and detention

Ownership is defined in Article 5:1 DCC, which explains the extent of the notion in three sub-paragraphs.

Article 5:1 DCC – (1) Ownership is the most comprehensive right which a person can have in a thing.

Paragraph 1 of Article 5:1 DCC describes ownership as the most extensive right one can exercise upon an object. This most extensive right is, nonetheless, constrained by the second sub-paragraphs of the same article.

Article 5:1 DCC – (2) To the exclusion of everybody else, the owner is free to use the thing provided that this use not be in violation of the rights of others and that it respect the limitations based upon statutory rules and rules of unwritten law.

Consequently, the right of ownership is a right exercised upon the object that gives the most extensive permissions to the owner upon the said object – including, *inter alia*, the right to dispose of it, to use it, etc.⁸²⁰ – as long as this right is exercised within the confinements of the law and does not affect the rights of others.⁸²¹ In

* N.B.: the translations of all legal provisions of the Dutch Civil Code are derived from Haanappel, P. P. C., Mackaay, E., *Netherlands Civil Code – Patrimonial Law in General*, P. Haanappel and E. Mackaay (eds), 1990.

⁸¹⁹ The Netherlands decided to sign the convention on the 21 June 1996, thus being one of the convention’s first signatories. It also expressed its willingness to ratify the instrument but, to date, this has not yet happened. The early overzealous interest of the Netherlands in the convention was explained by the discovery of antiquities originating from Ghana and Cambodia in the harbor of Rotterdam. This discovery led the Dutch Minister of Justice to express fears that the image of ‘The Netherlands would become one of a platform for the illicit traffic in cultural goods (see Koopman, M. W. E., Groene Serie Vermogensrecht, ‘2 Teruggave van gestolen cultuurobjecten vanaf 1 januari 1992 vóór de inwerkingtreding van art. 3:310a t/ m 3:310c BW bij: Burgerlijk Wetboek Boek 3, Artikel 310a [Cultuurobjecten]’ citing Kamerstukken II 1995/96, 24400 VI, 50). At the time of adoption of the convention, the Dutch Association of Museums was in favor of its ratification. The same cannot be said for Dutch art dealers who fiercely opposed participation, although there were concessions on their part that the situation needed to be addressed to some extent. The Dutch Secretary of State for Education, Culture and Science affirmed the final position taken by The Netherlands as to the convention by a letter addressed to the President of the Dutch House of representatives (*Tweede kamer der Staten-Generaal*) in July 2004. This letter, issued almost ten years after the adoption of the final text, rejected the ratification of the UNIDROIT convention. In doing so, the Dutch government submitted that the instrument failed to reach an appropriate balance between the protection of the interests of an original owner and a purchaser acting in good faith. Additionally, it found the number of ratifications to be too low at that time, demonstrating a clear lack of international support for this instrument. But for this non-adhesion, the on-going discussion led to the ratification of the 1970 UNESCO convention by the Dutch government. Compared to its 1995 counter-part, the 1970 instrument allows states to make reservations and, thus, to retain certain fundamental domestic legal tenets. Albeit the final choice of The Netherlands was at odds with the enthusiasm – not to say effervescence – with which it welcomed the convention before the turn of the century, this choice was well pondered. Therefore, The Netherlands settled for an UNESCO Plus solution by incorporating several aspects of the 1995 convention in implementing the 1970 instrument. For additional arguments by the Dutch authorities against the ratification of the UNIDROIT convention, see <http://www.unidroit.org/english/conventions/1995culturalproperty/1meet-120619/answquest-ef/netherlands.pdf>, last retrieved on 01.03.2018. Van Gaalen, M. S., Verheij, A. J., ‘De Gevolgen van het Unidroit-Verdrag Inzake Gestolen of Onrechtmatig Uitgevoerde Cultuurobjecten voor Nederland’, 5 *Nederlandse Juristen Blad* (NJB), (1997), pp. 193-201; Kuitenbrouwer, F. ‘The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance’, 13 *Europeen Revisie*, (2005), p. 602.

⁸²⁰ Reehuis, W. H. M., Heisterkamp, A. H. T., *PITLO Het Nederlands burgerlijk recht – deel 3 - Goederenrecht*, (Kluwer: Deventer, Dertiende Druk, 2012), p. 18.

⁸²¹ In this regard, see Article 3:13 DCC for an explanation as to the concept of abuse of right and the prohibition to make use of a right when such use constitutes an abuse of right.

this respect, the Dutch definition of ownership – prescribing an absolute but relative right – is in line with the Belgian and French definitions. Nevertheless, because of its all-encompassing nature, the right of ownership is often confused with the things upon which the right rests.⁸²² Nonetheless, it is technically important to distinguish the two notions, as ownership concerns the right upon the thing and, therefore, does not serve to refer to the thing subjected to the right.

Besides ownership, Dutch law also differentiates ownership from possession (*bezit*). Possession is defined in Article 3:107 (1) DCC.

Article 3:107 DCC – (1) Possession is the fact of detaining property for oneself.

Following Article 3:107 DCC, possession is a ‘kind of detention exercised for oneself (i.e. *pro se*)’.⁸²³ It thus requires the exercise of factual control over a thing for oneself.⁸²⁴ This definition of possession is corroborated by Article 3:113 (1) DCC, which states that “A person takes possession of property by acquiring actual control of it”. Thus, possession mirrors the factual taking of control over a thing through means of actual control over it. To determine the presence of possession through actual control, factual acts are vetted.⁸²⁵ Factual acts can either be immediate and mediate,⁸²⁶ as explained in Articles 3:107 (2) and (3) DCC.

Article 3:107 DCC – (2) A person who possesses property which is not detained for him by another has immediate possession.

(3) A person who possesses property which is detained for him by another has mediate possession.

Unlike Belgian and French law, possession in Dutch law is hybrid and can, therefore, either have a factual or a legal character depending upon the function played by the possession.⁸²⁷ Notwithstanding its legal or factual nature, the notion of possession requires that the possessor behaves as the owner of the thing,⁸²⁸ similar to possession in Belgian and French law. In other words, and in line with the two aforementioned legal systems, possession is considered as the exercise of competences given by a right irrespective of whether the possessor is the title-bearer of the said right:⁸²⁹ detention for oneself merely reflects a factual situation that does not indicate the legal relation between the possessor and the thing. More conspicuously, both an owner and a thief can possess for themselves but – legally speaking – they respectively have a right or no right at all upon the property.⁸³⁰ Furthermore, except for the situation of co-possession, possession is exclusionary.⁸³¹ This entails that – much like Belgian and French law – the possession by one person excludes the possession by another.⁸³² What is more, unlike Belgian and French law, it is possible for a possessor to transfer his possession to another, as is clarified by Article 3:114 DCC.

Article 3:114 DCC – A possessor transfers his possession by enabling the acquirer to exercise such control over the property as he himself was able to exercise over it.

Similar to Belgian and French law, possession in Dutch law also requires the presence of *corpus* and *animus*.⁸³³ Nonetheless, unlike Belgian and French law, these two notions are not fully separated.⁸³⁴ Instead, the *animus* is expressed through the control over the thing and, therefore, must be demonstrated through the *corpus*.⁸³⁵ This is witnessed by Articles 3:108 and 3:109 DCC. Furthermore, similar to the *possession anime suo, corpore alieno* adage followed in Belgian and French law, possession in Dutch law can be exercised through a direct or an indirect

⁸²² Reehuis and Heisterkamp, (2012), p. 5.

⁸²³ Reehuis and Heisterkamp, (2012), p. 18; Salomons, A. F., “National Report on the Transfer of Movables in The Netherlands”, in: W. Faber and B. Lurger, *National Reports on the Transfer of Movables in Europe*, Volume 6, (Sellier: Munich, 2011), p. 31; Bartels, S. E., Mierlo (van), A. I. M., *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht – Vermogensrecht algemeen – Deel IV Algemeen goederenrecht*, (Kluwer: Deventer, 2013), p. 95.

⁸²⁴ Bartels and Mierlo (van), (2013), p. 105.

⁸²⁵ Bartels and Mierlo (van), (2013), p. 96.

⁸²⁶ Bartels and Mierlo (van), (2013), p. 97.

⁸²⁷ Bartels and Mierlo (van), (2013), pp. 97-98. For more details about the factual or legal character of the functions of possession, see *ibidem*, pp. 97 and ff.

⁸²⁸ Reehuis and Heisterkamp, (2012), p. 18; Bartels and Mierlo (van), (2013), p. 117, where it is submitted that possession is the factual mirroring of ownership or of another right.

⁸²⁹ Bartels and Mierlo (van), (2013), pp. 95 and 117.

⁸³⁰ Reehuis and Heisterkamp, (2012), p. 18.

⁸³¹ Bartels and Mierlo (van), (2013), p. 97.

⁸³² Bartels and Mierlo (van), (2013), pp. 97 but also 149.

⁸³³ Bartels and Mierlo (van), (2013), p. 103.

⁸³⁴ Bartels and Mierlo (van), (2013), p. 104.

⁸³⁵ Bartels and Mierlo (van), (2013), p. 104.

possession (cf. Article 3:107 (2) and (3) DCC, immediate and mediate possession respectively). To facilitate proving the presence of the *animus*, Article 3:109 DCC creates a presumption of detention for oneself.⁸³⁶

Article 3:109 DCC – A person is presumed to detain property for himself.

Furthermore, Article 3:108 DCC establishes that the presence of *animus* is to be appreciated through the objective appreciation of the facts of the situation.⁸³⁷

Article 3:108 DCC – Whether somebody detains property and whether he does so for himself or for another, is determined according to common opinion, taking into account the following rules and, otherwise, the facts as they appear.

Consequently, the mere intrapersonal will to be possessor is not sufficient to qualify as *animus*.⁸³⁸ Instead, this intention to possess must be externalized, not merely through statements by the one holding, but – more importantly – through acts that are tantamount to the exercise of possession.⁸³⁹ What is more, in line with Belgian and French law, the *animus* must not be assimilated to good faith as both notions bear no relation with one another.

In line with the two legal systems described above, possession is to be differentiated from detention (*sensu stricto*).⁸⁴⁰ Contrary to possession, detention is not explicitly defined in the Dutch Civil Code. In light of this definitional shortcoming, detention can be understood as the exercise of factual control over the object,⁸⁴¹ without the intention to exercise it for oneself.⁸⁴² In fact, the detentor derives his factual control exercised for another from a legal relationship with this other person.⁸⁴³ Much like Belgian and French law, detention falls short of benefiting from the legal effects flowing from possession.⁸⁴⁴ Furthermore, a similar distinction between immediate / mediate detention is drawn in Article 3:107 (4) DCC by analogy with the two preceding paragraphs of the same article.

Article 3:107 DCC – (4) Mutatis mutandis detention is mediate or immediate.

From the above it is possible to infer that a possessor is a person that: detains property for himself and exercises factual control over the object,⁸⁴⁵ either by himself or through another. Instead, a detentor recognizes and abides by the right of another upon the object, and as such merely exercises factual control over it for someone else, but never for himself.⁸⁴⁶ To determine whether one can speak of detention or of possession, reference is made to Articles 3:108-3:119 DCC.⁸⁴⁷ Article 3:108 DCC posits the means of distinguishing possession from detention by means of common opinion and in accordance with the guidance provided in Articles 3:109-3:119 DCC. This is to be “[...] determined according to common opinion, taking into account the following rules [...]” and by requiring an objective assessment of the facts “[...] determined according to common opinion, taking into account [...] the facts as they appear”.

Both Dutch law concepts of possession and detention look similar to the two notions found in Belgian and French law: whilst possession in Dutch law implies a factual control – that is similar to the requirement of *corpus* in the two above-mentioned legal systems – by oneself or through another – similar to *possessio animo suo*, *corpore alieno* in Belgian and French law – but for oneself – therefore equating the requirement of *animus* to be found in the Belgian and French notion of possession –, detention merely implies the factual control upon the thing without the intention to hold it for oneself. This mere detention without the intention to hold for oneself is equal to the presence of *corpus* without *animus* in Belgian and French law. In this regard, detention (*sensu stricto*) in Dutch law resembles detention in Belgian and French law. Furthermore, the differentiation between possession and detention – either through the measuring of *corpus* and *animus* in Belgian and French law, or through the means of Article 3:108 and ff. DCC in Dutch law – requires an objective assessment of the behaviour and acts of the possessor and the detentor. Consequently, both the notions of possession and detention bear similar traits in the three legal systems scrutinized.

⁸³⁶ Bartels and Mierlo (van), (2013), p. 104.

⁸³⁷ Bartels and Mierlo (van), (2013), p. 104.

⁸³⁸ Bartels and Mierlo (van), (2013), p. 107.

⁸³⁹ Bartels and Mierlo (van), (2013), p. 107.

⁸⁴⁰ Detention is given two meanings in Dutch private law: when referring to detention *sensu stricto*, emphasis is put on the exercise of factual control over the thing for another (detention). When referring to detention *sensu lato*, emphasis is put on the exercise of factual control over a thing. See Bartels and Mierlo (van), (2013), pp. 102-103.

⁸⁴¹ Salomons, (2011), p. 31.

⁸⁴² Bartels and Mierlo (van), (2013), pp. 104-105.

⁸⁴³ Bartels and Mierlo (van), (2013), p. 105.

⁸⁴⁴ Bartels and Mierlo (van), (2013), pp. 104-105.

⁸⁴⁵ Salomons, (2011), p. 31.

⁸⁴⁶ Salomons, (2011), p. 31.

⁸⁴⁷ Bartels and Mierlo (van), (2013), p. 103.

(2) Theft

Theft is defined in Article 310 of the Dutch Criminal Code (*Wetboek van Strafrecht*) – hereinafter DCrC – in the following manner:

Article 310 DCrC – He who takes away a thing that belongs to another in its entirety, or in part, with an intention of unauthorised appropriation is guilty of theft, [...]

For the sake of applying Article 3:86 (3) DCC (see below), one must distinguish theft (*diefstal*) from embezzlement (*verduistering*):⁸⁴⁸ whilst the former falls within the ambit of the article, the latter will not.⁸⁴⁹ Instead, embezzlement is subsumed under the first paragraph of Article 3:86 DCC.⁸⁵⁰ The notion of theft must thus be strictly interpreted for the purpose of Article 3:86 (3) DCC as referring exclusively to theft as described in Article 310 DCrC.⁸⁵¹ A thief is thus a person that misappropriates a thing belonging to someone else without having obtained permission to do so by its owner. The definition of Article 310 DCrC, therefore, clearly discards all instances of voluntary loss of possession.

(3) Cultural object

But for certain provisions implementing the 1970 UNESCO convention and the European Union Directive 2014/60/EU,⁸⁵² there exists no specific definition for the notion of cultural object in the regime of Dutch private law.⁸⁵³ Instead, similar to the Belgian and French rules described above, cultural objects fall within the private law regime of the civil code applicable to things,⁸⁵⁴ a regime that merely distinguishes movables from immovables.⁸⁵⁵ To understand the distinction drawn here, it is important to clarify the notions of things and of movables. Things are defined by Article 3:2 DCC as corporeal objects that can be subjected to human control.⁸⁵⁶

Article 3:2 DCC – Things are corporeal objects susceptible of human control.

Following this definition, things are corporeal objects. The corporeal nature of the object refers therefore to concrete and visible materials.⁸⁵⁷ Consequently, intangibles cannot be subject to human control because they are not corporeal, excluding them thenceforth from the definition of things.⁸⁵⁸ Furthermore, things can either be movable or immovable.⁸⁵⁹ Article 3:3 (2) of the DCC defines movables *a contrario*, meaning by mutual exclusion: similar to Belgian and French law, what is not an immovable is thus – by exclusion – movable.⁸⁶⁰

Article 3:3 DCC – (2) All things which are not immovable, are movable.

In order to understand the method of distinction laid down by Article 3:3 (2) DCC, the notion of immovable must first be explained. Article 3:3 (1) DCC defines the fringes of the concept of immovable.⁸⁶¹

⁸⁴⁸ Embezzlement is defined in Article 321 of the DCrC as follows: “He who intentionally appropriates illegally a thing which belongs in part or in its entirety to another who has acquired differently than from a crime is guilty of embezzlement and is punished by imprisonment of a maximum of three years or a fine of the fifth category” [translation with the author].

⁸⁴⁹ Reehuis, W. H. M., Slob, E. E., “Invoering Boeken 3, 5 en 6 – Boek 3 Vermogensrecht in het algemeen”, in: C. J. Van Zeben, J. W. Du Pon, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek*, (Kluwer: Deventer, 1990), p. 1220; Reehuis and Heisterkamp, (2012), p. 133; Bartels and Mierlo (van), (2013), p. 417, citing Snijders & Rank-Berenschot 2012/374; Fesceur, 2005, p. 154; Rechtbank 's-Hertogenbosch, 24 september 1998, *Nederlandse Juristenblad*, 1999/39; Hof 's-Hertogenbosch 28 oktober 2003 *Landelijk Jurisprudentie Nummer* (LJN) AN9548; Rechtbank Rotterdam, 20 augustus 2008, LJN BE9341; Rechtbank Haarlem, 4 oktober 2012 LJN BY2126 and Hoge Raad, Strafkamer, 12 oktober 1999, *Nederlandse Juristenblad* (NJ) 2000/36, ECLI:NL:1999:AC2680. Nevertheless, Bartels and van Mierlo also provide that other sources have classified embezzlement as theft. In doing so, they cite Wagenaar, *Weekblad voor Privaatrecht, Notariaat en Registratie* (WPNR) 2004/6603; Van Erp, WPNR 2000/6405; Rechtbank Arnhem, 27 juni 2006, LJN AY4918 and Rechtbank Arnhem 4 september 2008, LJN BF0688. See also *ibidem*, p. 419.

⁸⁵⁰ Reehuis and Heisterkamp, (2012), p. 133.

⁸⁵¹ See more specifically Hoge Raad, Strafkamer, zaak n. 3967, 12 oktober 1999, ECLI:NL:PHR:1999:ZD1744 (also mentioned above) and the opinion of the Procureur-Generaal bij de Hoge Raad in Parket bij de Hoge Raad, zaak n. 3967, 12 oktober 1999, ECLI:NL:PHR:1999:ZD1744, (opinie d.d. 30 augustus 1999).

⁸⁵² In this regard, see respectively articles 3:86b and 3:86a DCC.

⁸⁵³ Brunner, (1994), p. 101.

⁸⁵⁴ Bartels and Mierlo (van), (2013), p. 395.

⁸⁵⁵ Brunner, (1994), p. 101.

⁸⁵⁶ Reehuis and Heisterkamp, (2012), p. 2; Bartels and Mierlo (van), (2013), p. 75.

⁸⁵⁷ Reehuis and Heisterkamp, (2012), p. 3.

⁸⁵⁸ Reehuis and Heisterkamp, (2012), pp. 2-3.

⁸⁵⁹ Bartels and Mierlo (van), (2013), p. 75.

⁸⁶⁰ Reehuis and Heisterkamp, (2012), p. 4; Snijders, H. J., Rank-Berenschot, E. B., *Goederenrecht – Studiereeks Burgerlijk Recht*, (Vijfde druk, Kluwer: Deventer, 2012), p. 35; Salomons, (2011), pp. 50-51; Bartels and Mierlo (van), (2013), pp. 76 and 395.

⁸⁶¹ Bartels and Mierlo (van), (2013), p. 78. For a detailed explanation as to the various elements listed in Article 3:3 (1) DCC, see *idem*.

Article 3:3 DCC – (1) The following are immovable: land, unextracted minerals, plants attached to land, buildings and works durably united with land, either directly or through incorporation with other buildings or works.

Consequently, movables constitute a residual category of corporeal things that are not immovables. Following this definition, cultural goods are to be considered as movable things in Dutch private law. Similar to Belgian and French law, cultural objects can thus be assimilated to non-registered movable⁸⁶² things subjected to the general regime of private law,⁸⁶³ and – more particularly in the present context – to the regime of Article 3:86 DCC.⁸⁶⁴

(4) Legal remedy

Much like Belgian and French law, the appropriate legal remedy for a dispossessed owner to reclaim a stolen object under Dutch law is the *rei vindicatio* (*revindicatie*).⁸⁶⁵ Article 5:2 DCC instates this petitory action allowing the owner to revindicate an object from a person who possesses without having a right to the thing.⁸⁶⁶

Article 5:2 DCC – The owner of a thing is entitled to revindicate (*sic*) it from any person who detains it without right.

Although the mechanism of *revindicatie* is only open for owners, possessors can make use of a possessory action to recover their possession after a theft, as is laid down in Article 3:125 (1) DCC.⁸⁶⁷

Article 3:125 DCC – (1) He who has acquired possession of property can, on the basis of a subsequent loss of or disturbance in the possession, institute the same actions against third persons to recover the property and to remove the disturbance as the title-holder of the property. Nevertheless, these actions must be instituted within the year following the loss or disturbance.

This provision entitles the possessor of a cultural object that is subsequently stolen to rely upon the possessory action of Article 3:125 (1) DCC and have his possession recognized and asserted.⁸⁶⁸ Thenceforth, the action of Article 3:125 (1) DCC results from the loss of possession, and not merely from the loss of factual control upon the object.⁸⁶⁹ The claimant will prevail provided that the possessor relying on Article 3:125 (1) DCC has a better right than the holder of the object. Except in case of appropriation through violence or through surreptitious means (cf. Article 3:125 (2) DCC *in fine*), if the holder has a better right then the action will fail (cf. Article 3:125 (2) DCC).

Article 3:125 DCC – (2) The action is rejected if the defendant has a better right than the plaintiff to the detention of the property or if he has performed the disturbing acts pursuant to a better right, unless the defendant has taken possession from the plaintiff or has disturbed his possession in a violent or surreptitious manner.

The action on the basis of Article 3:125 (1) DCC must be instated within a year following the dispossession from the claimant (cf. Article 3:125 (1) DCC *in fine*).⁸⁷⁰ If exercised within a period of one year, there is no need for the possessor to demonstrate that he is the title-holder of the thing.⁸⁷¹ In fact, it will be sufficient for him to show that he was in possession at the time of the theft.⁸⁷² After this one-year period, the possessor can only rely upon

⁸⁶² A definition of registered movable is given in Article 3:10 DCC.

⁸⁶³ Brunner, (1994), pp. 106, 121; Bartels and Mierlo (van), (2013), p. 395.

⁸⁶⁴ Bartels and Mierlo (van), (2013), p. 395.

⁸⁶⁵ Salomons, (2011), pp. 24-25; Rank-Berenschot, 'Burgerlijk Wetboek Boek 3, Artikel 86 [Gevolgen onbevoegdheid overdracht roerende zaak, niet registergoed, of recht aan toonder of order]', in: J. H. Nieuwenhuis, C. J. J. M. Stolker en W. L. Valk (ed), *Tekst & Commentaar Burgerlijk Wetboek, Bescherming tegen beschikingsonbevoegdheid*, (Wolters Kluwer Nederland, 11^e druk, bijgewerkt tem 1 juli 2015), punt 5.

Diefstal (lid 3) where it is submitted that theft is the only form of loss of possession that entitles the owner to trigger the mechanism of revindication. Reference is additionally made to Hoge Raad, Strafkamer, 12 oktober 1999, *Nederlandse Juristenblad* (NJ) 2000/36, ECLI:NL:1999:AC2680.

⁸⁶⁶ Salomons, (2011), 17; Bartels and Mierlo (van), (2013), p. 418; Schöenberger, (2009), p. 57; it is also possible for the insurance company that has insured the thing against theft to initiate an action in revindication whenever this party has acquired ownership of the thing based on the contract of insurance and in accordance with Article 3:95 DCC. Bartels and Mierlo (van), (2013), p. 421.

⁸⁶⁷ Bartels and Mierlo (van), (2013), pp. 106 and 156.

⁸⁶⁸ Bartels and Mierlo (van), (2013), pp. 154, 156, 157 and 421.

⁸⁶⁹ Bartels and Mierlo (van), (2013), p. 156.

⁸⁷⁰ Bartels and Mierlo (van), (2013), p. 421.

⁸⁷¹ Bartels and Mierlo (van), (2013), p. 421.

⁸⁷² Bartels and Mierlo (van), (2013), p. 421.

a tort action against the new possessor – such as the one posited by Article 6:162 DCC⁸⁷³ – as laid down in the third paragraph of Article 3:125 DCC.⁸⁷⁴

Article 3:125 DCC – (3) Nothing in this article deprives the possessor, even after the expiry of the year referred to in the first paragraph, or the detentor of the possibility, should there be grounds, to institute an action on the basis of an unlawful act.

It should be noted that Article 3:125 DCC entitles not only the possessor, but also a detentor to rely upon a tort action.⁸⁷⁵ However, the detentor is not entitled to rely upon the revindication to claim the object back from another and may only have recourse to the aforementioned tort action.⁸⁷⁶ Consequently, this means that both the owner and possessor can rely upon revindication when dispossessed by means of theft (similar to Belgian and French law), but that a detentor cannot make use of the revindication when dispossessed by theft (similar to French law) to the exception of a retentor: contrary to the detentor, the retentor of the thing may use the action in revindication to claim the thing back, as is prescribed by Article 3:295 DCC.⁸⁷⁷⁻⁸⁷⁸ Finally, it should be noted that, unlike the revindication, the tort action does not relate to having a possession recognized and asserted, but relates to the loss of factual control upon the object.⁸⁷⁹

Since Article 5:2 DCC specifies that the *rei vindicatio* is available to the owner of a thing, in order to successfully revindicate the owner must first prove that the possessor is not the title-holder of the object.⁸⁸⁰ The obligation to disprove title-holding stems from the presumption in favour of the possessor instated by Article 3:119 (1) DCC.⁸⁸¹

Article 3:119 DCC – (1) The possessor of property is presumed to be the title-holder.

Nevertheless, since the mere detentor of an object is presumed to be the possessor on the basis of Article 3:109 DCC, this entails that a mere detentor will then also be presumed to be title-holder on the basis of Article 3:119 (1) DCC.⁸⁸² In disproving that the possessor or the detentor is title-holder of the thing, the claimant will axiomatically – and in accordance with the Belgian and French rules described above – have to establish that a theft has taken place, to demonstrate the existence of a better title upon the object stolen⁸⁸³ – in other words, that he is the right-holder of the thing⁸⁸⁴ – and to prove that the object subject to the contention is the same as the one stolen. In order to demonstrate the existence of a right upon the object, it is sufficient for the possessor to prove that he had factual control (i.e. detention) over the thing at the time of the misappropriation to be presumed possessor (cf. Article 3:119 (1) DCC) and, subsequently, the title-holder of the thing (cf. Article 3:109 DCC).⁸⁸⁵ In this regard, since the claimant opposing the possession will also have to prove that he was either owner, possessor or detentor of the thing at the time of the theft for the purpose of Articles 2279 BCC, or owner for the purpose of Article 2276 FCC, there exists no major difference between the three legal systems under scrutiny. But for this apparent similarity, Dutch law merely requires evidence of detention at the time of the theft, whilst Belgian and French law require at least evidence of possession.

Following Article 5:2 DCC, the action in revindication can be exercised against ‘any person who detains it without right’. Through an action in *rei vindicatio*, it is thus possible for a dispossessed owner to reclaim the possession of an object that has been stolen from him from any person factually holding it, similar to both the second sentences of Articles 2279 BCC and 2276 FCC. In accordance with Articles 3:107 (2) and (3) DCC discussed above, four different types of defendants can be identified: either the possessor has immediate

⁸⁷³ “Article 6:162 DCC – 1. A person who commits an unlawful act toward another that can be imputed to him, must repair the damage which the other person suffers as a consequence thereof. 2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. 3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion”.

⁸⁷⁴ See also Bartels and Mierlo (van), (2013), p. 156.

⁸⁷⁵ Bartels and Mierlo (van), (2013), p. 155.

⁸⁷⁶ Bartels and Mierlo (van), (2013), p. 106.

⁸⁷⁷ Bartels and Mierlo (van), (2013), p. 420.

⁸⁷⁸ Whilst a judge is obliged to honour the properly introduced demand in revindication on the basis of Article 3:125 DCC, the judge may order the recovery of the thing when responding to a successfully lodged claim on the basis of an unlawful act, although he is not obliged to decide so. See Bartels and Mierlo (van), (2013), pp. 155-156.

⁸⁷⁹ Bartels and Mierlo (van), (2013), p. 157.

⁸⁸⁰ Salomons, (2011), p. 21.

⁸⁸¹ Salomons, (2011), p. 21.

⁸⁸² Bartels and Mierlo (van), (2013), p. 109.

⁸⁸³ Bartels and Mierlo (van), (2013), p. 109.

⁸⁸⁴ Bartels and Mierlo (van), (2013), p. 109.

⁸⁸⁵ Bartels and Mierlo (van), (2013), p. 108. It will then be possible for the defendant to disprove that the claimant was the right-holder at the time of the theft (*idem*, citing Hoge Raad, 1 juli 1977, NJ 1978/212).

possession of the object (i.e. immediate possession), or he has handed it to a detentor (i.e. mediate possession), or a detentor holds the item (i.e. immediate detention) or the detentor has handed it over to another detentor (mediate detention).⁸⁸⁶ The distinction between these four types of protagonists influences the question as to against whom the proceedings must be initiated. Whenever the *rei vindicatio* is against a person that is in mediate possession or mediate detention, it will not succeed when the said person “is not in a position to instruct the detentor to return the property”.⁸⁸⁷ In this regard, Dutch law provides more options than those available under Articles 2279 BCC and 2276 FCC as it also makes it possible to initiate a revindication procedure against a non-holder that can instruct the holder to hand over the object.

(5) Prescription

In accordance with Belgian and French law, Dutch law recognizes and gives legal effect to the institution of prescription. Nonetheless, the Dutch Civil Code does not explicitly define this notion, unlike Belgian law. Prescription is an important mechanism in Dutch private law that – *inter alia* – plays a key function in balancing the rights of the parties involved in the triangular relation under scrutiny. More conspicuously, the mechanism of prescription serves to bring a *de facto* situation in line with its *de jure* appreciation.⁸⁸⁸ This is notably the result of consolidating a long-lasting factual situation with its legal appreciation.⁸⁸⁹ Furthermore, prescription in Dutch law plays a probative role, as it helps to prove ownership:⁸⁹⁰ when the right of the possessor is contested, it is expected that the he is able to demonstrate his right of ownership upon the disputed thing, the right from his predecessor and from others from whom the predecessor in title had obtained the right.⁸⁹¹ The mechanism of prescription allows individuals to circumvent this *probatio diabolica*;⁸⁹² it is then sufficient to prove the possession of oneself or prior predecessors for the period of time required by the prescription in order to demonstrate having acquired ownership upon the thing.⁸⁹³ Much like Belgian and French law, two types of prescription exist in Dutch law: acquisitive and extinctive prescription (respectively *verkrijgende* and *bevrijdende verjaring*).⁸⁹⁴ Provisions regulating acquisitive prescription are to be found in Articles 3:99-3:106 DCC, and those regulating extinctive prescription are found in Articles 3:306-3:325 DCC.⁸⁹⁵

The mechanism of extinctive prescription has the effect of extinguishing a right of action (i.e. the *ius agendi*).⁸⁹⁶ The standard length of the period of prescription of the right of action is laid down in Article 3:306 DCC.

Article 3:306 DCC – Unless otherwise provided for by law, rights of action are prescribed by twenty years.

Article 3:306 DCC provides that a right of action can in general be relied upon within a period twenty years from the moment it can be exercised, unless provided differently by law.⁸⁹⁷ After this period, the right of action expires through means of extinctive prescription and it becomes impossible for a dispossessed owner to exercise his right of action. What matters for the application of the extinctive prescription is how long the title-holder has lost his possession upon the thing.⁸⁹⁸

Next to extinctive prescription, Dutch law also recognizes the institution of acquisitive prescription, the so-called *usucapio*. Acquisitive prescription is a method of acquisition of ownership of a thing that is regulated in Title 4 of Book 3 of the DCC, entitled ‘Acquisition and Loss of property’.⁸⁹⁹ The mechanism of *usucapio* allows the possessor of a thing to acquire a right upon the object through the passage of time.⁹⁰⁰ Put in a nutshell, this institution serves several prominent functions: firstly, acquisitive prescription – when considered alongside extinctive prescription – ensures legal certainty.⁹⁰¹ As established above, it is assumed that, after a certain period

⁸⁸⁶ Salomons, (2011), p. 25; a similar legal distinction does not exist in Belgian and French law, as the provisions enabling a dispossessed owner to revindicate allow him to reclaim from any person in whose hands the object is found, but not from someone that does not hold it (i.e. without factual control upon the thing).

⁸⁸⁷ Salomons, (2011), p. 25.

⁸⁸⁸ Bartels and Mierlo (van), (2013), p. 531.

⁸⁸⁹ Bartels and Mierlo (van), (2013), p. 531.

⁸⁹⁰ Bartels and Mierlo (van), (2013), p. 531.

⁸⁹¹ Bartels and Mierlo (van), (2013), p. 531.

⁸⁹² Bartels and Mierlo (van), (2013), pp. 531-532.

⁸⁹³ Bartels and Mierlo (van), (2013), p. 532.

⁸⁹⁴ Bartels and Mierlo (van), (2013), p. 532.

⁸⁹⁵ Sniijders and Rank-Berenschot, (2012), p. 211.

⁸⁹⁶ Sniijders and Rank-Berenschot, (2012), p. 212; Reehuis and Heisterkamp, (2012), p. 270; Bartels and Mierlo (van), (2013), p. 532.

⁸⁹⁷ Salomons, (2011), p. 25.

⁸⁹⁸ Bartels and Mierlo (van), (2013), p. 535.

⁸⁹⁹ Sniijders and Rank-Berenschot, (2012), p. 212.

⁹⁰⁰ Reehuis and Heisterkamp, (2012), p. 270; Bartels and Mierlo (van), (2013), p. 532.

⁹⁰¹ Sniijders and Rank-Berenschot, (2012), p. 214.

of time, a factual situation must match its legal status.⁹⁰² In other words, acquisitive prescription is used to superpose the factual reality to the legal reality.⁹⁰³ A second function relates to the need to simplify means of proof. To avoid situations involving a *probatio diabolica*, prescription periods limit the obligation of producing evidence to a certain maximum amount of time.⁹⁰⁴ Finally, *usucapio* has the effect of correcting a defective acquisition of property once and for all.⁹⁰⁵ Both a good faith and a bad faith acquirer can rely upon acquisitive prescription, albeit – much like Belgian and French law – two different periods are applicable depending upon the exercise of good faith:⁹⁰⁶ the period of acquisitive prescription can either be short – i.e. instantaneous or protracted by three years (cf. Article 3:86 and 3:99 DCC) – or long, i.e. twenty years (cf. Article 3:105 (1), in conjunction with Article 3:306 DCC). In line with Belgian and French law, the acquisitive mechanisms will, nonetheless, not be of avail to a person that does not qualify as possessor.⁹⁰⁷ Additionally, it is important to note that, unlike Belgian and French law, Dutch law has codified a direct correlation between the expiration of the period of extinctive prescription and the mechanism of acquisitive prescription.⁹⁰⁸ In fact, Article 3:105 (1) DCC foresees of an acquisitive prescription at the moment and time the extinctive prescription renders the right of action non-justiciable.⁹⁰⁹

Article 3:105 DCC – (1) A person who possesses property at the time of the completion of the prescription of the right of action to terminate possession, acquires the property even if his possession was not in good faith.

The expiration of the extinctive prescription period thus results in the extinction of the right of action for the dispossessed owner and in the concomitant automatic acquisition of the object by the actual possessor; because of the acquisitive effect provided by Article 3:105 (1) DCC, the person in contemporaneous possession⁹¹⁰ of the stolen object becomes title-holder of it⁹¹¹ at the expiration of the right of action.⁹¹² This entails that a possessor acquires ownership at the end of this period, irrespective of the length of his possession⁹¹³ and of the presence of good faith from the outset or throughout the said possession.⁹¹⁴ In other words, when the right of action of the dispossessed owner expires, the possessor acquires ownership of the object through means of acquisitive prescription.⁹¹⁵

2. CONTEXTUALIZATION

After having laid down the premises to the present discussion by explaining key concepts, the present section will now address the context within which these notions operate. In doing so, it discusses two tenets at the epicentre of the described rules: the distinction between voluntary and involuntary loss of possession and the *nemo dat* principle. In this regard, it must be emphasized that all three legal systems under scrutiny share these two common principles.

(1) Voluntary and involuntary loss of possession

Similar to Belgian and French law, Dutch law makes a distinction between voluntary and involuntary loss of possession, respectively known as *vrijwillig* and *onvrijwillig bezitsverlies*. The rationale behind differentiating between these two situations is similar to the rationale underpinning the distinction in Belgian and French law: in the former case, the parting with the possession of the object was done on a voluntary basis. This entails that the

⁹⁰² Snijders and Rank-Berenschot, (2012), p. 214.

⁹⁰³ Reehuis and Heisterkamp, (2012), p. 269; Brunner, (1994), p. 116.

⁹⁰⁴ Snijders and Rank-Berenschot, (2012), pp. 214-215.

⁹⁰⁵ Snijders and Rank-Berenschot, (2012), p. 215.

⁹⁰⁶ Snijders and Rank-Berenschot, (2012), p. 212.

⁹⁰⁷ Snijders and Rank-Berenschot, (2012), p. 213.

⁹⁰⁸ Snijders and Rank-Berenschot, (2012), p. 220.

⁹⁰⁹ Brunner, (1994), p. 121; see also Bartels and Mierlo (van), (2013), p. 532, where it is advanced that the difference in terminology between acquisitive and extinctive prescription is deplorable because the latter also leads to an acquisitive effect.

⁹¹⁰ This period of twenty years can be extended briefly for a possessor that has involuntarily lost the possession of the object before the staling of the statutory period. If said possessor has recovered possession of the object or has initiated the proceedings to have the object returned to him within a period of one year after the dispossession, then Article 3:105 (2) DCC winds up the acquisitive effect of the prescription upon the said possessor. Article 3:105 (2) DCC stipulates “Provided that a person who has involuntarily lost possession before the completion of the prescription of the right of action to terminate possession, has recovered it within the year following the loss of possession or by virtue of an action instituted within that year, he is deemed to be the possessor at the time indicated in the preceding paragraph”. See Salomons, (2011), p. 35, but also Snijders and Rank-Berenschot, (2012), p. 220.

⁹¹¹ Snijders and Rank-Berenschot, (2012), p. 213.

⁹¹² Snijders and Rank-Berenschot, (2012), p. 213.

⁹¹³ The length of the possession is not important to the application of Article 3:105 DCC.

⁹¹⁴ Salomons, (2011), p. 35; Brunner, (1994), pp. 120-121; it is important to emphasize that in order for somebody to acquire at the expiration of the period of extinctive prescription, there needs to be possession.

⁹¹⁵ Snijders and Rank-Berenschot, (2012), p. 220.

owner has conveyed the item to another on his own volition, and subsequently, that this other person has transferred it to another innocent third party without the owner's consent.⁹¹⁶ Since the owner took the risk of legitimizing his ownership right over the object against the actual physical holder of the item, the former must suffer the consequences of his act of separation when a third party acquires it in good faith.⁹¹⁷ This situation must be contrasted with cases of involuntary loss of possession through theft, in which there is no voluntary parting with the object by the owner. Henceforth, the owner never undertook the risk to part with the possession on his own volition.⁹¹⁸⁻⁹¹⁹ Similar to Belgian and French law, the distinction between voluntary and involuntary loss of possession is of paramount importance in determining the degree of protection – operationalized in the length of the period within which the owner can demand the recovery of the thing – given to third parties acquiring *a non domino*. In fact, Article 3:86 (1) DCC covers the situation of voluntary parting with the possession of an object⁹²⁰ and Article 3:86 (3) DCC is concerned with the involuntary dispossession, and more specifically dispossession through theft. Much like the first sentence of both Articles 2279 BCC and 2276 FCC, in case of voluntary loss of possession, Article 3:86 (1) DCC provides an instantaneous protection to the good faith possessor. Nonetheless, unlike Belgian and French law, the instantaneous right created by Article 3:86 (1) DCC is not created by means of acquisitive prescription, but instead by correcting the deficient transfer of title upon the thing (see below). Furthermore, contrary to the second sentence of both Articles 2279 BCC and 2276 FCC, Article 3:86 (3) DCC merely addresses situations of theft and not of loss of possession through the mere loss. What is more, the acquisitive prescription laid down in Article 3:99 DCC plays a subsidiary role for situations that do not fall within the ambit of Article 3:86 DCC. The distinction between voluntary / involuntary dispossession in the context of third-party protection (*derdenbescherming*) will be further addressed below.

(2) Nemo plus iuris ad alium transferre potest quam ipse habet

The Dutch civil code recognizes that any transfer of a thing to a third party starts from the premise that it is void if the transferor had no right to dispose of the object,⁹²¹ as confirmed in Article 3:84 (1) DCC.

Article 3:84 DCC – (1) Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property.

This article – mirroring the essence of the *nemo dat* principle – is thus concerned with the transfer of the ownership of a thing.⁹²² Following its letter, previous transferors must have had a right to dispose of the item in order for it to be validly conveyed.⁹²³ The terminology ‘to dispose’ refers to the act of alienation of an asset – in the form of a transfer to another – or the act of encumbering an asset with a limited right.⁹²⁴ In fact, Dutch law considers this right to be adjacent to the right of an owner.⁹²⁵ Proving that the transferor had the right to dispose means that the acquirer of a thing must be able to legitimize his acquisition, by retracing the chain of transactions conferring title to him. Acknowledging the difficulties – not to say the virtual impossibility – of doing so, this obligation is particularly burdensome.⁹²⁶ It should, nevertheless, be noted that it is possible to overcome this probative difficulty through means of acquisitive prescription or of correction of title, as explained above. Nonetheless, without the presence of a right to dispose with the predecessor, the transfer is thus technically considered void on the basis of Article 3:84 DCC,⁹²⁷ leading to the conclusion that the one to whom the object belongs has not lost his right upon the thing.⁹²⁸ This rule holds unless the acquirer can rely either upon the exception of third-party protection for acquisitions *a non domino* (as posited by Article 3:86 DCC),⁹²⁹ upon a short acquisitive prescription (cf. Article 3:99 DCC) or upon the long acquisitive prescription resulting from the expiration of the period of extinctive prescription (cf. Article 3:306 *juncto* Article 3:105 DCC). Consequently,

⁹¹⁶ Snijders and Rank-Berenschot, (2012), p. 314.

⁹¹⁷ Snijders and Rank-Berenschot, (2012), p. 314.

⁹¹⁸ Snijders and Rank-Berenschot, (2012), p. 314.

⁹¹⁹ Furthermore, the *Hoge Raad* has specified that there is no obligation for the owner not to have been inadvertent at the time of the involuntary loss of possession. See Bartels and Mierlo (van), (2013), p. 417, citing Hoge Raad, 18 januari 1991, NJ 1992/667; *AA* 1991, p. 1128 (*Centraal Beheer/ Gritter*) and Hoge Raad, 17 mei 1991, NJ 1992/668 (*Martinistad/ Zomerhuis*). Both cases relate to the application of Article 2014 DCC – the predecessor to Article 3:86 (3) DCC – but, following Bartels and van Mierlo, these cases are also applicable to Article 3:86 (3) DCC.

⁹²⁰ Bartels and Mierlo (van), (2013), p. 399.

⁹²¹ Reehuis and Heisterkamp, (2012), p. 121.

⁹²² Reehuis and Heisterkamp, (2012), p. 180.

⁹²³ Reehuis and Heisterkamp, (2012), p. 121.

⁹²⁴ Salomons, (2011), p. 54.

⁹²⁵ Salomons, (2011), p. 54.

⁹²⁶ Reehuis and Heisterkamp, (2012), p. 121.

⁹²⁷ Salomons, (2011), p. 55.

⁹²⁸ Bartels and Mierlo (van), (2013), p. 368.

⁹²⁹ Reehuis and Heisterkamp, (2012), p. 123.

Dutch law follows the *nemo dat* principle, similar to Belgian and French law, but has instated more exceptions to third-party protection when the acquisition was conducted in good faith. These exceptions are discussed in more detail below.

3. OPERATIONALIZATION

In the same fashion as the Belgian and French rules described above, the present section addresses the means of putting the concepts and principles laid down in sections C.1 and C.2 above in operation. As a starting point, the rules on third-party protection following acquisitions *a non domino* of movables are embodied in Article 3:86 (1), (3) and (4) DCC.

Article 3:86 DCC – (1) Although an alienator lacks the right to dispose of the property, a transfer pursuant to articles 90, 91 or 93 of a moveable thing, unregistered property, or a right payable to bearer or order is valid, if the transfer is not by gratuitous title and if the acquirer is in good faith.

(2) [...]

(3) Nevertheless, the owner of a moveable thing, who has lost its possession through theft, may revendicate (sic) it during a period of three years from the day of theft, unless the thing has been acquired by a natural person, not acting in the exercise of a profession or business, from an alienator whose business it is to deal with the public in similar things, otherwise than at a public sale, on business premises destined for that purpose, being an immoveable structure or part thereof with the land belonging thereto, and provided that the alienator be in the ordinary exercise of his business; or money or documents payable to bearer or order are involved.

(4) Articles 316, 318 and 319 regarding the interruption of the prescription of a right of action apply mutatis mutandis to the period referred to in the preceding paragraph.

Much like Articles 2279 BCC and 2276 FCC, Article 3:86 DCC addresses scenarios of third-party protection flowing from a *non domino* acquisitions resulting from both a voluntary and involuntary loss of possession. As specified above, the first scenario is specifically addressed by Article 3:86 (1) DCC, whilst the latter is dealt with in Article 3:86 (3) DCC.

Alongside Article 3:86 DCC, Article 3:99 DCC also regulates third-party protection for situations that do not fall within the ambit of the former article. As such, Article 3:99 DCC constitutes a residual provision and applies to situations that fall short of fulfilling the requirements of Article 3:86 DCC.

Article 3:99 DCC – Rights in moveable things which are not registered property and rights under documents payable to bearer and order are acquired by a possessor in good faith by uninterrupted possession for three years; other property is acquired by uninterrupted possession for ten years.

(1) Third-party protection – acquisitions in good faith (voluntary loss of possession)

Article 3:86 (1) DCC – correction of the transfer of possession

Article 3:86 DCC is specifically designed for situations where a third party⁹³⁰ has acquired a non-registered movable object from someone who does not have the faculty to dispose of it (*beschikkingsonbevoegde*).⁹³¹ In fact, the article allows for a derogation to the principle laid down in Article 3:84 DCC, which specifies that a transfer from a person who lacks the faculty to dispose of a thing is considered void.⁹³² Because Article 3:84 DCC starts from the premise that the transfer is void, the third party has received nothing from the transferor and, subsequently, the right-holder of the thing can impose his right on the acquiring third party.⁹³³ Since Dutch law considers this result to be particularly unfair in certain situations, exceptions exist whereby the acquiring third party is protected through means of third-party protection.⁹³⁴ One of these exceptions is to be found in Article 3:86 (1) DCC. In other words, Article 3:86 (1) DCC discards the requirement laid down in Article 3:84 DCC that a right to dispose be present with the transferor at the time of the delivery.⁹³⁵ This sturdy rule of third-party protection is based upon the legitimization doctrine (*legitimatieleer*):⁹³⁶ the rule protects a third party that has

⁹³⁰ This person is a third party to the situation as it is neither the right-holder of the thing or the person lacking the faculty to dispose. See Bartels and Mierlo (van), (2013), p. 369.

⁹³¹ Bartels and Mierlo (van), (2013), p. 395; Salomons, (2011), p. 107.

⁹³² Bartels and Mierlo (van), (2013), p. 368.

⁹³³ Bartels and Mierlo (van), (2013), p. 368.

⁹³⁴ Bartels and Mierlo (van), (2013), p. 368.

⁹³⁵ Bartels and Mierlo (van), (2013), pp. 398 and 416.

⁹³⁶ This legitimization doctrine was adopted by the *Hoge Raad* in the case *Damhoff/De Staat*, Hoge Raad, 5 mei 1950, NJ 1951, 1 (DJV). The decision related to Article 2014 DCC, which is now Article 3:86 DCC. See Snijders and Rank-Berenschot, (2012), p. 306; Reehuis, Heisterkamp, (2012), p. 122; Salomons, (2011), p. 109; See also Bartels and Mierlo (van), (2013), p. 370.

acquired from a person with factual control over the object, as this factual control implies the faculty to dispose of it and legitimizes the perception that the alienator exercises factual control as right-holder.⁹³⁷ This rule of third-party protection exists notably because it is, in general terms, difficult for the third party to know whether the transferor genuinely has the faculty to dispose of the thing.⁹³⁸ Consequently, a third party that acquires from a person – either a possessor or detentor⁹³⁹ – it could reasonably believe to be the right-holder (due to the person's exercise of factual control over the object – also known as real possession (*reëel bezit*)) –⁹⁴⁰ is protected in this belief. This protection entails that it becomes impossible for the right-holder to invoke the transferor's lack of faculty to dispose against the acquiring third party that acted in good faith.⁹⁴¹ Thenceforth, the derogation from Article 3:84 DCC is justified due to the fact that in certain circumstances,⁹⁴² it would be unfair not to protect the third party.⁹⁴³ Furthermore, this protection is afforded to ensure the security of commercial transactions (*verkeersbescherming*).⁹⁴⁴ Therefore, instating exceptions to the principle laid down in Article 3:84 DCC can be required when the interests of a third party so justify.⁹⁴⁵ Nonetheless, the legitimation doctrine affords protection to a purchaser only to the extent that a real possession could be imputed to the transferor.⁹⁴⁶ Unfortunately, due to the lack of codification of the notion of real possession in the Dutch Civil Code, it is considered as irrelevant to many writers.⁹⁴⁷

In order for the third party to benefit from the protective effect found in Article 3:86 (1) DCC, several conditions need to be fulfilled.⁹⁴⁸ More conspicuously, the transfer must comply with the conditions laid down in 1) Article 3:83 (1) DCC, 2) Article 3:84 (1) DCC and 3) Article 3:86 (1) DCC.

Conditionality of third-party protection through Article 3:86 (1) DCC

1) Article 3:83 (1) DCC

Article 3:83 DCC – (1) Ownership, dismembered rights and debts are transferable, unless this is precluded by law or by the nature of the right.

Firstly, the right that is conveyed from the transferor to the third party must be a transferable right, in accordance with Article 3:83 (1) DCC. Because in the present situation, the question is one of ownership, the condition laid down in this article is complied with. Secondly, because Article 3:86 (1) DCC only discards the requirement that the transferor needs to have the faculty to dispose, it is important that the other requirements of Article 3:84 (1) DCC are complied with.⁹⁴⁹

2) Article 3:84 (1) DCC

Article 3:84 DCC – (1) Transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property.

Notwithstanding the requirement relating to the transferor's faculty to dispose, Article 3:84 (1) DCC requires that there must be a) a *justa causa detentionis*⁹⁵⁰ and b) an act of delivery.⁹⁵¹

a) *Justa causa detentionis*

To be protected on the basis of Article 3:86 DCC, it is important that the third party has acquired the object on the basis of a *justa causa detentionis*.⁹⁵² This means that a *justa causa* must exist between the third party and the

⁹³⁷ Snijders and Rank-Berenschot, (2012), p. 306; Salomons, (2011), p. 109; Bartels and Mierlo (van), (2013), p. 390.

⁹³⁸ Bartels and Mierlo (van), (2013), p. 390.

⁹³⁹ Snijders and Rank-Berenschot, (2012), p. 307.

⁹⁴⁰ Snijders and Rank-Berenschot, (2012), p. 307; Salomons, (2011), p. 109.

⁹⁴¹ Bartels and Mierlo (van), (2013), p. 370, citing notably Hooge Raad, *Dambhoff/De Staat*, 5 mei 1950, NJ 1951/1.

⁹⁴² Notably where the third party does not know that the transferor lacks the faculty to dispose of the thing. See Bartels and Mierlo (van), (2013), p. 369.

⁹⁴³ Bartels and Mierlo (van), (2013), p. 368.

⁹⁴⁴ Bartels and Mierlo (van), (2013), p. 368.

⁹⁴⁵ Bartels and Mierlo (van), (2013), p. 370.

⁹⁴⁶ Salomons, (2011), p. 109.

⁹⁴⁷ Salomons, (2011), pp. 109-110.

⁹⁴⁸ Bartels and Mierlo (van), (2013), p. 371.

⁹⁴⁹ Bartels and Mierlo (van), (2013), pp. 398 and 400.

⁹⁵⁰ Bartels and Mierlo (van), (2013), p. 398, where it is advanced that it is not possible to rely upon Article 3:86 (1) DCC when the agreement upon which the transaction is undertaken is flawed; Bartels and Mierlo (van), (2013), p. 400.

⁹⁵¹ Snijders and Rank-Berenschot, (2012), p. 310; Bartels and Mierlo (van), (2013), p. 390.

⁹⁵² Bartels and Mierlo (van), (2013), pp. 370, citing Hoge Raad, 5 mei 1950, NJ 1951/1, but also specifying that this requirement still exists in the actual rules of the Dutch Civil Code. See also *ibidem*, p. 400.

transferor from which the former acquired the thing.⁹⁵³ *Justa causa detentionis* refers to the legal link underpinning a transfer that concurrently justifies it.⁹⁵⁴ Without this *justa causa*, the third party is deprived of protection,⁹⁵⁵ even if it is declared invalid afterwards.⁹⁵⁶ Belgian and French law also require the presence of a *justa causa detentionis* to form the basis of the possession. Nevertheless, this *justa causa* is required respectively by both Articles 550 BCC and 550 FCC for the purpose of demonstrating the presence of good faith at the time of the acquisition.

b) Act of delivery

Article 3:86 (1) DCC requires for the thing to have been transferred from an alienator lacking the faculty to dispose to an acquirer in good faith, in accordance with Articles 3:90, 3:91 and 3:93 DCC. Whilst Articles 3:90 and 3:91 DCC are relevant in the present context, Article 3:93 DCC is not.⁹⁵⁷ The protection of Article 3:86 (1) DCC is thus limited to certain specific types of transfers.⁹⁵⁸

Article 3:90 DCC – (1) Delivery required for the transfer of moveable things which are unregistered property and which are under the control of the alienator is made by giving possession of the thing to the acquirer.

(2) Delivery of a thing which remains in the hands of the alienator has no effect with respect to a third person who has a prior right to the thing, until the time when the thing has come into the hands of the acquirer, unless the third person has consented to the alienation.

Article 3:91 DCC – The delivery of things referred to in the preceding article in the performance of an obligation to transfer under suspensive condition is accomplished by giving the acquirer control over the thing.

Articles 3:90 and 3:91 DCC exemplify the importance of factual control in Dutch law, as it prescribes that the delivery of the object only takes place at the moment it is physically handed over to another person, meaning at the time the possession is transferred (*bezitsverschaffing*).⁹⁵⁹ For the purpose of Article 3:86 (1) DCC, it is thus of paramount importance that the transferor of the thing to the third party must have possession over it at the time of the transfer⁹⁶⁰ and that the third party has acquired the said possession over the object (cf. Article 3:90 (2) DCC).⁹⁶¹ In other words, it is impossible for an acquiring third party to invoke Article 3:86 DCC when the acquisition is *constitutum possessorium*,⁹⁶² meaning when the transferor remains in possession of the thing. Consequently, this last aspect is similar to the regimes of Articles 2279 BCC and 2276 FCC (see respectively possession *pro suo* (section A.3 above) and effective possession (section B.3 above)). Furthermore, the types of transfer addressed by Articles 3:90 and 3:91 DCC are the only ones from which the legitimization doctrine can be inferred because of the exercise of physical control by the transferor over the object.⁹⁶³ Consequently, when the delivery has occurred in different circumstances than the ones prescribed by Articles 3:90 and 3:91 DCC, then the purchaser cannot be protected by Article 3:86 DCC because of the lack of legitimacy in believing the transferor had a right to dispose.⁹⁶⁴ This is unless the exception contained in Article 3:95 DCC is applicable.

3) Article 3:86 (1) DCC

Thirdly, a third party is entitled to protection based on Article 3:86 (1) DCC in cases where he has acquired the object in accordance with the first paragraph of Article 3:86 DCC.⁹⁶⁵

Article 3:86 DCC – (1) Although an alienator lacks the right to dispose of the property, a transfer pursuant to articles 90, 91 or 93 of a moveable thing, unregistered property, [...] is valid, if the transfer is not by gratuitous title and if the acquirer is in good faith.

⁹⁵³ Bartels and Mierlo (van), (2013), p. 371.

⁹⁵⁴ Salomons, (2011), p. 53.

⁹⁵⁵ Bartels and Mierlo (van), (2013), p. 370.

⁹⁵⁶ Bartels and Mierlo (van), (2013), pp. 370-371.

⁹⁵⁷ As such, Article 3:93 DCC is omitted from the present analysis because it concerns the transfer of a right payable to bearer or the transfer of right payable to order, both transfers being irrelevant in the context of stolen movables.

⁹⁵⁸ Reehuis and Heisterkamp, (2012), p. 124.

⁹⁵⁹ Snijders and Rank-Berenschot, (2012), pp. 309 and 310; Brunner, (1994), p. 120.

⁹⁶⁰ Bartels and Mierlo (van), (2013), p. 399, citing Hoge Raad, 1 mei 1987, NJ 1988/852 (Lease Plan/IBM); Vliet (van), L. P. W. (2001).

‘Michael Gerson (Leasing) Ltd v Wilkinson, a comparative analysis.’, 5 (3) *Edinburgh Law Review*, (2001), pp. 364.

⁹⁶¹ Reehuis and Heisterkamp, (2012), p. 131; Brunner, (1994), p. 111.

⁹⁶² Bartels and Mierlo (van), (2013), p. 400; some exceptions to this rule exist. See notably Bartels and Mierlo (van), pp. 408 and ff.

⁹⁶³ Reehuis and Heisterkamp, (2012), p. 124; Snijders and Rank-Berenschot, (2012), p. 310.

⁹⁶⁴ Reehuis and Heisterkamp, (2012), p. 124; instead, Article 3:95 DCC provides: “In cases other than those provided for in articles 89 - 94 and without prejudice to articles 96 and 98, property is delivered by a deed intended for that purpose”. The delivery of the property will, therefore, take place through the elaboration of a deed of delivery.

⁹⁶⁵ Reehuis and Heisterkamp, (2012), p. 132.

This translates into the following: additionally to the requirements posited in Articles 3:93 and 3:84 DCC, in order to enjoy the protection laid down in Article 3:86 (1) DCC, the acquisition c) cannot be by gratuitous title and the d) acquirer must have been in good faith at the time of the passing of possession.⁹⁶⁶

c) Not by gratuitous title

Following Article 3:86 (1) DCC, the acquisition cannot be by gratuitous title (*verkerijging om niet*), and consequently must be for value. If the acquisition was gratuitous, equity mandates waiving the protection afforded to the third party in favour of the dispossessed owner.⁹⁶⁷ This is notably so because of the lack of prejudice by the acquirer that would have to restitute the object.⁹⁶⁸ In other words, the third party only deserves to be protected when it suffers a disadvantage.⁹⁶⁹ This requirement of disadvantage – also known as the *nadeelvereiste*⁹⁷⁰ – was established through case law before the adoption of the actual civil code⁹⁷¹ and was codified in the 1992 reviewed Dutch Civil Code. It constitutes a balance between the interests of the right-holder and of the acquirer.⁹⁷² Consequently, unlike Belgian⁹⁷³ and French law, a gratuitous acquisition will not be protected by Article 3:86 (1) DCC.

Distinguishing between gratuitous and for value acquisitions might prove less straightforward than initially believed:⁹⁷⁴ for example, if the counter performance is merely symbolic, it might be considered as non-existent,⁹⁷⁵ and, thus, gratuitous.⁹⁷⁶ Furthermore, conditional gifts or sales for a ‘friend price’ might be difficult to categorize.⁹⁷⁷ The facts and merits of the case will be determinative in assimilating the apparent *quid pro quo* as gratuitous or for value.⁹⁷⁸ Nonetheless, there exist no legal requirement for the counter performance to equal the value of the object transferred.⁹⁷⁹ Instead, the value of the counter performance must not be so low as to be assimilated to an almost gratuitous acquisition, but may be considerably below the market value of the thing.⁹⁸⁰ Acquiring for fifty per cent of the market value will not be considered as a gratuitous acquisition, although it might raise considerable questions as to the transferor’s faculty to dispose and, concomitantly, as to the good faith of the acquirer.⁹⁸¹ Nonetheless, the ‘for value’ nature of the acquisition does not mean that the object should have been paid with money. It is also possible to interpret this ‘for value’ requirement as meaning that the purchaser has obliged himself to deliver a non-pecuniary counter performance to the alienator.⁹⁸² If a counter performance has been promised instead of money, protection is afforded because of the existence of a *quid pro quo*, thus for the sake of fairness towards the acquirer.⁹⁸³ Furthermore, the value of the counter performance – even though it could be non-proportional to the value of the acquisition – is irrelevant,⁹⁸⁴ providing the counter performance was not for nothing.⁹⁸⁵ For nothing refers to donations or to the gratuitous transfer of a right that cannot be qualified as a donation.⁹⁸⁶ The ‘for value’ conditionality of protection additionally serves the purpose of securing commercial transactions.⁹⁸⁷ Donations have no part to play in commercial transactions.⁹⁸⁸ It is thus of paramount importance that the object has been acquired through a *quid pro quo*.⁹⁸⁹ Nonetheless, there is no obligation for the counter performance to have been exercised yet: it is sufficient for a promise to effectuate a counter performance to exist.⁹⁹⁰ Whether the purchaser respects his engagement is irrelevant for the sake of legal certainty.⁹⁹¹

⁹⁶⁶ Van Gaalen and Verheij, (1997), p. 194.

⁹⁶⁷ Reehuis and Heisterkamp, (2012), p. 130; Brunner, (1994), p. 110.

⁹⁶⁸ Reehuis and Heisterkamp, (2012), p. 130; Brunner, (1994), p. 110.

⁹⁶⁹ Bartels and Mierlo (van), (2013), p. 372.

⁹⁷⁰ Bartels and Mierlo (van), (2013), p. 372.

⁹⁷¹ Bartels and Mierlo (van), (2013), p. 372.

⁹⁷² Bartels and Mierlo (van), (2013), p. 404.

⁹⁷³ Cf. for example Sagaert, (2014), p. 677.

⁹⁷⁴ Salomons, (2011), p. 109.

⁹⁷⁵ Salomons, (2011), p. 109.

⁹⁷⁶ Reehuis and Heisterkamp, (2012), p. 130.

⁹⁷⁷ Reehuis and Heisterkamp, (2012), p. 130.

⁹⁷⁸ Reehuis and Heisterkamp, (2012), p. 130; Bartels and Mierlo (van), (2013), p. 405; Reehuis and Heisterkamp, (2012), p. 159 and

Snijders and Rank-Berenschot, (2012), p. 371.

⁹⁷⁹ Salomons, (2011), p. 109; Bartels and Mierlo (van), (2013), p. 405.

⁹⁸⁰ Bartels and Mierlo (van), (2013), p. 405.

⁹⁸¹ Reehuis and Heisterkamp, (2012), p. 130.

⁹⁸² Reehuis and Heisterkamp, (2012), p. 130; Snijders and Rank-Berenschot, (2012), p. 311; Bartels and Mierlo (van), (2013), p. 405.

⁹⁸³ Salomons, (2011), p. 108.

⁹⁸⁴ Snijders and Rank-Berenschot, (2012), p. 311.

⁹⁸⁵ Snijders and Rank-Berenschot, (2012), p. 311.

⁹⁸⁶ Snijders and Rank-Berenschot, (2012), p. 311.

⁹⁸⁷ Salomons, (2011), p. 108; Brunner, (1994), p. 110.

⁹⁸⁸ Brunner, (1994), p. 110.

⁹⁸⁹ Salomons, (2011), p. 108.

⁹⁹⁰ Reehuis and Heisterkamp, (2012), p. 130; Salomons, (2011), p. 109.

⁹⁹¹ Snijders and Rank-Berenschot, (2012), p. 311.

d) Acquisition in good faith

Unlike Belgian and French law, Dutch private law distinguishes between three types of qualifications: good faith, a lack of good faith and bad faith.⁹⁹² Bad faith has a particularly negative and subjective meaning⁹⁹³ and Dutch law considers that a lack of good faith must not mechanically be interpreted as bad faith.⁹⁹⁴ For the purpose of Article 3:86 (1) DCC, only good faith, or a lack thereof, are relevant considerations:⁹⁹⁵ it is important to note that the third-party protection of Article 3:86 (1) DCC is only given to third parties acting in good faith, as specifically stated in the article. The reasons for requiring the presence of good faith during the acquisition are as follows: because of the intricacies linked to verifying the transferor's faculty to dispose for non-registered movables – as explained above –, Article 3:86 DCC establishes a regime that is less stringent in affording protection to third parties, provided these are acting in good faith.⁹⁹⁶ The obligation to acquire in good faith is a natural consequence of the doctrine of legitimation – which also plays an important role in the requirement of good faith for the purpose of Article 2276 FCC –, as a lack of good faith would dissociate the doctrine from its *raison d'être*.⁹⁹⁷ Furthermore, because the third-party protection might result in depriving the owner of his right upon the thing, it is important that the party protected did not know or ought reasonably not to have known about the illegality underpinning the sale by which he acquires the litigious object.⁹⁹⁸ Henceforth, good faith plays a prominent role in the availability of third-party protection.⁹⁹⁹ Without this regime of protection, the commercial transactions of non-registered movables would be considerably impaired.¹⁰⁰⁰

Standard of good faith

Article 3:118 (1) DCC provides a broad understanding of what the notion of good faith entails.¹⁰⁰¹

Article 3:118 DCC – (1) A possessor who believes himself to be the title-holder and is reasonably justified in that belief, is a possessor in good faith.

Although not formulated in the same words, the essence of the definition of good faith posited in Article 3:118 (1) DCC mirrors the definitions of both Articles 550 BCC and 550 FCC. Article 3:11 DCC further complements Article 3:118 (1) DCC by providing a general standard of good faith for the purpose of appreciating the meaning of the latter article.¹⁰⁰²

Article 3:11 DCC – Where good faith of a person is required to produce a juridical effect, such person is not acting in good faith if he knew the facts or the law to which his good faith must relate or if, in the given circumstances, he should know them. Impossibility to inquire does not prevent the person, who had good reasons to be in doubt, from being considered as someone who should know the facts or the law.

The definition of good faith prescribed in Article 3:11 DCC is given *a contrario* by stating what a lack of good faith is.¹⁰⁰³ In the present context, Article 3:11 DCC prescribes that one that knew or ought to have known that the transferor lacked the faculty to dispose of the thing¹⁰⁰⁴ – or in other words doubted the licit origin of the object – cannot be considered to be acting in good faith.¹⁰⁰⁵ This nuancing given to Article 3:118 (1) DCC by Article 3:11 DCC brings the definition of good faith in Dutch law in line with the definitions that are prescribed

⁹⁹² Reehuis and Heisterkamp, (2012), p. 20.

⁹⁹³ Reehuis and Heisterkamp, (2012), p. 20, citing for example Articles 6:205, 6:207 and 6:274 DCC as examples where bad faith is used. See also Bartels and Mierlo (van), (2013), point 129: “Onder het oude recht werd gesproken van bezit te kwader trouw (art. 586-589 BW (oud)). In het oude recht werd zowel het begrip bezit te goeder als het begrip bezit te kwader trouw gedefinieerd in art. 587 onderscheidenlijk 588 BW (oud). Dat was niet alleen overbodig maar ook verwarrend, omdat de definities niet op elkaar aansloten. Zie HR 14 december 1906, W 8472, waar de Hoge Raad goede trouw aanwezig achtte ofschoon niet aan de definitie van art. 587 BW (oud) was voldaan. In het huidige wetboek wordt de term kwade trouw vermeden omdat men haar te diffamerend achtte. In vele gevallen waarin goede trouw ontbreekt, is de diffamerende klank die is verbonden aan het begrip kwade trouw niet op zijn plaats. Zie MvA bij art. 3:118, Parl. Gesch. Boek 3, p. 445”. In short, the qualification ‘lack of good faith’ came to replace the ‘bad faith’ qualification in many provisions of the civil code as the latter term was deemed particularly defamatory.

⁹⁹⁴ Reehuis and Heisterkamp, (2012), p. 20.

⁹⁹⁵ See Bartels and Mierlo (van), (2013), point 129 (*op. cit.*).

⁹⁹⁶ Reehuis and Heisterkamp, (2012), p. 122, 124.

⁹⁹⁷ Snijders and Rank-Berenschot, (2012), p. 312.

⁹⁹⁸ Reehuis and Heisterkamp, (2012), p. 121.

⁹⁹⁹ Reehuis and Heisterkamp, (2012), p. 121.

¹⁰⁰⁰ Reehuis and Heisterkamp, (2012), p. 122.

¹⁰⁰¹ Salomons, (2011), p. 34.

¹⁰⁰² Reehuis and Heisterkamp, (2012), p. 125; Salomons, (2011), p. 16.

¹⁰⁰³ Reehuis and Heisterkamp, (2012), p. 19.

¹⁰⁰⁴ Bartels and Mierlo (van), (2013), pp. 371 and 401.

¹⁰⁰⁵ Reehuis and Heisterkamp, (2012), p. 125; Brunner, (1994), p. 110; see Bartels and Mierlo (van), (2013), p. 371, where it is specified that the third party must have believed that the transferor had the faculty to dispose of the thing.

in Belgian and French law, as interpreted by their respective judicial authorities. Additionally, in order to be considered in good faith for the purpose of Article 3:86 (1) DCC, the acquirer must have acted in good faith with regard to the transferor's right to dispose of the object at the time of the acquisition,¹⁰⁰⁶ and more specifically, at the time of the passing of possession to the acquirer or to someone acting in his name (*bezitsverschaffing*).¹⁰⁰⁷ In this regard, Dutch law concurs with Belgian and French law, as both of these states consider the crux of the transaction to take place at the time the acquisition / taking of possession by the third party occurs (cf. Article 2269 BCC and Article 2275 FCC). This means that the third-party protection regime contained in Article 3:86 DCC also protects an innocent purchaser if he discovers that he is not the right-holder after the transfer of possession.¹⁰⁰⁸ In this regard, Dutch law is in accordance with the two other legal systems addressed above, as it also gives effect to the *mala fides superveniens non nocet* adage.

Similar to Articles 2268 BCC and 2274 FCC, Article 3:118 (3) DCC instates a presumption of good faith in favour of the possessor.¹⁰⁰⁹

Article 3:118 DCC – (3) Good faith is presumed; absence of good faith must be proven.

This provision entails that the claimant will have to rebut the presumption by demonstrating that the acquisition was not done in good faith. If successful, a purchaser must aver his good faith by laying down all the relevant facts indicative of the said good faith.¹⁰¹⁰ Henceforth, the acquirer *a non domino* must be able, at first, to provide the circumstances that exemplify that his good faith during the acquisition of the object is genuine and then that he neither knew, nor ought to have known that the alienator did not possess the faculty to dispose.¹⁰¹¹⁻¹⁰¹² The defendant has, thus, to provide evidence as to the circumstances of the acquisition and, eventually, of the steps that he has taken to comply with his obligation to inquire when the circumstances so require.¹⁰¹³ It is particularly important that the disclosure of the information does not lead to the conclusion that the acquirer had reasons to doubt the transferor's faculty to dispose.¹⁰¹⁴ It will then be for the claimant to disprove the allegations made by the defendant.¹⁰¹⁵

In addressing the standard of good faith, it must be noted that whilst the cognitive knowledge of the acquirer as to the situation is a particularly subjective notion, an objective appreciation of the situation leading to the conclusion that the acquirer ought to have known that the transferor was not entitled to dispose of the thing is possible under Article 3:11 DCC.¹⁰¹⁶ In pragmatic terms, this translates as meaning that the circumstances of the acquisition are the determinative factors in assessing the exercise of good faith¹⁰¹⁷ and, concomitantly, the

¹⁰⁰⁶ Reehuis and Heisterkamp, (2012), p. 125; Salomons, (2011), p. 112.

¹⁰⁰⁷ The crucial moment at which the good faith must be assessed is the moment of the passing of possession to the purchaser, meaning when the goods are handed over to him. See Snijders and Rank-Berenschot, (2012), p. 313; Reehuis and Heisterkamp, (2012), p. 128; Brunner, (1994), p. 120; Bartels and Mierlo (van), (2013), p. 403, citing Hoge Raad, 4 april 1986, NJ 1986/810; AA 1986, p. 790 (Apon/Bisterbosch). The same conclusion is reached by the *Hoge Raad* with regard to the assessment of good faith pre-adoption of the reviewed Dutch Civil Code of 1 January 1992. See Bartels and Mierlo (van), (2013), p. 404, citing Hoge Raad, 29 juni 1979, NJ 1980/133; AA 1980, p. 181 (Hoogovens/Matex) and Hoge Raad, 18 september 1987, NJ 1988/983; AA 1988, p. 396 e.v. (Berg/De Bary); Nonetheless, there exist some exceptions to this rule, as Article 3:115 DCC allows for the transfer of possession to be set by agreement between the parties. "Article 3:115 DCC – A bilateral declaration without material acts is sufficient for the transfer of possession: a. where the alienator possesses the thing and henceforth detains it for the acquirer by virtue of a stipulation made at the time of delivery; ^[1] where the acquirer was detentor of the thing for the alienator; ^[2] b. where a third party detained the thing for the alienator and detains it for the recipient after the transfer. In this event possession does not pass until the third party has acknowledged the transfer or has been notified of it by the alienator or acquirer". In case the transacting parties have concluded such an agreement on the basis of paragraph a (*traditio brevi manu*) or b (*traditio longa manu*), the good faith is assessed at the moment the agreement is concluded. Nonetheless, it is important to note that if the parties agree on the basis of the first paragraph (*constitutum possessorio*), then the transferor must be the possessor instead of the holder of the thing for the transfer to be effective. If the transferor is merely the detentor of the thing, then the good faith will be assessed at the time of the passing of the thing from the detentor to the acquirer. See Bartels and Mierlo (van), (2013), pp. 403-404. The moment at which they have agreed upon the transfer is then not the time at which good faith is assessed (*idem*).

¹⁰⁰⁸ Reehuis and Heisterkamp, (2012), p. 122.

¹⁰⁰⁹ Bartels and Mierlo (van), (2013), p. 402.

¹⁰¹⁰ Reehuis and Heisterkamp, (2012), p. 129; Snijders and Rank-Berenschot, (2012), p. 312; Salomons, (2011), p. 112; Bartels and Mierlo (van), (2013), p. 402.

¹⁰¹¹ Snijders and Rank-Berenschot, (2012), p. 312; Brunner, (1994), p. 120; Bartels and Mierlo (van), (2013), p. 401.

¹⁰¹² The mere possession of the object by a person other than the owner, whilst the acquirer knows the owner, is not sufficient grounds to believe the transferor had the faculty to dispose of the object. See Reehuis and Heisterkamp, (2012), p. 131. It would eventually be possible for the acquirer to rely upon said possession if his belief that the owner has mandated the possessor has been sowed by the behaviour or declarations of the owner (see Article 3:61 (2) DCC).

¹⁰¹³ Reehuis and Heisterkamp, (2012), p. 129; Bartels and Mierlo (van), (2013), p. 402.

¹⁰¹⁴ Bartels and Mierlo (van), (2013), p. 402.

¹⁰¹⁵ Bartels and Mierlo (van), (2013), p. 402, citing MvA II Invoeringswet bij art. 3:86 BW (*Parlementaire Geschiedenis BW Inv. 3, 5 en 6 Boek 3* 1990, p. 1214); Reehuis and Heisterkamp, (2012), p. 129; Salomons, (2011), p. 112; Snijders and Rank-Berenschot, (2012), p. 313.

¹⁰¹⁶ Reehuis and Heisterkamp, (2012), pp. 19, 125.

¹⁰¹⁷ Bartels and Mierlo (van), (2013), p. 401.

standard of cautiousness¹⁰¹⁸ expected from the acquirer at the time of the acquisition.¹⁰¹⁹ Decidedly, when the purchaser knows of the transferor's lack of right to dispose at the time of the passing of possession, he cannot be considered to have acted in good faith.¹⁰²⁰ The same can be concluded regarding a purchaser that could reasonably have known about the lack of right to dispose.¹⁰²¹ The standard applied in the latter situation is an objective appreciation of the imputed knowledge based upon a standard of reasonable judgement.¹⁰²² It is thus important for the purchaser to exercise a certain degree of cautiousness so as to avoid a flawed appreciation of the circumstances at the time of the acquisition.¹⁰²³ The mere detention of the object by the transferor is therefore not a sufficient indication that the transferor has the faculty to dispose of the object.¹⁰²⁴

Domestic judges play a prominent role in tackling the question of good faith:¹⁰²⁵ these judges can set tailored-made standards to assess more specifically the presence of good faith throughout the acquisition of the litigious object.¹⁰²⁶ If the circumstances so require – i.e. in cases where there might be doubts about the alienator's faculty to dispose –, the purchaser must exercise a duty to inquire – referred to as *nodige zorgvuldigheid*¹⁰²⁷ – into the rightfulness of this faculty.¹⁰²⁸ In determining whether the circumstances so require, the character of the parties – as well as their background –, the price paid, the location at the time of the acquisition, the likelihood that the transferor is the right-holder,¹⁰²⁹ the possibility to consult a register, or to consult other relevant information, constitute a few of the elements that will play a role in assessing the purchaser's good faith at the time of acquisition.¹⁰³⁰ This duty to inquire is inferred from Article 3:11 DCC: in the determination of the said good faith, the article prescribes that “such person [note author: in the present context, read ‘the acquirer’] is not acting in good faith if he knew the facts or the law to which his good faith must relate or if, in the given circumstances, he should know them”. Whenever there are indications that the alienator lacked the faculty to dispose of the object, the duty is mandatory and must be complied with, even if it was impossible for the possessor to inquire at the time of the acquisition.¹⁰³¹ In fact, Article 3:11 DCC *in fine* reads: “Impossibility to inquire does not prevent the person, who had good reasons to be in doubt, from being considered as someone who should know the facts or the law”. This is further corroborated by the findings of the *Hoge Raad* that established in 1986 that it is also possible to require from the acquirer that he ought to have known about the transferor's lack of faculty to dispose.¹⁰³² Consequently, where there are doubts about the transferor's faculty to dispose, the acquirer is required to undertake research, which in the given circumstances would be expected from him.¹⁰³³ Unfortunately, unlike French law there is no case law relating to the application of Article 3:86 DCC to cultural objects.

Synoptically, if the purchaser has any good reason to doubt the transferor's faculty to dispose, he must inquire as to the presence of this capacity with the transferor. Not being able to undertake further inquiries will result in qualifying the purchaser as not having acted in good faith.¹⁰³⁴ The exact degree of inquiry that should be exercised cannot be determined *ex ante* as this degree depends mainly upon the circumstances of the case.¹⁰³⁵ Nonetheless, it seems sufficient to synthesize that when the circumstances raise red flags to the potential purchaser, the degree of cautiousness – and thus the need for further inquiries – increases. The more doubts exist, the higher the degree of inquiries incidental to the doubts will be. If the inquiries satisfy the purchaser's doubts and objectively lead to the conclusion that the transferor has the faculty to dispose, then the purchaser will be considered as having acted in good faith during the transfer of possession.¹⁰³⁶ If, instead, the inquiries do not alleviate the concerns of the purchaser, or if he can be seen as gullible in assessing the unveiled evidence, he

¹⁰¹⁸ Reehuis and Heisterkamp, (2012), p. 125.

¹⁰¹⁹ Reehuis and Heisterkamp, (2012), pp. 19, 125; Bartels and Mierlo (van), (2013), p. 401.

¹⁰²⁰ Reehuis and Heisterkamp, (2012), p. 125; Brunner, (1994), p. 109.

¹⁰²¹ Reehuis and Heisterkamp, (2012), p. 125.

¹⁰²² Reehuis and Heisterkamp, (2012), p. 125; See also Bartels and Mierlo (van), (2013), p. 401, where it is specified that a normal standard of cautiousness is required from the acquirer.

¹⁰²³ Reehuis and Heisterkamp, (2012), p. 125.

¹⁰²⁴ Reehuis and Heisterkamp, (2012), p. 125.

¹⁰²⁵ Reehuis and Heisterkamp, (2012), p. 19; Brunner, (1994), p. 109.

¹⁰²⁶ Reehuis and Heisterkamp, (2012), p. 19.

¹⁰²⁷ Bartels and Mierlo (van), (2013), p. 401.

¹⁰²⁸ Reehuis and Heisterkamp, (2012), p. 129; Salomons, (2011), p. 112; Bartels and Mierlo (van), (2013), p. 401.

¹⁰²⁹ Bartels and Mierlo (van), (2013), p. 401.

¹⁰³⁰ Reehuis and Heisterkamp, (2012), p. 125; see also Bartels and Mierlo (van), (2013), p. 401, citing notably Hoge Raad, 14 januari 2011, *NJ* 2012/88 (Van der Plas/Janssens) for the character of the parties and the price.

¹⁰³¹ Snijders and Rank-Berenschot, (2012), p. 312; Bartels and Mierlo (van), (2013), pp. 371 and 401.

¹⁰³² Bartels and Mierlo (van), (2013), p. 401, citing Hoge Raad, 4 april 1986, *NJ* 1986/810; *JA* 1986, p. 790 (Apon/Bisterbosch).

¹⁰³³ Bartels and Mierlo (van), (2013), p. 401.

¹⁰³⁴ Brunner, (1994), p. 110.

¹⁰³⁵ Salomons, (2011), pp. 112-113.

¹⁰³⁶ Reehuis and Heisterkamp, (2012), pp. 19-20, 126.

will not be considered to have acted in good faith when proceeding with the acquisition.¹⁰³⁷ In other words, if the arguments submitted disputedly warrant the unequivocal belief of the presence of the transferor's right to dispose, or if the claimant successfully rebuts the *prima facie* showing of good faith and convincingly demonstrates a lack of good faith on behalf of the acquirer, then good faith will be missing. This means that inconclusive evidence will not be interpreted in favour of the acquirer.¹⁰³⁸ Conclusively, if the circumstances raise doubts and these doubts cannot be purged on the basis of the purchaser's inquiries, the risk that the transferor lacked the faculty to dispose is imputed upon the purchaser who, in turn, will not be able to rely on the protection given to acquisitions in good faith.¹⁰³⁹ Expressed differently, failing to comply with the standard set out in Article 3:118 (1) DCC *juncto* Article 3:11 DCC will result in qualifying the possessor as not being in good faith.¹⁰⁴⁰ If the purchaser was not in good faith, he cannot benefit from the protection laid down in Article 3:86 (1) DCC, which is designed to protect *bona fide* purchasers.¹⁰⁴¹ Nevertheless, if the four requirements posited above are complied with, the third-party protection is instantaneous, subject to the exception of the obligation of disclosure contained in Article 3:87 DCC.

Exception: obligation of disclosure

An important additional condition to the application of Article 3:86 DCC is to be found in the obligation of disclosure of Article 3:87 DCC,¹⁰⁴² which is referred to as *wegrijfsverplichting*.¹⁰⁴³

Article 3:87 DCC – (1) An acquirer, who is asked within three years from his acquisition to identify the alienator, must, without delay, provide all information which is necessary to trace that person or which he could have considered as being sufficient for that purpose at the time of his acquisition. If he does not comply with this obligation, he may not invoke the protection which the preceding article affords to an acquirer in good faith.

Following this article, the third-party protection acquired through Article 3:86 (1) DCC is waived if the good faith possessor does not disclose sufficient information to be able to retrace the whereabouts of the transferor from whom the possessor acquired the object.¹⁰⁴⁴ Concomitantly, the obligation requires the protected purchaser to disclose to the claimant the information that is necessary to trace back the transferor of the stolen object,¹⁰⁴⁵ within a period of three years following the acquisition. This obligation of disclosure discards the protection afforded by Article 3:86 (1) DCC when the acquirer does not comply with it,¹⁰⁴⁶ even though it is possible that the period of revindication has expired.

Disclosure does not mean that the acquirer must be able to give detailed information about the transferor in order to accurately establish the whereabouts of the latter. Instead, it is sufficient for the acquirer to point at a moment, time and place of acquisition so as to enable the dispossessed owner to undertake further steps to unveil the identity of the transferor.¹⁰⁴⁷ Indications such as “it was purchased in a small antique shop next to the former fire station in location x during the month of November last year” constitutes a description that is sufficient for the dispossessed person to make further inquiries.¹⁰⁴⁸ The *rationale* behind the present obligation is twofold: firstly, the obligation helps an owner that – because of the purchaser's acquisition of ownership through third-party protection – cannot revindicate anymore to rely upon other remedies, such as tort or unjust enrichment remedies.¹⁰⁴⁹ Secondly, this obliges the possessor to ascertain the identity of the transferor at the time of the acquisition, and thus constitutes a concretization of the obligation to inquire into the transferor's faculty to dispose.¹⁰⁵⁰ Furthermore, the obligation of disclosure is particularly important since the acquirer must disclose the information relating to the transferor, so as to trace back all previous right-holders.¹⁰⁵¹ Article 3:86 DCC might considerably facilitate this intricate burden when the acquirer can rely on the article's

¹⁰³⁷ Reehuis and Heisterkamp, (2012), pp. 20, 126.

¹⁰³⁸ Reehuis and Heisterkamp, (2012), p. 126.

¹⁰³⁹ Reehuis and Heisterkamp, (2012), p. 128.

¹⁰⁴⁰ Although this conclusion is inferred by reasoning *a contrario*, since the concept of possessor not in good faith is not defined in the Dutch Civil Code. See Salomons, (2011), p. 34; Reehuis and Heisterkamp, (2012), p. 126.

¹⁰⁴¹ Reehuis and Heisterkamp, (2012), p. 125.

¹⁰⁴² Bartels and Mierlo (van), (2013), p. 405.

¹⁰⁴³ Bartels and Mierlo (van), (2013), p. 406.

¹⁰⁴⁴ Reehuis and Heisterkamp, (2012), p. 128; Bartels and Mierlo (van), (2013), p. 405.

¹⁰⁴⁵ Bartels and Mierlo (van), (2013), p. 405; Brunner, (1994), p. 120.

¹⁰⁴⁶ Bartels and Mierlo (van), (2013), p. 407.

¹⁰⁴⁷ Reehuis and Heisterkamp, (2012), p. 128.

¹⁰⁴⁸ Reehuis and Heisterkamp, (2012), p. 128.

¹⁰⁴⁹ Reehuis and Heisterkamp, (2012), p. 128.

¹⁰⁵⁰ Reehuis and Heisterkamp, (2012), p. 129.

¹⁰⁵¹ Reehuis and Heisterkamp, (2012), p. 129; Bartels and Mierlo (van), (2013), p. 406. In this contribution, it is specified that although Article 3:87 DCC is meant for the first person that acquires from a transferor lacking the faculty to dispose of the thing (and not subsequent acquirers), in practice the acquirer will have to disclose the identity of the person from whom he has acquired himself (*idem*).

protection. Failing to comply with the obligation of disclosure would thus deprive him of this shortcut, and make him more vulnerable and prone to difficult burdens of proof.¹⁰⁵² Finally, it is important to note that the obligation of disclosure does not exist in Belgian or French law.

Article 3:99 DCC – acquisitive prescription

Alongside the third-party protection afforded by Article 3:86 (1) DCC, Article 3:99 DCC makes it possible for a possessor to acquire ownership upon a thing through means of acquisitive prescription.

Article 3:99 DCC – Rights in moveable things which are not registered property [...] are acquired by a possessor in good faith by uninterrupted possession for three years; [...].

This article makes it possible for the possessor that has been in possession of an object for a continuous period of three years to acquire ownership over the said object.¹⁰⁵³ What is important for the purpose of Article 3:99 DCC is how long the possessor has been in possession of the item.¹⁰⁵⁴ Despite the existence of other functions of possession,¹⁰⁵⁵ possession in the context of Article 3:99 DCC fulfils an acquisitive function.¹⁰⁵⁶ This function stems from the need to bring legal realities in accordance with factual situations.¹⁰⁵⁷ Because the possessor behaves as the right-holder, there exist a need to bring factual and legal reality in harmony after the expiration of a certain period of time.¹⁰⁵⁸ It is, therefore, required from a third party to possess to thing during the period of prescription for the purpose of the acquisitive prescription.¹⁰⁵⁹ Article 3:99 DCC thus constitutes an acquisitive prescription from which possessors in good faith can benefit after three years of continuous possession.¹⁰⁶⁰ The article has a residual role and will be applicable when the acquirer cannot rely upon Article 3:86 (1) DCC; more conspicuously, reliance upon Article 3:99 DCC is possible when the acquisition was not for value.¹⁰⁶¹ Nonetheless, in order to be entitled to rely upon Article 3:99 DCC, three conditions must be fulfilled. The conditions relate to 1) the nature of the good; 2) the quality of the possession and 3) the presence of good faith.¹⁰⁶² These three elements also play a crucial role in both Belgian and French law.

1) Nature of the good

All movable things – as defined above – can be acquired through means of acquisitive prescription.¹⁰⁶³

2) Quality of the possession

Only possessors can acquire objects through the operation of acquisitive prescription.¹⁰⁶⁴ Without possession – even if it is mediate, as was explained with reference to Article 3:107 (3) DCC –, there can be no acquisitive prescription.¹⁰⁶⁵ This entails that it is sufficient for a person to have physical control upon the thing to be considered as its detentor, and on the basis of Article 3:109 DCC to be considered as the possessor of the thing.¹⁰⁶⁶ Nonetheless, if the presumption of Article 3:109 DCC is rebutted, then it can be concluded that the mere detention is not sufficient to acquire through means of acquisitive prescription.¹⁰⁶⁷ Consequently, similar to Belgian and French law, it is important that the person that wants to acquire through means of acquisitive prescription is in possession of the object, or – in other words – that he is exercising factual control over it and does not do so for another.

¹⁰⁵² Reehuis and Heisterkamp, (2012), p. 129.

¹⁰⁵³ Brunner, (1994), p. 120.

¹⁰⁵⁴ Bartels and Mierlo (van), (2013), p. 535.

¹⁰⁵⁵ Possession is embedded with five distinct functions to protect a possessor: a defensive, a procedural, an acquisitive, a compensatory and a liability function. For more information in this regard, see Salomons, (2011), p. 36 and ff.

¹⁰⁵⁶ See Bartels and Mierlo (van), (2013), p. 390 and ff.;

¹⁰⁵⁷ Bartels and Mierlo (van), (2013), p. 101.

¹⁰⁵⁸ Bartels and Mierlo (van), (2013), p. 101.

¹⁰⁵⁹ Bartels and Mierlo (van), (2013), pp. 105 and 539, citing Hoge Raad, 3 mei 1996, NJ 1996/501 (Huizing/Stichting Andere Woonvormen), Hoge Raad, 8 september 2000, NJ 2000/629 and Hoge Raad, 31 oktober 2003, NJ 2004/38.

¹⁰⁶⁰ Brunner, (1994), p. 120.

¹⁰⁶¹ Bartels and Mierlo (van), (2013), p. 535, citing Van es 2011, p. 43.

¹⁰⁶² Snijders and Rank-Berenschot, (2012), p. 213.

¹⁰⁶³ Bartels and Mierlo (van), (2013), p. 534, citing *Parlementaire Geschiedenis Burgerlijke Wetboek Boek 3* (Inv. 3,5 en 6), 1990, p. 408 and ff.

¹⁰⁶⁴ Bartels and Mierlo (van), (2013), pp. 105 and 539.

¹⁰⁶⁵ Bartels and Mierlo (van), (2013), p. 539.

¹⁰⁶⁶ Bartels and Mierlo (van), (2013), p. 539.

¹⁰⁶⁷ Bartels and Mierlo (van), (2013), p. 539, submitting that it is not sufficient to be the detentor of the thing to acquire through means of acquisitive prescription.

To acquire the object on the basis of Article 3:99 DCC, the possession must be continuous for the prescribed period of three years.¹⁰⁶⁸ Following Article 3:101 DCC, the period of both acquisitive and extinctive prescription starts running from the day after the possessor entered into possession.¹⁰⁶⁹

Article 3:101 DCC – Prescription begins to run with the commencement of the day following the beginning of the possession.

This period terminates when the last day of the prescribed period has expired.¹⁰⁷⁰ Furthermore, a temporary involuntary loss of possession does not interrupt the running of the period of prescription, as laid down in Article 3:103 DCC; if the possession is involuntarily lost before the expiration of this period, it is still possible for the possessor to recover the possession of the thing within a period of one year running from the day of the loss of possession.

Article 3:103 DCC – Involuntary loss of property does not interrupt prescription, provided that possession is recovered within a year or an action instituted within a year leads to such recovery.

On the basis of Article 3:103 DCC, it will be possible for the possessor that has lost possession on an involuntary basis for less than one year and that has initiated legal proceedings for the recovery, or that has successfully recovered the thing within the prescribed period, to rely on the period of prescription of Article 3:99 DCC for the sake of acquiring ownership.¹⁰⁷¹ In order to be able to rely upon Article 3:103 DCC, it is not required to retake possession within one year, but instead, it is important that the individual whom relies upon the period of prescription laid down in Article 3:99 DCC has instituted proceedings for the restitution of the object within the one-year period, and that this procedure is successful.¹⁰⁷² Furthermore, Article 3:102 DCC makes it possible to compute the period of prescription from a previous possessor for the sake of calculating the acquisitive prescription of Article 3:99 DCC.¹⁰⁷³

Finally, similar to the period of extinctive prescription, the period of acquisitive prescription can be interrupted¹⁰⁷⁴ (*stuiting*) or prolonged (*verlenging*).¹⁰⁷⁵ In this regard, Dutch law mirrors Belgian law, but not French law (notably with regard to prolongation). In fact, prolongation in Dutch private law has the same effect as suspension in Belgian private law, although it differs in that it extends the suspension to six months after the cause of the suspension has disappeared.¹⁰⁷⁶

3) Good faith

After it has been established that the acquirer is in possession of the thing, it is required that the possession is conducted in good faith.¹⁰⁷⁷ If no possession can be established, then there is no need to address the question of good faith.¹⁰⁷⁸ Good faith, as required by Article 3:99 DCC, is not to be interpreted differently than for the purpose of Article 3:86 DCC. Therefore, it must be interpreted in conformity with Article 3:11 DCC,¹⁰⁷⁹ but also in light of Article 3:118 (1) DCC.¹⁰⁸⁰ In other words, the acquisition will not be considered to have been in good faith when there is a flaw in the transfer of possession that the acquirer should have been aware of.¹⁰⁸¹ Furthermore, the acquisition must comply with the requirement laid down in Article 3:84 DCC, which stipulates that the acquisition must be based on a *justa causa detentionis*¹⁰⁸² and that a delivery – as defined by Article 3:90, 3:91 or 3:95 DCC – must have occurred.¹⁰⁸³

¹⁰⁶⁸ Bartels and Mierlo (van), (2013), p. 543.

¹⁰⁶⁹ Snijders and Rank-Berenschot, (2012), p. 219; Bartels and Mierlo (van), (2013), p. 544.

¹⁰⁷⁰ Bartels and Mierlo (van), (2013), p. 544.

¹⁰⁷¹ Snijders and Rank-Berenschot, (2012), p. 219.

¹⁰⁷² Snijders and Rank-Berenschot, (2012), p. 219.

¹⁰⁷³ Snijders and Rank-Berenschot, (2012), p. 219; Brunner, (1994), p. 120; it is important to note that Article 3:102 DCC is only applicable to the period of acquisitive prescription laid down in Article 3:99 DCC and cannot be applied to the period contained in Article 3:105 DCC. This non-application is discussed in detail by the *Advocaat-Generaal* of the *Hoge Raad* – Rank-Berenschot – and confirmed by the *Hoge Raad* in Hoge Raad, Civiele kamer, 10 augustus 2012, N. 11/00459, ECLI:NL:PHR:2012:BW5324, respectively at 2.10 and 3.4.

¹⁰⁷⁴ The provisions of the Dutch Civil Code regulating the interruption of the prescription are laid down in Articles 3:316-3:319 DCC. See Bartels and Mierlo (van), (2013), pp. 546 and 547.

¹⁰⁷⁵ The provisions of the Dutch Civil Code regulating the prolongation of the prescription are laid down in Articles 3:320 and 3:321 DCC. See Bartels and Mierlo (van), (2013), p. 547. See also Bartels and Mierlo (van), (2013), p. 546 and ff. for the possibility to interrupt or prolong a period of prescription.

¹⁰⁷⁶ See Bartels and Mierlo (van), (2013), p. 549.

¹⁰⁷⁷ Bartels and Mierlo (van), (2013), p. 540.

¹⁰⁷⁸ Bartels and Mierlo (van), (2013), p. 540.

¹⁰⁷⁹ Snijders and Rank-Berenschot, (2012), p. 218.

¹⁰⁸⁰ Bartels and Mierlo (van), (2013), p. 540.

¹⁰⁸¹ Bartels and Mierlo (van), (2013), p. 540.

¹⁰⁸² Bartels and Mierlo (van), (2013), p. 540, citing Hoge Raad, 30 november 1945, NJ 1946/49.

¹⁰⁸³ Bartels and Mierlo (van), (2013), p. 540.

It is sufficient for the good faith to have been present at the time of the acquisition of the thing.¹⁰⁸⁴ Additionally, similar to Belgian and French law, Article 3:118 (2) DCC specifies that from the moment the possessor is found to be in good faith, his good faith will remain.¹⁰⁸⁵

Article 3:118 DCC – (2) Once a possessor is in good faith, he is considered to remain so.

In accordance with the *mala fides superveniens non nocet* principle, it does not matter that the acquirer discovers that the transferor did not have the faculty to dispose after the acquisition.¹⁰⁸⁶ This further entails that it is sufficient for the acquirer to have acted in good faith at the time of the acquisition in order to acquire through means of acquisitive prescription on the basis of Article 3:99 DCC.¹⁰⁸⁷ In other words, the presence of good faith for the sake of applying this article is assessed at the time of the transfer of possession¹⁰⁸⁸ and the presumption of continuity of Article 3:118 (2) DCC is only valid if the acquisition was made in good faith,¹⁰⁸⁹ even though the acquirer's cognition has changed afterwards.¹⁰⁹⁰ Thus, whilst a lack of good faith before or at the time of the passing of possession will be detrimental to the protection of the acquirer, a lack of good faith post-transfer of possession does not affect the protection given to the *bona fide* possessor.¹⁰⁹¹ If the possessor was in not in good faith at the time of the acquisition, the legal effect flowing from Article 3:99 DCC will only apply from the moment the possessor acts in good faith.¹⁰⁹² This moment might not be coterminous to the moment of the taking of possession of the object, and might thus materialize later on during the period of possession.¹⁰⁹³

(2) Third-party protection – acquisitions in good faith (involuntary loss of possession)

The previous sections considered the instances within which it was possible for a third party to acquire an object from a person that does not have the right to dispose of it. Even though a third party complies with the conditions prescribed by Article 3:86 (1) DCC, this party might still be subjected to a claim in *revindicatio* in two scenarios:¹⁰⁹⁴ the good faith possessor is deprived of any protection when he fails to provide sufficient information about the alienator within a period of three years from the moment of the acquisition in good faith (cf. Article 3:87 DCC) and when the object was stolen (cf. Article 3:86 (3) DCC).

Article 3:86 (3) DCC posits specific rules applicable to stolen objects and thus constitutes an important exception to Article 3:86 (1) DCC.¹⁰⁹⁵

Article 3:86 DCC – (3) Nevertheless, the owner of a moveable thing, who has lost its possession through theft, may revendicate (sic) it during a period of three years from the day of theft, [...]

Contrary to objects for which the owner agreed to part with the possession, the purchaser in good faith of an involuntarily lost cultural object through means of theft does not acquire instantaneous protection under the regime of Article 3:86 (1) DCC.¹⁰⁹⁶ Instead, Article 3:86 (3) DCC prescribes the time frame within which the dispossessed owner can impose his right upon a stolen object to a third party acquirer that is *prima facie* protected under Article 3:86 (1) DCC. This entails that a he is entitled to recover the property from anyone who has the object in his possession during a period of three years.¹⁰⁹⁷ In other words, following Article 3:86 (3) DCC, the owner of a stolen object is entitled to reclaim it from the hands of a good faith purchaser that acquired it in compliance with Article 3:86 (1) DCC, within a period of three years following the theft.¹⁰⁹⁸ What is more – and contrary to the regime of Articles 2279 BCC and 2276 FCC –, the regime of third-party protection posited by Article 3:86 (3) DCC in case of involuntary loss of possession only relates to the scenario of theft.¹⁰⁹⁹ This is corroborated by the submission that Article 3:86 (3) DCC is an attempt at fighting crime, as the acquisition of stolen objects should not be made too easy so as to avoid harbouring a platform for the laundering of stolen

¹⁰⁸⁴ Bartels and Mierlo (van), (2013), p. 541, citing MvA van artikel 3:99 DCC, *Parlementaire Geschiedenis Burgerlijke Wetboek Boek 3* (Inv. 3,5 en 6) 1990, p. 410.

¹⁰⁸⁵ Snijders and Rank-Berenschot, (2012), p. 219; Bartels and Mierlo (van), (2013), p. 404.

¹⁰⁸⁶ Bartels and Mierlo (van), (2013), p. 541.

¹⁰⁸⁷ Bartels and Mierlo (van), (2013), p. 541.

¹⁰⁸⁸ Bartels and Mierlo (van), (2013), p. 404.

¹⁰⁸⁹ Snijders and Rank-Berenschot, (2012), p. 219.

¹⁰⁹⁰ Snijders and Rank-Berenschot, (2012), p. 313; Brunner, (1994), p. 120.

¹⁰⁹¹ Snijders and Rank-Berenschot, (2012), p. 313.

¹⁰⁹² Bartels and Mierlo (van), (2013), p. 541.

¹⁰⁹³ Snijders and Rank-Berenschot, (2012), p. 219.

¹⁰⁹⁴ Snijders and Rank-Berenschot, (2012), p. 313.

¹⁰⁹⁵ Reehuis and Heisterkamp, (2012), pp. 123 and 132; Bartels and Mierlo (van), (2013), p. 416.

¹⁰⁹⁶ Brunner, (1994), p. 119.

¹⁰⁹⁷ Reehuis and Heisterkamp, (2012), pp. 123 and 133.

¹⁰⁹⁸ Bartels and Mierlo (van), (2013), p. 535; Brunner, (1994), p. 119.

¹⁰⁹⁹ Bartels and Mierlo (van), (2013), p. 417.

property.¹¹⁰⁰ Consequently, it is only possible for a dispossessed owner that has lost the object by means of theft to exercise his right of action in revindication against a purchaser in good faith within a period of three years following the theft.¹¹⁰¹ In order to be able to rely upon the exception of Article 3:86 (3) DCC, it is of paramount importance to comply initially with the general rule. In the present context, this means that the third-party acquirer must first comply with the conditions of Article 3:86 (1) DCC to be able to rely on the exception laid down in the third paragraph of the said article.¹¹⁰² This is no different from the situation under Belgian and French law.

Unlike Belgian and French law, the period of three years is not akin to a prefix period. Instead, this period is considered to be an expiration period (*vervaltermijn*)¹¹⁰³ within which the action in revindication must be instated.¹¹⁰⁴ What is more, the period mentioned in Article 3:86 (3) DCC does not correspond to a period of prescription.¹¹⁰⁵ More conspicuously, if Article 3:86 (3) DCC ought to be assimilated to a period of prescription, then it follows that Article 3:86 (4) DCC is deprived of any function.¹¹⁰⁶ Nonetheless, – unlike the prefix period found in Articles 2279 BCC and 2276 FCC – it is possible to interrupt the running of the three years on the basis of Article 3:86 (4) DCC.¹¹⁰⁷

Article 3:86 DCC – (4) Articles 316, 318 and 319 regarding the interruption of the prescription of a right of action apply mutatis mutandis to the period referred to in the preceding paragraph.

If the period of prescription mentioned is interrupted, a new period of three years will start running, as prescribed by Article 3:319 DCC.¹¹⁰⁸

Article 3:319 DCC – (1) The interruption of prescription of a right of action otherwise than by the institution of an action which is upheld starts a new prescription period as of the beginning of the following day. Where a binding opinion has been requested and obtained, the new prescription period begins to run at the beginning of the day following the one on which the binding opinion has been rendered.

(2) The new prescription period is equal to the original one but may not exceed five years. Nevertheless, the prescription is in no event completed until the time when the original period without interruption would have expired.

Exceptions to the exception – obligation of disclosure and market overt

The exception of Article 3:86 (3) DCC for stolen things knows of two exceptions:¹¹⁰⁹ a first one is found in the obligation of disclosure laid down in Article 3:87 DCC, which was already discussed above.¹¹¹⁰ When the possessor is unable to comply with the said obligation, he is deprived of the protection afforded by Article 3:86 DCC (cf. Article 3:87 DCC *in fine*). Note that the length of the period of Article 3:87 DCC matches the period of three years laid down in Article 3:86 (3) DCC (discussed below),¹¹¹¹ thus creating a balance between the claimant's period of revindication and the acquirer's period of protection.

A second – and no less important – exception to the owner's right of recovery of a stolen object instated by Article 3:86 (3) DCC is posited in the same article.¹¹¹² The possessor in good faith that is acting as a consumer will be able to rely on the protection offered by Article 3:86 (1) DCC within the three year revindication period,¹¹¹³ provided he can demonstrate having acquired the thing through means of market overt.¹¹¹⁴

Article 3:86 DCC – (3) [...], unless a. the thing has been acquired by a natural person, not acting in the exercise of a profession or business, from an alienator whose business it is to deal with the public in similar things, otherwise than at a public sale [note author: read in the capacity of an auctioneer], on business premises destined for that purpose, being an immoveable structure or part thereof with the land belonging thereto, and provided that the alienator be in the ordinary exercise of his business; [...]

¹¹⁰⁰ Snijders and Rank-Berenschot, (2012), p. 314.

¹¹⁰¹ Van Gaalen and Verheij, (1997), p. 194.

¹¹⁰² Reehuis and Heisterkamp, (2012), p. 133.

¹¹⁰³ Snijders and Rank-Berenschot, (2012), p. 316.

¹¹⁰⁴ Bartels and Mierlo (van), (2013), p. 418.

¹¹⁰⁵ Bartels and Mierlo (van), (2013), p. 418.

¹¹⁰⁶ Bartels and Mierlo (van), (2013), p. 418.

¹¹⁰⁷ Reehuis and Heisterkamp, (2012), p. 133.

¹¹⁰⁸ Reehuis and Heisterkamp, (2012), p. 133.

¹¹⁰⁹ Reehuis and Heisterkamp, (2012), p. 134.

¹¹¹⁰ Cf. section C. 3. (1) above.

¹¹¹¹ Bartels and Mierlo (van), (2013), p. 407.

¹¹¹² Brunner, (1994), p. 120.

¹¹¹³ Reehuis and Heisterkamp, (2012), p. 134; Bartels and Mierlo (van), (2013), p. 421.

¹¹¹⁴ Bartels and Mierlo (van), (2013), p. 423.

In the spirit of Article 3:86 (3) (a) DCC, stolen objects can be revindicated within three years from the moment of the theft, unless the ‘person who detains it without right’¹¹¹⁵ has acquired the thing in a consumer market overt setting. If the object has been acquired in this setting, then the owner cannot reclaim it from the purchaser in good faith.¹¹¹⁶ In other words, if stolen objects are at stake, the protection of Article 3:86 (1) DCC is postponed for a period of three years following the theft (cf. Article 3:86 (3) DCC), except if the said acquisition falls within the exception of sub paragraph a, and thus – in other words – if the thing has been acquired in the capacity of a consumer through market overt.¹¹¹⁷ Article 3:86 (3) (a) DCC is designed to balance the interests of consumers acquiring second hand goods and the interests of fighting crime;¹¹¹⁸ by instating this consumer’s market overt regime, the legislator has favoured consumers over both dispossessed owners¹¹¹⁹ and the fight against crime.¹¹²⁰

In line with the legitimization doctrine, it befits that – having due regard to the context within which the consumer’s market overt transaction took place – when the consumer has realized that the object was stolen, this consumer’s market overt rule is cancelled-out.¹¹²¹ The reason for discarding the consumer’s market overt protection in these circumstances is that, as a matter of rule, a consumer cannot expect an object to be stolen when purchased in a consumer’s circuit,¹¹²² but when he knows of the theft, there would be no point in protecting him. Thenceforth, the protection laid down in Article 3:86 (3) (a) DCC will only come into play when certain conditions are complied with; for the purpose of the protection afforded by this article, the purchaser must be considered as a consumer and the seller as a merchant.¹¹²³ If the circumstances deprive one of these parties of this characterization, the *bona fide* purchaser will not be entitled to rely upon Article 3:86 (3) (a) DCC. Consequently, four conditions must be strictly followed for this consumer’s market overt scenario to fall under the umbrella of Article 3:86 (3) (a) DCC.

Acquired by a natural person, not acting in the exercise of a profession or business...

The first requirement specified by Article 3:86 (3) (a) DCC is that the purchaser be an individual that acts in his private capacity and not in a professional capacity or in the name of a company.¹¹²⁴ This first condition thus discards protection to legal or natural persons that purchase the object in the course of their profession or of their business. In certain situations, it might be particularly difficult to distinguish whether the acquirer is acting in his private or professional capacity. It will be for the parties to the contention to submit the necessary evidence to prove or disprove allegations relating to the capacity of the acquirer.¹¹²⁵

... from an alienator whose business it is to deal with the public in similar things, otherwise than in the capacity of auctioneer...

Under the qualification “alienator whose business it is to deal with the public in similar things”, Article 3:86 (3) (a) DCC specifically targets professional sellers that make a living from the sale of things of the same nature on business premises destined for that purpose.¹¹²⁶ Nonetheless, things acquired from an auctioneer have been specifically excluded from the consumer’s market overt protection of Article 3:86 (3) (a) DCC.¹¹²⁷ However, these items do fall within the ‘public sale’ qualification found in Articles 2280 BCC and 2277 FCC. The protection afforded to a purchaser in good faith who had acquired at a public market that was found in the pre-

¹¹¹⁵ Cf. Article 5:2 DCC.

¹¹¹⁶ Brunner, (1994), p. 113.

¹¹¹⁷ Subparagraph b concerns ‘money and documents payable to bearer or order’. Since sub paragraph b does not relate to stolen cultural objects, it will be ignored for the purpose of the present research.

¹¹¹⁸ Bartels and mierlo (van), (2013), p. 422.

¹¹¹⁹ Hoge Raad, 14 November 1997, NJ 1998, (*Uitslag/Wolterink*), at 147: “Daarbij is de grens aldus getrokken dat particuliere kopers, mits aan de overige vereisten is voldaan, bescherming verdienen, indien zij - in de woorden van de Toelichting op de derde nota van wijziging, waarbij art. 3:86 lid 3, aanhef en onder a, voor zover hier van belang, zijn huidige tekst heeft gekregen - "een zaak hebben gekocht in de voor dergelijke zaken normale handel, waarbij met name is gedacht aan koop in een winkel of ander bedrijf met een duurzame en op een vaste plaats gevestigde bedrijfsruimte" (*Parlementaire Geschiedenis Burgerlijke Wetboek Boek 3* (Inv. 3, 5 en 6), p. 1223, laatste alinea), waar zij in beginsel geen gestolen zaken behoeven te verwachten.” Case referred to in Snijders and Rank-Berenschot, (2012), p. 316, footnote 192, but also Bartels and Mierlo (van), (2013), p. 422 (referring to page 1225 of the same *Parlementaire Geschiedenis*).

¹¹²⁰ Reehuis and Heisterkamp, (2012), p. 134.

¹¹²¹ Snijders and Rank-Berenschot, (2012), p. 316.

¹¹²² See the quote of the Hoge Raad, 14 November 1997, NJ 1998, (*Uitslag/Wolterink*), at 147 cited above, but also Bartels and Mierlo (van), (2013), p. 422.

¹¹²³ Snijders and Rank-Berenschot, (2012), p. 315.

¹¹²⁴ Reehuis and Heisterkamp, (2012), p. 134.

¹¹²⁵ See Bartels and Mierlo (van), (2013), p. 423, where an example is given of an antique dealer that purchases an antiquity from another antique dealer.

¹¹²⁶ Bartels and Mierlo (van), (2013), p. 423.

¹¹²⁷ Snijders and Rank-Berenschot, (2012), p. 315; Bartels and Mierlo (van), (2013), p. 423; Reehuis and Heisterkamp, (2012), p. 134.

1992 Dutch Civil Code¹¹²⁸ was considered to contribute to the sale of stolen objects. It was, therefore, abolished from the revised *Burgerlijk Wetboek*.¹¹²⁹

... on business premises destined for that purpose...

Following Article 3:86 (3) (a) DCC, it is important that the transaction has taken place on the seller's business premises.¹¹³⁰ In fact, this article was designed to cover acquisitions made in shops.¹¹³¹ As such, Article 3:86 (3) (a) DCC prescribes that the acquisition must have taken place on business premises destined for the exercise of the alienator's commercial activities. These premises may be located in an immovable or in part of an immovable that belongs to the land adjacent to it.¹¹³² In interpreting this provision, the notion of business premises has been given a broad meaning – even including places that are not open to the public¹¹³³ –, so as to encompass premises that technically do not qualify as a shop but where there are reasons to afford the protection from the perspective of consumers.¹¹³⁴ With this line of reasoning, the *Hoge Raad* has also given the qualification of business premises to non-permanently vested premises – meaning premises not attached permanently to the ground and, therefore, not immovable in the sense of Article 3:3 DCC – such as a caravan used as office.¹¹³⁵⁻¹¹³⁶ Furthermore, it is not required that the transaction be concluded specifically within the building within which the business operates, but it is also sufficient for the transaction to have been concluded on the premises.¹¹³⁷ Nonetheless, the following whereabouts are excluded from the present article: acquisition on a market, on a street, at a doorstep or in a bar.¹¹³⁸ A stand at a flea or antiques market will not qualify as a business premise falling within the ambit of the exception.¹¹³⁹ In general, any location within which normal business is conducted by one person which can easily be found and from which the purchaser cannot expect to find stolen objects will be considered as business premises for the purpose of Article 3:86 (3) (a) DCC.¹¹⁴⁰ In cases where it is difficult to determine whether the place of the transaction complies with the notion of business premises, it will be necessary to assess the nature and manner in which the location has been furnished from a perspective of usage as normal business premise.¹¹⁴¹

... the alienator be in the ordinary exercise of his business.

Finally, the acquisition must have taken place within the ordinary exercise of the seller's business.¹¹⁴²

(3) Third-party protection – acquisitions not in good faith.

Because good faith is required under Articles 3:86 (1), (3) and 3:99 DCC, it is impossible for a purchaser that has not acted in good faith at the moment of the acquisition to rely upon third-party protection as posited in these two articles. Instead, a purchaser whom has not acted in good faith might be confronted by an action in revindication introduced by the dispossessed owner within the statutory period of twenty years, as established by Article 3:306 DCC.

Article 3:306 DCC – Unless otherwise provided for by law, rights of action are prescribed by twenty years.

For the running of the period of extinctive prescription, reference is made to Article 3:314 (2) DCC.¹¹⁴³

¹¹²⁸ This protection was similar to the one provided in Articles 2280 BCC and 2277 FCC: the purchaser was obliged to hand back the object to the claimant but was entitled to the reimbursement of the price paid. See Bartels and Mierlo (van), (2013), p. 423.

¹¹²⁹ Brunner, (1994), p. 114.

¹¹³⁰ Brunner, (1994), p. 115.

¹¹³¹ Bartels and Mierlo (van), (2013), p. 422.

¹¹³² Reehuis and Heisterkamp, (2012), p. 134.

¹¹³³ Snijders and Rank-Berenschot, (2012), p. 315.

¹¹³⁴ Bartels and Mierlo (van), (2013), p. 422, where the following list is given: a garage where cars can be sold, a shipyard where ships are sold, a piece of land upon which an office is erected for the purpose of selling caravans and campers, an isolated room in a market hall that is used as store by regular users and supermarkets.

¹¹³⁵ Bartels and Mierlo (van), (2013), p. 423, citing Hoge Raad, 14 november 1997, NJ 1998/147 (*Uitslag/Wolterink*).

¹¹³⁶ Bartels and Mierlo (van), (2013), p. 422, where it is advanced that the *Hoge Raad* gives precedence to the rationale of Article 3:86 (3) (a) DCC instead of a literal application of its text.

¹¹³⁷ Bartels and Mierlo (van), (2013), p. 423, giving the example of a car bought on the parking lot of a garage.

¹¹³⁸ Bartels and Mierlo (van), (2013), p. 422, citing the *Parlementaire Geschiedenis Burgerlijke Wetboek Boek 3* (Inv. 3, 5 en 6).

¹¹³⁹ Reehuis and Heisterkamp, (2012), p. 134.

¹¹⁴⁰ Bartels and Mierlo (van), (2013), pp. 422-423.

¹¹⁴¹ Reehuis and Heisterkamp, (2012), p. 134.

¹¹⁴² Brunner, (1994), p. 115.

¹¹⁴³ Bartels and Mierlo (van), (2013), pp. 535 and 542.

Article 3:314 DCC – (2) The prescription period of a right of action to terminate the possession of a non-title-holder begins to run at the beginning of the day following the one on which the non-title-holder has become possessor or on which the immediate termination of the situation of which his possession forms the continuation could be claimed.

The period of extinctive prescription laid down in Article 3:306 DCC will, therefore, start running from the day another person than the right-holder exercises possession upon the thing.¹¹⁴⁴ This means that the period of twenty years laid down in Article 3:306 DCC runs from the day following the day of the first taking of possession of a stolen cultural object by a possessor that is a non-right-holder and has acquired *a non domino*. The running of the prescribed period does not depend on the knowledge acquired by the right-holder as to the facts that constitute sufficient grounds for the initiation of an action to terminate the unauthorized possession;¹¹⁴⁵ although the loss of the right of the dispossessed owner can only be justified when he has refrained from imposing his right upon others during the period of prescription,¹¹⁴⁶ Dutch law does not require that he has been informed of the identity of the possessor or of the whereabouts of the thing.¹¹⁴⁷ Following the *Hoge Raad*, the expiration of the right of action irrespective of whether the possessor has had the opportunity to initiate legal proceedings has been prescribed to ensure the certainty of commercial transactions.¹¹⁴⁸

The period of twenty years can be briefly extended for a possessor that has involuntarily lost possession of the object before the staling of the statutory period: it is important to keep Article 3:105 (2) DCC in mind, since a possessor that has involuntarily lost the possession before the expiration of the period of twenty years will be entitled to recover the object within a period of one year running from the moment of the dispossession, entitling him to acquire on the basis of Article 3:105 (1) DCC *juncto* Article 3:306 DCC.¹¹⁴⁹ If the said possessor has recovered possession of the object or has initiated the proceedings to have it returned to him within a period of one year after the dispossession, then Article 3:105 (2) DCC winds up the acquisitive effect of the prescription upon the said possessor. Furthermore, it is also important to note that it does not matter here who is responsible for the dispossession in first instance.¹¹⁵⁰ Similarly to acquisitive prescription, extinctive prescription can be interrupted or prolonged (see below).

Furthermore, as already explained above, it is possible for a possessor that has not acted in good faith to acquire ownership upon a thing through the expiration of the period of extinctive prescription by means of applying Article 3:105 (1) DCC.¹¹⁵¹

Article 3:105 DCC – (1) A person who possesses property at the time of the completion of the prescription of the right of action to terminate possession, acquires the property even if his possession was not in good faith.

This acquisition of ownership is concomitant to the expiration of the period of extinctive prescription. Consequently, the period of twenty years consolidates the right of the possessor over the thing, irrespective of how long he has possessed the said thing.¹¹⁵² What is more, Article 3:104 (1) DCC specifies that the interruption or the prolongation of the extinctive prescription has the effect of interrupting or extending the acquisitive prescription at the same time.¹¹⁵³

Article 3:104 DCC – (1) Interruption or extension of prescription of the right of action to terminate possession interrupts or extends acquisitive prescription accordingly.

The interruption or prolongation of the period of prescription of the right of action is applicable to both Articles 3:99 and 3:105 DCC.¹¹⁵⁴

Finally, because Article 3:105 *juncto* Article 3:314 (2) DCC prescribe the extinction of the right of action twenty years after the first taking of possession by a non-right-holder, it matters little that there was no sequence in possession or that prior possessors were in good faith for the purpose of Article 3:102 DCC.¹¹⁵⁵

¹¹⁴⁴ Bartels and Mierlo (van), (2013), p. 543, citing Hoge Raad, 14 november 1969, NJ 1970/283 and Hoge Raad, 8 mei 1997, NJ 1999/301 (*Luidens c.s./Het Land Aruba*). See also *ibidem*, p. 544.

¹¹⁴⁵ Bartels and Mierlo (van), (2013), p. 543.

¹¹⁴⁶ Bartels and Mierlo (van), (2013), p. 547.

¹¹⁴⁷ Bartels and Mierlo (van), (2013), p. 547.

¹¹⁴⁸ Bartels and Mierlo (van), (2013), p. 543, citing Hoge Raad, 8 mei 1998, NJ 1999/44, r.o. 3.6.

¹¹⁴⁹ Bartels and Mierlo (van), (2013), p. 542.

¹¹⁵⁰ Bartels and Mierlo (van), (2013), p. 542, citing Article 3:314 (2) DCC and MvA from the same article (*Parlementaire Geschiedenis Burgerlijke Wetboek Boek 3* (Inv. 3,5 en 6), 1990, p. 930).

¹¹⁵¹ Bartels and Mierlo (van), (2013), p. 542. See also Hoge Raad, Civiele kamer, 10 augustus 2012, N. 11/00459, ECLI:NL:PHR:2012:BW5324, at 3.4.

¹¹⁵² Bartels and Mierlo (van), (2013), p. 542.

¹¹⁵³ Bartels and Mierlo (van), (2013), p. 547.

¹¹⁵⁴ Snijders and Rank-Berenschot, (2012), p. 214.

¹¹⁵⁵ Bartels and Mierlo (van), (2013), pp. 542-543, citing Hoge Raad, 10 augustus 2012, NJ 2012/484 (*Hunnink/Opdam*) (see notably point 3.4).

Interestingly, the possibility for a thief or fencer to acquire ownership over the object after a period of twenty years of possession has been considerably subject to debate.¹¹⁵⁶ Some authors have argued that it was impossible for a thief or fencer to acquire ownership of a stolen object by means of acquisitive prescription under the aegis of Article 3:105 DCC. To them, there is no open possession, which – despite the apparent absence of any explicit statement to this effect in the article – these authors consider to be one of the conditions that must be fulfilled in order benefit from the acquisitive function of the said prescription. Others have rejected this interpretation for want of a legal basis. To their understanding, Article 3:105 DCC does not impose any additional requirement on the possessor than to possess the object at the end of the statutory period of twenty years. It is thus, to them, possible for a thief to hide an object for twenty years and then become its legal owner without further ado.¹¹⁵⁷ This interpretation – which has become the predominant view – allows a thief to become the owner after twenty years following the first taking of possession by a non-right-holder.

4. LEGAL EFFECTS

To summarize the above, it should be recalled that in cases of *bona fide* acquisition *a non domino* resulting from a voluntary loss of possession, the acquirer will instantaneously be protected on the basis of Article 3:86 (1) DCC, provided he complies with the above-mentioned conditions.¹¹⁵⁸ This protection will, nevertheless, be discarded when the possessor cannot fulfil the obligation of disclosure, as prescribed by Article 3:87 DCC.¹¹⁵⁹ Alternatively, when the conditions of article 3:86 (1) DCC cannot be complied with – such as in case of acquisition for free –, Article 3:86 (1) DCC will be of no avail and it will only be possible for the possessor to acquire ownership through means of the short acquisitive prescription posited by Article 3:99 DCC.¹¹⁶⁰ When the said acquisition follows from an involuntary loss of possession, the third paragraph of Article 3:86 DCC will come into play.¹¹⁶¹ Through this provision, the acquirer that has obtained the thing in accordance with Articles 3:86 (1) or 3:99 DCC will only be protected after the expiration of a period of three years running from the day of the theft,¹¹⁶² unless he cannot comply with the obligation of disclosure laid down in Article 3:87 DCC.¹¹⁶³ Nevertheless, the acquirer will be protected within the period of three years when the stolen object has been obtained by means of consumer market overt.¹¹⁶⁴ If the acquisition *a non domino* was not in good faith – irrespective of whether it followed from a voluntary or involuntary loss of possession –, the possessor may only acquire ownership twenty years after the first taking of possession of the thing by a person other than the right-holder.¹¹⁶⁵ This is only possible if he is in possession at the moment the period of twenty years lapses. The legal effects flowing from these rules are described in more detail below.

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)

Article 3:86 DCC – third-party protection

Despite the lack of specificity of the article,¹¹⁶⁶ the legal effect flowing from the third-party protection laid down in Article 3:86 DCC is that: the transferor's lack of faculty to dispose is corrected;¹¹⁶⁷ the thing is legally transferred to the acquirer;¹¹⁶⁸ and the dispossessed owner loses his right of ownership upon the object.¹¹⁶⁹ Henceforth, the right of ownership is transferred in full to the third party. Consequently, this person becomes the right-holder of the thing¹¹⁷⁰ and cannot be forced to give the object back to the owner. It is important to specify that, unlike in Belgian and French law, Article 3:86 DCC does not create this protection on the basis of an acquisitive prescription; instead this article corrects a deficient acquisition through means of third-party acquisition and protects the acquirer from becoming a victim of the transferor's lack of faculty to dispose.¹¹⁷¹

¹¹⁵⁶ An interesting summary of the discussion can be found in Klomp, R. J. Q., 'Dieven met geduld – Over Verkrijgende Verjaring te Kwader Trouw', in: *Tijd en onzekerheid, BW-kerant-jaarboek 16*, (Gouda Quint: Deventer, 2000), text available at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/36936/266.pdf?sequence=1>, last retrieved on 01.03.2018.

¹¹⁵⁷ For more information about this issue, see Salomons, (2011), p. 35, notably footnote 56; See also Brunner, (1994), p. 121.

¹¹⁵⁸ Cf. section C. 3. (1) above.

¹¹⁵⁹ Cf. section C. 3. (1) above.

¹¹⁶⁰ Cf. section C. 3. (1) above.

¹¹⁶¹ Cf. section C. 3. (2) above.

¹¹⁶² Cf. section C. 3. (2) above.

¹¹⁶³ Cf. section C. 3. (1) above.

¹¹⁶⁴ Cf. section C. 3. (2) above.

¹¹⁶⁵ Cf. section C. 3. (3) above.

¹¹⁶⁶ Bartels and Mierlo (van), (2013), p. 414.

¹¹⁶⁷ Bartels and Mierlo (van), (2013), pp. 391-392 and 413.

¹¹⁶⁸ Bartels and Mierlo (van), (2013), pp. 370, 391-392, 413 and 414.

¹¹⁶⁹ Bartels and Mierlo (van), (2013), p. 369.

¹¹⁷⁰ Bartels and Mierlo (van), (2013), p. 370.

¹¹⁷¹ Bartels and Mierlo (van), (2013), p. 368.

Furthermore, this third party can then validly transfer the thing to another, as the former is now to be considered as holding the faculty to dispose.¹¹⁷² It is, nonetheless, possible for the owner that has lost this right to obtain compensation for the loss from the transferor that did not have the faculty to dispose of the thing through the use of a tort action.¹¹⁷³

A contrario, if the possessor has not complied with the conditions laid down above for the purpose of Article 3:86 DCC, he will either have to give back the object to the claimant, or it might be possible to fall back on Article 3:99 DCC (see section C (3) (1) above).

Article 3:99 DCC – Acquisitive prescription

The effect of the expiration of the acquisitive prescription is to convey ownership to the acquirer,¹¹⁷⁴ discarding the possibility for the claimant to reclaim the object from him.¹¹⁷⁵ This acquisitive effect creates a retroactive right of ownership that is operative from the day of the taking of possession.¹¹⁷⁶ The acquisition of the said right by the possessor also means that the dispossessed owner loses his right of ownership over the thing.¹¹⁷⁷

If the possessor fails to comply with the requirements necessary for the purpose of Article 3:99 DCC posited above, then the holder acquires no right of ownership and the dispossessed owner can reclaim the object from him.

(2) Third-party protection – acquisition in good faith (involuntary loss of possession)

If the claim in revindication is successfully lodged within the prescribed period of time, the possessor is obliged to give back the object to the owner. The only exception to this obligation is the one of consumer market overt that is found in Article 3:86 (3) (a) DCC, which entitles the possessor to keep the item. When the action in revindication is not instated within the period of three years prescribed by Article 3:86 (3) DCC and when the acquisition is done in accordance with the requirements laid down in Articles 3:86 (1) *juncto* 3:84 (1) DCC, then the acquirer will be protected on the basis of Article 3:86 (1) DCC.¹¹⁷⁸ In other words, at the end of the period laid down in Article 3:86 (3) DCC, the ownership of the dispossessed owner is divested from him and transferred to the possessor.¹¹⁷⁹ As such, because the deficient transaction between the possessor and his transferor is corrected, the right to the object acquired through Article 3:86 (3) DCC is given a retroactive effect from the moment of the acquisition.¹¹⁸⁰ Furthermore, if the purchaser is protected under Article 3:86 (3) DCC, any subsequent acquirer of the object will be able to rely upon this protection against the dispossessed owner.¹¹⁸¹

But for this protection, it is additionally possible for the third party to acquire ownership through the application of Article 3:99 DCC.¹¹⁸² Article 3:99 DCC is thus important when a good faith possessor acquired a stolen cultural object *a non domino* by gratuitous title.

(3) Third-party protection – acquisition not in good faith

If the claim in revindication is exercised within the statutory period of twenty years running from the first day of the taking of possession by another, then the possessor lacking good faith must give back the thing to the claimant. In other words, the revindication remains open to the claimant for the period of twenty years when the item is in the hands of a thief or an acquirer that did not act in good faith (cf. Article 3:306 DCC).¹¹⁸³ It is, therefore, impossible for a thief or an acquirer that did not act in good faith to obtain ownership upon the thing within this period of twenty years following the theft. Nevertheless, if the revindication is not exercised within this period of twenty years, the practical effect of the expiration of the period of extinctive prescription is that the possessor acquires the ownership upon the thing by operation of law;¹¹⁸⁴ because the possessor does not acquire ownership through a continuous possession during a prescribed time period, but acquires ownership by means of expiration of the period of extinctive prescription (cf. Article 3:105 DCC), it is not possible to speak of

¹¹⁷² Bartels and Mierlo (van), (2013), pp. 414-415.

¹¹⁷³ Bartels and Mierlo (van), (2013), p. 369.

¹¹⁷⁴ Bartels and Mierlo (van), (2013), p. 550.

¹¹⁷⁵ Snijders and Rank-Berenschot, (2012), p. 213.

¹¹⁷⁶ Bartels and Mierlo (van), (2013), p. 551.

¹¹⁷⁷ Bartels and Mierlo (van), (2013), p. 550.

¹¹⁷⁸ Bartels and Mierlo (van), (2013), p. 418.

¹¹⁷⁹ Snijders and Rank-Berenschot, (2012), p. 221.

¹¹⁸⁰ Reehuis and Heisterkamp, (2012), p. 133.

¹¹⁸¹ Reehuis and Heisterkamp, (2012), p. 135.

¹¹⁸² Reehuis and Heisterkamp, (2012), p. 133.

¹¹⁸³ Bartels and Mierlo (van), (2013), p. 418.

¹¹⁸⁴ Bartels and Mierlo (van), (2013), pp. 550 and 551.

acquisition through prescription.¹¹⁸⁵ Instead, the acquisition is coupled with the expiration of the right of action.¹¹⁸⁶ The dispossessed owner will be barred from exercising his right of action against the possessor that has become a right-holder through the expiration of the extinctive prescription period.¹¹⁸⁷ It is important to emphasize that the acquisition of the ownership upon the thing also implies the loss of the right of ownership of the dispossessed owner.¹¹⁸⁸

¹¹⁸⁵ Bartels and Mierlo (van), (2013), p. 542.

¹¹⁸⁶ Bartels and Mierlo (van), (2013), p. 542, where reference is made to the MvA (*Parlementaire Geschiedenis Burgerlijke Wetboek Boek 3* (Inv. 3,5 en 6), 1990, p. 419) in which this method of acquisition is described as acquisition through prescription. Further reference is made to Van Schaik, *Rechtsgevolgen en functies van bezit en bouderschap* (Mon. Nieuw BW nr. A14) 2003/97.

¹¹⁸⁷ Snijders and Rank-Berenschot, (2012), p. 213.

¹¹⁸⁸ Bartels and Mierlo (van), (2013), p. 550.

Summary

Introductory remark – Hitherto, Belgium has not become a party to the 1995 convention, and has not instated a *lex specialis* for the acquisition of cultural objects in its private law regime. Therefore, books II and III of the Belgian Civil Code (BCC) are applicable to these acquisitions. Similar to Belgium, France has not ratified the convention to date, although it did sign the instrument at the time of its inception. In much the same way as Belgium, France subjects cultural objects to its general rules of private law. More particularly, book 3 of the French Civil Code (FCC) regulates the contemplated triangular situation. Much like France, The Netherlands signed the convention in its early days, but has not yet ratified it. Instead, it has decided to adopt a UNESCO Plus solution in its implementation of the 1970 convention. Transfers of stolen cultural objects are thus primarily regulated by books 3 and 5 of the Dutch Civil Code (DCC).¹¹⁸⁹

Ownership – Article 544 BCC defines ownership as the right to enjoy and dispose of property in the most absolute manner, provided that the said right is not exercised in a way that is prohibited by statutes or regulations. Similar to Article 544 BCC, Article 544 FCC speaks of ownership in comparable terms. In The Netherlands, Article 5:1 (1) DCC defines ownership as the most comprehensive right that a person can have over a thing. The second paragraph of Article 5:1 DCC imposes, nonetheless, restrictions to the right. Consequently, in all three jurisdictions, the absoluteness of ownership is relativized by legal constraints.¹¹⁹⁰

Possession – Possession is defined in Article 2228 BCC as “the detention or the enjoyment of a thing or of a right that one holds or that one exercises for himself, or by another that holds or exercises in one’s name”. Article 2255 FCC defines possession in almost the same words. Dutch law departs from these two definitions as Article 3:107 (1) DCC defines possession as a fact of detaining for oneself. Furthermore, in both Belgian and French law, possession is a situation of fact with legal effects and implies a factual control over a thing for oneself. Possession in Dutch law has a hybrid nature depending on the function played. But for this difference, in all three states a possessor is not an owner but a non-owner that exercises prerogatives belonging to the right of ownership. Therefore, possession often constitutes a presumption of ownership that is separate from the question of right-bearing. In both Belgian and French law, it is impossible to transfer one’s possession to another. This is different in Dutch law, as Article 3:114 DCC explicitly authorizes a transfer of possession.¹¹⁹¹

Corpus and animus – In order to speak of possession, the three jurisdictions under scrutiny require that the factual holding of the object must comply with the requirement of *corpus* and *animus*. Whenever there is a lack of either *corpus* or *animus*, there can be no possession *de jure*. These two conditions – respectively, the factual and cognitive constitutive elements of possession – are clearly distinguished in Belgian and French law. The first requirement relates to the factual control over the object. This factual control is appreciated by the domestic court seized through analysing the behavior of the person holding the object *in concreto*. Whilst Belgian law limits this assessment to the acts performed by the holder that coincide with the exercise of the right of ownership, French courts assess the behavior of the person holding the object in comparison to what a *bonus pater familia* would do as bearer of the right of ownership. What is more, Belgian, French but also Dutch law all adhere to the adage *possession animo suo, corpore alieno*, meaning that possession can be exercised either directly or indirectly.¹¹⁹² The *animus* implies that possession is for oneself; as of right; and is, therefore, indicative of the right concerned. The *animus* entails that the possessor has the unconditional intention to exercise physical control over the object for himself – i.e. not for another –, and that this intention is always present when exercising the factual control either directly or indirectly. Furthermore, both Belgian and French law require the *animus* to be exercised directly. Articles 2230 BCC and 2256 FCC both create a presumption of possession for oneself to facilitate the demonstration of this direct exercise. But for this presumption, the presence of the *animus* will be determined on the basis of the objectively ascertainable usage of the object; objective standards of determination are applied to determine the presence of *animus domini*. This means, for example, that a temporary use of the item will negate the presence of the *animus*. It is important for the possessor not to believe that his factual control is temporary. The *causa detentionis* is, therefore, determinative in discerning the *animus*; if it can be established on the basis of the *causa detentionis* that there was an *ab initio* obligation to give the object back, it is possible to conclude that there is no *animus*. Whilst both Belgian and French law clearly distinguish the two requirements of *corpus* and *animus*, Dutch law seems to assimilate both concepts to one another, meaning that the *animus* is demonstrated through

¹¹⁸⁹ Cf. sections A., B. and C. above.

¹¹⁹⁰ Cf. sections A. 1. (1), B. 1. (1) and C. 1. (1) above.

¹¹⁹¹ Cf. sections A. 1. (1), B. 1. (1) and C. 1. (1) above.

¹¹⁹² Cf. Article 2228 BCC *in fine*, Article 2255 FCC *in fine* and Articles 3:107 (2) and (3) DCC.

the *corpus*. Therefore, a presumption of possession for oneself, similar to the ones posited by Articles 2230 BCC and 2256 FCC is posited in Article 3:109 DCC. Article 3:108 DCC and ff. explains how the presumption of Article 3:109 DCC is to be objectively appreciated. This means that, similar to Belgian and French law, the *animus* must be externalized in some way and be objectively ascertainable. Furthermore, it may not be confused with the concept of good faith, which exists in the three jurisdictions under scrutiny independently of the question of possession.¹¹⁹³

Detention – Ownership and possession must be distinguished from detention in all three jurisdictions. Possession as of right must be distinguished from detention, which is similar to possession but without the *animus*. The *animus* is lacking because the detentor has no intention to hold the object for himself. Consequently, he may not enjoy the protection that is conferred upon possessors, such as the protection flowing from acquisitive prescription.¹¹⁹⁴

Theft – Theft is defined in Article 461 BCrC in the following words: “Whomever subtracts fraudulently a thing that does not belong to him is guilty of theft. (An act of fraudulent subtraction of a thing belonging to another for the purpose of temporarily using the thing is assimilated to theft)”. Because Article 461 BCrC requires a fraudulent appropriation by another who is not entitled to hold the object, even for the purpose of temporary use, theft is given a broad appreciation in Belgian law. Nonetheless, criminal acts presupposing a voluntary transfer of possession – such as abuse of confidence or swindle – do not qualify as theft for the purpose of Article 461 BCrC. The definition of theft as given by Article 461 BCrC is applied in private law and can be relied upon for example for the purpose of acquisitive prescription,¹¹⁹⁵ or to make the remedy of revindication available. Article 311-1 FCrC refers to theft as the fraudulent appropriation of a thing belonging to another person. Similar to Belgian law, a temporary appropriation also qualifies as theft. Furthermore, situations of voluntary loss of possession – such as abuse of confidence or swindle – do not fall with the ambit of Article 311-1 FCrC, in accordance with Belgian law. Additionally, theft as defined by article 311-1 FCrC is relevant to the application of the private law rules contemplated, such as Articles 2276 and 2277 FCC. Article 310 DCrC provides a similar definition of theft: “He who takes away a thing that belongs to another in its entirety, or in part, with an intention of unauthorized appropriation is guilty of theft”. This article is to be strictly construed for the purpose of Articles 3:86 (3) and 3:87 DCC. Furthermore, Dutch law also differentiates theft from embezzlement, which is not caught by Article 3:86 (3) DCC. Only the forms of misappropriations that flow from an involuntary loss of possession and comply with Article 310 DCrC are relevant to the application of Article 3:86 (3) and 3:87 DCC.¹¹⁹⁶

Cultural object – In all three jurisdictions concerned, cultural objects are subjected to the private law rules applicable to corporeal objects. In Belgian, French and Dutch law, cultural objects are assimilated to movable corporeal things.¹¹⁹⁷

Legal remedy – The three jurisdictions recognize revindication as the most important petitory action available to an owner to recover a stolen cultural object from a person that holds it. This action, rooted in property law, is to be found respectively in Articles 2279 BCC, 2276 FCC and 5:2 DCC. This action can only be relied on by owners, possessors and detentors in Belgian law, by owners in French law and by both owners and possessors in Dutch law. In the three jurisdictions, the claimant must prove: to have been dispossessed by means of theft; his superior right over the stolen object in contrast to the possessor’s right; and that the litigious object is the same as the one that was stolen. In all three jurisdictions, the action in revindication can be exercised against any holder of the object that detains it without having the right to do so.¹¹⁹⁸ In Belgian and French law, the revindication has the effect of retrieving the object from where it is located. Because revindication is a petitory action, it can only be invoked against the current possessor or detentor of the stolen property. This means that it can be invoked against the thief in possession of the stolen object, or against any other detentor or possessor irrespective of whether the identity of the thief is known. Dutch law provides an additional option to a claimant, as the object can be retrieved from both a possessor in mediate possession or a detentor in mediate detention, provided these persons are able to instruct the detentor to hand back the property.¹¹⁹⁹

¹¹⁹³ Cf. sections A. 1. (1), B. 1. (1) and C. 1. (1) above.

¹¹⁹⁴ Cf. sections A. 1. (1), B. 1. (1) and C. 1. (1) above.

¹¹⁹⁵ Cf. Articles 2279 and 2280 BCC.

¹¹⁹⁶ Cf. sections A. 1. (2), B. 1. (2) and C. 1. (2) above.

¹¹⁹⁷ Cf. sections A. 1. (3), B. 1. (3) and C. 1. (3) above.

¹¹⁹⁸ Cf. Articles 2279 BCC, 2276 FCC and 5:2 DCC.

¹¹⁹⁹ Cf. sections A. 1. (4), B. 1. (4) and C. 1. (4) above.

Prescription – Article 2219 BCC defines prescription as a “means of acquisition or of liberation triggered by the passage of a certain lapse of time, and subject to the conditions established by law”. Unlike Belgian law, neither French law, nor Dutch law have adopted a general definition of prescription. Nevertheless, prescription in the three jurisdictions serves to bring finality to procedures when memories wane, witnesses disappear, evidences are destroyed and ink fades. It also serves to bring *de facto* situations in line with its *de jure* appreciation. All three jurisdictions recognize two forms of prescription in the present context: acquisitive and extinctive prescriptions. In Belgian and French law, extinctive prescription – to be found in Articles 2219 BCC and 2219 FCC respectively – has no bearing on the exercise of a revindication due to the imprescriptible nature of ownership. Dutch law differs from the two in that the general rule is that a right of action prescribes by means of extinctive prescription twenty years after the right has not been exercised.¹²⁰⁰ Therefore, it is important to take into consideration the amount of time during which the owner has lost possession of the object for the purpose of this provision. After twenty years, the right to resort to the revindication prescribes. Next to extinctive prescription, the three jurisdictions adhere to the mechanism of acquisitive prescription. In Belgian law, acquisitive prescription is to be found in both Articles 2262 BCC (i.e. long prescription) and 2279 BCC (i.e. short prescription). Both long and short acquisitive prescriptions are only operative through the exercise of possession.¹²⁰¹ As long as nobody acquires ownership through means of acquisitive prescription, the owner’s right of ownership and the adjacent action in revindication remain unconstrained. Nevertheless, the length of the possession necessary to acquire by means of acquisitive prescription is determined by the exercise of good faith. In case of possession flowing from a good faith acquisition, the third-party protection by means of acquisitive prescription is immediately operative.¹²⁰² Nevertheless, when an acquisition is made in bad faith, the possessor can only acquire ownership through means of acquisitive prescription after thirty years.¹²⁰³ Acquisitive prescription is defined in French law in Article 2258 FCC. This article defines the concept as a means of acquiring a thing or a right through possession without there being a need by the one alleging it to show some title in support, or without it being possible to oppose to him an exception inferred from bad faith. Similar to Belgian law, French law provides a long (i.e. thirty years) and a short (i.e. immediate) period of prescription, which are to be respectively found in Articles 2272 and 2276 FCC. In harmony with Belgian law, French law applies a short period of acquisitive prescription when the acquisition was conducted in good faith¹²⁰⁴ and a long period¹²⁰⁵ when the acquisition was conducted in bad faith. Furthermore, as long as nobody acquires ownership by means of acquisitive prescription, the dispossessed owner can exercise revindication to have the object returned to him. Despite the changes brought about by the 2008 reform to the FCC, the regime has not been changed by these modifications: good faith is still required for the purpose of a short acquisitive prescription and bad faith merely protracts the period of possession before it is possible to acquire by means of acquisitive prescription. Similar to Belgian and French law, Dutch law provides both a long,¹²⁰⁶ but also a short acquisitive prescription period.¹²⁰⁷ Similar to Belgian and French law, Dutch law also allows a possessor to acquire through means of acquisitive prescription at the expiration of the period of extinctive prescription, thereby extinguishing the right of action. Nevertheless, unlike Belgian and French law, it has codified the assimilation of the period of extinctive prescription to acquisitive prescription through Article 3:105 DCC.¹²⁰⁸

Voluntary / involuntary loss of possession – The three jurisdictions under scrutiny all distinguish situations of voluntary and involuntary loss of possession. In the three states, theft is considered as a means of involuntary loss of possession that triggers specific rules for third-party protection in case of acquisition *a non domino*.¹²⁰⁹ These rules provide a period of three years for the owner to retrieve his stolen property.¹²¹⁰

Nemo dat quod non habet – The period of three years prescribed to recover a stolen cultural object stems from the fact that the three jurisdictions abide by the *nemo dat quod non habet* principle, which means that thieves cannot transfer more than what they have to a subsequent possessor. Since a thief has no right to the stolen object, he transfers nothing to another. Nevertheless, in all three jurisdictions, there exist exceptions to the *nemo dat* principle for the sake of securing commercial transactions by which the owner’s right to recover a stolen

¹²⁰⁰ Cf. Article 3:306 DCC.

¹²⁰¹ As defined by Article 2228 BCC.

¹²⁰² Cf. Article 2279 BCC.

¹²⁰³ Cf. Article 2262 BCC.

¹²⁰⁴ Cf. Article 2276 FCC.

¹²⁰⁵ Cf. Article 2272 FCC.

¹²⁰⁶ Cf. Articles 3:105 and 3:306 DCC.

¹²⁰⁷ Cf. Article 3:99 DCC.

¹²⁰⁸ Cf. sections A. 1. (5), B. 1. (5) and C. 1. (5) above.

¹²⁰⁹ Cf. Articles 2279 BCC, 2276 FCC and 3:86 DCC.

¹²¹⁰ Cf. sections A. 2. (1), B. 2. (1) and C. 2. (1) above.

object is limited in time. It is important to note that, contrary to Belgian and French law, Dutch law knows of two exceptions in case of good faith acquisitions instead of one.¹²¹¹⁻¹²¹²

Third party protection – In operationalizing the above, it should be recalled that – as a derogation to the *nemo dat* principle – possession is a means for the possessor to acquire ownership over the object through means of third-party protection. Three scenarios of third-party protection exist in all of the jurisdictions addressed: (1) third-party protection in case of good faith acquisition following a voluntary loss of possession, (2) third-party protection in case of acquisition in good faith following an involuntary loss of possession and (3) third-party protection in case of acquisition in bad faith / not in good faith. Although theft is not a means of voluntary dispossession, the scenario of voluntary dispossession must be analysed to the extent that the rules of third-party protection constitute the basis of the theory relating to the scenarios concerning involuntary loss of possession. Consequently, the three scenarios are discussed in detail for each jurisdiction.¹²¹³

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)

In case of good faith acquisition flowing from a voluntary loss of possession, it possible for a *bona fide* possessor to acquire ownership of the object by means of acquisitive prescription on the basis of Article 2279 BCC. The same is possible in French law based on Article 2276 FCC. Dutch law differs from Belgian and French law as it proposes two different means of third-party protection: the first one – correcting the transaction between the *a non domino* acquirer and the transferor lacking the faculty to dispose of the object – is laid down in Article 3:86 DCC. The other – by which the possessor acquires by means of acquisitive prescription – is laid down in Article 3:99 DCC.

In order to acquire on the basis of these articles, the possession must comply with stringent conditions: to acquire ownership on the basis of Article 2279 BCC, three conditions must be fulfilled: 1) the prescription must relate to an object that can be acquired by means of acquisitive prescription; 2) the possession must be real, *pro suo* and must be free of defects and 3) the possessor must have acquired the object in good faith. Article 2276 FCC requires similar conditions: 1) the nature of the property must be such that it can be acquired by means of acquisitive prescription; 2) the possession must be effective, genuine and free of defects and 3) good faith must be present during the acquisition. Although a means of third-party protection, Article 3:86 DCC is not a provision dealing with acquisitive prescription. Instead, this article allows correcting the transaction by which the possessor has acquired nothing from the transferor lacking the faculty to dispose of the property. For this transfer to be corrected, the acquisition must comply with the requirements posited in 1) Article 3:83 DCC, 2) Article 3:84 DCC and 3) Article 3:86 (1) DCC. Alongside Article 3:86 DCC, Article 3:99 DCC constitutes a short acquisitive prescription flowing from an uninterrupted possession of three years. This article is, similar to Articles 2279 BCC and 2276 FCC, an acquisitive prescription. Furthermore, it has a residual function as it will only be relevant to an acquisition that fails to comply with Article 3:86 DCC. Similar to Articles 2279 BCC and 2276 FCC, Article 3:99 DCC requires the possession 1) to be over a good capable of appropriation by means of acquisitive prescription, 2) for the possession to be embedded with certain qualities and 3) for it to have materialized in good faith.¹²¹⁴

First sentence of Article 2279 BCC – 1) Acquisitive prescription applies to all corporeal movable objects that do not fall within a special protected category. In short, it does not apply to non-individualized objects, movables accessories to an immovable, movables by anticipation, objects classified as belonging to the public domain and registered movables.

2) To be operative for the purpose of acquisitive prescription, the possession must be real, *pro suo* and free of defects. A real possession means that the possessor has factual control upon the object and that he is required to put the owner on notification of his adverse possession. A possession *pro suo* entails that the possessor exercises possession as of right (i.e. reuniting both the *corpus* and *animus*, as explained above). Furthermore, the possession must be free of defects. This entails that it must comply with the conditions laid down in Article 2229 BCC and, therefore, that the possession must be continuous and uninterrupted, peaceful, public, unequivocal and in the quality of an owner (i.e. as of right). These conditions do not affect possession in itself, but constitute a *sine qua non* to acquisitive prescription by means of possession. A possession is not continuous when the possessor does not exercise acts of possession at the time when a conscientious owner would exercise these acts. Therefore, a continuous possession presupposes acts of possession over the object at

¹²¹¹ Cf. Articles 3:86 and 3:99 DCC.

¹²¹² Cf. sections A. 2. (2), B. 2. (2) and C. 2. (2) above.

¹²¹³ Cf. sections A. 3., B. 3. And C. 3. above.

¹²¹⁴ Cf. sections A. 3. (1), B. 3. (1) and C. 3. (1) above.

times during which the owner would exercise these acts of possession. Because Article 2234 BCC presumes continuity in the possession, it is for the party asserting the gap in continuity to demonstrate it. Furthermore, if the possession is resumed, the presumption of Article 2234 BCC allows the possessor to rely on the in-between period for the purpose of acquisitive prescription. Lack of continuity in possession constitutes an absolute defect in the possession, which can thus be invoked by anyone. The requirement of peaceful possession entails either that the possession was taken without violence in its inception, or that the possessor acts as a normal diligent possessor (i.e. a *bonus pater familia*) against acts of violence by others during the possession. Article 2233 BCC specifies that acts of violence cannot be constitutive of a possession that is capable of operationalizing into acquisitive prescription and that the possession is only freed of the defect once the violence has ceased. Therefore, the presence of violence will lead to a defective possession. Violence is unanimously interpreted by doctrine by reference to Articles 1112-1114 BCC. An acquisitive prescription will only start running once the acts of violence have stopped. What is more, violence is a relative concept that needs to be invoked by the victim. Finally, because a thief is deemed to have taken possession by means of violence and that this violence is deemed continuous, he can never benefit from the mechanism of acquisitive prescription. Next to a continuous and peaceful possession, the possession must also be public. This entails that the possessor may not hide the object from those who have an interest in knowing about the existence of the possession, i.e. that could put an end to it. Therefore, the public character of the possession is a relative notion that can only be invoked by the parties having an interest in knowing about the possession. The surreptitiousness of the possession is thus to be assessed by the judge adjudicating upon the facts, based on the interactions between the parties. The nature of the object must also be taken into consideration in addressing the surreptitiousness. Although the public character of the possession is otiose when the possessor acquires immediately through Article 2279 BCC, this element weighs considerably when there is no instantaneous protection. Finally, an ambiguous possession will constitute a defect in possession that will affect acquisitive prescription. A possession is considered ambiguous when there exist doubts as to the intention to possess for oneself, doubts with regard to the exclusiveness of the possession or when the possession can be interpreted in several ways (e.g. of concurring claims over the same object). Importantly, an ambiguous possession must not be confused with bad faith: the ambiguity of possession will impair acquisitive prescription, whilst bad faith will not.

3) To acquire through means of acquisitive prescription on the basis of Article 2279 BCC, the possessor must acquire the object in good faith. Although this condition is not to be found in the Belgian Civil Code, it has been unanimously constructed by doctrine as an implied condition to the short acquisitive prescription of Article 2279 BCC. In constructing this implicit requirement, doctrine has extrapolated the condition of good faith from Article 1141 BCC. Good faith is defined in Article 550 BCC in the following words: “A possessor is in good faith when he possesses as an owner, on the basis of a title translatif of ownership, whose defects he does not know. The possessor is no longer in good faith when these defects are known to him”. Good faith thus means that the possessor, possessing as of right, genuinely did neither know, nor ought to have known, that the transferor was not the owner – or lacked the faculty to transfer ownership – or that the *causa detentionis* was not valid. In other words, good faith means that the possessor does not know, nor ought to have known, that he has not become the owner of the good through his acquisition (i.e. actual or constructive notice of the lack of right to dispose by the transferor). Therefore, doubts as to either the transferor’s faculty to dispose of the property or a too credulous belief that the transferor has the capacity to transfer, lead to the conclusion that the possessor has not acquired the object in good faith. Furthermore, good faith requires that the object be acquired by means of *justa causa detentionis*, thus that it was acquired by an act of *traditio* transferring ownership (nevertheless, this *justa causa detentionis* is presumed and the possessor does not need to demonstrate it). Article 2269 BCC requires that the good faith be present at the inception of the possession, thus at the time of the acquisition of the object. Because Belgian law requires the possessor to handle innocently at the time of the acquisition, it does not matter that he discovers that he is not the right-holder after the said acquisition, in accordance with the *mala fide superveniens non nocet* adage. What is more, Article 2268 BCC creates a presumption of good faith in favour of the possessor. The person challenging this good faith must, therefore, rebut this presumption by proving the lack of good faith. It will be important for the one that challenges the good faith to show that the acquisition was not in good faith so as to reverse the burden of proof. The possessor will then have to prove that the acquisition has been carried out in good faith. This reversal is a question of fact left to the appreciation of the judge adjudicating upon the facts. If the presumption is successfully rebutted, the possessor will have to demonstrate that he entered into possession in good faith. Similar to the shifting of the burden of proof, the exercise of good faith by the defendant at the time of the acquisition is left to the discretion of the judge adjudicating upon the facts of the case. To appreciate the good faith of the defendant, the court will objectively assess the knowledge that the possessor has or ought to have had as to the transferor’s faculty to dispose (in accordance with Article 550 BCC). Specific attention is thus given to the circumstances of the acquisition and the standard of assessment is the one of inexcusability (i.e. *culpa levis in abstracto*). Elements that could have influenced the acquirer’s knowledge

– such as the character of the transacting parties, secrecy as to the identity of the seller by the use of a middleman – are taken into computation in the assessment. If these elements lead to the conclusion that the possessor should have had doubts about the transferor's faculty to dispose at the time of physical transfer of the object, then the court will conclude that the possessor did not act in good faith, i.e. that he was in bad faith. In conclusion, any red flags that could have raised doubts to the possessor when acquiring the object are taken into consideration in assessing the presence of good faith. The presence of red flags entails a further duty of inquiry from the possessor. This duty of inquiry does not mean that the acquirer must undertake comprehensive research into the transferor's right to dispose, but the degree of inquiries to justify the presence of red flags depends on both the nature of the object and the character of the acquirer. Compliance with the duty is assessed in light of what a prudent person would do in the same circumstances and must thus be evaluated on the basis of the situation *in concreto*.¹²¹⁵

First sentence of Article 2276 FCC – 1) In accordance with Belgian law, acquisitive prescription can only operate on movables that can be subject to acquisitive prescription. Article 2276 FCC is exclusively to be applied to individualized corporeal movable objects that can be passed through a manual *traditio*. Furthermore, family souvenirs, registered movables, movables belonging to the public domain and all inalienable goods are excluded from the scope of Article 2276 FCC.

2) The possession must be effective, genuine and free of defects. An effective possession entails that the object was acquired through an effective *traditio* and that the possessor has material detention of the object. These two conditions also exist in Belgian law, although the *traditio* is mirrored in the *justa causa detentionis* requirement adherent to good faith. The material detention is also present in Belgian law in the form of the 'real possession' requirement. Nevertheless, Belgian law requires that the material possession be *corpore suo*. French law differs on this point as the possession may not be *corpore alieno*, but it is possible for the possession to be exercised *solo animo* through a detentor. It is then sufficient for the possessor to have the object at his disposal when needed. Nevertheless, both Belgian and French law recognize that the possessor will not be protected if the possession remains with the transferor (i.e. *constitutum possessorium*), or if the holder has mere detention instead of possession. Alongside effective possession, French law requires that the possession be genuine. To be genuine, the possessor must possess as of right. This condition matches the Belgian requirement that the possession be *pro suo*. Here too, a mere detention will be insufficient to satisfy this requirement of genuine possession. Furthermore, the genuineness of the possession must be assessed from the moment of the entering into possession. Both Articles 2230 BCC and 2256 FCC instate a presumption of possession for oneself to the benefit of the possessor, imputing the burden of proving the contrary to the person challenging the genuineness of the possession. In addressing whether the possession is free of defects, Article 2261 FCC lays down the same six conditions that are contained in Article 2229 BCC: a continuous and uninterrupted possession that is peaceable, public, unequivocal and in the quality of owner (i.e. as of right). Similar to Belgian law, the non-compliance with one of these six conditions results in the conclusion that the possession is defective, and thus cannot lead to acquisitive prescription. A continuous possession entails that the possession must have a continuous character. Hence, it is sufficient to demonstrate that acts of usage were exercised or that juridical acts on the object were concluded at times during which the right bearer would have normally acted. To demonstrate continuity, Article 2264 FCC creates a presumption of continuity between two periods in which the possession can be discerned in favour of the possessor, much like Article 2234 BCC. Furthermore, Article 2264 FCC allows the possessor to adjoin the possession of a prior possessor to his own possession. Similar to Belgian law, an interrupted possession entails the termination of the possession. Both Articles 2271 FCC and 2263 BCC require the interruption to be longer than a year for the possession to be considered interrupted. Occasional disruption in the possession by third parties is not sufficient for the period to be interrupted. A *possessio solo animo* remains uninterrupted, as long as third parties do not disrupt the possession for a period longer than one year. Finally, interruption must not be confused with discontinuity, where the possession stops because of the want of continuity of the *corpus*. Like in Belgian law, a peaceful possession requires the possession to have materialized and subsist without violence. Both physical and moral violence are taken into account to verify the nature of the possession. Similar to Article 2233 BCC, Article 2263 FCC clarifies that acts of violence cannot be constitutive of a possession leading to acquisitive prescription. Furthermore, the second sentence of both articles specifies that the possession will only cease to be defective once the violence has stopped. In both Belgian law and French law, the presence of violence in the possession during the possession will result in restarting the period of possession necessary for the computing of the period of acquisitive prescription. Furthermore, the presence of violence can considerably affect the possessor's good faith. Similar to Belgian law, violence is a relative defect in the possession, which can only be invoked by the victims of the violence. For the possession to be public, it

¹²¹⁵ Cf. section A. 3. (1) above.

must be sufficiently open to give notice to right-bearers of the possession. Concealment is not protected by law, as it is assimilated to usurpation. Therefore, clandestine possessions will lead to the consideration that the possession is marred by a defect. Similar to Belgian law, the public holding of the object is relative, as it must be held publicly against the persons that have an interest in contesting the possession, such as the owner. The *Cour de Cassation* has clarified that the mere fact that the possessor hid the object to those having an interest in contesting the possession was sufficient to be considered as clandestine. Nevertheless, a public possession that does not provide notification to the aforementioned interested parties will not be considered as defective. The clandestine character of the possession is a relative defect that can only be invoked by the person against whom the possession was hidden. Akin to the requirement of unambiguity laid down in Article 2229 BCC, Article 2261 FCC requires that the possession be unequivocal. The possession is tainted by equivocity when there exist doubts as to the genuineness to behave like an owner or to exercise a right upon the object as a right-bearer. This is, for example, the case when there is no correlation between the acts exercised upon the object and the right that the author pretends to exercise. The possessor must thus exercise acts that constitute an outward expression of the right he exercises. The equivocity of the possession must be apparent to others and not to the possessor himself, as it is to be assessed objectively.¹²¹⁶ The last requirement of possession as of right laid down in Article 2261 FCC is, similar to the one found in Article 2229 BCC, otiose. This is notably because the requirement to possess as of right is already constitutive of a genuine possession.

3) Similar to Article 2279 BCC, to benefit from the instantaneous acquisitive prescription contained in Article 2276 FCC, the possessor must have acquired possession in good faith. Much like Article 2279 BCC, this condition of good faith is not to be found in Article 2276 FCC but has been constructed by both doctrine and case law in the said article; the good faith requirement is extrapolated from Article 1141 FCC, similar to Article 1141 BCC. Nevertheless, this requirement of good faith is also extracted from the *ratio legis* of Article 2276 FCC, which is designed to protect the innocent purchaser that believed that he genuinely acquired the right of ownership over the object. In concordance with Article 550 BCC, good faith is defined in Article 550 FCC as the honest belief that one possesses as of right on a *justa causa detentionis* forming the basis of the *traditio* of ownership. The *Cour de Cassation* has clarified that a possessor acts in bad faith at the time of the acquisition if he knew that the transferor was not the owner or had no right to dispose of the property. Later on, the same court broadened the scope of bad faith by submitting that a possessor that ought to have serious suspicions in this regard was also deemed to have acted in bad faith. Therefore, both a gross and blameworthy imprudence and thoughtlessness or negligence during the acquisition by the acquirer amounts to bad faith. As both an actual and a constructive notice of the transferor's lack of right to dispose are constitutive of bad faith, this interpretation of bad faith is in line with the appreciation of it found in Belgian law. Nonetheless, French law also assimilates a lack of inquiry into the origin of the object as affecting the presence of good faith. What is more, if the possessor was aware or could have been aware that the transferor was not entitled to dispose of the object at the time of the acquisition through means of publicity, then he might not be considered to be acting in good faith. The requirement of due diligence for the purpose of acquisitive prescription on the basis of Article 2276 FCC appears thus more stringent than the one required by Article 2279 BCC. Nonetheless, both Belgian and French law require the inception of the possession to be based on a *justa causa detentionis*, or in other words upon a juridical act that would have transferred ownership if the transferor had the right to dispose of the object. This is notably because the acquisitive prescription of Article 2276 FCC only serves to correct the lack of capacity to dispose of the transferor. Similar to the words found in Article 2269 BCC, Article 2275 FCC requires the good faith to be present at the time of the acquisition. If the good faith becomes bad faith after the acquisition, the adage *mala fides superveniens non impedit usucapionem* will apply and, according to both Belgian and French law, the bad faith will not affect the good faith when the possessor discovers the lack of the transferor's right to dispose after the acquisition. In line with Belgian law, the assessment of good / bad faith is left to the discretion of the judge adjudicating upon the facts of the case. What is more, Article 2274 FCC instates a presumption of good faith in favour of the possessor, similar to that of Article 2268 BCC. This entails that bad faith is never presumed and it is to the one challenging the good faith to reverse the presumption. Because the presence of good faith or of bad faith is left to the discretion of the judge adjudicating upon the facts, it is not clear what arguments suffice to rebut the presumption of good faith. Nonetheless, French courts have discarded this presumption in cases where it was clear that professionals were involved in dubious transactions. Similar to Belgian law, formulating a litmus test of good faith in French law is not possible. In fact, French courts assess the subjective requirement of good faith through an exercise of objectivization of the acquisition. In doing so, it is advanced that the following elements are weighted by the French courts: the object's nature, its value, a too low purchase price, the character of the purchaser, or the circumstances that should have raised suspicions as to the identity of the seller or the origin of the object are a handful of examples of factors playing a role in the determination of good faith. An in-

¹²¹⁶ Cf. the Arman case.

depth analysis of French case law with regard to the determination of good faith reveals that, all in all, French courts will merely verify whether there were red flags during the transaction, much like Belgian law. This is notably due to the fact that the determination of good faith is context and fact-dependent, that the situations within which the acquisitions are made have kaleidoscopic traits, and that the fulcrum of this determination rests in the power of appreciation of the court seized with the contention.¹²¹⁷

Article 3:86 (1) DCC – 1) Article 3:83 DCC allows for ownership to be transferred, except when explicitly precluded by law or by the nature of the right. This requirement matches the first requirement of transferability of certain types of objects laid down in both Belgian and French law, as both are controlling as to the acquisition of ownership of these types of goods too.

2) Similar to Belgian and French law, Article 3:84 DCC requires for a delivery to have taken place on the basis of a *justa causa detentionis*. As to the delivery, Article 3:90 (2) DCC specifically rejects that the delivery be *constitutum possessorium*. This is in accordance with both Belgian and French law, which also reject the protection of a possessor in a situation of delivery *constitutum possessorium*. Furthermore, Articles 3:90 (1) and 3:91 DCC both explain that the delivery is operated at the time of the passing of possession of the thing. This focus on the transfer of possession is rooted in the legitimization doctrine, by which a factual control over the object is indicative to the transferee that the transferor is the right-holder. The passing of possession to the acquirer is, much like Belgian and French law, determinative in affording third-party protection.

3) At last, Article 3:86 (1) DCC requires for the acquisition by the third party not to have been gratuitous. A third party that has acquired gratuitously is not protected by Article 3:86 (1) DCC. Equity discards the protection given by Article 3:86 (1) DCC when the possessor would not suffer a disadvantage. Dutch law differs from Belgian and French law in this regard, as both Belgian and French law require the possession to be established on a *justa causa detentionis* without laying down additional requirements as to the gratuitous or for value character of the acquisition. The requirement that the transaction be for value stems from the idea that gratuitous transaction does not need to be protected because the Dutch legislator considers that donations have no part to play in commercial transactions. If Article 3:86 (1) DCC is to secure commercial transactions, then donations need not be protected. What is more, Article 3:86 (1) DCC – similar to Articles 2279 BCC and 2276 FCC – require that the possessor acts in good faith at the time of the acquisition. Similar to Belgian and French law, good faith stems from a belief that the possessor is the right-holder and is reasonably justified in that belief.¹²¹⁸ Article 3:11 DCC complements Article 3:118 DCC by explaining what good faith is not: “Where good faith of a person is required to produce a juridical effect, such person is not acting in good faith if he knew the facts or the law to which his good faith must relate or if, in the given circumstances, he should know them”. Although not coined in similar terms, this definition of what good faith is not is in accordance with the meaning of good faith as given by both the Belgian and French *Cour de Cassation* with regard to Articles 550 BCC and 550 FCC respectively (actual and constructive knowledge of the transferor’s lack of faculty to dispose / of the lack of right to the object). Similar to Belgian and French law, Dutch law requires that the good faith be present at the time of both the acquisition of the object by, and the transfer of the possession to, the third party.¹²¹⁹ Furthermore, Article 3:118 (3) DCC instates a presumption of good faith in favour of the possessor, similar to Articles 2268 BCC and 2274 FCC. This means that the claimant will first have to rebut the presumption, which will then shift the burden of proof to the possessor. It is subsequently possible for the claimant to disprove the allegations made by the defendant. To assess the exercise of due diligence, good faith is objectively assessed by reviewing the circumstances of the acquisition. These circumstances are also revealing of the standard of cautiousness expected from the acquirer at the time of the acquisition. In this regard, Article 3:11 DCC requires the acquirer to undertake further inquiries when he has good reasons to doubt that he will become the right-holder through the acquisition, which is also the case in both Belgian and French law. Similar to the tests of good faith in Belgian and French law, the main crux of the issue stems from in the presence of red flags. Where red flags are present, and thus when the circumstances so require, the possessor must undertake further research when this is expected from him. In assessing whether the circumstances so require, Dutch courts pay attention – *inter alia* – to the character of the parties, their background, the price paid, the location at the time of the acquisition, any likelihood that the transferor is the right-holder, any possibility to consult a register or any other relevant information. The obligation to undertake further inquiry is mandatory and the impossibility to conduct these inquiries does not constitute a valid justification.¹²²⁰ In deciding whether the acquirer knew or ought to have known that the transferor was not conveying the right upon the thing, the courts apply a standard of reasonable judgment. Nonetheless, because of the fact-dependent nature of acquisitions and of the discretion

¹²¹⁷ Cf. section B. 3. (1) above.

¹²¹⁸ Cf. Article 3:118 (1) DCC.

¹²¹⁹ Cf. Articles 2269 BCC and 2275 FCC.

¹²²⁰ Cf. Article 3:11 DCC *in fine*.

given to judges in deciding on the matter, the exact degree of cautiousness expected from the acquirer is difficult to standardize. Instead, it is sufficient to synthesize that the presence of red flags enhances the degree of cautiousness of the acquirer. The more doubts that exist, the more enhanced the purchaser's degree of inquiries will be. This is not any different from Belgian and French law. If the inquiries objectively suffice to satisfy the acquirer's doubts, then he may be considered as acting in good faith. On the contrary, if these inquiries do not reasonably satisfy the doubts of the acquirer or if he was too gullible, he will be considered as not having acted in good faith during the acquisition. Inconclusive evidence will not be interpreted in favour of the acquirer. Belgian and French law seem to follow a similar pattern of reasoning. If the acquisition complies with the conditions laid down above, the possessor is instantaneously protected by Article 3:86 (1) DCC, subject to the exception contained in Article 3:87 DCC. The latter article imposes an obligation of disclosure upon the person protected by Article 3:86 DCC. This obligation entails that the acquirer is obliged to disclose the identity of the alienator and provide, without delay, all the necessary information to be able to retrace this person, or – in the alternative – the information that the acquirer deemed sufficient at the time of the acquisition to retrace the transferor. This obligation of disclosure must be honored up to three years from the acquisition onwards, subject to the caveat that the acquirer is deprived of the protection found in Article 3:86 DCC if he does not disclose the required information. To comply with this obligation, it is sufficient to point to the moment, time and place of the acquisition to make it possible for the dispossessed owner to retrieve the identity of the transferor. The obligation of disclosure does not exist in either Belgian or French law and is peculiar to Dutch law.¹²²¹

Article 3:99 DCC – 1) Dutch law makes it possible to acquire any movable thing based on Article 3:99 DCC.

2) In order to acquire on the basis of this article, the possessor must have factual control upon the thing to qualify as a detentor, detention that constitutes a presumption of possession on the basis of Article 3:109 DCC. What is more, the possession must be continuous for a period of three years, and – following Article 3:101 DCC – it starts running on the day following the day of the taking of possession. The period is achieved on the last day of the three years. If the possession is lost during this period, it can be recovered and the period of prescription can be resumed, provided that the loss of possession is not longer than one year.¹²²² It is, furthermore, possible to compute a period of possession of a prior possessor to one's own possession on the basis of Article 3:102 DCC. Finally, the period of acquisitive prescription can be interrupted (as is the case in Belgian and French law) or prolonged. The prolongation has the same effect as suspension in Belgian and French law, although it merely extends the suspension for a maximum of six months after the cause of the prolongation has disappeared.

3) Good faith is required for the purpose of Article 3:99 DCC. Good faith is to be interpreted similarly to good faith as required by Article 3:86 (1) DCC. Therefore, Articles 3:108 (1) and 3:11 DCC must be respected. Furthermore, to be considered as made in good faith, the acquisition must be compliant with Article 3:84 DCC – and, therefore, it must be based upon a *justa causa detentionis* –, and the delivery must have been effectuated in accordance with Articles 3:90, 3:91 and 3:95 DCC. Similar to Belgian and French law, Dutch law gives effect to the adage *mala fides superveniens non nocet*, but has codified it in Article 3:118 (2) DCC. It is then sufficient for the possessor to have acted in good faith at the time of the acquisition to benefit from the protection of Article 3:99 DCC. Although the acquisition might not have been in good faith, it is possible for the period of possession laid down in Article 3:99 DCC to run from the moment the possessor is in good faith.¹²²³

(2) Third-party protection – acquisitions in good faith (involuntary loss of possession)

Second sentence of Article 2279 BCC – As a derogation to the instantaneous acquisitive prescription posited by the first sentence of Article 2279 BCC, in case of theft (i.e. involuntary loss of possession) the acquisitive prescription is protracted for a period of three years from the day of the theft. This protraction is notably due to the lack of fault by the owner in losing possession over the object. It is, consequently, fair to give him a chance to recover his belongings. This is done by affording him the possibility to reclaim from anyone having factual control over the object within a fixed period of three years running from the day of the theft. The fixed period is not to be assimilated to a period of prescription as it cannot be suspended, interrupted or extended. The length of the possession is irrelevant to the running of Article 2279 BCC. It is only relevant to the possessor that he is in possession at the expiration of the prefix period to be protected in his possession. Article 2280 BCC instates a market overt exception to Article 2279 BCC. This exception entails that if the claimant initiates proceedings for the recovery of the stolen object within the prefix period of three years, the claimant will have to reimburse the

¹²²¹ Cf. section C. 3. (1) above.

¹²²² Cf. Article 3:103 DCC.

¹²²³ Cf. section C. 3. (1) above.

price paid and other ancillary costs made by the possessor if the latter has acquired the object through means of market overt. Good faith is particularly important to the present article, as a possessor that acquired in bad faith will not be able to rely on the regime of market overt. The exception of Article 2280 BCC is only for objects acquired at a market, auction house or from a dealer usually selling similar goods. Regarding the last setting, the dealer must principally deal in the type of goods concerned. Finally, bric-a-brac dealers are not considered as dealers usually selling similar goods for the purpose of Article 2280 BCC.¹²²⁴

Second sentence of Article 2276 FCC – Similar to Article 2279 BCC, Article 2276 FCC protracts the acquisitive prescription for three years in case of theft. The period of three years is – identical to the one contained in Article 2279 BCC – a prefix period that is immutable. In accordance with Article 2279 BCC, the length of the possession is irrelevant to the running of the prefix period. Much like Article 2280 BCC, Article 2277 FCC constitutes an exception to the regime of Article 2276 FCC when the acquisition was made at a fair, at a market, in a public sale or from a merchant selling similar things. In such situations, Article 2277 FCC specifies that the possessor is entitled to the reimbursement of the price paid for the object. The claimant will then have to reimburse the possessor in these circumstances. To be entitled to the protection of Article 2277 FCC, the possession must comply with the conditions required for the protection of Article 2276 FCC and the possessor must thus also have been in good faith at the time of the acquisition. The exception of market overt favours the purchaser because of the presumption that the circumstances of acquisition are indicative of good faith. French courts have interpreted Article 2277 FCC rather restrictively: flea markets are excluded, the term merchant must be given a plain meaning and must, thus, be interpreted as meaning a dealer exercising a commercial activity of buying and selling goods to generate a profit for his own benefit (objective appreciation). Similar to Article 2280 BCC, bric-a-brac dealers do not amount to merchants selling similar things. A painting dealer may qualify as dealer selling similar things, provided he does not act as middleman for someone else.¹²²⁵

Article 3:86 (3) DCC – Article 3:86 (3) DCC posits a specific exception to the instantaneous protection afforded by Article 3:86 (1) DCC when the object concerned has been stolen. Similar to Articles 2279 BCC and 2276 FCC, Article 3:86 (3) DCC entitles the owner of a stolen cultural object to recover it within a period of three years running from the day of the theft. Nonetheless, unlike Articles 2279 BCC and 2276 FCC, the period prescribed by Article 3:86 (3) DCC is not a prefix period; Article 3:86 (4) DCC makes it possible to interrupt the period of three years. The effect of the interruption is to trigger the running of a new period of three years.¹²²⁶ Even when the possessor is protected after the period of three years has lapsed, two exceptions to this protection exist: firstly, the obligation of disclosure of Article 3:87 DCC must be honored, subject to the penalty of losing the protection in its entirety. Secondly, a market overt exception exists for consumer sales.¹²²⁷ The consumer market overt exception is built on the premise that an innocent consumer purchasing from a professional seller dealing in similar items is worthy of protection. It is, thenceforth, subject to stringent conditions characterizing the purchase, as well as the parties involved in the sale: firstly, the acquirer must be a natural person acting in a private capacity; secondly, the alienator must be a professional seller making a living from the sale of things of the same nature, excluding specifically auctioneers. Unlike Articles 2280 BCC and 2277 FCC, Article 3:86 (3) (a) DCC specifically excludes acquisitions at public markets because the Dutch legislator believed that these types of acquisitions contributed to the sale of stolen objects; thirdly, the acquisition must have taken place on business premises destined for the exercise of the alienator's commercial activity. These premises can be located in an immovable or part thereof, and it has been broadly interpreted so as to also include areas that are not open to the public, but also non-permanently vested premises (e.g. a caravan used as an office). What is more, the transaction can also take place on the plot of land adjacent to the premises and does not, strictly speaking, have to take place within the business premises themselves. Acquisitions on street markets, in the street, at doorsteps, in a bar or at a stand at a flea or antiques market do not fall within the scope of Article 3:86 (3) (a) DCC; fourthly, the acquisition must have taken place within the seller's ordinary course of business.¹²²⁸

(3) Third-party protection – acquisitions in bad faith / not in good faith

Article 2262 BCC – A bad faith acquisition is not protected by either Articles 2279 or 2280 BCC. Instead, the acquisitive prescription in case of bad faith acquisition can only operate after thirty years of real, *pro suo* and non-

¹²²⁴ Cf. section A. 3. (2) above.

¹²²⁵ Cf. section B. 3. (2) above.

¹²²⁶ Cf. Article 3:319 DCC.

¹²²⁷ Cf. Article 3:86 (3) (a) DCC.

¹²²⁸ Cf. section C. 3. (2) above.

defective possession.¹²²⁹ Unlike the prefix period of Article 2280 BCC, the period of thirty years is to be calculated by full days and, therefore, starts running on the day after the taking of possession by the first bad faith possessor.¹²³⁰ Unlike the prefix period laid down in Article 2280 BCC, it is possible to suspend or interrupt the period of thirty years.¹²³¹

Article 2272 FCC – In accordance with Article 2262 BCC, Article 2272 FCC makes it possible for a bad faith possessor – (unlike in Belgian law) including a thief – that has an effective, genuine and non-defective possession to acquire after a period of possession of thirty years. A bad faith possessor can neither rely on the protection afforded by Article 2276 FCC, nor on the market overt exception of Article 2277 FCC. The period of thirty years is to be counted in full days; starts running on the day following the first taking of possession in bad faith;¹²³² and is complete at the expiration of the last day of this period.¹²³³ Unlike Belgian law, it is only possible to interrupt the period of thirty years, but not to suspend it.¹²³⁴

Article 3:306 DCC – Similar to Belgian and French law, a possessor may not rely upon means of third-party protection posited by Articles 3:86 and 3:99 DCC if he has not acquired in good faith. Instead, he may only acquire after twenty years on the basis of Article 3:306 DCC – which prescribes a period of extinctive prescription of the right of action – due to the extinction of the owner's right of action.¹²³⁵ Similar to Belgian and French law, the period of twenty years runs from the day following the one upon which a possessor has entered into possession. Furthermore, it is possible for the possessor that has lost possession to recover it within one year from the loss for the purpose of the acquisitive prescription.¹²³⁶ With regard to the running of the period of prescription, Article 3:104 DCC clarifies that it is possible to interrupt or suspend both periods of acquisitive prescription,¹²³⁷ and the period of extinctive prescription.¹²³⁸ At last, an important discrepancy between the long periods of acquisitive prescription found in Belgian, French and Dutch law must be noted: whilst the possession must have endured for a period of thirty years to acquire in the two first legal systems listed, Article 3:105 DCC enables a possessor whose possession is coterminous to the expiration of the period of twenty years to acquire the object. This means that it does not matter how long the person acquiring ownership on the basis of Article 3:105 DCC has possessed it. Finally, it is generally conceded that a thief can acquire at the end of the period of twenty years. Therefore, only French and Dutch law allow a thief to acquire through means of acquisitive prescription. Belgian law does consider the possession of a thief to be defective, as it is tainted by violence.¹²³⁹

Legal effects – Finally, for the present overview to be complete, attention must be given to the legal effects flowing from the rules described above (1) when the acquisition is in good faith and follows from a voluntary loss of possession, (2) when the acquisitions is in good faith and follows from an involuntary loss of possession and (3) when the acquisition is in bad faith / not in good faith. The legal effects flowing from the three scenarios are given below.¹²⁴⁰

(1) Third-party protection – acquisition in good faith (voluntary loss of possession)

First sentence of Article 2279 BCC – The practical effect of the acquisitive prescription of the first sentence of Article 2279 BCC is that the possessor instantaneously acquires a right of ownership over the object. The owner's right of ownership is lost and so is the adjacent action in revindication.¹²⁴¹

First sentence of Article 2276 FCC – Similar to Belgian law, the legal effect flowing from the third-party protection given by the first sentence of Article 2276 FCC is to confer an instantaneous right of ownership on

¹²²⁹ Cf. Article 2262 BCC.

¹²³⁰ Cf. Article 2235 BCC.

¹²³¹ Cf. section A. 3. (3) above.

¹²³² Cf. Article 2228 FCC.

¹²³³ Cf. Article 2229 FCC.

¹²³⁴ Cf. section B. 3. (3) above.

¹²³⁵ Cf. Article 3:105 (1) DCC.

¹²³⁶ Cf. Article 3:105 (2) DCC.

¹²³⁷ Cf. Articles 3:99 and 3:105 DCC.

¹²³⁸ Cf. Article 3:306 DCC.

¹²³⁹ Cf. section C. 3. (3) above.

¹²⁴⁰ Cf. sections A. 4, B. 4, A. and C. 4. above.

¹²⁴¹ Cf. section A. 4. (1) above.

the possessor. Equally, the right of ownership of the dispossessed owner is extinguished and so is the claim in revindication.¹²⁴²

Article 3:86 (1) DCC – Unlike Articles 2279 BCC and 2276 FCC, the legal effect flowing from Article 3:86 (1) DCC is to correct the transferor’s lack of faculty to dispose by transferring *de jure* the ownership to the third party.¹²⁴³

Article 3:99 DCC – Article 3:99 DCC, on the other hand, creates a right of ownership for the possessor by means of acquisitive prescription. This right works retroactively as the ownership will be deemed to have started at the beginning of the possession resulting in the acquisitive prescription. Concurrently, the right of ownership of the dispossessed owner ceases to exist.¹²⁴⁴

(2) Third-party protection – acquisition in good faith (involuntary loss of possession)

Second sentence of Article 2279 BCC – In case of involuntary loss of possession, two outcomes are possible based on Belgian law: either the owner reclaims within the period of three years laid down in Article 2279 BCC, or his claim is exercised too late and he cannot reclaim any longer. If the claim is timely introduced, the possessor must physically hand back the object to the claimant. The only exception to this obligation is found in Article 2280 BCC, which gives a right of retention to the possessor up until reimbursement by the claimant of the following costs: the price paid for the object, contractual costs for the acquisition of it, as well as any necessary and useful expenses undertaken that have contributed to inflate the value of the property. Any interests charged by the purchaser are cancelled-out through the enjoyment of the item by the purchaser. When the claim is belated, the possessor that has a real possession, *pro suo* and free of defects acquires a right of ownership when the period of three years has expired. This means that the right of ownership of the owner ceases to exist, although he can still sue the thief on the basis of tort law.¹²⁴⁵

Second sentence of Article 2276 FCC – Similar to Belgian law, when the claimant has timely filed suit for the recovery of the stolen property, the possessor must give it back. Article 2277 FCC prescribes the same market overt exception than the one contained in Article 2280 BCC. Therefore, the possessor that has acquired by means of market overt is entitled to the reimbursement of the price paid, and has a right of retention over the object up until the said reimbursement has been effectuated. On the other hand, when the suit is not filed within the period of three years, the possessor acquires a right of ownership over the object that operates retroactively from the first day of the possessor’s taking into possession onwards. The action in revindication of the dispossessed owner does not cease to exist, but his right does.¹²⁴⁶

Article 3:86 (3) DCC – Dutch law also favours the dispossessed owner if the claim is introduced within three years following the theft. Although, unlike in Belgian and French law, this period of three years can be interrupted. The interruption will lead to renewing the period of three years. The only exception to recovering, when the claim is instated in due time, is the one of consumer market overt laid down in Article 3:86 (3) (a) DCC. This exception will favour the possessor against the dispossessed owner. When the claim is not timely introduced, the expiration of the period of three years laid down in Article 3:86 (3) DCC results in correcting the transaction between the possessor and the transferor lacking the faculty to dispose of the object. The correction has a retroactive effect as it will operated back to the moment of the acquisition of the possessor protected by Article 3:86 (3) DCC. This protection is lost when the possessor does not comply with the obligation of disclosure laid down in Article 3:87 DCC.¹²⁴⁷

Article 3:99 DCC – If it is not possible to rely upon Article 3:86 (3) DCC (e.g. in case of gratuitous acquisition), Article 3:99 DCC also prescribes a period of three years of possession of avail to a third party. If the claim is instituted within the period of three years, the dispossessed owner may recover, although the expiration of the period of three years laid down in the said article will give a right of ownership to the possessor.¹²⁴⁸

(3) Third-party protection – acquisition in bad faith / not in good faith

¹²⁴² Cf. section B. 4. (1) above.

¹²⁴³ Cf. section C. 4. (1) above.

¹²⁴⁴ Cf. section C. 4. (1) above.

¹²⁴⁵ Cf. section A. 4. (2) above.

¹²⁴⁶ Cf. section B. 4. (2) above.

¹²⁴⁷ Cf. section C. 4. (2) above.

¹²⁴⁸ Cf. section C. 4. (2) above.

Article 2262 BCC – The legal effect flowing from Article 2262 BCC is that the bad faith possessor acquires ownership at the end of the thirty-year period of prescription. If the dispossessed owner lodges the claim in revindication within this period, then the claimant may recover the property.¹²⁴⁹

Article 2272 FCC – French law gives the same legal effect to the expiration of the period laid down in Article 2272 FCC. Furthermore, it also entitles a claimant that sues within the prescribed period of thirty years to recover the object. In Dutch law, if the claimant initiates the revindication within the period of twenty years, then he can recover the property. Nevertheless, at the expiration of the period of twenty years prescribed by Article 3:306 DCC, the possessor acquires a right of ownership over the good, making it impossible for the owner to recover it.¹²⁵⁰

Article 3:306 DCC – Contrary to Belgian and French law, the possessor is not required to exercise his possession on the object for the period of long prescription. Instead, it is sufficient for the person to be in possession at the expiration of the period of twenty years in order to become the owner, irrespective of how long his possession has lasted. Therefore, the acquisitive effect does not stem from an acquisitive prescription linked to possession, but rather stems from the prescription of the right of action. The acquisition of the right of ownership by the possessor means that the right of the dispossessed owner ceases to exist.¹²⁵¹

¹²⁴⁹ Cf. section A. 4. (3) above.

¹²⁵⁰ Cf. section B. 4. (3) above.

¹²⁵¹ Cf. section C. 4. (3) above.

Chapter 3 |

CULTURAL PROPERTY THEFT – UNDERSTANDING THE
PARADOX (II) - NEW JERSEY, CALIFORNIA AND NEW YORK.

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Introduction	203
A. New Jersey, California and New York	205
1. Basic concepts.....	205
(1) Ownership, possession and detention.....	205
(2) Theft.....	206
(3) Cultural object.....	208
(4) Legal remedy.....	209
(5) Statute of limitations.....	212
2. Contextualization.....	216
(1) Nemo plus iuris transferre potest quam ipse habet.....	216
(2) Third-party protection – voidable title, statutory and equitable estoppel.....	218
3. Operationalization.....	221
(1) New Jersey Adverse Possession.....	222
(2) New Jersey Discovery Rule.....	228
(3) California Strict Discovery Rule.....	237
(4) New York Demand and Refusal.....	248
(5) New York Laches.....	256
4. Legal effects.....	270
(1) New Jersey Adverse possession.....	270
(2) New Jersey Discovery rule.....	272
(3) California Strict Discovery Rule.....	273
(4) New York Demand and Refusal.....	276
(5) New York Laches.....	276
Summary	277

INTRODUCTION

After having considered the resolution of the triangular situation in Belgian, French and Dutch law, this third chapter complementarily addresses the rules applicable to solving the said situation in New Jersey, California and New York. In contrast to the three jurisdictions that were discussed above, the legal orders addressed in this chapter put the emphasis on the protection of ownership to the detriment of third parties; the contemplated laws have been emphatic in protecting the interests of owners of cultural objects that have been dispossessed by means of theft, thwarting good faith purchasers from acquiring a stolen object by means of possession.¹ Therefore, at the antipodes of Belgian, French and Dutch law, all three of the regimes discussed below presuppose that a stolen cultural object can never be validly acquired by a third party through means of a *bona fide* acquisition and, instead, the object must be given back to a dispossessed owner. This predilection for protecting ownership stems from the idea that it is impossible to perfect the title to a stolen cultural object, irrespective of the exercise of good faith during its acquisition. Nonetheless, this apparent protection of ownership is not absolute. As was noted by Sauveplanne in addressing the question of harmonization of the *bona fide* acquisitions of corporeal movables for the purpose of drafting the LUAB: “The topic governed by the present draft is dealt with very differently in the law of the various countries. While the large majority of continental countries base themselves on the principle of the protection of the transferee in good faith, other legal systems and in particular the Common law systems are, on the contrary, based on the opposing principle of the safeguarding of the rights of the dispossessed owner. However, in neither group is the basic principle rigorously applied. The systems which are based on the principle of the protection of the transferee lay down conditions for this protection which often seriously limit its efficacy. On the other hand, the systems which are based on the principle of maintaining the right of the dispossessed owner also provide exceptions which considerably limit the scope of the principle. These conditions and exceptions vary from country to country”.² In the three jurisdictions that are subject to the analysis below, exceptions to the owner’s right of recovery have been established in the form of statutes of limitations:³ if the proceedings are initiated in due course, the court will address the merits of the claim in which preference will be given to the owner of a stolen chattel as against a third party. However, if this period has lapsed, the possessor of the stolen property might be preferred over the dispossessed person.

In accordance with the previous chapter’s delimitation, before delving into the gist of the matter, it is important to prepend certain reservations in nuancing the limitations of this research: firstly, in the three U.S. jurisdictions under scrutiny, the restitution of stolen cultural property constitutes a problem that falls exclusively within the ambit of private law, and more specifically within the realm of tort law.⁴ Thenceforth, the present analysis focuses particularly on the rules of tort law that are applicable in cases relating to the conversion of stolen personal property. Therefore, similar to the reservations that were formulated in Chapter 2 above, the present analysis focuses on the general rules that are applicable to personal property, omitting the special rules adopted to protect certain types of cultural property – such as for example the *Convention on Cultural Property Implementation Act*,⁵ or the *Native American Grave Protection and Repatriation Act*⁶ – because of the peripheral nature of these rules to the present research. Secondly, the rules studied here merely concern the scenario of acquisition *a non domino* of stolen cultural property. More specifically, the rules applicable in the three American jurisdictions distinguish situations of acquisition *a non domino* stemming from a voluntary or involuntary loss of possession. Because the focus of the present disquisition is on the private law implications flowing from the theft of cultural objects, only the situation of involuntary loss of possession through theft requires to be considered. Furthermore, to ensure consistency in the approach when analysing the six jurisdictions, the overview given in the present chapter is modeled on the basis of the triangular scenario by which an owner dispossessed by a thief is opposed to an innocent purchaser. Hence, the present chapter does not attempt to provide a comprehensive comparative analysis between the various jurisdictions addressed but, instead, attempts to illustrate the resolution of the triangular situation mentioned and to compare these solutions to the regime of Chapter II of the 1995

¹ See for example In Re “Paysage Bords de Seine,” Unsigned Oil Painting on Linen by Pierre-Auguste Renoir United States of America v. Baltimore Museum of Art, et al., 991 F.Supp. 2d 740 (14 January 2014), at 744, specifying that a bona fide purchaser for value cannot acquire title to stolen goods (citing *Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc.*, 256 Va. 243, 506 S.E.2d 14, 16 (1998) as authority in Virginia) but also submitting that the rule is equally applicable in Maryland (see footnote 1).

² See Presidenza del Consiglio dei Ministri, Dipartimento per l’Informazione e l’Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings*, Rome, June 1995, (1996), p. 42.

³ See Schwartz, A., Scott, R. E., ‘Rethinking the Laws of Good Faith Purchase’, Vol. 111 *Columbia Law Review*, (2011), p. 1334, footnote 7 where it is specified that “The owner’s right to recover stolen goods in jurisdictions, such as the United States, that follow the theft rule is contingent on the owner bringing suit within the statute of limitations for an action in replevin”.

⁴ Schönerberger, B., *The Restitution of Cultural Assets – Causes of Action – Obstacles to Restitution – Developments*, (Stämpfli Publishers Ltd: Berne / Eleven International Publishing: Utrecht, 2009), p. 56.

⁵ Text available at <https://eca.state.gov/files/bureau/97-446.pdf>, last retrieved on 01.03.2018.

⁶ Text available at <https://www.law.cornell.edu/uscode/text/25/chapter-32>, last retrieved on 01.03.2018.

convention. Therefore, points of discussion that are peripheral to the resolution of these triangular scenarios will be omitted from the present analysis. Fourthly, the present chapter assimilates the dispossessed owner to the claimant and the possessor to the defendant. Finally, it should be remarked that there is a methodological discrepancy between the present chapter and Chapter 2 above: the present chapter will analyse the three U.S. jurisdictions simultaneously – thus purposely creating a mesh between the jurisdictions – for the sake of clarity and expediency (cf. section A below). Accordingly, Chapter 3 provides a linear overview of the three jurisdictions studied, derogating from the consecutive overview of the three jurisdictions discussed in Chapter 2. The difference in approach is justified by the high degree of coincidence between the rules prescribed in New Jersey, California and New York.

A. New Jersey, California and New York

Similar to Belgium, France and The Netherlands, the United States has not, hitherto, become party to the regime of the 1995 UNIDROIT convention. Furthermore, despite its acceptance of the 1970 UNESCO convention in 1983 and its participation in the negotiations relating to the 1995 instrument, it has not amended its *Convention on Cultural Property Implementation Act* (1983) to bring this implementing legislation in line with the UNIDROIT convention through an UNESCO Plus implementation. Consequently, the transfer of stolen personal property is prominently regulated by the *Uniform Commercial Code* – hereinafter UCC – and more particularly by the instruments transposing its provisions into state law.⁷

In appreciating the rules posited, section A.1 will analyse the basic concepts of relevance to the rules described. Similar to Chapter 2, the delimitation of these key concepts constitutes a sturdy basis to understand the studied regimes. Section A.2 will then contextualize the discussion and explain what principles are to be followed in applying the core notions that are being analysed. Section A.3 will operationalise the factors described in sections A.1 and A.2, thereby elucidating the regulation of the triangular situation. Finally, section A.4 will explain the legal effects given to the rules, thus operationalising the core notions and principles discussed in sections A.1-A.3.

1. BASIC CONCEPTS

(1) Ownership, possession and detention

Unlike for the three European jurisdictions addressed in Chapter 2, the distinction between the notions of ownership, possession and detention is not of primary importance to the analysis of the rules contemplated in the present Chapter. It should be recalled that – unlike the regimes laid down in the three European jurisdictions that were discussed above – the constraints relating to the recovery of a stolen object by a dispossessed owner relate to the timeliness of his action. Therefore, these limitations are, primarily, of a procedural nature.⁸ This means that when jurisdiction is conferred on the domestic courts of one of the three U.S. jurisdictions under analysis, the admissibility of the case will depend – *inter alia* – on the timeliness of the action. Subsequently, when the claim is timeously introduced, the case must be decided on its merits. In this regard, because the law in the three U.S. jurisdictions under scrutiny specifies that title to a stolen chattel can never be perfected,⁹ it is sufficient for the claimant to prove having a better title as against the possessor in order to be entitled to the recovery of the object.¹⁰ The determination of who has a better title is left to the appreciation of the court seized by

⁷ Kurjatko, A., ‘Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art’, 5 (1) *U. C. Davis Journal of International Law & Policy*, (1999), p. 70, footnote 82 specifying that each state in the U.S. has its own law regulating the transfer of stolen personal property and that this state law is modelled upon the Uniform Commercial Code (citing John Henry Merryman, ‘American Law and the International Trade in Art’, in *International Sales of Works of Art* (1985), pp. 425-426).

⁸ See Pinkerton, L. F., ‘Due Diligence in Fine Art Transactions’, 22 *Case Western Reserve Journal of International Law*, (1990), p. 16; See also *David Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case No CV 05-3459-JFW (Ex), 153 F.Supp.3d 1148, (June 4, 2015), at 1160, where the Central District Court of California submitted that the rules of acquisitive prescription found in Spanish law – which it refers to as the rules on adverse possession – do not constitute a procedural constraint but, instead, relate to the merits of the case; see also *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, Not Reported in N.Y.S.2d, 2001 WL 1657237, 2001 N.Y. Slip. Op. 40445(U), (September 28, 2001), at 5: “Statutes of Limitations are usually characterized as procedural, and not substantive. A court generally adheres to the procedural rules of its forum state even when applying the substantive law of another state”.

⁹ See for example Kurjatko, (1999), p. 70, footnote 82, where it is specified that a purchaser merely acquires the same property right as the seller. Henceforth, thieves cannot pass property rights over the chattel, even to a *bona fide* purchaser (citing John Henry Merryman, ‘American Law and the International Trade in Art’, in *International Sales of Works of Art*, (1985), p. 428); see also below but also Kennon, H., ‘Take a Picture, It May Last Longer if Guggenheim Becomes the Law of the Land: The Repatriation of Fine Art’, 8 *Saint Thomas Law Review*, (1995-1996), p. 377, affirming that a thief can never convey title to a subsequent possessor, even if this possessor is an ‘innocent purchaser for value’ (citing *O’Keeffe v. Snyder*, 416 A.2d 862, 867 (N.J. 1980) where the court relied upon *Joseph v. Lesnevech*, 153 A.2d 349 (N.J. Super. Ct. App. Div. 1959), and citing Article 2-403 UCC. In *Joseph v. Lesnevech*, the Superior Court of New Jersey stated that “Although in an action for the conversion of personalty it is no defense to assert the status of Bona fide purchaser for value where the transferor (Lesnevech) had no power to transfer”, citing *Ashton v. Allen*, 70 N.J.L. 117, 56 A. 165 (Sup.Ct.1903); Prosser, *Torts* (2d ed. 1955), s 15, pp. 71-72; 1 Restatement, *Torts*, s 229, p. 585).

¹⁰ See for example *Redmond v. New Jersey Historical Society*, 31 Backes 464, 132 N.J. Eq. 464, 28 A.2d 189, (September 8, 1942), at 469, where the court submitted: “It is settled law that in an action of equitable replevin, as in an action at replevin at law, the possession of the portrait by the Society since 1888, or since Preston came of age (in 1894) is ‘prima facie evidence’ of its ownership (cf. *Burr v. Bloomsburg*, supra, 101 N.J.Eq. at page 625, 138 A. at page 880), but ‘it is not conclusive’. *Nelson v. Bock*, 84 N.J.L. 123, 85 A. 1009. The burden is on complainants properly to establish ownership—absolute or qualified—and the right to exclusive possession where such ownership is denied. *Pintenics v. Menwig*, 113 N.J.L. 4, 5, 172 A. 377; *Kleinfeld v. General Auto Sales Co.*, 118 N.J.L. 67, 71, 191 A. 460, 110 A.L.R. 350. Complainants’ right of recovery is necessarily based upon the strength of their title to the portrait rather than upon the weakness of the Society’s title thereto. Cf. *Chambers v. Hunt*, 18 N.J.L. 339, 345.”; Yang, M., ‘Void Versus Voidable Contracts: The

application of the doctrine of relativity of title.¹¹ Thenceforth, the claimant whose claim is admissible, in accordance with the rules described below, will only need to prove having a better title to the disputed object for his claim in recovery to be successful. This entails that the present study merely focuses on the rules pertaining to the timeliness of the claim and it will obviate any discussions on the relativity of title, therefore making the explanation of the concepts of ownership, possession and detention otiose for the purpose of the present research. In other words, there is no need to discuss the distinction between these concepts since the third-party protection is operationalised through temporal limitation of a right of action and relate, therefore, to the question of the admissibility of claims.

(2) Theft

In the case of dispossession by theft, since no title has been validly transferred from the original owner to a purchaser in good faith and for value, the said purchaser can never acquire a valid title under the law of New Jersey, California or New York: any contract by which a stolen object is acquired will always result in the title being declared void.¹² In fact, a thief can never acquire title to a stolen object and cannot transfer a valid title in accordance with the *nemo dat* principle (see below), even to a purchaser who acts in good faith.¹³ Therefore, any transfer subsequent to a theft results in a void title because there was no intention by the owner to transfer title to another, to conclude a sale and effectuate delivery of the goods flowing from the contractual agreement.¹⁴ Because the title transferred from a thief to any subsequent possessor is regarded as void, the possessor of a stolen object will automatically have to give back the object.¹⁵ In other words, a void title is considered null and has no binding effect.¹⁶ Nonetheless, in order for the claimant to benefit from this favourable regime, the dispossessed owner must prove that a theft has taken place.¹⁷ If this burden of proof is fulfilled, the other party will then have to disprove that the object had been stolen in the first place.¹⁸

In New Jersey, theft of personal property is defined in Section 2C:20-3 to 20-5 of the New Jersey Code of Criminal Justice (hereinafter NJCCJ).¹⁹ Under New Jersey law, it is thus possible to steal an object through unlawful taking or unlawful disposition (Section 2C:20-3 NJCCJ), deception (Section 2C:20-4 NJCCJ),²⁰ or extortion (Section 2C:20-5 NJCCJ).²¹ California defines theft in Section 484 of the California Penal Code (hereinafter CPC).

Subtle Distinction That Can Affect Good Faith-Purchasers' Title to Goods' New York State Bar Association (NYSBA), 19 (1) *NYLitigator*, (Spring 2014), p. 34, specifying that the owner will only have to establish that he has "legal title or a superior right of possession" and citing *Matter of Flamenbaum*, 27 Misc. 3d at 1096. Furthermore, Yang specifies that the relativity of title is only between the owner and the possessor, and that the owner is not, therefore, required to demonstrate superior title as against the rest of the world (citing *Matter of Flamenbaum*, at 1097).

¹¹ See for example the discussion in *In Re "Paysage Bords de Seine"*, (2014), at 743 and ff.

¹² Yang, (2014), p. 33, citing *Stevens v. Hyde* (1860), 32 Barb. 171, 180 (Sup. Ct., N.Y. Co. 1860) at 176.

¹³ Yang, (2014), p. 33, citing *Stevens v. Hyde* (1860), at 178 and *Sheridan Suzuki, Inc.*, 110 Misc. 2d at 824.

¹⁴ Yang, (2014), p. 33, citing *Stevens v. Hyde* (1860), at 176 and 179 and comparing the rationale of *Stevens* with *Anstin Instrument, Inc.*, 29 N.Y.2d at 130-31.

¹⁵ Yang, (2014), p. 31, citing Restatement (Second) of Contracts §174 comment b (1981) and p. 33, citing *Stevens v. Hyde* (1860) at 178, *Dilorenzo v. Gen. Motors Acceptance Corp.*, 29 A.D.3d 853, 854, 814 N.Y.S.2d 750, 750 (2d Dep't 2006), *Candela v. Port Motors, Inc.*, 208 A.D.2d 486, 487, 617 N.Y.S.2d 49, 50 (2d Ddep't 1996), *Green v. Arcadia Fin. Ltd.*, 174 Misc. 2d 411, 413, 663 N.Y.S.2d 944, 946 (Sup. Ct. Erie Co. 1997) (same) *aff'd*, 261 A.D.2d 896, 689 N.Y.S.2d 596 (1999), *Johnny Dell, Inc. v. N.Y. State Police*, 84 Misc.2d 360, 363, 375 N.Y.S.2d 545, 548 (Sup. Ct., Onondaga Co. 1975) (same).

¹⁶ Yang, (2014), p. 31, citing 22 N.Y. Jur.2d *Contracts* §8 (2014).

¹⁷ See *Solomon R. Guggenheim Foundation v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618, (January 25, 1990), at 153.

¹⁸ This was notably what happened before the Appellate Division of the New York Supreme Court in *Solomon R. Guggenheim Foundation v. Lubell* (1990). See *Solomon R. Guggenheim Foundation v. Lubell* (1990), at 153.

¹⁹ New Jersey Revised Statutes, § 2C:20-3 (2013).

²⁰ Deception is then defined in the same article: "A person deceives if he purposely: a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind, and including, but not limited to, a false impression that the person is soliciting or collecting funds for a charitable purpose; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; b. Prevents another from acquiring information which would affect his judgment of a transaction; or c. Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship. The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing or exaggeration by statements unlikely to deceive ordinary persons in the group addressed".

²¹ Extortion is defined in the following manner: "A person extorts if he purposely threatens to: a. Inflict bodily injury on or physically confine or restrain anyone or commit any other criminal offense; b. Accuse anyone of an offense or cause charges of an offense to be instituted against any person; c. Expose or publicize any secret or any asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; d. Take or withhold action as an official, or cause an official to take or withhold action; e. Bring about or continue a strike, boycott or other collective action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; f. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or g. Inflict any other harm which would not substantially benefit the actor but which is calculated to materially harm another person. It is an affirmative defense to prosecution based on paragraphs b, c, d or f that

Section 484 CPC – (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. [...]

(b) (1) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and that property has a value greater than one thousand dollars (\$1,000) and is not a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 10 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(2) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and where the property has a value no greater than one thousand dollars (\$1,000), or where the property is a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.

New York qualifies theft as larceny, which is defined in § 155.05 of the New York Penal Section (hereinafter NYPS).

§ 155.05 NYPS – 1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property. A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise. A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed;

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

(i) Cause physical injury to some person in the future; or

(ii) Cause damage to property; or

(iii) Engage in other conduct constituting a crime; or

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

the property obtained was honestly claimed as restitution or indemnification for harm done in the circumstances or as lawful compensation for property or services”.

- (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

All three of these definitions provide a broad appreciation of the notion of theft, an appreciation that – unlike in Belgian, French and Dutch law – is not restricted to the mere intentional deprivation of another's property, but includes other forms of misappropriation, e.g. fraud, deception, belated return of a rented chattel, embezzlement or extortion.

(3) Cultural object

Similar to Belgian, French and Dutch law, New Jersey, California and New York apply rules of recovery of personal property to stolen chattels. Nevertheless, each of the actions for the recovery of stolen property prescribed in these states use their own narrative: the action for the recovery of stolen property laid down in Section 2B:50-1 of the New Jersey Revised Statutes – hereinafter NJRS – is directed specifically at goods. Goods are defined in Section 12A:2-105 NJRS as follows:

Section 12A:2-105 NJRS – (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (12A:2-107).

California law allows dispossessed owners to rely on a writ of possession (also known as the action of claim and delivery) for the recovery of personal property. In defining personal property, California operates by means of exclusion and considers everything that is not real property to fall within this residual category.²² Article 658 of the California Civil Code – hereinafter CCC – defines real property in the following manner:

§ 658 CCC – Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.

Section 658 CCC must be read in conjunction with §§ 659-662 CCC, which respectively clarify the meaning of § 658 (1.), (2.) and (3.) CCC. Therefore, all that is not real property is considered to be personal property. In New York law, an action in replevin based upon Article 71 of the New York Civil Practice Law and Rules – hereinafter CPLR – (see below) is only applicable to chattels. Chattels are defined by Section 15 of the General Construction Law – hereinafter GCL – as including “goods and chattels” and “all specific personal property, such as, but not limited to, certificate of stock, bonds, notes or other securities or obligations”.²³ As an important exception to the rules applicable to personal property, California is the only state that has established specific exceptions for ‘any article of historical, interpretive, scientific, or artistic significance’ and ‘works of fine art’. The definition of these specific categories will be discussed in more detail in the analysis below.

²² This is dictated by § 663 of the California Civil Code.

²³ See also Alexander, V. C., ‘Practice Commentaries’, *McKinney's CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101: “Article 71, by its terms, is applicable only to claims involving chattels. Section 15 of the General Construction Law states that the term “chattel” includes “goods and chattels” and “all specific personal property, such as, but not limited to, certificate of stocks, bonds, notes, or other securities or obligations.” Claims to fixture (chattels that have become part of realty) fall outside the scope of CPLR Article 71. See e.g. *East Side Car Wash, Inc. v. R.R.K. Capitol, Inc.*, 1984, 102 A.D.2d 157, 161, 476 N.Y.S.2d 837, 840 (1st Dep’t), appeal dismissed 63 N.Y.2d 770.”

(4) Legal remedy

Unlike in Belgian, French and Dutch law, the means of recovering of a stolen cultural object are to be found within the ambit of tort law. In fact, an act of interference with an owner's possessory or property rights is considered by many U.S. jurisdictions as a tortious act of conversion.²⁴ Conversion constitutes an act by which a person wrongfully invades the rights of and the absolute dominium²⁵ that a person has over an object²⁶ through ownership or control of the object, resulting in a deprivation of these rights or dominion.²⁷ It has been defined as the “unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights”.²⁸ As such, both theft and the subsequent purchase of a stolen object by an innocent purchaser constitute tortious acts of conversion.²⁹ Nevertheless, because the present disquisition focuses on the theft of cultural goods, it should be emphasised that all thefts constitute conversion, but not all conversions constitute theft.³⁰ This means that attention is paid exclusively to conversion resulting from theft, and not from other types of misappropriation. Furthermore, conversion must be specifically distinguished from trespass: whilst conversion is tantamount to either taking or destroying property so as to exclude the rights of the owner on the object, trespass constitutes a mere interference with the owner's right over the object.³¹

²⁴ Demarsin, B., ‘Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum’, 59 (3) *Buffalo Law Review*, (2011), p. 624; Foutty, S. L., ‘Recent Development - Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art’, 43 *Vanderbilt Law Review*, (1990), p. 1845.

²⁵ Black's Law Dictionary defines Dominium as follows: “1. *Roman & civil law.* Absolute ownership including the right to possession and use; a right of control over property that the holder might retain or transfer at pleasure. [...] This term gradually came to also mean merely ownership of property, as distinguished from the right to possession or use. Garner, B. A., *Black's Law Dictionary*, (West, 10th edition, 2014), keyword: Dominium.

²⁶ See *Cantor v. Anderson*, 639 F.Supp.364, 2 UCC Rep.Serv.2d 312, (June 16, 1986), at 369, citing *Meese v. Miller*, 79 A.D.2d 237, 436 N.Y.S.2d 496 (4th Dept.1981).

²⁷ See also Henson, E. J., ‘The Last Prisoners of War: Returning World War II Art to its Rightful Owners – Can Moral Obligations be Translated Into Legal Duties’, 51 *DePaul Law Review*, (2001-2002), p. 1140, citing *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. (1989), at 1399, note 23.

²⁸ *Mirrish v. Mott*, 75 A.D.3d 269, 901 N.Y.S.2d 603, 2010 N.Y. Slip Op. 04525, (May 27, 2010), at 274 and *Malanga v. Chamberlain*, 20 Misc.3d 1134(A), 872 N.Y.S.2d 691 (Table), 2008 WL 3521349, 2008 N.Y. Slip Op. 51724(U), (August 13, 2008), at 2, similarly citing *Employer's Fire Inc. Co. V. Cotten*, 245 N.Y. 102, at 105 [1927] and *Carlson v. Stern's Boatyard, Inc.* 79 A.D.2d 981 [2d Dept 1981] (overturned to the advantage of the demand and refusal by the Supreme Court of New York in *Malanga v. Chamberlain*, 71 A.D.3d 644, 896 N.Y.S.2d 385, 2010 N.Y. Slip Op. 01767 (March 2, 2010), at 645). See also *Cantor v. Anderson*, (1986), at 369, where the court specified that “Conversion is any unauthorized exercise of dominion or control over the property by one who is not the owner of the property, which interferes with and is in defiance (*sic*) of a superior or possessory right of another in the property” citing *Aetna Casualty & Surety Co. v. Glass*, 75 A.D.2d 786, 428 N.Y.S.2d 246 (1st Dept.1980); “Conversion of personal property has been defined as requiring: some exercise of the right of complete ownership and dominion over the property, to the total exclusion of the rights of the owner; or alternatively an act which destroys the property, changes its character, or in some way deprives the owner permanently or for an indefinite length of time”. Gerstenblith, P., ‘The Adverse Possession of Personal Property’, 37 *Buffalo Law Review*, (1988-1989), p. 126 (footnote 15), citing *Brandenburg v. Northwestern Jobbers' Credit Bureau*, 128 Minnesota 411, 414, 151 N.W. 134, 135 (1915). See also the definition that is contained in Black's Law Dictionary: “**conversion**, *n.* (14c) 2. *Tort & criminal law.* The wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property. [...]”. “There are three distinct methods by which one man may deprive another of his property, and so be guilty of a conversion and liable in an action for trover — (1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing of it. The term conversion was originally limited to the third of these cases. To convert goods meant to dispose of them, or make away with them, to deal with them, in such a way that neither owner nor wrongdoer had any further possession of them: for example, by consuming them, or by destroying them, or by selling them, or otherwise delivering them to some third person. Merely to take another's goods, however wrongfully, was not to convert them. Merely to detain them in defiance of the owner's title was not to convert them. The fact that conversion in its modern sense includes instances of all three modes in which a man may be wrongfully deprived of his goods, and not of one mode only, is the outcome of a process of historical development whereby, by means of legal fictions and other devices, the action of trover was enabled to extend its limits and appropriate the territories that rightly belonged to other and earlier forms of action.” R.F.V. Heuston, *Salmond on the Law of Torts* 94 (17th ed. 1977). “By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner's right of property. It does not include mere acts of damage, or even an asportation which does not amount to a denial of the owner's right of property; but it does include such acts as taking possession, refusing to give up on demand, disposing of the goods to a third person, or destroying them.” William Geldart, *Introduction to English Law* 143 (D.C.M. Yardley ed., 9th ed. 1984).” Garner, B. A., *Black's Law Dictionary*, (West, 10th edition, 2014), keyword: Conversion.

²⁹ Foutty, (1990), p. 1845.

³⁰ See for example *United States of America v. Portrait of Wally, A Painting by Egon Schiele*, 2002 WL 553532, No. 99 Civ. 9940(MBM), (April 12, 2002), at 23: “[referring to the *Morissette (sic) v. United States* 342 U.S. 246, 271–72 (1952) decision] It indeed found “considerable overlap []* between stealing and conversion, noting that “probably every stealing is a conversion.” *Id.* at 271”.

³¹ See Wallace, J., ‘If the Expiration of the Statute of Limitations Bars You from Recovering Your Art from the Current Holder, When the Current Holder Sells Can You, Nevertheless, Recover Your Art from the Buyer? And, Anyway, When Did the Statute of Limitations Begin to Run Against You?’, 2(3) *Spencer's Art Law Journal*, (January 2012), p. 25, citing *Sporn v. M.C.A Records Inc.*, 58 N.Y.2d 482 (1983) and *Vigilant Ins. Co. v. Housing Authority*, 87 N.Y.2d 36 (1995).

The most notorious remedies provided in domestic U.S. tort laws in response to acts of conversion are the actions of replevin³² and conversion.³³ It is common to use the term ‘replevin’ as a general qualification of the actions towards the recovery of the possession of personal property³⁴ and the term ‘conversion’ for the payment of damages instead of recovery. Furthermore, emphasis must be placed upon the fact that the term ‘conversion’ is embedded with two meanings, the first one is concerned with the unauthorised appropriation of someone else’s belongings – hereinafter referred to as an ‘act of conversion’ – and the second one – hereinafter referred to as an ‘action in conversion’ – which refers to the action by which the claimant may obtain damages instead of the recovery of the chattel. Consequently, it suffices here to contrast the ‘action in replevin’ with the ‘action in conversion’, which constitutes a remedy by which damages can be claimed for the wrongful appropriation of the property³⁵ instead of the actual recovery of the good. Whilst some U.S. state courts have found actions in replevin better suited for the recovery of cultural property,³⁶ other courts have considered an action in conversion to be an appropriate alternative to replevin.³⁷ Despite this alternative role, this remedy is often considered less desirable when dealing with unique cultural objects.³⁸ Instead, conversion is sought when the object cannot be handed back under a claim in replevin.³⁹ Thenceforth, the present research is uniquely concerned with replevin as means of recovering stolen cultural objects. Consequently, the action in conversion will not be further addressed in the remainder of this disquisition.

In many U.S. states, the proper action – and the action most frequently used by dispossessed owners⁴⁰ – to request stolen property back is the action in replevin.⁴¹ An action in replevin is an action at law⁴² that constitutes a “speedy statutory remedy designed to allow one to recover possession of the property wrongfully held or detained as well as any damages incidental to the detention” and involves a “right to present possession” of the litigious object(s).⁴³ Replevin constitutes a possessory action,⁴⁴ constructed on the rationale of the *nemo dat*

³² **replevin** (ri-plev-in), n. (17c) 1. An action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it. — Also termed claim and delivery. [...] “Replevin consists in the redelivery of the goods taken to the owner; the name of one of the common-law actions, the distinguishing features of which are that it is brought to obtain possession of specific chattel property, and is prosecuted by the provisional seizure and delivery to the plaintiff of the thing in suit. Replevin is a personal action *ex delicto* brought to recover possession of goods unlawfully taken, the validity of which taking it is the regular mode of contesting.” J.E. Cobby, *A Practical Treatise on the Law of Replevin* 3 (2d ed. 1900). “The action of replevin lies, where specific personal property has been wrongfully taken and is wrongfully detained, to recover possession of the property, together with damages for its detention. To support the action it is necessary: (a) that the property shall be personal. (b) That the plaintiff, at the time of suit, shall be entitled to the immediate possession. (c) That (at common law) the defendant shall have wrongfully taken the property (replevin in the cepit). Although, by statute in most states, the action will now also lie where the property is wrongfully detained, though it was lawfully obtained in the first instance (replevin in the detinet). (d) That the property shall be wrongfully detained by the defendant at the time of suit.” Benjamin J. Shipman, *Handbook of Common-Law Pleading* § 49, at 120 (Henry Winthrop Ballantine ed., 3d ed. 1923). “In rare cases, the plaintiff might seek equitable relief to secure return of a chattel. More commonly, the claim for recovery of the chattel was pursued at common law under forms of action such as Detinue or Replevin. American statutes or court rules tracked the common law generally, referring to the recovery variously as replevin, detinue, claim-and-delivery, or sequestration. The statutes usually allowed the plaintiff to recover the disputed chattel before trial, though this is now subject to constitutional limits which have led to procedural revisions in many of the statutes.” 1 Dan B. Dobbs, *Law of Remedies* § 5.17(1), at 917 (2d ed. 1993). [...] Garner, B. A., *Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Replevin.

³³ **conversion**, n. (14c) 1. The act of changing from one form to another; the process of being exchanged”. Garner, B. A., *Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Conversion. See also Henson, (2001-2002), p. 1140.

³⁴ Petrovich, J. G., ‘Comments – The Recovery of Stolen Art: of Paintings, Statues, And Statues of Limitations’, 27 *UCLA Law Review*, (1979-1980), p. 1125, footnote 13, citing D. Dobbs, *Handbook on the Law of Remedies*, § 513, at 399 (1973).

³⁵ Petrovich, (1979-1980), p. 1125, footnote 13, citing D. Dobbs, *Handbook on the Law of Remedies*, § 513, at 399 (1973).

³⁶ Henson, (2001-2002), p. 1136.

³⁷ Henson, (2001-2002), p. 1136.

³⁸ Gerstenblith, P., *Art, Cultural Heritage, and the Law, Cases and Material*, (Carolina Academic Press: Durnham, Third Edition, 2004), p. 386; See for example *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp.829, (June 15, 1981), at 859: “Because the Duerers are unique chattels, the court may exercise its equitable jurisdiction to enter a judgment directing Elicofon to deliver the paintings to the Kunstsammlungen. [...] Thus, an alternative provision for recovery of the value of the chattel need to be included in the judgment where the chattel is unique”.

³⁹ 66 *American Jurisprudence*, (Second Edition, May 2017 update), Replevin § 2.

⁴⁰ Youngblood Reyhan, P. ‘A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art’, 50 (4) *Duke Law Journal*, (February 2001), p. 966.

⁴¹ Burke, K. T., ‘International Transfer of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?’, 13 *Loyola of Los Angeles International and Comparative Law Journal*, (1990-1991), p. 429; this was also confirmed by several courts, such as the court in the *Autoccephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts* case, 917 F.2d 278, (October 24, 1990), at 286. See Gerstenblith, P., *Art, Cultural Heritage, and the Law, Cases and Material*, (Carolina Academic Press, Third Edition, 2004), p. 386.

⁴² 66 *Am. Jur. 2d*, Replevin § 2 (2017).

⁴³ *Autoccephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 717 F.Supp. 1374 (August 3, 1989), at 1395-1396; Gerstenblith, Art, Cultural Heritage, and the Law, Cases and Material, (2004), p. 386.

⁴⁴ 66 *Am. Jur. 2d* Replevin § 2 (2017); a possessory action is defined as: “1. An action to obtain, recover, or maintain possession of property but not title to it, such as an action to evict a nonpaying tenant. — Also termed *possessorium*”. Garner, B. A., *Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Possessory action.

principle,⁴⁵ by which the possession of a unique object⁴⁶ is to be determined.⁴⁷ The purpose of the said action is not to ascertain ownership over the object, but merely to establish whether the claimant is entitled to possession *in rem* of the litigious object.⁴⁸ Whilst the primary purpose of this action is to entitle a claimant with a stronger title to recover possession,⁴⁹ replevin has a dual nature: it constitutes an action *in rem* and *in personam* at the same time.⁵⁰ On the one hand, the *in rem* function of the action entitles a claimant that can prove superior title to recover possession *in rem* of the object. On the other hand, the *in personam* function provides for the recovery of damages for the value of the use of the goods during the period of wrongful possession.⁵¹ Consequently, the involuntary dispossessed owner of an object that is wrongfully detained by another person can reclaim the possession of the object on the basis of an action in replevin.⁵²

In order to initiate an action in replevin, a claimant must generally comply with four prerequisites: firstly, the claimant must prove that the chattel whose ownership is disputed is the chattel that has been stolen.⁵³ Secondly, the claimant must prove to have a title or a right of possession over the object.⁵⁴ Concomitantly, he must prove that his title is superior to the one of the possessor.⁵⁵ It is thus not sufficient to prove that the title of the possessor is weaker.⁵⁶ Thirdly, the claimant must demonstrate that the good is unlawfully detained.⁵⁷ This showing witnesses that the owner neither permitted, nor authorised, the removal of the object in the first place.⁵⁸ A mere showing of a lack of intention by the owner to abandon, bequeath or relinquish title or possession of the object to another is sufficient to prove the unlawfulness of the possession.⁵⁹ Finally, with the exception of New York,⁶⁰ the claimant must prove that the defendant is in wrongful possession of the chattel.⁶¹ By providing evidence of theft, it is possible to infer wrongful possession since a thief can never transfer a valid title to a stolen object.⁶²

There exists no federal procedure for the recovery of personal property and state laws prescribe the available remedies to conversion.⁶³ New Jersey recognises the action in replevin as the appropriate procedure for

⁴⁵ Bengs, B., 'Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law', 6 *Transnational Law & Contemporary Problems*, (1996), p. 518.

⁴⁶ 66 Am. Jur. 2d, Replevin § 2 (2017).

⁴⁷ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1396; Youngblood Reyhan, (2001), p. 966.

⁴⁸ Henson, (2001-2002), p. 1137.

⁴⁹ 66 Am. Jur. 2d, Replevin § 2 (2017), citing *Lou Leventhal Auto Co., Inc. v. Munn*, 164 Ind. App. 368, 328 N.E.2d 734 (1975); *Taylor v. McNeal*, 523 S.W.2d 148 (Mo. Ct. App. 1975); *Com. v. Dean*, 245 Pa. Super. 322, 369 A.2d 423 (1976); See also Alexander, V. C., 'Practice Commentaries', *McKinney's CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101, specifying that the contemporary purpose of the action in replevin stems in determining which one of the parties to the contention has a superior possessory right over the disputed chattel (citing *Christie's Inc. v. Davis*, S.D.N.Y. 2002, 247 F.Supp.2d 414, 419).

⁵⁰ 66 Am. Jur. 2d, Replevin § 2 (2017), citing *Jedlicka v. Good Mechanical Auto Co.*, 21 Ohio App. 3d 19, 486 N.E.2d 121 (8th Dist. Cuyahoga County 1984).

⁵¹ 66 Am. Jur. 2d, Replevin § 2 (2017), citing *Kelly v. Miller*, 575 P.2d 1221, 23 U.C.C. Rep. Serv. 632 (Alaska 1978); *Brown v. Reynolds*, 872 So. 2d 290 (Fla. Dist. Ct. App. 2d Dist. 2004).

⁵² Bengs, (1996), pp. 517-518.

⁵³ See for example the California case of *Naftzger v. American Numismatic Society*, Not Reported in Cal.Rptr.2d, 1999 WL 1074009, (June 17, 1999), at 3 where the Court of Appeal of the Second District concluded that there was substantial evidence to prove that the coins at stake were the coins that were substituted from the American Numismatic Society.

⁵⁴ *Yale University v. Konowaloff*, 5 F.Supp.3d 237, 308 Ed. Law Rep. 797, (March 20, 2014), at 241, where the court specified for Connecticut that the claimant has the burden of proof of showing superior title (citing *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548). See also Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1397; see *Matter of Flamenbaum*, 27 Misc.3d 1090, 899 N.Y.S.2d 546, 2010 N.Y. Slip. Op. 20117, (March 30, 2010), at 1096, citing *Batsidis v. Batsidis*, 9 A.D.3d 342, 778 N.Y.S.2d 913 [2d Dept. 2004]; *Matter of Barrett*, 82 N.Y.S.2d 137 [Sur. Ct., Westchester County 1948]; see also *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 853 and ff. for an example in which the claimant had to demonstrate his superior right.

⁵⁵ See the Connecticut case *Yale University v. Konowaloff*, (2014), at 241 where the court cites *M. Izkowitz & Sons, Inc. v. Santorelli*, 128 Conn. 195, 198, 21 A.2d 376 (1941) and *Nissan Motor Acceptance Corp. V. Scialpi*, 94 A.D.3d 1067, 944 N.Y.S.2d 160, 162 (2012). See also Henson, (2001-2002), p. 1138, citing *Autocephalous*, (1989), at 1397-1398; for a good example where the two parties had to prove having superior title to a statue by Jacques Lipchitz, see *Mirish v. Mott*, 18 N. Y.3d 510, 965 N.E.2d 906, 942 N.Y.S.2d 404, 2012 N.Y. Slip. Op. 01149, (February 16, 2012).

⁵⁶ Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1397-1398.

⁵⁷ Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1397-1398.

⁵⁸ Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1397-1398.

⁵⁹ Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1397-1398.

⁶⁰ In New York, because the purchaser has an obligation to research the provenance of the property that he wants to acquire, the possessor of a chattel must prove in replevy that the object was not stolen. See *Sotheby's, Inc. v. Shene*, Not Reported in F.Supp.2d, 2009 WL 762697, (March 23, 2009), at 2: "New York places "the burden of investigating the provenance" of an object on its purchaser, and therefore requires the possessor of an object to prove in a replevin action that the object was not stolen", citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, at 320.

⁶¹ Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1396-1397.

⁶² Henson, (2001-2002), p. 1138, citing *Autocephalous*, 717 F.Supp., at 1376; see also for example *In Re "Paysage Bords de Seine."*, (2014), at 744 requiring evidence of theft for the purposes of the action in replevin. Additionally, see also *Naftzger v. American Numismatic Society*, (1999), at 3.

⁶³ Demarsin, (2011), p. 624, footnote 16.

the recovery of stolen personal property:⁶⁴ following the ruling of the New Jersey court in *O’Keefe v. Snyder*, “[a]n action brought for replevin is a proper means for an owner to regain possession of chattels lost through conversion”.⁶⁵ This action is thus possible on the basis of Section 2B:50-1 of the *New Jersey Revised Statutes*⁶⁶ (hereinafter NRJS). Unlike in New Jersey, California law knows of the action in claim and delivery.⁶⁷ This action – which is codified in Sections 511.010 and ff. of the California Code of Civil Procedure⁶⁸ – hereinafter CCCP – shares similar traits to the action in replevin⁶⁹ as it has been characterised as “a remedy by which a party with a superior right to a specific item of personal property (created, most commonly, by a contractual lien) may recover possession of that specific property before judgment”.⁷⁰ At last, Article 71, entitled ‘Recovery of Chattel’, of the New York CPLR prescribes the action of replevin for the repossession of stolen chattels.⁷¹ Although the article does not specifically refer to the action in replevin, Article 71 CPLR has been interpreted as providing “a procedure in the nature of provisional remedy, which may be used as an incident to such action, by which an officer seizes the chattel before judgment”,⁷² which is tantamount to a right of possession to a chattel when superior title can be shown.⁷³

(5) Statute of limitations

Despite the fact that the *nemo dat* principle is grounded as a sturdy premise of the contemplated rules⁷⁴ (see below), there exist procedural constraints to the principle’s predominance. These procedural constraints rest in

⁶⁴ “In a strict sense replevin at the common law could only lie where the goods or chattels were so taken that an action of trespass *De bonis asportatis* would lie. The original taking of possession by the defendant had to be unlawful or tortious *Ab initio*. *Woodside v. Adams*, 40 N.J.L. 417 (Sup.Ct.1878); *Shinn on Replevin*, section 292. Since early times under our statute, R.S. 2:73—3, N.J.S.A., replevin would also lie where the original taking of possession was lawful but the subsequent detention of the property was unlawful or tortious. This provision in the statute brought the common law action of detinue within the ambit of the remedy. The gist of the common law action of detinue was that defendant originally had and acquired possession of the chattels lawfully, as by finding or bailment, but holds them subject to the plaintiff’s superior right to immediate possession which has been asserted by a demand. The essence of the action is the wrongful detention not the wrongful taking. *Shinn on Replevin*, section 292; *McKelvey’s Common Law Pleading*, sections 31 and 68. Under our statute there must be an unlawful detention and in that respect the action of replevin is put on the same footing as an action in trover or detinue. There must be an actual conversion or refusal to deliver on demand which is evidence of conversion, before the detention becomes unlawful. But to constitute such conversion there must be some repudiation by the defendant of the owner’s right or some exercise of dominion over the chattels by him inconsistent with such right or some act done which has the effect of destroying or changing the quality of the chattels. *Woodside v. Adams*, supra, 40 N.J.L. at page 430”. *Baron v. Peoples National Bank of Secaucus*, 16 N.J.Super. 243, 84 A.2d 492, (November 5, 1951), at 255-256.

⁶⁵ “An action brought for replevin is a proper means for an owner to regain possession of chattels lost through conversion. *Baron v. Peoples National Bank of Secaucus*, 9 N.J. 249, 255-256, 87 A.2d 898 (1952); D. Dobbs, *The Law of Remedies* s 5.13 at 399 et seq. (1973); 20 N.J. Practice (Ackerson & Fulop, *Skills and Methods*) s 1711 at 490 (2 ed. 1973); 66 Am.Jur.2d, Replevin, s 39 at 860 (1973); see also *Plummer v. Kingsley*, 190 Or. 378, 384-385, 226 P.2d 297, 300-301 (Sup.Ct.1951); J. Darlington, *The Law of Personal Property* 4 (1891).” *O’Keefe v. Snyder*, (1980), at 509; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 409.

⁶⁶ “Action for replevin – A person seeking recovery of goods wrongly held by another may bring an action for replevin in the Superior Court. If the person establishes the cause of action, the court shall enter an order granting possession”. N.J.R.S. § 2B:50-1 (2014).

⁶⁷ *Simms v. NPCK Enterprises, Inc.*, No. C039756, 109 Cal.App.4th 233, 134 Cal.Rptr.2d 557, 03 Cal. Daily Op. Serv. 4505, 2003 Daily Journal D.A.R. 5712, (May 28, 2003), at 241 whereby the court specified: “A secured party wishing to repossess by judicial action, can bring an action in replevin or proceed under the statutory successor to replevin, an action of claim and delivery. (White & Summers, *Uniform Commercial Code* (4th ed. 1999 Supp.) § 25–8, p. 221.)”.

⁶⁸ See *Waffer Internat. Corp. v. Khorsandi*, 69 Cal.App.4th 1261, 82 Cal.Rptr.2d 241, 99 Cal. Daily Op. Serv. 1225, 1999 Daily Journal D.A.R. 1471, (February 16, 1999), at 247.

⁶⁹ 18 *American Jurisprudence*, (Second Edition, May 2017), Conversion § 66 and 66 Am. Jur. 2d, Replevin § 3 (2017); Alexander, V. C., ‘Practice Commentaries’, *McKinney’s CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101, where it is specified that the CPLR has abolished the use of the terminology ‘replevin’ and that § 7101 CLPR constitutes an action to determine the right of possession.

⁷⁰ See *Simms v. NPCK Enterprises, Inc.*, No. C039756, May 28, 2003, 109 Cal.App.4th 233, 134 Cal.Rptr.2d 557, at 241, citing *Waffer Internat. Corp. v. Khorsandi* (1999) 69 Cal.App.4th 1261, 1271, 82 Cal.Rptr.2d 241.

⁷¹ *Solomon R. Guggenheim Foundation v. Lubell* (1990), at 145; See also Alexander, V. C., ‘Practice Commentaries’, *McKinney’s CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101, specifying that the action laid down in Article 71 CPLR finds its roots in the action of replevin (citing *Simmott v. Feiock*, 1901, 165 N.Y. 444, 445-46, 59 N.E. 265, 265 and Joseph A. Koffler & Alison Reppy, *Common Law Pleading* § 127 (1969)).

⁷² *DeWeerth v. Baldinger*, 658 F.Supp.688, (April 20, 1987), at 695, citing McLaughlin, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, C.P.L.R. C7101:1 et seq. at 170-172; see also Alexander, V. C., ‘Practice Commentaries’, *McKinney’s CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101, where the juxtaposition of the procedure of seizure and delivery to the action in replevin is explained.

⁷³ *DeWeerth v. Baldinger*, (1987), at 695, citing McLaughlin, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, C.P.L.R. C7101:1 et seq. at 170-172 and *East Side Car Wash, Inc. v. K.R.K. Capitol, Inc.*, 102 A.D.2d 157, 476 N.Y.S.2d 837, 840 (1st Dept.1984); the CPLR is solely concerned with the question of relativity of the possessory rights of the plaintiff and defendant. See Alexander, V. C., ‘Practice Commentaries’, *McKinney’s CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101, citing N.Y.Adv.Comm.on Prac. ¶ Proc., Fourth Prelim.Rep., Legis.Doc.No.20, p. 253 (1960) and *G & S Quality, Inc. v. Bank of China*, 1966, 233 A.D.2d 215, 650 N.Y.S.2d 97 (1st Dep’t).

⁷⁴ McCord, J. A., ‘The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Traffic in Art’, 70 *Indiana Law Journal*, (1994-1995), p. 989.

temporal limitations of actions⁷⁵ in the form of statutes of limitations. Statutes of limitations – hereinafter SOL – are important time restrictions that are necessary for the efficient and fair prosecution of claims.⁷⁶ The United States Supreme Court highlighted the purpose of these statutes in the case of *Riddlesbarger v. Hartford Insurance Company*:⁷⁷

“The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes as a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies.”

SOL have been prescribed to provide fairness to defendants,⁷⁸ who will have reasonable expectations that they will not be subject to the prosecution of claims arising when “evidence has been lost, memories have faded, and witnesses have disappeared”.⁷⁹ It guarantees that a claim may not be brought any longer when this would lead to a troublesome or unfair result.⁸⁰ Consequently, after a certain period of time has lapsed, a defendant can expect a clean slate, providing him with permanent repose from litigation.⁸¹ In other words, SOL cut-off the assertion of a right to promote peace and order in society,⁸² and are meant to bring finality to certain factual situations.⁸³ Adjacently, these statutes ensure commercial transactions by protecting *bona fide* purchasers upon expiration of the limitation period.⁸⁴ In other words, they promote commercial activities by allowing titles to be quieted in favour of the marketability of goods.⁸⁵ Correspondingly, SOL ensure prompt activity by the claimant and will punish dilatory behaviour⁸⁶ based upon the presumption that one that has a valid cause of action will not delay enforcing his right.⁸⁷

Reiterating the foregoing, temporal limitations to the recovery of converted personal property have been exclusively enacted in the form of statutes of limitations and – with the exception of the *Holocaust Expropriated Art Recovery Act* – hereinafter HEAR Act –,⁸⁸ at the state level:⁸⁹ the possibility to initiate actions in replevin has

⁷⁵ Grover, S. F., ‘Note – The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study’, 70 *Texas Law Review*, (1991-1992), p. 1447; in general, two different types of temporal limitations exist over rights of action: statutes of limitations and statutes of repose. Whilst statutes of limitations constitute procedural constraints that are – *inter alia* – inherent to the exercise of an action in replevin, statutes of repose are inoperative in the context of replevin and will, therefore, be omitted from the present analysis. Statutes of limitations are time slots within which a lawsuit must be initiated by a plaintiff in a civil case. “In the ordinary course, a statute of limitations creates “a time limit for suing in a civil case, based on the date when the claim accrued.” Black’s Law Dictionary 1546 (9th ed. 2009) (Black’s); see also *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. —, —, 134 S.Ct. 604, 610, 187 L.Ed.2d 529 (2013) (“As a general matter, a statute of limitations begins to run when the cause of action ‘accrues’ – that is, when ‘the plaintiff can file suit and obtain relief’” (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997))). Measured by this standard, a claim accrues in a personal-injury or property-damage action “when the injury occurred or was discovered.” Black’s 1546. For example, North Carolina, whose laws are central to this case, has a statute of limitations that allows a person three years to bring suit for personal injury or property damage, beginning on the date that damage “becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.” N.C. Gen.Stat. Ann. § 1–52(16).” *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 189 L.Ed.2d 62, 78 ERC 1505, (June 9, 2014), at 2182.

⁷⁶ Demarsin, (2011), p. 624.

⁷⁷ *Riddlesbarger v. Hartford Insurance Company*, 74 U.S. 386, 390 (1868), cited in Demarsin, (2011), p. 626.

⁷⁸ Demarsin, (2011), p. 624.

⁷⁹ Demarsin, (2011), p. 625; Gerstenblith, (1988-1989), p. 131; Petrovich, (1979-1980), p. 1127; Redman, L. F., ‘A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases’, 15 *UCLA Entertainment Law Review*, (2008), p. 211.

⁸⁰ Petrovich, (1979-1980), p. 1126.

⁸¹ Demarsin, (2011), p. 625; Petrovich, (1979-1980), pp. 1127 and 1128.

⁸² Demarsin, (2011), p. 627.

⁸³ Demarsin, (2011), pp. 627-628.

⁸⁴ Demarsin, (2011), p. 626; Gerstenblith, (1988-1989), p. 131; Petrovich, (1979-1980), p. 1128.

⁸⁵ Redman, (2008), p. 211.

⁸⁶ See *O’Keefe v. Snyder*, (1980), at 490-491; Petrovich, (1979-1980), p. 1127.

⁸⁷ Petrovich, (1979-1980), p. 1127; Redman, (2008), p. 211.

⁸⁸ The HEAR Act, which entered into force on 16 December 2016, is a Federal Act enacted to remove technical barriers to the prosecution of claims for the recovery of WWII Nazi looted artworks. As noted by section 2 (6) of the Act: “Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. [...] The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law”. To remove the procedural hurdles engendered by limitations of the rights of actions, the Act prescribes fair and just solutions to the problem (cf. Section 3 HEAR Act). In doing so, it introduces a specific period of limitations for the recovery of Nazi confiscated ‘artwork or other property’ (as defined in Section 4 (2) HEAR Act) misappropriated between 1 January 1933 and 31 December 1945 (see the definition of ‘covered period’ in Section 4 (3) HEAR Act before U.S. courts (cf. also Section 2 (7) HEAR Act). This period of limitations is a statute of limitations of six years to run from the actual discovery of both a. the identity and

been curtailed in most common law jurisdictions through the enactment of statutes of limitations.⁹⁰ Concomitantly, the expiration of SOL is the primary defence invoked by defendants in proceedings for the recovery of stolen cultural objects⁹¹ and constitute the most prominent and viable⁹² defence for purchasers who act in good faith.⁹³ The length prescribed by these laws varies along a spectrum of one to six years.⁹⁴ In all three jurisdictions under scrutiny, statutes of limitations have been enacted with regard to actions in replevin: under Section 2A:14-1 of the NJRS (2014), the length of the statute of limitation is set at six years from the accrual of the cause of action.⁹⁵ Section 1:3-1 of the New Jersey Rules of Court – hereinafter NJRC – lays down the manner with which the prescribed period of six years must be computed.⁹⁶ California knows of a statute of limitations of three years or of six years depending upon the accrual of the cause of action prescribed by the CCCP (cf. actual Sections 338 (2) and (3) CCCP discussed below). The running of the period is further regulated by § 12 and ff. of the CCCP.⁹⁷ For New York, the statute of limitations for action to recover personal property is laid down in Section 214 (3) of the CPLR.⁹⁸ Following this article, the action in recovery of chattels must be initiated within a period of three years. Section 203 (a) CPLR clarifies that for the claim to be timely filed, it must have been interposed before the period of three years has lapsed. Following the same section, the period of three years starts to run at the accrual of the cause of action.

Whilst each of these foregoing statutes of limitations explicitly provide the period within which a claimant must act, these statutes – with the exception of California – say little about the materialization of the cause of action. Traditionally, states’ legislators have provided very limited guidance as to how the periods laid down in statutes of limitations are to apply.⁹⁹ Instead, decision-makers have often entrusted courts with the application of the said statutory periods,¹⁰⁰ giving them discretion in determining the timeliness of the actions concerned.¹⁰¹ The sole guidance provided by law has been in specifying that a statute of limitation is triggered by the materialisation of the cause of action or – to reiterate the terminological choices posited – at the accrual of

the whereabouts of the artwork or other property and of b. the existence of a possessory interest in the artwork of other property by the claimant (cf. Section 5 (a) HEAR Act). Furthermore, the statute is applicable to pending and future proceedings (cf. Section 5 (c), (d) and (e) HEAR Act) up until 31 December 2026 (cf. Sections 5 (d) (2) and (g) HEAR Act). To date, the Act has been invoked in several cases that still have to be adjudicated. See for example *Zuckerman v. Museum of Modern Art* in which a work of Pablo Picasso entitled “The actor” is currently disputed, as well as the case for the recovery of the Guelph Treasure from the German *Stiftung Preussischer Kulturbesitz*. In another suit for the recovery of an Edgar Degas against Christie’s lodged by the family relatives of Holocaust victims Ludwig and Margareth Krainer, the HEAR Act is averred to eliminate the statute of limitations’ bar. Nonetheless, because this Act addresses the recovery of artwork and other property looted during the Second World War, it is peripheral to the present research (as was specified in the introductory chapter of the present disquisition) and will, therefore, not be discussed any further. For more details about the Act, see Cronin C., ‘Von Saher v. Norton Simon Museum: Ethical Quandaries of Art Restitution Claims Against Public Collections’, (2017), pp. 1-30. See also Kreder, J., ‘Analysis of the Holocaust Expropriated Art Recovery Act of 2016’, 20 (1) *Chapman Law Review*, pp. 1-24.

⁸⁹ Fincham, D., ‘Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities’, 37 *Syracuse Journal of International Law and Commerce*, (2009-2010), p. 189.

⁹⁰ Pinkerton, (1990), p. 2.

⁹¹ Demarsin, B., ‘The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer – The Limitation and Act of State Defenses in Looted Art Cases’, 28 *Cardozo Arts & Entertainment Law Journal*, (2010-2011), p. 260; Redman, (2008), p. 210.

⁹² McCord, (1994-1995), p. 990.

⁹³ Foutty, (1990), p. 1841; McCord, (1994-1995), p. 990.

⁹⁴ It should be noted that Demarsin mentions that a typical period ranges from two to six years, albeit certain other U.S. states have prescribed a limitation of one year. See the overview of thirteen states provided by Demarsin in Demarsin, (2010-2011), p. 260, footnote 23; Demarsin, (2011), p. 633; Redman, (2008), p. 210.

⁹⁵ “Every action at law for [...] taking, detaining, or converting personal property, for replevin of goods or chattels, [...] shall be commenced within 6 years next after the cause of any such action shall have accrued”. Article 2A:14-1 NJRS 2014.

⁹⁶ See Klock, J. H., ‘New Jersey Practice Series – Court Rules Annotated’, (March 2017 update), R 1:3-1: “In computing any period of time fixed by rule or court order, the day of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday. In computing a period of time of less than 7 days, Saturday, Sunday and legal holidays shall be excluded”.

⁹⁷ § 12 of the CCCP reads as follows: “The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded”; *Society of California Pioneers v. Baker*, 43 Cal.App.4th 774, 50 Cal.Rptr.2d 865, 96 Cal. Daily Op. Serv. 1810, 96 Daily Journal D.A.R. 3079, (March 15, 1996), at 785, footnote 12 (citing *Del. Leon v. Bay Area Rapid Transit Dist.* (1983) 33 Cal.3d 456, 460-461, 189 Cal.Rptr. 181, 658 P.2d 108).

⁹⁸ “The following actions must be commenced within three years: [...] 3. an action to recover a chattel or damages for the taking or detaining of a chattel; [...]”. New York Civil Practice Law and Rules, section 214; see *DeWeert v. Baldinger*, 38 F.3d 1266, (May 16, 1994), at 1277; see also Schwartz and Scott, (2011), p. 1336, footnote 17. See also *Mirish v. Mott*, (2010), at 274.

⁹⁹ Demarsin, (2011), p. 634; Foutty, (1990), p. 1842; Gerstenblith, (1988-1989), p. 126; this was notably the conclusion reached by the New Jersey Supreme Court in the case of *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277, (June 30, 1961), at 285 with regard to the New Jersey legislator. See Fincham, (2009-2010), p. 190.

¹⁰⁰ Petrovich, (1979-1980), p. 1129, citing for example *Fernandi v. Strully* (1961), where the court submitted that in most states “the legislatures have not at all expressed themselves on the matter, preferring to leave to judicial interpretation and application the rather obscure statutory phraseology that the plaintiff’s proceedings shall be instituted within a stated period after his cause of action ‘shall have accrued’” (35 N.J. 439 and 173 A.2d 279).

¹⁰¹ Demarsin, (2010-2011), p. 261; Gerstenblith, (1988-1989), p. 126; Fincham, (2009-2010), p. 190; Pinkerton, (1990), p. 2.

the cause of action.¹⁰² The accrual of the cause of action is to be understood as the moment at which all the prerequisites to the initiation of legal proceedings by the claimant are disclosed to him.¹⁰³ More specifically, the cause of action will accrue when the last requirement has materialised.¹⁰⁴ Courts have therefore been entrusted with the role of laying down the facts or events that will need to be computed for the cause of action to materialise.¹⁰⁵ The practical effect of a deferred accrual of the cause of action is to toll the application of the statute of limitations,¹⁰⁶ which constitutes a peculiarity inherent to statutes of limitations.¹⁰⁷ The different fashions with which domestic courts apply statutes of limitations, or – more specifically – when these courts consider the accrual of the cause of action to have materialised,¹⁰⁸ will be explained in greater detail below. What is important to note here is that the application of the *nemo dat* principle, although praised as sacrosanct and inviolable, is in practice limited by statutes of limitations that constitute “rules on limitation of action”.¹⁰⁹ In other words, while, theoretically, a dispossessed owner remains entitled to recover a stolen object in the three jurisdictions under review, in practice these jurisdictions tend to have developed justiciability constraints in the form of limitations on the exercise of the action, which render restitution difficult and, sometimes, impossible.¹¹⁰ How difficult or impossible recovery becomes depends mainly on the interpretation of the accrual of the cause of action that is used by the domestic court seized. It is, therefore, of paramount importance to determine, with precision, when the period prescribed by a statute of limitations will start running¹¹¹ – or in other words, when the cause of action accrues –, as this will be determinative for an owner in successfully reclaiming a stolen cultural object. This determination is addressed in more detail in section A.3 below.

¹⁰² Demarsin, (2010-2011), p. 261; Gerstenblith, (1988-1989), p. 126; Petrovich, (1979-1980), pp. 1126 and 1128.

¹⁰³ “**accrue** (<<schwa>>-kroo), *vb.* (15c) **1.** To come into existence as an enforceable claim or right; to arise [...] “The term ‘accrue’ in the context of a **cause of action** means to arrive, to commence, to come into existence, or to become a present enforceable demand or right. The time of **accrual** of a **cause of action** is a question of fact.” 2 Ann Taylor Schwing, *California Affirmative Defenses* § 25:3, at 17–18 (2d ed. 1996)”. Black’s law dictionary, 10th edition, 2014, keyword: Accrue; as the United States Supreme Court put it in the 2014 *CTS Corp. v. Waldburger* decision (*CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 189 L.Ed.2d 62, 78 ERC 1505, (June 9, 2014)), the accrual of the cause of action materialises when “the plaintiff can file suit and obtain relief” (Quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997)). The notion is additionally explained in 51 *American Jurisprudence Second Edition, Limitation of Actions* §127: “The term “to accrue” means to arrive, to commence, to come into existence, or to become a present enforceable demand. [footnote 11: *Polizos v. Nationwide Mut. Ins. Co.*, 54 Conn. App. 724, 737 A.2d 946 (1999), *aff’d*, 255 Conn. 601, 767 A.2d 1202 (2001); *Strassburg v. Citizens State Bank*, 1998 SD 72, 581 N.W.2d 510 (S.D. 1998)]. For statutes of limitations purposes, a cause of action “accrues” at the time the cause of action is complete with all of its elements. [footnote 12: *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151 (2007); *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 27 Cal. Rptr. 3d 661, 110 P.3d 914 (2005)]. However, it is not necessary that a plaintiff be able to prove each element of the cause of action before the period of limitation begins to run. [footnote 13: *Jackson County Hog Producers v. Consumers Power Co.*, 234 Mich. App. 72, 592 N.W.2d 112 (1999)]. See also Petrovich, (1979-1980), pp. 1128-1129 where reference is made to ‘Development in the Law—Statutes of Limitations’ 63 *Harvard Law Review* 1177, 1185 (1950), at 1200, but also ‘Comment, *The Evolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why?*’, 53 *Chi.-Kent Law Review* 673, 675 & n.17 (1977) at 677 specifying that the cause of action accrues when all the necessary elements to establish liability occur. Further reference is made to *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187, 491 P.2d 421, 428, 98 Cal. Rptr. 837, 844 (1971) and *Reat v. Illinois Cent. R.R.*, 47 Ill. App. 2d 267, 197 N.E.2d 860 (1964); *American Law Reports ALRD3d* 847, § 2[a], where it is specified that the accrual of the cause of action equates to the moment when the right to commence an action comes into being.

¹⁰⁴ Petrovich, (1979-1980), p. 1129, citing ‘Development in the Law—Statutes of Limitations’ 63 *Harvard Law Review* 1177, 1185 (1950), at 1200.

¹⁰⁵ Petrovich, (1979-1980), p. 1129.

¹⁰⁶ As was specified by the United States Supreme Court in *Waldburger* “Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to “pursu[e] his rights diligently,” and when an “extraordinary circumstance prevents him from bringing a timely action,” the restriction imposed by the statute of limitations does not further the statute’s purpose. Lozano, *supra*, at —, 134 S.Ct., at 1231–1232.” *CTS Corp. v. Waldburger*, (2014), at 2183.

¹⁰⁷ “One central distinction between statutes of limitations and statutes of repose underscores their differing purposes. Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that “pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.” Lozano v. Montoya Alvarez, 572 U.S. 1, —, 134 S.Ct. 1224, 1231–1232, 188 L.Ed.2d 200 (2014). Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff’s control. See, e.g., *Lampf, supra*, at 363, 111 S.Ct. 2773 (“[A] period of repose [is] inconsistent with tolling”); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1056, p. 240 (3d ed. 2002) (“[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling”); Restatement (Second) of Torts § 899, Comment g (1977).” and “But a statute of repose is a judgment that defendants should “be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.” C.J.S. § 7, at 24. [...]”. *CTS Corp. v. Waldburger*, (2014), at 2183.

¹⁰⁸ Demarsin, (2010-2011), p. 261; Fouty, (1990), p. 1841.

¹⁰⁹ Reichelt, G., ‘International Protection of Cultural Property by Gerte REICHELt, Univ. Dozent Vienna Institute of Comparative Law’, *Uniform Law Review*, (1985), p. 105.

¹¹⁰ Klein, (1999), pp. 273, 276.

¹¹¹ Demarsin, (2011), p. 634; Petrovich, (1979-1980), p. 1128.

2. CONTEXTUALIZATION

Before meticulously analysing the different ways by which New Jersey, California and New York courts toll statutes of limitations that are applicable to actions in replevin for stolen cultural chattels, the present intermezzo will give some context to the present disquisition. Unlike in Belgian, French and Dutch law, the distinction between voluntary / involuntary loss of possession by the owner is not *ipso facto* determinative to the outcome of the case. Instead, the *nemo dat quod non habet* principle acts as the fulcrum in the transfer of personal property in the three U.S. jurisdictions that are under scrutiny in this chapter. This principle is, nonetheless, subject to three general exceptions, which will be addressed below.

(1) Nemo plus iuris transferre potest quam ipse habet

As United States law does not allow exceptions of third-party protection in case of theft, the *nemo dat* principle has been endowed with sacrosanct value. As such, a basic tenet of US law holds that an owner whom is victimised by theft can unconditionally reclaim the stolen object, including from a good faith purchaser that has acquired it from a thief.¹¹² This unfettered possibility to recover flows from the adage *nemo plus iuris ad alium transferre potest quam ipse habet* (*nemo dat*). The principle was first discussed by the Federal Supreme Court in the case of *Mitchell v. Hawley* (1872).¹¹³

“Nemo dat quod non habet. Persons, therefore, who buy goods from one not the owner, and who does not lawfully represent the owner, however innocent they may be, obtain no property whatever in the goods, as no one can convey in such a case any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner.”¹¹⁴

In 1952, the prominence of the *nemo dat* principle as a cornerstone of U.S. law was reinvigorated through its codification in Article 2-403 (1) UCC.

Article 2-403 UCC – (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.

For the sake of accuracy, it is important to note that every state in the U.S. has its own legislation regulating the private law implications resulting from the theft of personal property,¹¹⁵ but that all of these states’ legislation can nowadays derive the authority from the *nemo dat* principle of Article 2-403 of the 1952 UCC.¹¹⁶ Concomitantly, due to the UCC’s role as a model code, Section 2-403 UCC will only be binding in an U.S. state where it has been reproduced in that state’s domestic law, which is the case in New Jersey,¹¹⁷ California¹¹⁸ and New York.¹¹⁹

¹¹² Demarsin, (2010-2011), p. 259.

¹¹³ *Mitchell v. Hawley*, 83 U.S. 544, 1872 WL 15359, 21 L.Ed. 322, 16 Wall. 544, (December 1, 1872), at 550.

¹¹⁴ The authorities cited by the Supreme Court are: *Foxley’s Case*, 5 Coke, 109 a; 2 Blackstone’s Commentaries, 449; 2 Kent, 11th ed. 224; *Williams v. Merle*, 11 Wendell, 80; *Stone v. Marsh*, 6 Barnewall & Creswell, 551; *Marsh v. Keating*, 1 Bingham, New Cases, 198; *Marsh v. Keating*, 2 Clarke & Finley, 250; Benjamin on Sales, 4; *White v. Spettigue*, 13 Meeson & Welsby, 603; 1 Smith’s Leading Cases, 7th edition, 1195; 1 Parson’s Con., 5th ed. 520.

¹¹⁵ Property theft is a domain that is regulated by State law and not by Federal law. See Cronin, (2017), pp. 7-8, footnote 45.

¹¹⁶ See Burke, (1990-1991), p. 447.

¹¹⁷ In New Jersey, Section 2-403 UCC has been codified in Article 12A, Section 2-403 of the New Jersey Statutes Annotated (hereinafter NJSA). Adjacently, the *nemo dat* principle has been recognised by the New Jersey courts as an important tenet of New Jersey law. As confirmed in *O’Keeffe v. Snyder*, the *nemo dat* principle was observed in several precedents, including by the New Jersey Supreme Court in *Ashton v. Allen*, 70 N.J.L. 117, 41 Vroom 117, 56 A. 165, (November 9, 1903), at 119, by the Superior Court of New Jersey (Appellate Division) in *Joseph v. Lesnevich*, 56 N.J.Super. 340, 346, 153 A.2d 349 (July 15, 1959), at 346, and by the Superior Court of New Jersey (Chancery Division) in *Kutner Buick v. Strelceki*, 111 N.J.Super. 89, 267 A.2d 549, (June 29, 1970), at 97 where the court specified “Most of the cases that have laid down this rule have dealt with the rights of the original owner over a bona fide purchaser. *National Retailers Mut. Ins. Co. v. Gambino*, Supra, states: And if the wrongdoer sells the chattel to an innocent purchaser, the latter obtains no title from the trespasser because the wrongdoer had none to give. The owner may still retake it in its improved or changed state. *Silbury v. McCoon*, 3 N.Y. 379 (1850). (at 629—630, 64 A.2d at 928) [5] The concern in these cases has been to protect the innocent victim of theft. Although many cases speak in terms of no title in the purchaser, the better and more accurate rule of law seems to be that a bona fide purchaser of personal property taken tortiously or wrongfully, as by trespass or theft, does not acquire a title good against the true owner. 7 C.J.S. Sales § 295e (1952)” (at 553-554). See *O’Keeffe v. Snyder* (1980), at 488.

¹¹⁸ The rule contained in Article 2-403 UCC has been transposed into Section 2403 of the California Uniform Commercial Code (hereinafter CUCC). Furthermore, in 1999, California courts borrowed the *nemo dat* rule from the *Velzjan v. Lewis* decision by the Oregon Supreme Court (1888). In *Velzjan*, the court submitted that “Nothing can be plainer than that no one can sell a right when he himself has none to sell, [...] every such wrongful sale, by whomever made, whether by thief or bailee, acts in derogation of the rights of the owner, and in hostility to his authority, and consequently, can neither acquire themselves, nor confer on the purchaser any right or title of such owner”. See *Velzjan v. Lewis*, 15 Or. 539, 16 P. 631, 3 Am.St.Rep. 184, (January 2, 1888), at 542. Furthermore, in *Velzjan* the Supreme Court of Oregon added “Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake” (*idem*). In this explanation, Oregon’s Supreme Court established that, when a dispossessed owner parts with his possession on an involuntary basis, as in the case of theft, the *nemo dat* principle, combined with the rule of *caveat emptor* from the perspective of the buyer, makes it impossible for a thief or subsequent

In the same vein as the 1872 Supreme Court judgment, Article 2-403 (1) UCC clarifies that it is impossible for a thief to pass good title upon these objects to any subsequent purchaser(s), even if the acquisition took place in good faith:¹²⁰ since the thief has acquired no valid right from the dispossessed owner through the act of thievery, it is considered that any subsequent transfer of ownership from him is void and, consequently, cannot result – directly or indirectly – in the transfer of a valid right to a subsequent purchaser, irrespective of the exercise of good faith during the acquisition by the latter.¹²¹ Discussing the implications of the *nemo dat*'s towering influence does not constitute a pedantic exercise, but is particularly germane to the present discussion. Its sacrosanctity has rendered cases about stolen cultural objects particularly straightforward:¹²² in case of conflict between a dispossessed owner and an unauthorised possessor, the dispossessed owner will prevail against a thief or a subsequent possessor,¹²³ irrespective of the means of acquisition, of the gratuitous or for value nature of the transaction or acquisition, or even of the presence of good or bad faith throughout the said transaction.¹²⁴ Concomitantly, unlike the three jurisdictions discussed in Chapter 2, possession in good faith does not constitute an effective defence to an owner's action in recovery of the stolen chattel.¹²⁵ The lack of relevancy of *bona fide* acquisitions in cases dealing with stolen cultural goods in the three U.S. jurisdictions addressed in this chapter entails that defining good faith is not important when deciding on the merits of these

possessor to acquire title in the object. See *Harpending v. Meyer*, 6 P.C.L.J. 201, 55 Cal. 555, 1880 WL 1991, (July 1, 1880), at 560. The requirement of *caveat emptor* was already scrupulously followed in California as it had been posited less than a decade prior to *Velozian in the Harpending v. Meyer* decision. As a corollary to the *nemo dat* principle, the *caveat emptor* principle imputes notice upon the purchaser: he must ascertain the seller's ownership (*Harpending v. Meyer*, (1880), at 560), as possession is not conclusive evidence of title (*Metropolitan Finance Corp. v. Morf*, 42 Cal.App.2d 756, 109 P.2d 969, (February 6, 1941), at 760). Because of California's adherence to both the *nemo dat* and the *caveat emptor* principles, the conclusion posited above for New Jersey law constitutes a similar truism for California law: an owner remains *prima facie* protected when dispossessed by theft. This is further corroborated by the Court of Appeal of the Second Circuit in *Naftzger v. American Numismatic Society*, 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784, 96 Cal. Daily Op. Serv. 780, 96 Daily Journal D.A.R. 1140, (February 1, 1996) – referred to as *Naftzger I* –, at 428: “Even if Naftzger is an innocent purchaser, however, he did not acquire valid title to the coins, assuming they were stolen, because a thief cannot transfer a valid title” and by the same court in *Naftzger v. American Numismatic Society*, (1999), at 7: “One who purchases stolen property from a thief is subject to the rule of *caveat emptor*. (*Harpending v. Meyer*, *supra*, 55 Cal. at p. 560 [“We are unable to perceive ... that a person can ever be considered a *bona fide* purchaser of goods from one who has no right to sell, in a case where the rule of *caveat emptor* applies. The law imputes notice to him. Under that rule he is not only put on inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it.”]; *Metropolitan Finance Corp. v. Morf* (1941) 42 Cal.App.2d 756, 760 [“[N]othing is better settled than that possession of personal property is *prima facie*, not conclusive, evidence of title and that the maxim *caveat emptor* applies.” [Citation,]”])” and in footnote 14.

¹¹⁹ In accordance with New Jersey and California, New York has transposed Section 2-403 UCC into its domestic legislation. Section 2-403 of the New York Uniform Commercial Code (hereinafter NYUCC) reproduces the *nemo dat* rule. In case of theft, both the law of New York and its case law have been exponents of protecting dispossessed owners: for the latter, the *nemo dat* rule was reiterated by the New York Supreme Court in the 1966 case of *Menzel v. List*. In the words of the court: “[...] the principle has been basic in the law that a thief conveys no title as against a true owner” (*Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804, (February 10, 1966), at 314, citing *Silisbury v. McCoon*, 3 N.Y. 379, 383-384 (1850); II Kent Comm. 14th ed., per Holmes, 324-325; see also *DeWeert v. Baldinger*, (1987), at 696, citing *Eliofofon*, 678 F.2d at 1160). Unsurprisingly, the Court of Appeals in *Solomon R. Guggenheim Foundation v. Lubell*, added that New York's case law has long protected the interests of dispossessed owners, irrespective of possession by third parties acquiring for value and in good faith. (*Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 317; this submission was further confirmed in judge Owen's dissenting opinion (citing *Saltus & Saltus v. Everett*, 20 Wend 167, 32 Am.Dec. 541, (January 1, 1838), at 282. See *DeWeert v. Baldinger*, (1994), at 1277-1278; acquisition in good faith and for value does not derogate from the rights of the dispossessed owner to recover the property, unless the title can be traced back to the dispossessed owner. See *DeWeert v. Baldinger*, (1987), at 695-696; it is thus particularly important that the object is transferred without the owner's authorisation. The distinction is particularly important as it is possible under the law of New York to acquire superior title if the object was not stolen but instead sold. See *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 152-153). In the 1871 case *Basset v. Spofford* decided in New York, it was established that an owner does not lose his property upon a chattel through a larcenous taking (*Basset v. Spofford*, 6 Hand 387, 45 N.Y. 387, 1871 WL 9713, 6 Am.Rep. 101, (April 25, 1871), at 387 and 391). A subsequent transfer to another will not confer a title to the acquirer that is impossible against the owner, even though the purchase has been made in good faith and in the ordinary course of trade (*idem*). This entails that the owner may reclaim the stolen object from anyone who has it (*Basset v. Spofford*, (1871), at 387 and 391), without it being possible to invoke the owner's negligence to bar the latter's claim (*ibidem*, at 387).

¹²⁰ See for example *O'Keefe v. Snyder*, 170 N.J.Super. 75, 405 A.2d 840, (July 27, 1979) at 82, where the court stated: “Defendant also concedes the indisputable proposition of law that a thief acquires no title to the property stolen by him and can pass none to others regardless of their good faith and ignorance of the theft” citing *Joseph v. Lesnevich*, 56 N.J.Super. 340, 346, 153 A.2d 349 (App.Div.1959); *Ashton v. Allen*, 70 N.J.L. 117, 119, 56 A. 165 (Sup.Ct.1903); Restatement, Torts 2d, s 229, comment (e) at 448 (1965); Prosser, Torts (4 ed. 1971), s 15 at 87; White, J. J., Summers, R. S., *Uniform Commercial Code, Sixth Edition*, (Thomson Reuters/West: St. Paul, 2010), p. 201; Grover, (1991-1992), p. 1447; McCord, (1994-1995), p. 989; see also the concurring opinion of Judge Korman in *Bakalar v. Varra*, 619 F.3d 136, (September 2, 2010), at 149: “A person who acquires the goods from a thief, however, has no title and consequently neither he nor successive transferees can pass ownership.” *Id.*; see also Thomas M. Quinn, *Quinn's Uniform Commercial Code Commentary and Law Digest* § 2-403[A][6] (2d ed., 2002)”.

¹²¹ White and Summers, (2010), p. 201; Demarsin, (2011), p. 632; Hayworth, A. E., ‘Stolen Artwork: Deciding Ownership is No Pretty Picture’, 43 *Duke Law Journal*, (1993-1994), p. 375.

¹²² McCord, (1994-1995), p. 989; Hayworth, (1993-1994), p. 376.

¹²³ McCord, (1994-1995), p. 990.

¹²⁴ Demarsin, (2011), p. 632; Fincham, (2009-2010), p. 170.

¹²⁵ Demarsin, (2011), p. 632.

cases. The possessor of a stolen object is thus continuously subject to the eventuality of litigation for the recovery of the object by the owner.¹²⁶ But for this exposure, the possessor can merely avail himself of technical defences in the form of statutes of limitations,¹²⁷ which are further discussed below.

It is particularly instructive to the present discussion to note that the six jurisdictions under review in this dissertation have posited the *nemo dat* principle as an important premise to the rules governing the triangular problem. In fact, the *nemo dat* principle is a common ground to both the three common law and the three civil law jurisdictions studied, but only differ with regard to the exceptions to the principle.¹²⁸ In Belgian, French and Dutch law, these exceptions are to be found in the regimes of third-party protection. Nevertheless, because there exists no third-party protection relating to stolen chattels in New Jersey, California and New York, the exceptions posited are not operative in the present context. But for their lack of relevance to the present discussion, the three exceptions must *arguendo* be explained in order to delimit the scope of the rules laid down in the present chapter.

(2) Third-party protection – voidable title, statutory and equitable estoppel

In general, there exist three accepted exceptions to the *nemo dat* principle that are capable of providing protection to third parties, notably in three specific scenarios of voluntary loss of possession. These exceptions are: voidable title (§2-403 (1) UCC), bailment – also known as statutory estoppel – (§2-403 (2) UCC)¹²⁹ and equitable estoppel.

Voidable title

A third party that has acquired a chattel from a person with voidable title¹³⁰ is protected in his acquisition against the owner. A transferor has voidable title when he has acquired ownership of the good by inducing the owner to transfer the object to him by means of fraud or deceit,¹³¹ as is described in more detail in the first paragraph of Article 2-403 UCC.

§ 2-403 UCC – (1) [...] A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale", or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

For this exception to become operative, three conditions must be fulfilled: firstly, the transferor with voidable title must have forced the owner's hand, or must have lured the owner into selling to him under pretences. This will be the case when the owner was mistaken as to the transferor's identity, when the transferor has paid by cheque but the same cheque was later dishonored, when the parties had agreed to a cash sale but the transferor promised to pay later and did not, subsequently, comply, or when the delivery of the good resulted from a fraud qualifying as larceny under criminal law. When falling within the ambit of one of these exceptions, the title acquired by the transferor is regarded as voidable. Secondly, the transferor with voidable title must have transferred the possession to the third party by means of sale. Thirdly, the third party that purchases the object from the transferor with voidable title must have acted in good faith throughout the transaction.¹³² When these conditions are fulfilled, the third party *a non domino* good faith purchaser will acquire valid title to the goods,¹³³ as the exception laid down in Article 2-403 (1) UCC will become applicable.

¹²⁶ Demarsin, (2011), p. 632.

¹²⁷ McCord, (1994-1995), p. 990.

¹²⁸ See also Schwartz and Scott, (2011), p. 1335 where it is submitted that common law and civil code systems all rely on the same fundamental principle and that the differences exist only with regard to the exceptions to this principle.

¹²⁹ Schwartz and Scott, (2011), p. 1335.

¹³⁰ A voidable title implies that "one of the parties has the power either to avoid or to validate the agreement". See Yang, (2014), p. 31, citing 22 N.Y. Jur.2d *Contracts* §8 (2014). This specifically refers to the situation between the owner and the transferor and is not relevant to the third party.

¹³¹ Schwartz and Scott, (2011), p. 1335; see also for example the concurring opinion of Judge Edward R. Korman in *Bakalar v. Vavra*, (2010), at 148-149: "The key to the voidable title concept appears to be that the original transferor voluntarily relinquished possession of the goods and intended to pass title". Franklin Feldman & Stephen E. Weil, *Art Law* § 11.1.3 (1986) The Feldman & Weil treatise continues: "He may have been defrauded, or the check he received may have bounced, or he may have intended to sell it to Mr. X rather than to Mr. Y, but, nevertheless, he intended to pass title. In such cases, the transferor has an option to void the sale, but the transferee can pass good title".

¹³² Yang, (2014), pp. 31 and 32-33.

¹³³ Yang, (2014), p. 31, citing Restatement (Second) of *Contracts* §174 comment b (1981).

Statutory estoppel

Whilst paragraph 1 of § 2-403 UCC makes it possible for a good faith third party to acquire valid title to the good in case of fraudulent or false misrepresentation,¹³⁴ paragraph 2 applies to situations of bailment, and more specifically when a seller entrusts the good to a “merchant who deals in goods of that kind” and where the said merchant sells the specified goods to “a buyer in the ordinary course of business”.¹³⁵

§ 2-403 UCC – (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

The bailment rules that are laid down in § 2-403 (2) UCC relate to situations whereby an owner has voluntarily parted with the possession of the personal property¹³⁶ by entrusting it to a merchant that deals with similar goods. The notion of ‘Entrusting’ is defined in the third paragraph of the same article.

§ 2-403 UCC – (3) “**Entrusting**” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

The definition of ‘merchants who deals in goods of that kind’ is given in § 2-104 (1) UCC:¹³⁷

§ 2-104 UCC – (1) “**merchant**” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

The notion of ‘buyer in the ordinary course of business’ is further defined in § 1-201 (9) UCC:¹³⁸

§ 1-201 UCC – (9) “**Buyer in ordinary course of business**” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. “Buyer in ordinary course of business” does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

To benefit from the regime of § 2-403 (2) UCC, both the owner and the buyer in ordinary course of business must be aware that the merchant deals in the goods of the same kind as the goods transacted.¹³⁹ Moreover, the buyer in the ordinary course of business will not be entitled to rely on paragraph 2 when so-called ‘red flags’ are present and the buyer does not conduct further due diligence to verify that the transferor has the faculty to dispose of the good transacted.¹⁴⁰ Red flags are waved when there exists any doubt that the transferor does not have ownership of the good, which could be mirrored in a sale price below the market value of the good or a different course of action between transacting parties than prior means of conducting business between them.¹⁴¹

¹³⁴ Yang, (2014), p. 32, citing *Davis v. Gifford*, 182 A.D. 99, 100-01, 169 N.Y.S. 492 (1st Dep’t 1918) and *Sheridan Suzuki, Inc. v. Caruso Auto Sales, Inc.*, 110 Misc. 2d 823, 824-25, 442 N.Y.S.2d 957, 959 (Sup. Ct., Eri Co. 1981).

¹³⁵ Yang, (2014), p. 32, citing *Peters v. Sotheby’s, Inc.*, 34 A.D.3d 29, 821 N.Y.S.2d 61 (1st Dep’t 2006); for another example where the rule was discussed, see *Cantor v. Anderson*, 639 F.Supp.364, 2 UCC Rep.Serv.2d 312, (June 16, 1986), where the court concluded that a person receiving the goods to purge a money debt (even partially) was not to be considered as a buyer in the ordinary course of business (at 368).

¹³⁶ In this regard, the dissenting opinion of Judge Korman in *Bakalar v. Varra* is particularly instructive: “Under American law and the law of many foreign states there is only one scenario in which a good faith purchaser's claim of title is immediately recognized over that of an original owner. This scenario arises when the owner *voluntarily* parts with possession by the creation of a bailment, the bailee converts the chattel, and the nature of the bailment allows a reasonable buyer to conclude that the bailee is empowered to pass the owner's title.” Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 Duke L.J. 955, 971 (2001) (emphasis added). The principle to which Professor Reyhan alludes is codified in more limited form in section 2-403(2) of the Uniform Commercial Code, [...]” See *Bakalar v. Varra*, (2010), at 148.

¹³⁷ Yang, (2014), p. 33.

¹³⁸ Yang, (2014), p. 33.

¹³⁹ Yang, (2014), p. 33, citing *Dorothy G. Bender Found., Inc. v. Carroll*, 40 Misc. 3d 1231 (A), 975 N.Y.S.2d 708, 2013 N.Y. Misc. LEXIS 3711, at 9-10 (Sup. Ct., N.Y. Co. 2013).

¹⁴⁰ Yang, (2014), p. 33, citing *Dorothy G. Bender Found., Inc.*, 2013 N.Y. Misc. LEXIS 3711, at 19; this was notably the conclusion reached by the Supreme Court of New York in *Dorothy G. Bender Foundation, Inc. v. Carroll*, 40 Misc. 3d 1231 (A), 975 N.Y.S.2d 708, 2013 N.Y. Misc. LEXIS 3711, at10 (Sup. Ct., N.Y. Co. 2013).

¹⁴¹ Yang, (2014), p. 33, citing *Dorothy G. Bender Found., Inc.*, 2013 N.Y. Misc. LEXIS 3711, at 19 where the court quoted *Joseph P. Carroll Ltd. v. Baker*, 889 F.Supp.2d 593, 604 (S.D.N.Y. 2012). Furthermore, Yang also refers to *Atlas Auto Rental Corp.*, 54 Misc. 2d at 171-72.

The need to conduct due diligence when red flags are present conspicuously resembles the good faith requirement found in the three European jurisdictions that were discussed in Chapter 2. What is more, a higher threshold of due diligence – referred to by the New York courts as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade” – is required from a merchant handling in the capacity of buyer acting in the ordinary course of business.¹⁴² Consequently, merchants acting as a buyer in the ordinary course of business also need to undertake additional steps to verify whether the transferor of the good is the owner, when red flags are present.¹⁴³ The legal effect flowing from a lack of compliance with these conditions is that the purchaser does not acquire valid title and must return the good to its owner.¹⁴⁴ *A contrario*, if all the conditions are fulfilled, the third party will be protected against the owner.

Equitable estoppel

Thirdly, it is possible for a third party that acquires for value to invoke the defence of equitable estoppel against the owner in a claim in replevin. Unlike §2-403 (1) and (2) UCC, equitable estoppel is not specifically described in the Uniform Commercial Code. Instead, courts are entitled to apply this principle through § 1-103 UCC, which read as follows:

§ 1-103 UCC – Construction of Uniform Commercial Code to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law.

(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

Equitable estoppel entails that the owner is prevented from recovering his good from a good faith purchaser when he has conferred possession and has given indicia of title to the vendor.¹⁴⁵ As was noted by the court in *Porter v. Wertz*, “Indeed “[t]he rightful owner may be estopped by his own acts from asserting title. If he has invested another with the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing on the faith of such apparent ownership”.¹⁴⁶ Consequently, it will be possible for a third party to invoke equitable estoppel when it has purchased the item in good faith and there were indications that the owner had vested the capacity to dispose of the property in the transferor.

In all three scenarios, it is possible for the third party acquiring *a non domino* to acquire valid title and overcome a replevin claim that is initiated by the owner. However, it should be reiterated that both paragraphs of § 2-403 UCC and the doctrine of equitable estoppel are not relevant to the present discussion as it involves either an abuse of the owner’s confidence, a bailment, or a delegation of authority to dispose by which the owner voluntarily transfers the good to another through means of sale.¹⁴⁷ Instead, the focus of the present research is on theft of cultural objects, whereby the dispossession will always be involuntary. Pragmatically, this means that in situations of acquisition *a non domino* by a third party, it is sound to start from the premise that the owner is entitled to recover – more commonly known as the first-in-time rule in which the owner prevails – and, therefore, that the title acquired by the possessor is void, unless the situation falls within the two exceptions contained in §§ 2-403 (1) and (2) UCC, or within the equitable estoppel exception. A failure to demonstrate that

¹⁴² Yang, (2014), p. 33, citing UCC §2-103 (1) (b).

¹⁴³ Yang, (2014), p. 33, citing *Porter v. Wertz*, 68 A.D.2d 141, 145046, 416 N.Y.S.2d 254, 257 (1st Dep’t 1979) at 145-47, *Dorothy G. Bender Found., Inc.* 2013 N.Y.Misc. LEXIS 3711, at 27-28; *Koçar v. Christie’s, Inc.*, 31 Misc. 3d 1228(A), 929 N.Y.S.2d 200, 2011 N.Y. Misc. LEXIS 2350, at 27 (Sup. Ct., Westchester Co. 2011).

¹⁴⁴ This was notably the conclusion reached by the Supreme Court in *Dorothy G. Bender Foundation, Inc. v. Carroll*, (2013), at 10.

¹⁴⁵ See *Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254, 26 UCC Rep.Serv. 876, (May 10, 1979), at 147-148, citing *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 “owner may be estopped from setting up his own title and the lack of title in the vendor as against a *bona fide* purchaser for value where the owner has clothed the vendor with possession and other indicia of title” (relying itself upon 46 Am Jur, Sales, s 463).

¹⁴⁶ *Porter v. Wertz*, (1979), at 148, citing *Smith v. Clews*, 114 NY 190, 194.

¹⁴⁷ See for example *Bakalar v. Vavra*, 819 F.Supp.2d 293, (August 17, 2011), at 299: “However, Article 2 of the U.C.C. applies only to “sales,” defined as the “passing of title from the seller to the buyer *for a price*.” N.Y.U.C.C. § 2-106(10) (emphasis added); see also *Takisada Co., Ltd. v. Ambassador Factors Corp.*, 147 Misc.2d 435, 556 N.Y.S.2d 788, 790 (1989) (“Article 2 of the UCC . . . applies only to transactions of the sale of goods.”).”

the situation falls within one of these three exceptions will lead to the conclusion that the title acquired by the third party is void and he will thus be obliged to give the object back to its owner.¹⁴⁸

3. OPERATIONALIZATION

Having laid down the foundations to the discussion, the present section will turn to the operationalization of the concepts that were described above. Recapitulating what has been established hitherto, the owner of a stolen cultural object can always recover the property from a third party, even though this party has acquired the chattel in good faith.¹⁴⁹ This is notably because the laws in the three jurisdictions analysed in this chapter do not protect third parties in cases dealing with stolen goods. The only defence available to these third parties is to be found in the expiration of the statute of limitations.¹⁵⁰ In order to be able to successfully rely upon the defence of the statute of limitations, the limitation period prescribed in the procedural law of the *lex fori* must have expired. In reckoning the period of limitation, it is, hence, of paramount importance to determine from what point and time the cause of action accrues. Because the determination of the accrual of the cause of action is often left to the discretion of the courts seized by a contention, this concept – tainted by ambiguity and murkiness – has been interpreted in different manners.¹⁵¹ The present section will explain how the domestic courts of New Jersey, California and New York have interpreted the notion of accrual of the cause of action in their respective legal orders, starting with the doctrine of unlawful taking. Subsequently, more recent and tailor-made interpretations applied by the three jurisdictions under scrutiny will be further analysed. Throughout this overview, attention will be given to the functioning of the different interpretations and the legal effects flowing from the said interpretations.

The starting point for many U.S. jurisdictions is to be found in the doctrine of unlawful taking: in the absence of concealment or fraud, statutes of limitations have been interpreted as starting to run against a dispossessed owner who lost the good by means of theft at the time of the conversion, and thus at the time of the wrongful taking of possession.¹⁵² Following this theory, the period laid down in the statute of limitations thus runs from the moment of the taking of the unlawful possession of the stolen object,¹⁵³ irrespective of the cognition of this unlawful taking by the owner.¹⁵⁴ This rule notably stems from the idea that a cause of action accrues from the moment that the tortious act is completed.¹⁵⁵ The problem with the doctrine of unlawful taking was, however, highlighted by Justice Handler in his dissenting opinion in the *O’Keeffe v. Snyder* case that is discussed below: the doctrine of unlawful taking results in depriving the dispossessed owner from his property, even though he is fully innocent and the identity of the thief or subsequent convertors is unbeknownst to him.¹⁵⁶

¹⁴⁸ In this regard, the case *Porter v. Wertz* appropriately illustrates this sequence. In the said case, the acquirer of a painting by Maurice Utrillo attempted to rely upon the statutory estoppel exception that is provided for by § 2-403 (2) UCC, but failed to convince the court that the transferor was to be qualified as “person selling goods of that kind” and that he qualified as a purchaser in good faith (see *Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254, 26 UCC Rep.Serv. 876, (May 10, 1979), at 145-146). The acquirer also failed to demonstrate that he was a purchaser in good faith for the purpose of equitable estoppel (*ibidem*, at 147-149). Consequently, the court fell back upon the general rule that the good should be given back to the owner (*ibidem*, at 149).

¹⁴⁹ Cf. section A.2 (1) above.

¹⁵⁰ Cf. section A.1 (5) above.

¹⁵¹ American Law Reports ALRD3d 847, § 2[a] specifying that there exist difficulties in determining when a cause of action will be considered to have accrued.

¹⁵² *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1392, citing 51 *American Jurisprudence Second Edition* Limitation of Actions § 124 and the 79 American Law Reports Third Edition 847, at 851; Foutty, (1990), p. 1843; Demarsin, (2011), p. 638; Gerstenblith, (1988-1989), pp. 123 and 126; O’Neal, S. V., ‘Accrual of Statutes of Limitations: California’s Discovery Exception Swallows the Rule’, 68 *California Law Review*, (1980), p. 106; Fox, C., ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property’, 9 (1) *American University International Law Review*, (1993), p. 237; Bengs, (1996), p. 530; Petrovich, (1979-1980), p. 1131, citing *Adams v. Coon*, 36 Okla. 644, 646, 129 P. 851, 852 (1913) in which the court specified: “As a general proposition, the statute of limitations, as to replevin actions for the recovery of lost or stolen property, begins to run from the time of the wrongful taking of possession, and not from the time when the plaintiff first had knowledge thereof . . .”. Reference is also made to *Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 201, 531 P.2d 932, 934 (1975) where it was specified that the cause of action is to run from the moment of the wrongful appropriation and not from the moment that the identity of the taker is discovered. Additional reference is made to *Christensen Grain, Inc. v. Garden City Coop., Equity Exch.*, 192 Kan. 785, 787, 391 P.2d 81,83 (1964) in which the court specified that statutes of limitations are to run from the conversion onwards instead of the moment at which the owner discovers the identity of the innocent purchaser that has purchased the stolen goods; see also *Mirvish v. Mott*, (2010), at 275 where the court confirmed that the accrual runs from the conversion onwards (citing *Matter of Peters v. Sotbelby’s Inc.*, 34 A.D.3d 29, 36, 821 N.Y.S.2d 61 [2006], *lv. denied* 8 N.Y.3d 809, 834 N.Y.S.2d 90, 865 N.E.2d 1257 [2007]); American Law Reports ALRD3d 847, § 2[a].

¹⁵³ Foutty, (1990), p. 1843; Demarsin, (2011), p. 640.

¹⁵⁴ O’Neal, (1980), p. 107.

¹⁵⁵ Petrovich, (1979-1980), p. 1130, citing *Hove v. Pioneer Mfg. Co.*, 262 Cal. App. 2d 330, 340, 68 Cal. Rptr. 617, 623 (1968), *Seelenfreund v. Terminix, Inc.*, 84 Cal. App. 3d 133, 136, 148 Cal. Rptr. 307, 308 (1978), *Tom Olesker’s Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.* 61 Ill. 2d 129, 131-32, 334 N.E.2d 160, 161 (1975), *E.J. Korvette, Div. Of Spartan Indus., Inc. v. ESKO Roofing Co.*, 38 Ill. App. 3d 905, 907, 350 N.E.2d 10, 12 (1976) and *Fernandi v. Strully*, 35 N.J. 434, 439, 173 A.2d 277, 280 (1961).

¹⁵⁶ *O’Keeffe v. Snyder*, (1980), at 507.

The unfitness of the doctrine to the present problem has led the courts of the three jurisdictions under scrutiny in this chapter to adopt other interpretations of the accrual of the cause of action.

(1) New Jersey| Adverse Possession

In discord with the doctrine of unlawful taking, the courts in New Jersey have relied on the notion of adverse possession in order to determine the accrual of the cause of action. In doing so, they have adjoined adverse possession to the statute of limitations, creating a mesh between the two notions.¹⁵⁷ This was notably clarified in the *O’Keeffe v. Snyder* case (discussed below), whereby the Appellate Division of the Superior Court affirmed that the statute of limitations is triggered and runs through means of adverse possession.¹⁵⁸ Unlike the doctrine of unlawful taking, adverse possession is a means of acquiring a right upon a chattel by a converter through means of possession.¹⁵⁹ Originally applied to issues relating to real property,¹⁶⁰ it was later extrapolated to contentions involving title over personal property.¹⁶¹ The focus of the said doctrine is on the behaviour of the adverse

¹⁵⁷ See for example *Rowe v. Bonneau-Jeter Hardware Co.*, 245 Ala. 326, 16 So.2d 689, 158 A.L.R. 1266, (December 16, 1943), at 694: “In such a suit as this, the court observed in *Drummond v. Drummond*, 232 Ala. 401, 168 So. 428, that the ten-year statute of limitations and the statute of adverse possession are to the same end. And in *VanAntwerp (sic) v. VanAntwerp (sic)*, 242 Ala. 92 (31 to 40), 5 So.2d 73, we applied the statute of six years to the right to vacate a fraudulent conveyance of personality, but held that it did not begin to run until the grantee asserted claim of ownership of the property under the grant by a hostile possession, since adverse possession is an essential feature of the statute of limitations as a defense to a suit for the recovery of property, real or personal. And in *Jones v. Jones*, 18 Ala. 248, it is said that, “the statute (of limitations) operates on the title, and when the bar is complete, the title of the original owner is defeated, and the adverse possessor has the complete title.” Although as a general rule the statute of limitations operates only on the remedy, not on the right, as to the recovery of property it operates as to both. *Newcombe v. Leavitt*, 22 Ala. 631. So that in such suits the statute of limitations serves to cut the plaintiff off from the enforcement of his right of recovery by vesting such right in the respondent by adverse possession. As a defense to such a suit the statute of limitations and adverse possession are inseparable. The same qualities of the defense exist in equity as at law when analogous”, cited in *O’Keeffe v. Snyder*, (1979), at 846.

¹⁵⁸ *O’Keeffe v. Snyder*, (1979), at 847: “In direct answer to the questions posed at the outset of this opinion, a cause of action for replevin accrues, in the sense that the statutory time in which suit must be brought starts running, when the possession by the defendant, or by those claiming through him, assumes the characteristic elements of adverse possession. See 5 Thompson, Real Property, s 2552 at 660 (1979). Although a theoretical cause of action may exist before that time, the statutory period does not run against it. Once it starts running, it continues against subsequent possessors possessing the chattel in the same way; it does not start running anew with each subsequent conversion. *Joseph v. Lesnevich*, supra. Plaintiff’s ignorance of the whereabouts of his property does not affect the running of the statute if the possession has the required openness and notoriety; where possession is held clearly and unequivocally, knowledge of the true owner will be presumed. 5 Thompson, Real Property, s 2546 at 619 (1979). The good faith of the possessors who nonetheless fail to possess the chattel openly and notoriously has no effect on the running of the statutory period. Finally, the defenses of adverse possession and limitation are the same on the theory that the law refuses to recognize a title it will not protect. 3 American Law of Property, s 15.16 at 834 (1952).” See also *Van Antwerp v. Van Antwerp*, 242 Ala. 92, 5 So.2d 73, (December 18, 1941), at 102: “In suits to recover personal property the statute of limitations and the principle of adverse possession are inseparably connected, on the theory that the statute does not begin to run until the possession becomes adverse. The case of *Van Ingen v. Duffin*, supra, is not to be treated as authority for a different view”.

¹⁵⁹ As noted by the United States Supreme Court in *Campbell v. Holt*: “By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and at one time paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of *prescription*, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds. Mr. Angell, in his work of *Limitations of Actions*, says that the word ‘limitation’ is used in reference to ‘the time which is prescribed by the authority of the law during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or suit in equity can be maintained;’ and in the Roman law it is called *praescriptio*. ‘Prescription, therefore,’ he says, ‘is of two kinds; that is, it is either an instrument for the acquisition of property, or an instrument of an exemption only from the servitude of judicial process.’ Ang. Lim. §§ 1, 2. Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title, a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. *Leffingwell v. Warren*, 2 Black, 599; *Croxall v. Shererd*, 5 Wall. 289; *Dickerson v. Colgrove*, 100 U. S. 583; *Brikenell v. Comstock*, 113 U. S. 152; S. C. 5 Sup. Ct. Rep. 399”. See *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, (December 7, 1885), at 622-623 (report by Judge Miller).

¹⁶⁰ Carey Miller, D. L., Meyers, D. W., Cowe, A., ‘Restitution of Art and Cultural Objects: A Reassessment of the Role of Limitation’ VI (1) *Art Antiquity & Law*, (2001), p. 4; Preziosi, T., ‘Applying a Strict Discovery Rule to Art Stolen in the Past’, 49 *Hasting Law Journal*, (1997-1998), p. 233; Gerstenblith, (1988-1989), pp. 119 and 120; Fincham, (2009-2010), p. 191; Petrovich, (1979-1980), p. 1141; the rationale for the use of adverse possession in the context of land is that it is socially sound for the assertion of claims to be limited in time and to secure the possessory interest of the person claiming to have become the owner through the passage of time. Petrovich, (1979-1980), p. 1141, citing C. Smith & R. Boyer, *Survey Of The Law Of Property* 157-58 (1971) and R. Powell & P. Rohan, *Powell On Real Property*, ¶¶ 1012-1027 (abr. Ed. 1968).

¹⁶¹ See *O’Keeffe v. Snyder* (1979), at 843 and 844, referring to *Redmond v. New Jersey Historical Society*, 132 N.J. Eq. 464, at 473, but also to *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582 (Cr.App.1910) and 3 American Law of Property, s 15.16 at 834-838 (1952); see also *O’Keeffe v.*

possessor – i.e. the person in possession of the property –, discarding the behaviour of the original owner as being irrelevant.¹⁶² Consequently, where adverse possession has been applied – such as in New Jersey –, statutes of limitations start to run from the time of the conversion¹⁶³ – irrespective of the knowledge of either the theft or the subsequent adverse possession to the dispossessed owner¹⁶⁴ –, provided that the said possessor holds the chattel adversely. In fact, it is the adversity of the possession of the adverse possessor that enables the statute of limitations to run.¹⁶⁵

To benefit from adverse possession, it is generally accepted¹⁶⁶ that in order to trigger the running of the statute of limitations and, subsequently, establish a title to the goods for the adverse possessor, the possession must be “adverse, hostile, open, notorious, actual, visible, exclusive and continuous”¹⁶⁷ in order to have the time-span prescribed by the respective statutes of limitations run.¹⁶⁸ Adversity requires that the possession exercised by the adverse possessor is “inconsistent and antagonistic to the rights” of the claimant.¹⁶⁹ Hostility entails that the possessor holds the object against the entire world, and not specifically against the owner.¹⁷⁰ Openness and notoriety are two aspects relevant to the notification to an owner – as a person of ordinary prudence – that

Snyder (1980), at 494-495; Petrovich, (1979-1980), p. 1141, citing *Priester v. Milleman*, 161 Pa. Super. 507, 55 A.2d 540 (1947), 513, 55 A.2d 543 and *Rowe v. Bonneau-Jeter Hardware Co.*, 245 Ala. 326, 332, 16 So. 2d 689, 694 (1943), *Isham v. Cudlip*, 33 Ill. App.2d 254, 267, 179 N.E.2d 25, 31 (1962), *Redmond v. New Jersey Historical Society*, 132 N.J. Eq. 464, 473, 28 A.2d 189, 194 (1942) and *Lightfoot v. Davis*, 198 N.Y. 261, 265, 91 N.E. 582, 583 (1910); Kurjatko, (1999), p. 73, footnote 103, citing *Priester v. Milleman*, 55 A.2d 540 (Penn. 1947); in New Jersey, the doctrine was extrapolated to chattels in the case of *Redmond v. New Jersey Historical Society*, 31 Backes 464, 132 N.J. Eq. 464, 28 A.2d 189, (September 8, 1942). The court in *Redmond* concluded that adverse possession was also applicable to chattels by referring to the work of Dean James Barr Ames and notes: “The classic discussion of the subject will be found in an article (in three parts) by Dean James Barr Ames on ‘The Disseisin of Chattels,’ reported in Vol. III, Harvard Law Review, at p. 23, et seq., at page 313, et seq. (The Nature of Ownership) and at p. 337, et seq. (Inalienability of Choses of Action). [...] Dean Ames, in fully considering this question, contrasts the Roman and the English laws on the subject. He persuasively demonstrates, by a wealth of authorities, that other courts, when considering personalty, have consistently applied the same rules of law concerning the necessary requisites of adverse possession that they applied when considering the question of adverse possession of realty. The basis for this like application of principle is, in our opinion, sound and just. We adopt it” at 473 and 194.

¹⁶² Preziosi, (1997-1998), p. 234; Demarsin, (2010-2011), p. 262; Demarsin, (2011), p. 636.

¹⁶³ *DeWeerth v. Baldinger*, (1987), at 109; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 406; the focus used to be on the possession by another instead of the knowledge of the whereabouts of the object. See *Solomon R. Guggenheim Foundation v. Lubell* in Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 420.

¹⁶⁴ Kelly, M. J., “Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio animo Ferundi/Lucrandi”, 14 *Dickinson Journal of International Law*, (1995-1996), p. 40; Demarsin, (2011), p. 635.

¹⁶⁵ *O’Keeffe v. Snyder*, (1980), at 495: “[...] and that the statute of limitations would not begin to run against the true owner until possession became adverse” referring to *Redmond v. New Jersey Historical Society*, (1942), at 475.

¹⁶⁶ It should be remarked that the prescribed conditions are not to be found in statutes, but have been judicially constructed. See *O’Keeffe v. Snyder*, (1979), at 847: “In this connection, it should be observed that neither the statutes of limitations barring rights of entry into real estate nor the statute specifying the period within which suits to recover personal property must be brought recites the requirements for adverse possession. Both types of statutes are essentially couched in terms of limitation similar to the statutes barring personal injury claims. Nonetheless, all judicial authority constructing such enactments read into them the essential requirements of adverse possession. See *DeBow v. Hatfield*, 35 N.J. Super. 291, 114 A.2d 10 (App.Div.1955), cert.den. 19 N.J. 327, 116 A.2d 829 (1955)”. Courts have borrowed these conditions from the doctrine of adverse possession that is applicable to real property. See Gerstenblith (1988-1989), p. 123 (see also footnote 12).

¹⁶⁷ *Redmond v. New Jersey Historical Society*, (1942), at 474: “The facts necessary to establish title by adverse possession are settled. The possession cannot be founded upon ‘permission,’ it must be ‘hostile as well as actual, visible, exclusive, and continuous.’ Wittke v. Wittke, 102 N.J.L. 176, 130 A. 598, 599. Cf. Myers v. Folkman, 89 N.J.L. 390, 99 A.97; Folkman v. Myers, 93 N.J. Eq. 208, 115 A. 615; Leigh v. Howard, 87 N.J.L. 113, 93 A. 680; De Luca v. Melin, 103 N.J.L. 140, 134 A. 735. It must be ‘adversary,’ it ‘must begin, and continue for the whole term, in hostility.’ Content v. Dalton, 122 N.J. Eq. 425, 430, 431, 194 A. 286, 289, 112 A.L.R. 1031, and cases there cited; *O’Keeffe v. Snyder* (1979), at 844, citing *Foulke v. Bond*, 41 N.J.L. 527, 545 (E. & A.1879) and reminding of the unaltered (and still very relevant) test of adverse possession as laid down in *Foulke v. Bond*; *O’Keeffe v. Snyder* (1980), at 494, citing *Redmond v. New Jersey Historical Society*, 132 N.J. Eq. 464, 474, 28 A.2d 189 (E. & A. 1942), 54 *Corpus Juris Secundum* Limitations of Actions s 119 at 23; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 405; Preziosi, (1997-1998), p. 233; Petrovich, (1979-1980), p. 1142 (footnote 79), citing *Redmond v. New Jersey Historical Society*, 132 N.J. Eq. 464, 28 A.2d 189 (1942), *O’Keeffe v. Snyder*, 170 N.J. Super. 75, 83, 405 A.2d 840, 844 (1979), *Lightfoot v. Davis*, 198 N.Y. 261, 265, 91 N.E. 582, 583 (1910) and *Priester v. Milleman*, 161 Pa. Super. 507, 513, 55 A.2d 540, 543-544 (1947); similar conditions are discussed in New York in the case of *DeWeerth v. Baldinger*, (1987), at 697, citing *Risi v. Interboro Industrial Parks, Inc.*, 99 A.D.2d 174 (*sic*), 470 N.Y.S.2d 174, 175 (2d Dept.1984) (citing *Belotti v. Bickhardt*, 228 N.Y. 296, 127 N.E. 239 (Ct.App.1920).

¹⁶⁸ *O’Keeffe v. Snyder* (1980), at 495 citing *Redmond v. New Jersey Historical Society* 132 N.J. Eq. 464, at 475; Demarsin, (2010-2011), p. 261, footnote 29.

¹⁶⁹ See *Van Antwerp v. Van Antwerp*, 242 Ala. 92 (1941), 5 So.2d 73, at 101: “In both aspects of the law of the statute of limitations if the possession of the defendant originated in recognition of complainants’ asserted rights, the statute does not begin to run until defendant repudiates such recognition, of which complainant has notice. For such is the law of adverse possession. Lucas v. Daniels, supra; Benje v. Creagh’s Adm’r, supra. [...] So long as complainants are led by defendant to believe that the possession by defendant is in recognition of their right to such property the cause of action for the recovery of the property does not accrue, and adverse possession essential to the statute of limitations as a defense to a suit for that property does not begin to run. [...] The authorities hold that it begins to run when the possession becomes inconsistent and antagonistic to the rights and claims of complainants, in such manner as to carry notice of it, and when complainants have the immediate right to assert their claim”.

¹⁷⁰ Petrovich, (1979-1980), p. 1142, citing C. Smith ¶ R. Boyer, *Survey Of the Law of Property*, at 158 (1971).

another person is using the property as his own.¹⁷¹ The possession has to be conspicuous and it is sufficient for it to put the world and the owner on notice.¹⁷² Henceforth, it is required that the chattel be used in such a way that would notify the owner.¹⁷³ If both the world and the owner are thereby put on notice, this would then result in considering that the owner is notified of the adverse possession. This in turn presses the owner to undertake prompt action if he does not want to be deprived of his property.¹⁷⁴ This imputed knowledge stems from the fact that adverse possession is not possible without actual or constructive notice of the adverse possession to the owner.¹⁷⁵ Only negligent owners that are notified will lose their property under the doctrine of adverse possession.¹⁷⁶ Finally, the adjective ‘visible’ means that it is impossible for someone that, by means of common law larceny, has surreptitiously acquired possession and concealed that possession to acquire by means of adverse possession.¹⁷⁷

The period of adverse possession will start running from the day that the eight attributes are complied with.¹⁷⁸ In other words, if the adverse possession – from the first adverse possessor onwards and irrespective of a passing to subsequent adverse possessors¹⁷⁹ – complies with the eight above-mentioned conditions throughout the entire period prescribed by the statute of limitations,¹⁸⁰ the dispossessed owner will be barred from recovering the item. If the adverse possession is not vested with one of the eight attributes mentioned, the possession is not considered adverse and the dispossessed owner’s remedy will not be barred.¹⁸¹ The burden of

¹⁷¹ Gerstenblith, (1988-1989), p. 120, footnote 6.

¹⁷² Gerstenblith, (1988-1989), p. 120, footnote 6.

¹⁷³ Kurjato, (1999), p. 73, footnote 103, citing *O’Keeffe v. Snyder*, (1979), at 845 where the court implied that a museum-type display of the paintings would suffice for the purpose of notification.

¹⁷⁴ Gerstenblith, (1988-1989), p. 120, footnote 6.

¹⁷⁵ Gerstenblith, (1988-1989), pp. 120-121, footnote 6.

¹⁷⁶ Gerstenblith, (1988-1989), pp. 120-121, footnote 6.

¹⁷⁷ See *Lightfoot v. Davis*, (1910), at 267, specifying that it would be impossible – because of the aforementioned reasons – for a thief to acquire title to the chattel.

¹⁷⁸ Petrovich, (1979-1980), pp. 1142-1143, citing *Rabinhof v. United States*, 329 F. Supp. 830, 841-842 (S.D.N.Y. 1971), *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 705, 239 P. 319, 321 (1925), *O’Keeffe v. Snyder*, 170 N.J. Super. 75, 84, 405 A.2d 840, 844 (1979), *Redmond v. New Jersey Historical Society*, 132 N.J. Eq. 464, 473-474, 28 A.2d 189, 194 (1942) and *Lightfoot v. Davis*, 198 N.Y. 261, 268, 91 N.E. 582, 584 (1910); Kurjato, (1999), p. 73, footnote 103, citing *O’Keeffe v. Snyder*, 405 A.2d. 840, 847 (1979); see for example *Lightfoot v. Davis*, where the Court of Appeals of New York – basing its ratio decidendi upon *Campbell v. Holt* – specified “Judge MILLER speaks of a case where the possession is ‘peaceable, undisturbed, open, *** with an assertion of his ownership,’ and it is apparent that, if title to personal property may be acquired by possession in analogy to the acquisition of that to real property, that possession must have the qualifications stated. From the earliest period in our state it has been uniformly held that mere possession of real estate, continued however long, will not divest the owner of his property unless the possession is under a claim of title. Otherwise, the possession will be presumed to be in subordination to the true legal title” citing *Gansevoort v. Parker*, 3 Johns. Cas. 124; *Poor v. Horton*, 15 Barb. 485; *Doherty v. Matsell*, 119 N. Y. 646, 23, N. E. 994; In *Lightfoot*, the court further supports its argument by submitting: “If the acquisition of personal property by adverse possession rests on analogy to the law relating to real property—and that is the ground on which it seems to rest—it is clear that the possession must be under claim of right, and open, public and notorious”. *Lightfoot v. Davis*, (1910), at 266.

¹⁷⁹ *O’Keeffe v. Snyder* (1979), at 847, citing Thompson, *Real Property*, s. 2552 at 660 (1979); *Joseph v. Lesnevich* clarified that it is possible for an adverse possessor to tack the period throughout which a predeceasing possessor held the chattel openly and notoriously – as determined based upon the nature of the chattel – for the purpose of computing the period of the statute of limitations. *Joseph v. Lesnevich*, (1959), at 354. and 356 (referring to the writings of Ames cited in *O’Connell v. Chicago Park Dist*, 376 Ill. 550 (1941), 34 N.E.2d 836, 135 A.L.R. 698, at 559-560). In *O’Connell v. Chicago Park Dist.*, the Supreme Court of Illinois submitted: “The doctrine that adverse possession of successive holders of land may be tacked in determining the period of limitations is familiar. After discussing the rule as to tacking in cases involving real estate, Professor Ames of the Harvard Law School in his Lectures on Legal History, page 204, observes” “The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land. A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel five years after its conversion, to one ignorant of the seller’s tort, the dispossessed owner’s right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted if there had been no sale. In other words, an innocent purchaser from a wrongdoer would be in a worse position than the wrongdoer himself—a conclusion as shocking in point of justice as it would be anomalous in law.” On page 203 he says: ‘In the cases thus far considered the land or chattel has been assumed to continue in the possession of the disseisor or converter until the bar of the statute is complete. But before that time the wrongdoer may have parted with the res by a sale or other transfer, or he may have been, in turn, deprived of it by a second wrongdoer. If the thing has passed to the new possessor by a sale, the change of possession will produce, so far as the Statute of Limitations is concerned, only this difference: The title will vest at the end of the period of limitation in the new possessor, instead of the original disseisor or converter.’ [...] In our judgment the reasoning of Professor Ames is sound and well supported by judicial precedent. While there may be other decisions to the contrary we adopt the principles laid down by Professor Ames”. See *O’Connell v. Chicago Park Dist.*, 376 Ill. 550, 34 N.E.2d 836, 135 A.L.R. 698, (April 10, 1941), at 559-560; *O’Keeffe v. Snyder*, (1980), at 503, citing *Lesnevich*, supra, 56 N.J. Super. at 357, 153 A.2d 349; see also *O’Connell v. Chicago Park Dist.*, 376 Ill. 550, 34 N.E.2d 836 (1941); *Brown*, supra, s 18-19; *Walsh*, supra, at 84; *Comment*, 14 *Rut.L.Rev.* 443, 444-445 (1960). See also *O’Keeffe v. Snyder* at 503-504: “In New Jersey tacking is firmly embedded in the law of real property. *O’Brien v. Bilow*, 121 N.J.L. 576, 578-579, 3 A.2d 641 (E. & A.1938). The rule has also been applied to personal property. *Lesnevich*, supra, 56 N.J. Super. at 357, 153 A.2d 349”; Gerstenblith, (1988-1989), p. 128.

¹⁸⁰ *O’Keeffe v. Snyder*, (1979), at 847.

¹⁸¹ *O’Keeffe v. Snyder*, (1979), at 847 citing *Predham v. Hoffester*, 32 N.J. Super. 419, 108 A.2d 458 (App.Div.1954).

proving the compliance with the eight attributes is imputed to the party relying upon the adverse possession.¹⁸² The satisfaction of this showing can only be found by displaying a clear and positive showing of the presence of all these elements.¹⁸³

It is important to note that there exists a further nuance to the application of the doctrine of adverse possession, which depends on the behaviour of the adverse possessor. As theorised by Gerstenblith, a distinction needs to be drawn on the basis of the possessor's good and bad faith.¹⁸⁴ When the possessor acts in bad faith – which is tantamount to holding the stolen chattel surreptitiously –, the statute of limitations will only start running against the owner in case of constructive or actual notice of the adverse possession.¹⁸⁵ In New Jersey, this was notably clarified by the Appellate Division of the Superior Court in *Joseph v. Lesnevich*: as against a thief, the period of limitation will only begin to run from the moment that the owner is given a reasonable opportunity of knowing the stolen chattel's whereabouts and of asserting his title against the thief.¹⁸⁶ This means that when the adverse possessor acts in bad faith, the focus is shifted from his behaviour to the owner – for whom an actual or constructive notice of the adverse possession is required in order for the period of limitation of the adverse possession to start running.¹⁸⁷ Therefore, in case of concealment or fraud by the thief or by another converter, the period of limitation is tolled until the owner is given a fair opportunity to exercise his right.¹⁸⁸ The SOL will only start running when the concealment stops – either by an open and notorious

¹⁸² *O'Keefe v. Snyder*, (1979), at 844, citing *Wilomay Holding Co. v. Peninsula Land Co.*, 36 N.J.Super 440, 443, 116 A.2d 484 (App.Div.1955) (affirmed by the Supreme Court in *O'Keefe v. Snyder* (1980), at 500); *Redmond v. New Jersey Historical Society*, (1942), at 473-474: "A party relying on a title by adverse possession has the burden of proving 'all the facts necessary to establish such a title.'" 1 Am.Jur. p. 925, § 237; *Cohn v. Plass*, 85 N.J.Eq. 153, 95 A. 1011. That proof must be made out 'CLEARLY AND POSITIVELY, BY A PREPONDERANCE OF THE EVIDENCES.' *Mason v. home Real Estate Co.*, 90 N.J.Eq. 455, 456, 108 A.4Cf. Northern R. Co. of New Jersey v. Demarest, 94 N.J.L. 68, 108 A. 376.; *O'Keefe v. Snyder*, (1979), at 844 "Moreover, established principles squarely place the burden of proving each of these essential elements of adverse possession on the one claiming title on that basis, and such burden is satisfied only by evidence of a clear and positive nature. *Wilomay Holding Co. v. Peninsula Land Co.*, 36 N.J.Super. 440, 443, 116 A.2d 484 (App.Div.1955); *Redmond v. New Jersey Historical Society*, supra 132 N.J.Eq. at 473-474, 28 A.2d 189."; *Petrovich*, (1979-1980), p. 1142, citing *Rabinhof v. United States*, 329 F. Supp. 830, 841-842 (S.D.N.Y. 1971) referring to Illinois law, which requires "clear positive and unequivocal proof" and applied by analogy to New York law, *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 705, 239 P. 319, 321 (1925), which specifies that the burden of proof for all eight attributes is imputed to the defendant, *O'Keefe v. Snyder*, 170 N.J. Super. 75, 84, 405 A.2d 840, 844 (1979), in which the court has expressed that the adverse possession must be established on the basis of proofs of a "clear and positive nature"; *Redmond v. New Jersey Historical Society*, 132 N.J. Eq. 464, 473-474, 28 A.2d 189, 194 (1942) in which the court stated that the obligation to prove all the elements of adverse possession by the defendant was dependent upon a clear and positive showing, by a preponderant showing of all the evidences; see also Kurjatko, (1999), p. 73, footnote 103, citing *O'Keefe v. Snyder*, 405 A.2d. 840, 844 (1979).

¹⁸³ *O'Keefe v. Snyder*, (1979), at 844, citing *Wilomay Holding Co. v. Peninsula Land Co.*, 36 N.J.Super 440, 443, 116 A.2d 484 (App.Div.1955); *Redmond v. New Jersey Historical Society*, 132 N.J.Eq. at 473-474, 28 A.2d 189.

¹⁸⁴ In justifying the distinction, Gerstenblith advances that courts have protected the innocent party by punishing the party at fault. "Courts have clearly articulated a principled methodology for the resolution of personal property possession disputes. If only one party is at fault—the adverse possessor by taking in bad faith or the owner by unnecessarily delaying longer than the statutory time period after receiving notice of the location of the property—then the innocent party prevails". Gerstenblith, (1988-1989), p. 125.

¹⁸⁵ Gerstenblith, (1988-1989), p. 124.

¹⁸⁶ "It should also be noted that even as to a thief, the period does not begin to run until the thief affords the true owner a reasonable opportunity of knowing the whereabouts of the property and of asserting his title. See 34 Am.Jur., Limitation of Actions, s 135, p. 109. Cf 54 C.J.S. Limitations of Actions s 119, p. 23". *Joseph v. Lesnevich*, (1959), at 354.

¹⁸⁷ Gerstenblith, (1988-1989), p. 124: "However, actual or even constructive notice to the true owner of the adverse claim and the accrual of the cause of action is relevant only when the adverse possessor acts in bad faith. In such a situation, the focus shifts to the conduct of the original owner, who will prevail unless he or she has such notice and fails to pursue recovery of the property. [...] Thus, a right to notice is accorded to the original owner only when the possessor demonstrates bad faith and, in fact, the right to notice substitutes for the possessor's lack of good faith".

¹⁸⁸ *Joseph v. Lesnevich*, (1959), at 355: "It is settled that ignorance of the facts giving rise to the cause of action does not prevent the statute of limitations from running. *Weinstein v. Blanchard*, 109 N.J.L. 332, 162 A. 601 (E. & A. 1932); *Sullivan v. Stout*, 120 N.J.L. 304, 199 A. 1, 118 A.L.R. 211 (E. & A. 1938); *Zimmerman v. Chervitsh*, 5 N.J.Super. 590, 68 A.2d 577 (Law Div.1949); 6 *Willinston, Contracts* (rev. Ed. 1938), s 2020, p. 5675. An exception to the rule has been recognized in a majority of jurisdictions in cases of fraudulent concealment. But in the absence of fraudulent concealment, the fact that a person has no knowledge of the identity of the thief or converter will not prevent the statute of limitations from running in favour of persons who have dealt with the property without knowledge it has been stolen. See Annotation, 136 A.L.R. 658 (1942)"; a defendant or any other of his predecessor in privity that are neither aware of the theft, nor have concealed the chattel or are found guilty of another affirmative act of wrongdoing may enjoy the protection given by the statute of limitations. *Joseph v. Lesnevich*, (1959), at 355-356: "In the present case, although there is a question of facts as to whether the credit company and Grobow were holders in due course, there is nothing to indicate that they had actual knowledge of the fact the bond were stolen, that they failed to hold the bond as openly and notoriously as the nature of the property would permit, or that they were guilty of any other affirmative act of wrongdoing. Nor are there facts to the contrary stated in the complaint. Compare *Quimby v. Blackey*, 63 N.H. 77 (Sup.Ct.1884); *Vault v. Gatlin*, 31 Okl. 394, 398, 120 P. 273 (Sup.Ct.1911); *Chilton v. Carpenter*, 78 Okl. 210, 189 P. 747 (Sup.Ct.1920); 2 C.J.S. Adverse Possession s 239, p. 885; 34 Am. Jur., Limitation of Actions, s 136, p. 110. If the defendants or those in privity with them did not participate in the fraudulent acts, the defendants cannot be deprived of the benefit of the statute of limitations. *Munson v. Hollowell*, 26 Tex. 475 (1863); 54 C.J.S. Limitations of Actions s 207, p. 229"; Gerstenblith, (1989-1989), p. 127 specifying that in case of fraudulent concealment, the accrual of the cause of action cannot materialise when the owner is not aware of the relevant facts. Gerstenblith also compares the effect of this mechanism to the doctrine of equitable estoppel by which a wrongdoer cannot rely upon his own wrong by invoking the statute of limitations as a defence; see also Gerstenblith, (1989-1989), pp. 129-130, where Gerstenblith

possession by the thief or any other converter that is aware of the theft, or when the chattel is transferred to an innocent purchaser unaware of the theft.¹⁸⁹ Therefore, when the possessor is innocent – and has no reason to hold the chattel surreptitiously, but will instead hold it openly and notoriously¹⁹⁰ –, the focus stays upon the behaviour of the adverse possessor. When that is the case, it matters little that the owner has had no notification of the adverse possession for the statute of limitations to start running and expire through means of adverse possession.¹⁹¹

The underlying rationale of the doctrine of adverse possession is that the dispossessed owner should not be deprived of the possibility to exercise his right until he knows (or reasonably ought to have known) of the existence of the cause of action,¹⁹² which in this case should accrue at the time when the adverse possession becomes visible and when the current possessor of the object is known. The mandatory compliance with the eight attributes of adverse possession is intended to warn the dispossessed owner by putting him on notice¹⁹³ so as to be able to undertake legal action on time.¹⁹⁴ The theory goes that because the owner is notified of the adverse possession, dilatory legal action due to negligence must be punished.¹⁹⁵ Nevertheless, unlike situations dealing with real property, where personal property is concerned – and also when cultural objects are at stake –, adverse possession is a particularly difficult doctrine to apply because these objects are often purchased for personal enjoyment.¹⁹⁶ For example, in *O’Keeffe v. Snyder*, the Appellate Division of the Superior Court of New Jersey required that the visible and notorious possession prescribed by the doctrine be applied to paintings in a manner that is sufficient to give notice to the true owner.¹⁹⁷ This seemed particularly troublesome, as the mere residential display of the concerned paintings and a one-time exhibition display were considered insufficient to notify the owner of the adverse possession.¹⁹⁸ Thenceforth, the requirement of open and public possession of the doctrine of adverse possession, as interpreted in *O’Keeffe*, forces possessors to publicly display their cultural goods.¹⁹⁹ In putting the emphasis on a display that gives sufficient indication of the adverse possession to the owner, the court conceded that such a stringent standard may constitute a bar to the protection that should be conferred on an adverse possessor.²⁰⁰ Consequently, it will be particularly difficult for the possessor of a stolen

specifies that there needs to be a direct causal link between the behaviour of the possessor resulting in the owner’s ignorance of the facts of the situation, and therefore preventing the latter in undertaking legal proceedings; for examples of concealment, see Gerstenblith, (1988-1989), pp. 128-130.

¹⁸⁹ Petrovich, (1979-1980), p. 1131, footnote 36.

¹⁹⁰ Gerstenblith, (1988-1989), p. 129: “Because the bona fide purchaser, by definition, is unaware of the theft of the property and has no reason to conceal it intentionally, any use of the property is considered “open and notorious,” and the statute will always start to run as soon as the property comes into the hands of a bona fide purchaser”; Demarsin, (2010-2011), p. 261.

¹⁹¹ Gerstenblith, (1988-1989), p. 124: “Even without notice, however, the statute of limitations will run against the true owner as long as the adverse possessor has acted in good faith”.

¹⁹² See the dissenting opinion of Judge Fritz in *O’Keeffe v. Snyder*, (1979), at 850.

¹⁹³ Gerstenblith, (1988-1989), p. 129.

¹⁹⁴ *O’Keeffe v. Snyder*, (1979), at 844, citing *Brewer v. Porch*, 98 N.J.Super 583, 588, 238 A.2d 193, 195 (App.Div.1968), rev’d on other grounds, 53 N.J. 167, 249 A.2d 388 (1969).

¹⁹⁵ Gerstenblith, (1988-1989), p. 129.

¹⁹⁶ Fox, (1993), p. 239.

¹⁹⁷ *O’Keeffe v. Snyder*, (1979), at 845: “In our view, if a display of the chattel is not such as to give notice to the true owner of the chattel’s whereabouts, the latter’s claim therefor cannot be barred; our adoption of the “discovery rule”, applicable in other contexts, demonstrates our rejection of the notion that one can be barred from asserting a right before he was afforded a real opportunity to assert it”.

¹⁹⁸ *O’Keeffe v. Snyder*, (1979), at 844: “Although not thoroughly discussed, the trial judge apparently viewed the intramural residential display of the paintings and a one-day display at a local art exhibit as insufficient to establish a visible and notorious possession. The conclusion reached is in our view indisputably correct in light of the essential purpose for those requirements. [emphasis] The requirement of the eight adjectives noted above (actual and exclusive, visible and notorious, continued and interrupted (*sic*), hostile and adverse) *** is consequently designed to flag to the true owner the necessity of taking timely legal action ***. (Brewer v. Porch, 98 N.J.Super. 583, 588, 238 A.2d 193, 195 (App.Div.1968), rev’d on other grounds, 53, N.J. 167, 249 A.2d 388 (1969)) [end emphasis]. Hence, title by adverse possession may never be acquired by mere possession however long continued “which is not such as will give unmistakable notice of the nature of the occupant’s claim”. Mannillo v. Gorski, 54 N.J. at 388, 255 A.2d at 263; 5 Thompson, Real Property, § 2546 at 619-624(1979). Display in one’s home provides to the true owner no more notice of the possessor’s claim or warning of the need for timely legal action than would its retention in a closet. Neither mode of possession is such as to afford the true owner a realistic opportunity to regain possession of legal action”.

¹⁹⁹ Fox, (1993), p. 239.

²⁰⁰ *O’Keeffe v. Snyder*, (1979), at 845: “We fully recognize that by adoption of this view, applying all the requirements for the adverse possession of land to chattel, we are in many, if not most, cases foreclosing any real opportunity to acquire adverse title to stolen personalty. Jewelry, for instance, often the subject of theft, is not capable of museum display, except in extraordinary circumstances and, being small and designed primarily for personal wear, does not lend itself to the kind of display that would call an owner’s attention to its possessor’s potential adverse claim. Clearly, in such a case, title to jewelry stolen in California and subjected to country club display on the person of an innocent purchaser in New Jersey cannot vest title by adverse possession in the latter because the true owner in California was denied a fair opportunity of regaining title. To hold otherwise would reject reality in favour of the fiction that the character of the possession has been such as to place the true owner on notice of the need for prompt legal action. Such, however, are the difficulties inherent in applying to chattels principles of adverse possession developed with respect to land. No owner of land can be deprived of knowledge of where his land is. If he lacks such knowledge, it is only because he lacks knowledge of his ownership, not of the land’s location, ignorance entirely independent of and not resulting from a trespass or the action of a person from whom the defendant claims.

object to hold it openly and notoriously because this holding must be sufficient to put the owner on notice, enabling him to defend his interests sufficiently.²⁰¹ Moreover, the subjectivity of this open and notorious possession makes it particularly difficult to appreciate what acts will be tantamount to sufficient notice.²⁰² Furthermore, even if the possessor is able to hold the object openly and notoriously, the doctrine of adverse possession fails in its enterprise of notifying the owner when the adverse possessor is in good faith because it shields the adverse possessor's possession from litigation irrespective of the owner's knowledge of the adverse possession.²⁰³ This is particularly problematic since the purpose of the doctrine of adverse possession is to notify the owner of the adverse claim, allowing him to promptly secure his right. It is only in case of bad faith adverse possession that the doctrine of adverse possession fulfills its objective of notification.²⁰⁴

Consequently, due to its inherent function as a doctrine applicable to land or cattle,²⁰⁵ adverse possession is unsuitable for situations involving stolen personal property and, therefore, also in cases concerning cultural objects.²⁰⁶ As was noted by Preziosi “unlike domestic animals, to which much of the early adverse possession cases apply, art is seldom open to view by the general public in the way that horses and cows are”.²⁰⁷ In fact, the said doctrine applies, in a problematic way, the ‘open and notorious’ criterion to the possession of privately owned personal property²⁰⁸ and, for example, fails to take into account any diligent efforts made by the original owner to find his property back.²⁰⁹ Furthermore, due to the difficulties in retracing the stolen property, it is often impossible for the original owner to be notified of an adverse possession.²¹⁰ Consequently, it is particularly challenging for him to either find the stolen object or to initiate an action in replevin in due time.²¹¹

Recognising the flaws of adverse possession, certain domestic jurisdictions have developed more suitable equitable doctrines.²¹² As was noted by the U.S. District Court of Pennsylvania in *Erisoty v. Rizjik* (discussed below),²¹³ “The statute of limitations may be tolled if strict enforcement would work an injustice on victims of a

Many chattels are, of course, small and even when openly held may not give notice of claimant's adverse possession to the true owner. In many cases both the owner and the possessor are equally innocent; one must bear the loss. The question is, and always has been, who of these two innocents must bear the loss? Where adverse possession is concerned, the law favors the owner, at least where he has been deprived of opportunity to defend his title, by the imposition of the several requirements to a title by adverse possession, all of which must be proved by clear and convincing evidence by the adverse claimant. We merely give effect to that policy in applying such law to personality”.

²⁰¹ Fincham, (2009-2010), p. 192; Kurjatko, (1999), p. 73, footnote 103, citing Jesse Dukeminier & James Krier, property 136 (3rd ed. 1993), at 136.

²⁰² See Fincham, (2009-2010), p. 192, discussing the different possible outcomes depending on the court that is deciding upon the matter.

²⁰³ Gerstenblith, (1988-1989), p. 124: “The fundamental problem is that when dealing with personal property, unlike real property, the adverse possessor can use the property as would a true owner (that is, openly, notoriously, visibly), and yet the owner—even the diligent owner— may never in fact receive notice of the adverse claim”.

²⁰⁴ Gerstenblith, (1988-1989), p. 130: “It is difficult to accept, therefore, that notice to the owner is the motivation for the open and notorious requirement because, if this were so, the statute would never run until the owner had actual or constructive notice of the adverse claim. Instead, notice to the owner is a prerequisite for the running of the statute only when the possessor is the thief or one who takes with notice of a defect in title”.

²⁰⁵ Demarsin, (2010-2011), p. 263.

²⁰⁶ See for example the dissenting opinion of Judge Fritz in *O’Keeffe v. Snyder*, (1979), at 849 where he submits that the apparent differentiation between realty and personal property raises “insurmountable barriers to the intelligent, wholesale and strict application to personalty of the doctrine of adverse possession as we have applied it to real property”. *O’Keeffe v. Snyder*, (1979), at 850; also *O’Keeffe v. Snyder*, (1980), at 495 citing *Joseph v. Lesnevich*, 56 N.J.Super. 340, 153 A.2d 349 (App.Div.1949) and specifying: “As Lesnevich demonstrates, there is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious. In *Lesnevich*, the court strained to conclude that in holding bonds as collateral, a credit company satisfied the requirement of open, visible, and notorious possession”; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 406; Preziosi, (1997-1998), p. 234; Demarsin, (2010-2011), p. 264; Demarsin, (2011), p. 637.

²⁰⁷ Symeonides, S. C., ‘A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Objects’, 38 *Vanderbilt Journal of Transnational Law*, (2005), p. 1196, citing Preziosi, (1997-1998), p. 234.

²⁰⁸ Carey Miller, Meyers and Cowe, (2001), p. 4; Doyle, M. B., ‘Note – Ownership By Display: Adverse Possession To Determine Ownership of Cultural Property’, 41 *The George Washington International Law Review*, (2009), p. 281; Demarsin, (2010-2011), p. 263; Demarsin, (2011), p. 637; in the case *Nafziger v. American Numismatic Society*, (1999), while not specifically applying it to the case at hand, the Court of Appeals confirmed that the lack of open and notorious possession required to acquire through means of adverse possession were determinative in a defence of adverse possession. Hiding or denying possession of an object will thus affect the openness and notoriousness of the possession of the person that is invoking adverse possession (see *Nafziger v. American Numismatic Society*, (1999), at 10).

²⁰⁹ Because the doctrine was developed for real property, the adverse possession by another person could not be ignored by the owner of a piece of land, since he was well aware of the whereabouts of the realty. Henceforth, the doctrine would only deprive him or her of the land, had he been grossly negligent towards it. If applied to personal property, even a diligent owner might not be able to cognise the notice of adverse possession because of the lack of knowledge of the whereabouts of the object. Gerstenblith, (1988-1989), p. 124.

²¹⁰ Demarsin, (2010-2011), p. 263.

²¹¹ Demarsin, (2010-2011), p. 262.

²¹² Gerstenblith, (1988-1989), pp. 131-132; Sherlock, M. A., ‘A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property’, 8 *Tulane Journal of International & Comparative Law*, (2000), p. 488.

²¹³ *Erisoty v. Rizjik*, Not Reported in F.Supp., 1995 WL 91406, (February 23, 1995).

tort crime, such as where an original owner is unable to locate stolen art work for many years despite reasonable search efforts”.²¹⁴ Consequently, alternative solutions that toll the accrual of the cause of action have been developed on the basis of equity in order to provide less draconian outcomes to the mere mechanical application of the statute of limitations from either the moment of the conversion or of the adverse possession. These alternative solutions allow correcting the particularly weak position of original owners resulting from the said mechanical application,²¹⁵ enabling owners to discover the identity of the defendant before allowing the statute of limitations to run.²¹⁶ In other words, certain U.S. courts allow for the deferral of the materialization of the cause of action, protracting the period within which an owner can reclaim his property. For cultural goods, this protraction is particularly responsive to the weak position of owners due to the difficulties that are encountered in recovering a stolen good: these chattels are often moved across borders and are often prone to concealment.²¹⁷ Furthermore, it is also adequate since it provides a viable opportunity for owners to claim back their stolen personal property.²¹⁸ Therefore, the application of statutes of limitations has been subject to flexible equitable doctrines interpreting the accrual of the cause of action,²¹⁹ which are aimed at enhancing the protection of original owners. Henceforth, from 1980 onwards,²²⁰ certain courts have been inclined to toll the accrual of the cause of action so as to help the original owner recover his stolen property.²²¹ In doing so, the courts in New Jersey, California and New York have respectively developed or brought forward the following doctrines: the discovery rule, a strict discovery rule and the demand and refusal rule.²²² Contrary to unlawful taking and adverse possession, these equitable doctrines have the advantage of providing the dispossessed owner with a genuine chance of reclaiming his stolen property.

(2) New Jersey Discovery Rule

The application of the doctrine of adverse possession to personal property was overturned by the New Jersey Supreme Court in *O’Keeffe v. Snyder* in favour of the discovery rule.²²³

In the case of *O’Keeffe v. Snyder*, three small oil paintings – “Cliffs”, “Seaweed” and “Fragments”²²⁴, owned by Georgia O’Keeffe, were stolen in 1946 from a storage room of the New York gallery of O’Keeffe’s husband. Although an employee known as Estrick was suspected of the theft, it remained impossible to identify precisely the thief. Because of want of concreteness as to Estrick’s involvement and as to the identity of the thief, the theft remained unreported to the authorities.²²⁵ Nonetheless, O’Keeffe had mentioned the crime to colleagues in the art world and – by registering the object in the registry of stolen objects maintained by the Art Dealers Association of America (hereinafter ADAA) – she openly disclosed it in 1972.²²⁶ Three years after the registration in the ADAA’s database, the paintings were traced back to the Princeton Gallery of Fine Art, an art gallery located in New Jersey and owned by Snyder. Snyder had himself acquired the painting from Frank in March 1975 for the price of 35.000

²¹⁴ *Erisoty v. Rizjik*, (1995), at 10.

²¹⁵ Margules, P. L., ‘International Art Theft and the Illegal Import and Export of Cultural Property: a Study of Relevant Values, Legislation, and Solutions’, 15 *Suffolk Transnational Law Journal*, (1991-1992), p. 632; Demarsin, (2010-2011), p. 264; Petrovich, (1979-1980), p. 1132.

²¹⁶ Petrovich, (1979-1980), p. 1132.

²¹⁷ Gerstenblith, P., ‘Chapter 15 – Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage’, in: James A. R. Nafziger and A. M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, (Martinus Nijhoff Publishers, 2009), p. 310.

²¹⁸ Gerstenblith, (2009), p. 310.

²¹⁹ Roodt, C., ‘Keeping cultural objects ‘in the picture’: traditional legal strategies’, 27 (3) *The Comparative and International Law Journal of Southern Africa*, (1994), p. 325.

²²⁰ Demarsin, (2011), p. 635.

²²¹ Demarsin, (2010-2011), p. 264; in the case of stolen cultural objects, the accrual of the cause of action has been adapted because it is easy to conceal cultural objects for a long period of time, and, consequently, it becomes relatively hard for the dispossessed owner to find his property back on time. See Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 394; for these reasons, American courts have added equitable considerations to the application of statutes of limitations in case of actions in replevin for personal property. See Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 406; Sherlock, (2000), p. 488.

²²² This enumeration is given by the U.S. District Court in *Erisoty v. Rizjik*, (1995), at 10.

²²³ Kelly, (1995-1996), p. 40; *O’Keeffe v. Snyder* (1980), at 499; in *O’Keeffe v. Snyder*, the court found that the doctrine of adverse possession was not suitable for the art world. In its view, adverse possession was an appropriate doctrine for land law because land cannot be concealed or moved. This is, of course, different for chattels. The court established that the introduction of equitable considerations by the mechanism of the discovery rule would be better fitted than adverse possession. The use of adverse possession was thus supported in the cases of *Redmond v. New Jersey Historical Society* and *Joseph v. Lesnerich* 132 N.J. Eq. 464, 473-476 (E. & A. 1942) but was overruled by the Supreme Court of New Jersey in *O’Keeffe v. Snyder* (1980). See, Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), pp. 406-407.

²²⁴ McFarland-Taylor, L., ‘Tracking Stolen Artwork on the Internet: A New Standard for Due Diligence’, 16 *The John Marshall Journal of Computer & Information Law*, (1997-1998), p. 954.

²²⁵ The theft was neither reported to the relevant authorities, nor to Georgia O’Keeffe’s insurance company (the paintings were not insured) or to the art world through means of publications.

²²⁶ O’Keeffe could not have reported the theft in the database at the time when it took place, since the registry did not yet exist.

dollars.²²⁷ Upon discovering the whereabouts and the identity of the possessor,²²⁸ O’Keeffe informed Snyder of the illicit origin of the paintings. While the latter contended having purchased the paintings from a dealer that had been in continuous possession of the paintings for more than thirty years, the demand for recovery was refused and O’Keeffe thereby initiated the proceedings against the former on 18 May 1976, during the same year both the identity of Snyder and the whereabouts of the paintings were discovered.²²⁹

As was reported above, the trial court firstly applied the doctrine of adverse possession and – seemingly confused about the intertwined character of the adverse possession’s accrual of the cause of action and of the statute of limitations –, differentiated the two notions by applying the statute of limitations of six years separately.²³⁰ In doing so, the trial court concluded that Snyder had not been able to demonstrate that he had acquired the paintings through adverse possession²³¹ and, concurrently, declared that the statute of limitations was tolled. In applying the limitations period, it considered that the accrual of the cause of action materialised at the moment of the theft, and that it had thus already expired in 1952.²³² On appeal, this application was partly dismissed by the Appellate Division of the Superior Court of New Jersey: it held that the trial judge had not *erred* in finding that the adverse possession was not open, visible and notorious, but was mistaken in differentiating the running of the statute of limitations from the moment of theft from adverse possession.²³³ Furthermore, the Appellate Division specifically rejected a proposition made by Snyder to borrow the discovery rule from “other contexts” of New Jersey law.²³⁴ Instead, albeit the court recognised the problems inherent with the application of a doctrine that was originally designed for land to personal property,²³⁵ it called for an elaborate test of adverse possession to be determined first.²³⁶ In doing so, the court preached for a strict application of the doctrine of adverse possession – similar to the one applicable to real property²³⁷ – and only from the moment such adverse possession could be established, would the six year period laid down in the statute of limitations start to run against the true owner.²³⁸ More particularly, the court specified that the private display of the object would not meet the condition of an ‘open and notorious’ display of the object for the test of adverse possession to be

²²⁷ Frank had received the painting from his parents in 1965, before his father – the previous possessor *in rem* – passed away in 1968. The three paintings had also been displayed in public on several occasions, either for the purpose of an exhibition (notably in the Jewish Community Centre in Trenton in 1968) or for the purpose of attempting to sell the items (through the Andrew Crispo and Bernard Denenberg Galleries). See *O’Keeffe v. Snyder*, (1979), at 842.

²²⁸ It should be noted that O’Keeffe first heard, through a New York associate, that the paintings were proposed for sale to the Andrew Crispo Gallery in New York. O’Keeffe was only able to discover the exact whereabouts of the paintings in February 1976. *O’Keeffe v. Snyder*, (1979), at 842.

²²⁹ Demarsin, (2010-2011), p. 264, footnote 45.

²³⁰ *O’Keeffe v. Snyder*, (1979), at 846 (see below).

²³¹ *O’Keeffe v. Snyder*, (1979), at 843: “[...] the trial judge held that “defendant has simply failed to establish several of the basic requirements of adverse possession.” He found that defendant’s possession and that of those preceding him and upon which he relies was not a “continual possession which was visible, open and notorious so as to put the plaintiff directly or indirectly on notice of the defendant’s possession”.

²³² *O’Keeffe v. Snyder*, (1979), at 843: “Nonetheless, he held plaintiff’s suit barred by passage of the statutory six-year period of time (N.J.S.A. 2A:14-1), holding that her cause of action accrued at the time of the original theft in 1946”; *O’Keeffe v. Snyder* (1980), at 489 and 496; Bator, P. M., ‘An Essay on the International Trade in Art’, 34 *Stanford Law Review*, (1982), p. 352, footnote 139; Demarsin, (2010-2011), p. 265.

²³³ *O’Keeffe v. Snyder*, (1979), at 846: “The trial judge apparently viewed as separate the questions of limitation and adverse possession, holding that although title by adverse possession has not been established, plaintiff’s claim was nonetheless barred by limitation, the six-year period having commenced running with the theft in 1946. We view these two issues as being the same, and hence reach the contrary result”; *O’Keeffe v. Snyder*, (1980), at 489 and 496: “The Appellate Division determined that it was bound by the rules in Redmond and reversed the trial court on the theory that the defenses of adverse possession and expiration of the statute of limitations were identical”.

²³⁴ One of the other contexts referred to is, notably, negligence law; *O’Keeffe v. Snyder*, (1979), at 845. The rationale for rejecting the application of the discovery rule to the actions in replevin for aesthetic goods was given by the court: “[...] if a display of the chattel is not such as to give notice to the true owner of the chattel’s whereabouts, the latter’s claim therefor cannot be barred; our adoption of the “discovery rule,” applicable in other contexts, demonstrates our rejection of the notion that one can be barred from asserting a right before he was afforded a real opportunity to assert it”. In support of the application of the discovery rule to this case, see Judge Fritz (dissenting opinion) in *O’Keeffe v. Snyder*, (1980), at 850-851.

²³⁵ The court noted the significant difference between land and personal property by elaborating upon the knowledge of the owner as to the location of his property. For land, the owner can ascertain, without much difficulty, where the land is located, whilst with personal property that has been stolen, ascertaining the whereabouts of the object might prove to be much more complicated. *O’Keeffe v. Snyder*, (1979), at 845.

²³⁶ Bator, (1982), p. 352, footnote 139.

²³⁷ The court has interpreted adverse possession as requiring giving notice to a dispossessed owner, failing which the claim cannot be barred. The adverse possession must thus be visible and notorious to the original owner, rejecting possession in a private home as being visible and notorious. The court itself recognised that such an interpretation of adverse possession for chattels would render acquisition of title through adverse possession upon chattels virtually impossible. See *O’Keeffe v. Snyder*, (1979), at 845; the dearth of visibility and notoriousness of a mere residential display of the object was reiterated in *DeWeerth v. Baldinger*, (1987), at 697, citing *Elcofon*, 678 F.2d at 1164 note 25.

²³⁸ Bator, (1982), p. 352, footnote 139.

complied with.²³⁹ The court touted the doctrine in submitting that it benefits a dispossessed owner since the requirements for adverse possession are strict and must be demonstrated in an unequivocal and convincing manner before the defendant can benefit from the prescriptive right inherent to the notion of adverse possession.²⁴⁰ Since the defendant could not prove that his possession complied with the intricate test invoked by the court, O’Keeffe’s claim was considered to be timeously introduced.²⁴¹

A year later, the Supreme Court of New Jersey quashed the decision of the Court of Appeals, substantiating its rejection on the basis of the precedent laid down in *Lopez v. Snyder*.²⁴² Although the Supreme Court reiterated the correlated working of adverse possession and of the statute of limitations – thus affirming the findings of the Court of Appeals regarding the application of adverse possession²⁴³ –, justice and equity were called-upon to remedy the harsh result obtained as a result of the mechanical application of the statute of limitations through the doctrine of adverse possession.²⁴⁴ In the Supreme Court’s opinion, the latter test was obsolete for actions in replevin aimed at retrieving aesthetic goods,²⁴⁵ and unfit for the actual needs of the art market.²⁴⁶ The Supreme Court therefore overruled the doctrine of adverse possession for chattels in favour of the use of the discovery rule.²⁴⁷ In substantiating its decision, the court considered that it is the behaviour of the true owner that needs to be reviewed instead of the behaviour of the possessor.²⁴⁸ Henceforth, the Supreme

²³⁹ In the words of the court: “Display in one’s home provides to the true owner no more notice of the possessor’s claim than would its retention in a closet. Neither mode of possession is such as to afford the true owner a realistic opportunity to regain possession by legal action”. *O’Keeffe v. Snyder* (1979), at 844; Demarsin, (2010-2011), p. 265.

²⁴⁰ *O’Keeffe v. Snyder*, (1979), at 845.

²⁴¹ Bator, (1982), p. 352, footnote 139; Demarsin, (2010-2011), p. 265.

²⁴² *Lopez v. Snyder*, 62 N.J. 267, 300 A.2d 563, (February 20, 1973), at 273-275.

²⁴³ *O’Keeffe v. Snyder*, (1980), at 494.

²⁴⁴ *O’Keeffe v. Snyder*, (1980), at 491 and 497: “We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession”. See also at 498: “Properly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the statute of limitations for replevin in, N.J.S.A. 2A:14-1” and 504: “The discovery rule permits an equitable accommodation of the rights of the parties without establishing a rule fraught with uncertainty”; Demarsin, (2010-2011), p. 266; Grover, (1991-1992), p. 1460; Fincham, (2009-2010), p. 197; in *Lopez v. Snyder*, the Supreme Court of New Jersey specified: “The discovery rule is essentially a rule of equity. It has been said that in equity lies its genesis. *Owens v. White*, 342 F.2d 817, 820 (9th Cir. 1965). Like so many other equitable doctrines it has appeared and is developing as a means of mitigating the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law. On the face of it, it seems inequitable that an injured person, unaware that he has a cause of action, should be denied his day in court solely because of his ignorance, if he is otherwise blameless. Yet such is the result that must follow if the years of the statute are to be inexorably calculated from the moment of the wrong, whether or not the party aggrieved knows or has reason to know that he has a right of redress”.

²⁴⁵ “Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor. The problem is even more acute with works of art: like many kinds of personal property, works of art are readily moved and easily concealed. O’Keeffe argued that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes”. *O’Keeffe v. Snyder*, (1980), at 496; additionally, the court recognised that the schism between the conclusions reached in the Court of Appeals by the majority and by Judge Fritz in his dissenting opinion implied the obsolescence of adverse possession as a fair and reasonable solution for disputes relating to personal property. See *O’Keeffe v. Snyder*, (1980), at 496-497: “Nonetheless, for different reasons, the majority and dissenting judges in the Appellate Division acknowledged deficiencies in identifying the statute of limitations with adverse possession. The majority stated that, as a practical matter, requiring compliance with adverse possession would preclude barring stale claims and acquiring title to personal property. O’Keeffe, supra, 170 N.J. Super. at 86, 405 A.2d 840. The dissenting judge feared that identifying the statutes of limitations with adverse possession would lead to a “handbook for larceny”. Id. At 96, 405 A.2d 840. The divergent conclusions of the lower courts suggest that the doctrine of adverse possession no longer provides a fair and reasonable means of resolving this kind of dispute”.

²⁴⁶ Demarsin, (2010-2011), p. 265; this conclusion was also reached previously by Judge Fritz in the dissenting opinion to the decision of the majority in the Court of Appeals in the case *O’Keeffe v. Snyder* (1979), at 848 and ff. Judge Fritz, restating at first the underlying rationale of adverse possession – demanding the existence of a cause of action to be unveiled to a dispossessed owner before the right to exercised said action could be subject to expiration – proposed, subsequently, a differentiation between the expiration of rights of action for repossession of realty (which expire through adverse possession) and the expiration of rights of action for negligence, which seemed more appropriate for personal property than adverse possession. *O’Keeffe v. Snyder* (1979), at 850-851 citing the discovery rule from *Lopez v. Snyder*, 115 N.J. Super. 237, 279 A.2d 116 (App.Div.1971), aff’d 62 N.J. 267, 300 A.2d 563 (1973), reiterated in *O’Keeffe v. Snyder*, (1980), at 484, but also at 496 where the court stated: “Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor” and at 497: “[...] we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession”. Furthermore: “[...] the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession” (*idem*).

²⁴⁷ *O’Keeffe v. Snyder*, (1980), at 499, overruling *Redmond v. New Jersey Historical Society* and *Joseph v. Lesnevich*. The court also specified: “The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it”.

²⁴⁸ *O’Keeffe v. Snyder*, (1980), at 497: “The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property”; Bator, (1982), p. 352, footnote 139.

Court – borrowing the discovery rule from the lower courts in New Jersey²⁴⁹ – ruled that the statute of limitations starts to run from the moment the owner discovers the “facts which form the basis of a cause of action”,²⁵⁰ or should have known of such cause of action by the exercise of reasonable diligence or intelligence.²⁵¹ This translates in the tolling of the accrual of the cause of action up until the moment that the owner discovers or should have discovered the identity of the possessor and the whereabouts of the object,²⁵² both moments respectively and hereinafter referred to as the actual and constructive notice. The accrual of the cause of action thus lies with the discovery of the elements required for instating the proceedings for restitution,²⁵³ because the cause of action runs from the moment the plaintiff discovers that he has suffered an injury and that this injury stemmed from the act of another person.²⁵⁴ In determining the accrual of the cause of action, the focus is thus placed on the knowledge that the owner has – or is expected to have – about these two elements, both of which are required in order to introduce a timeous action in replevin.²⁵⁵ Clearly, the accrual of the cause of action is fact-specific and the determination of the accrual is left to the discretion of courts.²⁵⁶ Because it is the owner’s behaviour in searching for his property that is relevant, and that it is the continuous dispossession of the said owner that is to be taken into consideration,²⁵⁷ tacking has no relevancy to the discovery rule. In fact, subsequent transfers in possession of a stolen chattel only affect the exercise of diligence by the owner²⁵⁸ and a diligent owner is entitled to the discovery rule irrespective of how often the chattel has been transferred to unauthorised possessors.²⁵⁹

Compared to the doctrines of unlawful taking and adverse possession, the discovery rule has the benefit of putting the owner on notice of the whereabouts and the possessor of the stolen chattel, providing him with a fair chance to recover the stolen property. In doing so, it works in a similar fashion to the equitable doctrine of fraudulent concealment,²⁶⁰ as it tolls the accrual of the cause of action until notification of the elements sufficient to discover the cause of action.²⁶¹

²⁴⁹ *O’Keefe v. Snyder* (1980), at 491 and 492; for more information about the origins of the discovery rule, notably from suits for medical malpractice in California, see O’Neal, (1980), *op. cit.*, Demarsin, (2010-2011), p. 266 and Fincham, (2009-2010), p. 196, footnote 262; it appears that the discovery rule was already applied by the Supreme Court of New Jersey in the case of *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277, (June 30, 1961) in the area of medical malpractice in 1961. See *Lopez v. Snyder*, 62 N.J. 267, 300 A.2d 563, (February 20, 1973), at 273 and Fincham, (2009-2010), p. 196, footnote 262.

²⁵⁰ *O’Keefe v. Snyder* (1980), at 491, citing *Burd v. New Jersey Telephone Company*, 76 N.J. 284, 291-292, 386 A.2d 1310 (1978).

²⁵¹ *O’Keefe v. Snyder* (1980), at 491, citing *Burd v. New Jersey Telephone Company*, 76 N.J. 284, 291-292, 386 A.2d 1310 (1978); Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 404; Bator, (1982), p. 352, footnote 139.

²⁵² *O’Keefe v. Snyder* (1980), at 491 and 493; Kelly, (1995-1996), p. 40; Symeonides, (2005), p. 1192.

²⁵³ Pinkerton, (1990), p. 2.

²⁵⁴ Henson, (2001-2002), p. 1141, citing *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp., at 1388.

²⁵⁵ Demarsin (2010-2011), p. 266.

²⁵⁶ Redman, (2008), p. 219.

²⁵⁷ *O’Keefe v. Snyder*, (1980), at 874-875.

²⁵⁸ *O’Keefe v. Snyder*, (1980), at 875.

²⁵⁹ *O’Keefe v. Snyder*, (1980), at 875.

²⁶⁰ This comparison was also drawn by the Supreme Court of California in *Bernson v. Brown–Ferris Industries of California*, 7 Cal.4th 926, 873 P.2d 613, 30 Cal.Rptr.2d 440, 22 Media L. Rep. 2065, (June 6, 1994), at 931: “A close cousin of the discovery rule is the “well accepted principle ... of fraudulent concealment.” (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99, 132 Cal.Rptr. 657, 553 P.2d 1129.) “It has long been established that the defendant’s fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.” (*Ibid*) Like the discovery rule, the rule of fraudulent concealment is an equitable principle designed to effect substantial justice between the parties; its rationale “is that the culpable defendant should be estopped from profiting by his own wrong to the extent that it hindered an ‘otherwise diligent’ plaintiff in discovering his cause of action.” (*Id.* At p. 100, 132 Cal.Rptr. 657, 553 P.2d 1129, italics omitted; see also *Pashley v. Pacific Elec. Ry. (sic) Co.* (1944) 25 Cal.2d 226, 231–232, 153 P.2d 325.”)

²⁶¹ “**Concealment rule.** (1950) The principle that a defendant’s conduct that hinders or prevents a plaintiff from discovering the existence of a claim tolls the statute of limitations until the plaintiff discovers or should have discovered the claim. — Also termed fraudulent-concealment rule. [...]”. Garner, B. A., *Black’s Law Dictionary*, 10th edition (2014), keyword: Concealment rule; The doctrine of fraudulent concealment finds root in equity (*Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1387) and serves the function of equitable estoppel (Demarsin, (2011), p. 636; Demarsin, (2010-2011), p. 262). In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, the court defined the doctrine as “[...] an equitable doctrine to estop a defendant from asserting a statute of limitations when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.” (*Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1387, citing *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind.1989) at 1104). The doctrine bars a defendant from relying upon its own wrong doing of hiding the chattel for the purpose of invoking the statute of limitations as a bar to the plaintiff’s recovery claim (Demarsin, (2010-2011), p. 262). In determining whether there has been a fraudulent concealment, the possessor’s good or bad faith is determinative (Gerstenblith, (1988-1989), p. 128): the concealment of the possessor and of the whereabouts of the object must be active and intentional (Demarsin, (2010-2011), p. 263; Demarsin, (2011), p. 638). This means that changing the outward appearances of or identification marks upon the stolen property, an intentional misrepresentation towards the dispossessed owner as to the whereabouts of the property, removal of the property to another state than the one of the residence of the owner, a change in the usual whereabouts where the stolen property is kept and the flouting of statutes directed at helping the owner to retrieve his stolen property constitute a few of the examples of the behaviours that will be subsumed under the heading of fraudulent concealment. Gerstenblith, (1988-1989), pp. 127-128. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1387, citing *Guy v. Schuldt*, 236 Ind. 10, 138 N.E.2d 891, (1956): “While a wrongdoer is concealing from an

As a side note, it is also important to specify that it is possible to toll the statute of limitations through the doctrine of fraudulent concealment,²⁶² thus protracting the period for the original owner to find his object back throughout the period in which the object is intentionally concealed.²⁶³ This is particularly relevant to cultural property, as it is often prone to storage in bank safes or kept in cloistered spaces for long periods so as to wait for the extinction of the statute of limitations.²⁶⁴ Consequently, the doctrine of fraudulent concealment helps to toll the running of the statute of limitations, provided it is established that the stolen property was intentionally concealed to prevent the original owner from initiating a claim in recovery within due time.²⁶⁵ Thenceforth, the doctrine can be invoked against a person that conceals personal property from diligent owners and that relies upon the said fraud when invoking the statute of limitations to bar the original owner's claim.²⁶⁶ The result of the tolling is that the statute of limitations will be suspended until the dispossessed owner knows where the property is and identifies the possessor.²⁶⁷ To benefit from the tolling, the original owner has to exercise due diligence in the search for his object.²⁶⁸ If he does not act with due diligence, the doctrine will not toll the statute of limitations.²⁶⁹ The difficulty with fraudulent concealment with regard to stolen cultural property is that the non-display in public of a stolen chattel might be assimilated to intentional concealment. Nevertheless, this is not conclusive as cultural goods are often purchased by dilettantes or collectors in order to be enjoyed in private settings.²⁷⁰ The burden of proof is imputed to the dispossessed owner who will have to demonstrate that he exercised due diligence in attempting to retrieve the object and that the possessor has actively and intentionally concealed the object from the former.²⁷¹ This burden is, therefore, particularly high because of the lack of notification and of information available to the owner.²⁷²

Consequently, the discovery rule corrects the lack of notification of the doctrines of unlawful taking and adverse possession, concurrently responding more adequately to the problem of theft of personal property. This doctrine is certainly appropriate to the recovery of stolen cultural property. Nevertheless, it will not always be possible to rely on this equitable estoppel doctrine in an action in replevin for stolen personal property. In fact, the Supreme Court in *O'Keefe* made a reservation to the application of the discovery rule by stating: "In determining whether the discovery rule should apply, a court should identify, evaluate, and weight the equitable claims of all parties".²⁷³ What is more, the same court also submitted that an owner that sleeps on his right might not be entitled to rely on the discovery rule.²⁷⁴ This means that the statute of limitations is to run from the day of the theft – bringing back the SOL in line with the doctrine of unlawful taking computed from the time of the first unlawful taking –, unless the dispossessed owner exercises due diligence in recovering his stolen property.²⁷⁵ By the exercise of due diligence, it is possible for a diligent owner to toll the running of the statute of limitations until he discovers both the identity of the possessor and the whereabouts of the object. In deciding as such, the court instated an obligation of due diligence on the dispossessed owner.

Due Diligence

injured person his wrongful act, the law will not, through a statute of limitations, strip the injured party of his remedy against the wrongdoer", at 894; Henson, (2001-2002), p. 1139. The doctrine will thus postpone the commencement of the running of the period of limitation until the party has discovered or ought to have discovered the existence of the cause of action (Redman, (2008), p. 214, citing *Najtzger v. American Numismatic Society*, 42 Cal. App. 4th 421, 49 Cal. RPT.R. 2d 784 (Ct. App. 1996), at 429 (citing *Bennet v. Hibernia Bank*, 427 Cal. 2d 540, 561 (1956)); Gerstenblith, (1988-1989), pp. 126-127).

²⁶² Demarsin, (2010-2011), p. 262; Demarsin, (2011), p. 636; Petrovich, (1979-1980), p. 1131.

²⁶³ See *O'Keefe v. Snyder*, (1980), at 498; Kelly, (1995-1996), p. 41; Gerstenblith, Art, Cultural Heritage, and the Law, Cases and Material, (2004), p. 406; Demarsin, (2010-2011), pp. 262-263; In *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg, Dikman* intentionally concealed the mosaics in Germany for almost a decade. This act of active concealment led to the application of the doctrine for the duration of this period. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1391; Bengs, (1996), p. 519; Gerstenblith, Art, Cultural Heritage, and the Law, Cases and Material, (2004), p. 438; Symeonides, (2005), p. 1182

²⁶⁴ Margules, (1991-1992), 612, footnote 15.

²⁶⁵ Bengs, (1996), p. 519.

²⁶⁶ Demarsin, (2011), p. 636; Henson, (2001-2002), p. 1139.

²⁶⁷ This was explained by the Court of Appeals in the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d, at 294, cited in Henson, (2001-2002), p. 1139.

²⁶⁸ See for example *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1387-1388 for the exercise of due diligence for the purpose of fraudulent concealment in Indiana law; Bengs, (1996), p. 519.

²⁶⁹ Bengs, (1996), p. 519.

²⁷⁰ Demarsin, (2010-2011), p. 263.

²⁷¹ Henson, (2001-2002), p. 1139.

²⁷² Henson, (2001-2002), pp. 1139-1140.

²⁷³ *O'Keefe v. Snyder*, (1980), at 498 citing *Lopez v. Snyder*, 62 N.J. 267 (1973) at 274, 300 A.2d 563.

²⁷⁴ *O'Keefe v. Snyder*, (1980), at 502: "An owner who diligently seeks his chattel should be entitled to the benefit of the discovery rule although it may have passed through many hands. Conversely an owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person".

²⁷⁵ See the dissenting opinion of Justice Handler in *O'Keefe v. Snyder*, (1980), at 507: "the Court today rules that if a work of art has been stolen from an artist, the artist's right to recover his or her work from a subsequent possessor would be barred by the statute of limitations if the action were not brought within six years after the original theft".

The Supreme Court added an element to the transposition of the discovery rule to the recovery of personal property, and thus required from the owner to prove having exercised a certain diligence – hereinafter referred to as due diligence – in researching the object, if he wants to be able to rely upon the discovery rule.²⁷⁶ Consequently, the exercise of due diligence in the search for the stolen object by the original owner constitutes an important facet of the rule,²⁷⁷ albeit the exact degree of diligence to be exercised by the owner is rather unclear.²⁷⁸ Contrary to the notion of adverse possession, the focus is shifted from the possessor to the behaviour of the original owner,²⁷⁹ and the burden of inquiring about the object – in the form of due diligence – is imputed to the latter.²⁸⁰ Concomitantly, he is the one who must undertake research with regard to the possible location of his stolen property.²⁸¹ If the owner diligently searches for the item but cannot find it, or fails to discover the identity of the possessor, the cause of action will not accrue and the statute of limitations will be tolled.²⁸²

Standard of due diligence

Due diligence, as perceived by the court in *O’Keeffe*, is determined by a “specific analysis which will vary depending on the facts of each case, including the ‘nature and value of the property’”.²⁸³ As such, the court in *O’Keeffe* did not set a specific standard of diligence but rather left the determination of this standard to the discretion of the courts, on a case-by-case basis.²⁸⁴ What is clear is that there is no obligation to undertake all efforts possible, but merely to adopt efforts that are reasonable given the circumstances of the case.²⁸⁵ Consequently, there seems to be no determinative test for ascertaining the appropriate exercise of due diligence for the application of the discovery rule. Since due diligence is fact-dependent, the degree of inquiry expected from the dispossessed owner will depend on the chattel at stake.²⁸⁶ Thus, the fringes of the required standard of due diligence can only be discerned by analysing contentious cases in which the discovery rule was applied.

The requirement of due diligence relevant to the applicability of the discovery rule was explored in the Pennsylvanian case of *Erisoty v. Rizik*.²⁸⁷

This case concerned one painting out of a series of four depicting the four seasons that was painted by the eighteenth-century painter Corrado Giaquinto. The painting, entitled ‘Winter’ had been purchased by the father of the defendant, Ayoub Rizik, in around 1940.²⁸⁸ On 24 July 1960, ‘Winter’ was stolen, along with four other paintings (including ‘Spring’ and ‘Summer’) from the home of the widowed mother of the defendant, Souraya Rizik. On the following day, its disappearance was reported by one of her daughters – a sibling of the defendant, Jacqueline Rizik – to the Metropolitan Police Department of the District of Columbia. Subsequently, the Federal Bureau of Investigation was informed of the theft and undertook further communications with Interpol.²⁸⁹ The course of events ranging from the theft of the painting to the acquisition in good faith can be resumed as follows:

²⁷⁶ Demarsin, (2010-2011), p. 266.

²⁷⁷ Benge, (1996), p. 519; it is, nevertheless, not clear what the test of due diligence is. In the words of the court in *O’Keeffe*, “[...] the meaning of due diligence will vary with the facts of each case, including the nature and value of personal property”. Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 407; “The dilemma the courts face in art replevin cases is if and how the true owner’s action or inaction in searching for the art affect the running of the limitations period-the due diligence inquiry”, Preziosi, (1997-1998), p. 237; Warring, (2005), p. 267.

²⁷⁸ Warring, (2005), pp. 267-268, especially footnote 215.

²⁷⁹ *O’Keeffe v. Snyder*, (1980), at 497.

²⁸⁰ *O’Keeffe v. Snyder* (1980), at 497 and 500: “Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. *Wilomay Holding Co. v. Peninsula Land Co.*, 36 N.J.Super. 440, 443, 116 A.2d 484 (App.Div.1955), certif. den. 19 N.J. 618, 118 A.2d 128 (1955). Under the discovery rule, the burden is on the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations. See Lopez, supra, 62 N.J. at 276, 300 A.2d 563.”; *Erisoty v. Rizik*, (1995), at 10; Demarsin, (2010-2011), pp. 266-267.

²⁸¹ *A contrario*, adverse possession, which was the traditional doctrine previously used by American courts, puts the emphasis on the possessor. The latter was required to exercise his possession under the requirements of adverse possession, if so, he would be entitled to keep the object after a certain period of time had lapsed. See Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 406; Demarsin, (2010-2011), pp. 261-262; subsequent transfers from one possessor to another are taken into consideration in verifying the owner’s due diligence in researching his property. Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 407; Preziosi, (1997-1998), p. 236.

²⁸² *O’Keeffe v. Snyder*, (1980), at 499: “By diligently pursuing their goods, owners may prevent the statute of limitations from running.”; *Erisoty v. Rizik*, (1995), at 10 (citing *O’Keeffe v. Snyder*, (1980), at 499).

²⁸³ *O’Keeffe v. Snyder*, (1980), at 499; Preziosi, (1997-1998), p. 237.

²⁸⁴ Redman, (2008), p. 220.

²⁸⁵ *O’Keeffe v. Snyder* (1980), at 497; *Erisoty v. Rizik*, (1995), at 14.

²⁸⁶ See for example the illustrations provided by the Supreme Court in *O’Keeffe v. Snyder* (1980), at 499, cautioning various degrees of diligence for a ring or for works of art of greater value.

²⁸⁷ *Erisoty v. Rizik*, Not Reported in F.Supp., 1995 WL 91406, (February 23, 1995).

²⁸⁸ Although certain documents about the painting’s provenance and authenticity had been received at the time of the transaction and, thenceforth, kept by the defendant’s father, it was not clear to the defendant where the painting had been acquired and what its purchase price was.

²⁸⁹ *Erisoty v. Rizik*, (1995), at 1.

in March 1988, the painting reappeared in an apartment on Catherine Street in Philadelphia but had, in between the theft and the discovery, been cut into five pieces. Whilst it remained unclear who the thief was and how the ‘Winter’ painting ended up spoiled in the said apartment, the finder, Alan Karr – also known as Karl Kern – discovered it in the course of his employment. Karr, who was in the business of delivering cleanout and removal services, was instructed to empty the apartment and leave it ‘broom clean’. He found the painting while executing the instructed task. Subsequently, the lack of publication of the theft by the Rizik family was soon to be felt: prominent experts on Giaquinto were consulted by the curator of European paintings prior to 1900 of the Philadelphia Museum of Art – Rishel –, acting on behalf of an antique dealer mandated by Alan Karr. These experts were unable to provide information as to the illicit origin of the painting, as they could not have been aware of the theft that took place in 1960 because of the dearth of publicity given to the theft. In March 1989, Karr decided to put the painting up for sale through an auction house with whom he had often worked with in the past. The auction house undertook to publicise the auction extensively so as to increase interest for the pieces that were up for sale. On 16 April 1989, the painting was sold for 25,000 dollars to Dreama Erisoty, acting on behalf of several Erisoty family members. It then underwent several years of restoration work with Steven Erisoty, a family member who specialised in the conservation of paintings. In the fall of 1992, following the publication of the disappearance of the Giaquinto paintings, a former colleague of Rishel – who was employed in a different museum – informed him of the listing of the painting as stolen in a publication issued by the International Foundation for Art Research (hereinafter *IFAR reports*). Subsequently, Rishel informed the Executive Director of the International Foundation for Art Research – hereinafter IFAR – of the unfortunate turn of events to which ‘Winter’ had been subjected, running from its reappearance to its auctioning. The IFAR, in turn, contacted the FBI who got hold of the name Erisoty through Slosberg, the Director of the auction house. On 8 September 1993, the FBI inquired with Steven Erisoty about the whereabouts of the painting and, after learning that it was on the house’s third floor, requested that the painting be handed over to its agents. After having recovered the painting, the FBI contacted Jacqueline Rizik to arrange the restitution, subject to clarification regarding the title between the Rizik and their insurance company. The latter – who had acquired title by compensating the 1960 theft – agreed to transfer the title of the painting back to the Rizik family, so long as they received a reimbursement of the 5,000 dollars that was paid in 1960 as compensation. Following the repayment, the FBI personally returned the painting to the Rizik family, ignoring possible claims of better title by the Erisoty, who claimed to have lawfully purchased the painting in 1989. On 20 September 1993, the attorneys of the Erisoty family demanded the return of the painting, a demand that was refused on 1 October 1993 by communication from the attorney of the Rizik. After recovering the painting more than three decades post-theft through the help of the FBI, the case was brought before the court by the Erisoty family, who, undeniably, lawfully purchased ‘Winter’ at the auction.

As the case was brought before the United States District Court of Pennsylvania, the court first determined – by applying the *lex fori* conflict of law rules – that the applicable law was the law of Pennsylvania.²⁹⁰ Pennsylvania law recognises and applies the discovery rule in similar tort actions. Consequently, the main crux of the case was the determination of the exercise of ‘reasonable due diligence’²⁹¹ as mandated by the discovery rule for the purpose of tolling the statute of limitations.²⁹² Despite preliminary contentions by the Erisoty family that ownership had passed to the insurance company upon payment of the compensation to the Rizik family, the court found that the latter had a “continuing interest in the Painting sufficient to warrant consideration of their efforts under the due diligence criteria of the discovery rule”. The efforts of the Rizik family, and not of the insurance company,²⁹³ to retrieve the painting were to be vetted in evaluating whether reasonable due diligence was carried out. It should be stressed that the court acknowledged that the claimants, in an action in replevin, should have been the Rizik family against the defendant – the Erisoty family –, albeit the turn of events changed this setting in an unusual manner. To correct this unexpected scenario, the court established a legal fiction by which the case was considered to have been brought by the parties without the involvement of the FBI, a fiction that was also determinative in allocating the burden of proof in the replevin proceedings before the court. Thenceforth, the court imputed the burden of proving the exercise of the said due diligence upon the defendant Rizik, as it would usually be imputed upon the dispossessed owner, that is, the party relying on the discovery rule and who is usually the claimant in an action in replevin.²⁹⁴

In proving the exercise of due diligence, the following actions in researching the stolen paintings were undertaken by the Rizik heirs: Philip Rizik – one of the seven siblings of Souraya and Ayoub Rizik – intended to

²⁹⁰ *Erisoty v. Rizik*, (1995), at 10, notably footnote 4 and footnote 5 (the latter illustrates that the choice of law was a false conflict in this case, because all the applicable laws that have connections with the case at hand follow the discovery rule); the court applied §5521(b) of the Pennsylvania Consolidated Statutes to conclude that the *lex fori* was applicable to the case at hand.

²⁹¹ *Erisoty v. Rizik*, (1995), at 11.

²⁹² As was established above, Pennsylvania is one of the states that adheres to the discovery rule, including the obligation to exercise due diligence that is imputed upon the dispossessed owner in the course of retrieving his stolen property. See also *Erisoty v. Rizik*, (1995), at 8 and 9.

²⁹³ It should be noted that the insurer undertook minimal efforts to retrace the paintings, notably because of Rizik’s constant involvement in trying to retrieve the paintings.

²⁹⁴ *Erisoty v. Rizik*, (1995), at 11.

undertake variegated actions to recover the paintings, but his efforts were thwarted from the outset. During the early exchanges with museum officials and with Blok – the representative of the insurance company obliged to compensate –, Philip was discouraged from proceeding with further inquiries on the basis that delegating the research to the Metropolitan Police, FBI and Interpol was the most appropriate response to the theft. Furthermore, Philip Rizik intended to hire a private detective to retrace the stolen paintings, but was further disincentivised by local law enforcement authorities. Despite these recommendations, Philip did not loiter and contacted the Art Dealers Association of America to report the theft twelve years after it had taken place. But for several unfruitful attempts by the FBI to recover the paintings, there had been no further contact between the FBI and the Rizik family between July 1979 and August 1993. Furthermore, the Rizik family members did not disclose the disappearance of the paintings to the public or to stakeholders of the art market until 1992. Before 1992, two newspapers had reported the theft of the Giaquinto paintings right after it had taken place, with only one mentioning the title of the painting. Furthermore, it appeared that the Rizik siblings were mere dilettantes and had no advanced knowledge of fine art or of the antiquities market. Moreover, the only comprehensive publication of the theft took place thirty-two years after the theft, when Jacqueline Rizik heard of the existence of the IFAR and of their involvement in addressing the issue of cultural property theft, notably through the creation of the Art Loss Register (hereinafter ALR). The IFAR then subsequently, with Jacqueline Rizik's permission, published the three stolen Giaquinto paintings (including their titles, pictures and dimensions) in its *IFARreports* that was subsequently circulated and which specified that the Rizik family were willing to pay a reward for any information that led to the retrieval of the paintings.

In pondering the question of due diligence, the court was satisfied with these steps and found that the Rizik family were reasonably diligent by relying mainly upon the involvement of the FBI and of Interpol.²⁹⁵ The court appreciated the efforts undertaken by the Rizik family within a period of thirty years and considered that, it was normal for their efforts to wane after many years of research.²⁹⁶ It conceived that the inquiries made by the Rizik family could have been more assertive, but that the lack of proactivity did not defeat the exercise of their sufficiently reasonable efforts, and, consequently, of the exercise of due diligence.²⁹⁷ Furthermore, the court took the character of the parties into consideration in determining the degree of reasonable diligence expected from the dispossessed owner. The parties' lack of specialisation and their quality as mere dilettantes was weighed in the determination of the appropriate diligence.²⁹⁸ Thenceforth, their belated acknowledgment of the existence of the IFAR was not considered by the court as a lack of diligence on their part.²⁹⁹ Of particular relevance to the present disquisition, the court went on to discuss the buyer's behaviour: in an exercise of balancing of equities, it found that the Erisotys did not vet the provenance of the painting. Following the court, they did not research the prior ownership or the identity of the consignor, and did not make any inquiries with law enforcement agencies.³⁰⁰ Furthermore, the fact that the painting had been cut into five pieces should have raised red flags to the Erisotys.³⁰¹ Consequently, the latter took the risk that an owner would reclaim the painting at any time.³⁰² The court concluded by recognizing the flexibility of the standard of due diligence under the discovery rule and submitted that "Given the flexibility of the standard as currently applied in the case law, it should not be required of individual victims, unschooled in the ways of the art community, that they leave no stone unturned in order to recover their stolen art".³⁰³

In the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Art* decision, the trial court exemplified what conscientious efforts would be expected from the owner in exercising due diligence.



In the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg* case,³⁰⁴ four Byzantine mosaics from the sixth century – known as the Kanakaria Mosaics – representing Jesus as a child, two apostles (Saint Matthew and Saint James) and the Archangel Michael³⁰⁵ (all four represented in this respective order) were removed from a larger mosaic that was located in the early Christian church³⁰⁶ of Kanakaria in Lythragomi, Northern Cyprus. The mosaics were particularly important to Cyprus because these were the rare remnants of a period of iconoclasm that took place in the eighth-century.³⁰⁷ The removal took place at some time during or after

²⁹⁵ *Erisoty v. Rizik*, (1995), at 13.

²⁹⁶ *Erisoty v. Rizik*, (1995), at 13.

²⁹⁷ *Erisoty v. Rizik*, (1995), at 14.

²⁹⁸ *Erisoty v. Rizik*, (1995), at 13.

²⁹⁹ *Erisoty v. Rizik*, (1995), at 13.

³⁰⁰ *Erisoty v. Rizik*, (1995), at 14.

³⁰¹ *Erisoty v. Rizik*, (1995), at 14.

³⁰² *Erisoty v. Rizik*, (1995), at 14.

³⁰³ *Erisoty v. Rizik*, (1995), at 14.

³⁰⁴ For a detailed overview of the facts, see *Autocephalous Greek-Orthodox Church of Cyprus v. Golberg*, (1990), at 279 and ff.

³⁰⁵ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1377-1378; Symeonides, (2005), p. 1180.

³⁰⁶ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1377; Symeonides, (2005), p. 1180.

the occupation of Northern Cyprus by Turkish forces.

Throughout the Turkish invasion, both the government of the Republic of Cyprus and the Church of Cyprus were denied access to the Kanakaria Church.³⁰⁸ It was thus impossible for either one of them to oppose the removal of the mosaics during the Turkish occupation. Thenceforth, the church was vandalised somewhere in-between the period August 1976-October 1979.³⁰⁹ During this period, the mosaics were shorn of the apse of the church by a Turkish national known as Aydin Dikman³¹⁰ who subsequently disappeared.³¹¹ Dikman – passing through Turkey – transported the mosaics from Cyprus to Germany and kept these hidden for almost a decade.³¹²



In July 1988, Dikman concluded a deal with Patty Goldberg – an Indianapolis art dealer –, and subsequently transported the four mosaics to the free-port at Geneva airport, Switzerland, to be delivered to Goldberg.³¹³ She purchased the mosaics for 350,000 U.S. dollars and paid in cash, putting the entire sum in paper bags.³¹⁴ Thus, Goldberg acquired possession of the mosaics in 1988³¹⁵ through a shady transaction executed in Switzerland.³¹⁶

Subsequently, she transported the mosaics back to Indiana and proposed these for sale to the Getty Museum, California, for 20 million U.S. dollars.³¹⁷ Not only did the curator refuse the offer but he promptly contacted the Cypriot authorities to disclose the identity of the current possessor of the stolen mosaics.³¹⁸ Afterwards, both the Republic of Cyprus and the Church contacted Goldberg and proposed the return of the mosaics against reimbursement of the price paid.³¹⁹ After refusing the offer, an action in replevin was instated against Goldberg in March 1989 before an Indiana federal district court.³²⁰



In vetting due diligence, the court advanced that a dispossessed owner that, for example, failed to inform the competent authorities of the theft and did not initiate a diligent search to discover the whereabouts of the object or the identity of the possessor, consequently fails in exercising his incumbent obligation of due diligence.³²¹ In this case, the proactivity of the Cypriot government demonstrated a high level of diligence in tracing the whereabouts of the stolen mosaics. As the District Court noted “From the time they [the government of the Republic of Cyprus] learned of the mosaics’ disappearance, the Republic of Cyprus engaged in an organised and systematic effort to notify those who might assist them and to seek the return of the mosaics”.³²² As such, Cyprus undertook the following steps: it contacted UNESCO, the ICOM, the ICOMOS,³²³ it issued a resolution directed at *Europa Nostra*, which it also communicated for further dissemination to the Council of Europe, it contacted several European museums, including the Louvre and the British Museum, and American museums, and several auction houses such as Christie’s and Sotheby’s. The disappearance of the mosaics was further condoned during several symposia, congresses and disseminated through letters to many market stakeholders. The theft was also communicated in the U.S. through the Embassy of Cyprus by issuing statements in the press, communicating information to members of Congress, to legislative assistants working in the ambit of foreign affairs, to members of academia, to members of the archaeological community and to any other organization

³⁰⁷ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1377. It should be noted that only six or seven Byzantine mosaics survived this period of iconoclasm, the original mosaics of the Kanakaria Church being one of these rare remnants; Demarsin, (2010-2011), p. 267, footnote 69.

³⁰⁸ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1379.

³⁰⁹ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1379; Demarsin, (2010-2011), p. 267, footnote 69.

³¹⁰ Symeonides, (2005), p. 1180.

³¹¹ Demarsin, (2010-2011), p. 267, footnote 69.

³¹² Symeonides, (2005), p. 1180.

³¹³ Symeonides, (2005), p. 1180.

³¹⁴ Symeonides, (2005), p. 1180.

³¹⁵ Pinkerton, (1990), p. 3.

³¹⁶ Demarsin, (2010-2011), p. 267, footnote 69.

³¹⁷ Symeonides, (2005), p. 1180.

³¹⁸ Symeonides, (2005), p. 1180.

³¹⁹ Symeonides, (2005), p. 1180.

³²⁰ Symeonides, (2005), p. 1180.

³²¹ Symeonides, (2005), p. 1192.

³²² *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1389.

³²³ Which the court in *Autocephalous* mistakenly referred to as the “International Council of Museums and Sites”. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1380, the same mistake was made by the Court of Appeals in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1990), 917 F.2d 278, at 281.

having an interest in Greek and Cypriot affairs.³²⁴ Cyprus also kept these contacts alive and met on several occasions with UNESCO to ensure further cooperation on the matter.³²⁵

Later on, the Court of Appeals affirmed the submission of the District Court in declaring that due diligence requires “substantial and meaningful steps” from the moment of the theft until the recovery of the chattel,³²⁶ and not to provide an impeccable and all-encompassing research record. It is important to note that the dissemination of information in the present case constituted an intelligent exercise of due diligence: the government of Cyprus principally disseminated the information to a targeted and specialised audience that was dealing with Byzantine art.³²⁷ Furthermore, the character of the party obliged by the due diligence is particularly important here: it is conceivable that the fact that the dispossessed owner in the above case was a government presupposes a higher standard of diligence because of the expertise and the financial means that it has at its disposal.

(3) California Strict Discovery Rule

Unlike in New Jersey, California courts have not applied the doctrines of unlawful taking³²⁸ and of adverse possession to stolen personal property.³²⁹ Considerations relating to the protection of the dispossessed owner

³²⁴ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1380 and the approval of a proper exercise of due diligence by the court at 1389.

³²⁵ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1380.

³²⁶ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1990), at 290.

³²⁷ See the commentary of Marion True, Curator of Antiquities at the J. Paul Getty Museum of Los Angeles at the time of the court proceedings. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, (1989), at 1389.

³²⁸ Although both *Harpending v. Meyer*, (1880) and *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 239 P. 319, (August 19, 1925) indicate that the statute of limitations is to run from the moment of the unlawful taking by the defendant (see *Society of California Pioneers v. Baker*, 43 Cal.App.4th 774, 50 Cal.Rptr.2d 865, 96 Cal. Daily Op. Serv. 1810, 96 Daily Journal D.A.R. 3079, (March 15, 1996), at 781 and ff.), both cases dealt with a conversion following from a bailment. Although these cases are relevant to conversions of personal property, they are not authoritative in case of conversion following from theft. The Court of Appeals of the Second District in Naftzger clearly established a distinction between cases of bailment involving the voluntary dispossession by the owner and entrustment to another from cases of conversion following from theft: “*Harpending*, however, is plainly distinguishable because in that case the property owner voluntarily deposited her jewels “with one Baux of San Francisco[.]” (*Harpending v. Meyer*, *supra*, 55 Cal. at p. 557.) Without the owner’s knowledge or consent, Baux pawned the jewelry and failed to redeem it. The owner sued the pawnbrokers for the recovery of her jewelry or their value. The trial court entered judgment for the pawnbrokers due to the expiration of the three-year limitations period of section 338. Affirming the judgment on appeal, the Supreme Court concluded the limitations period commenced running when Baux had pawned the jewelry, thus converting it to his own use. Naftzger contends that because the limitations period commenced in *Harpending* on the date of the conversion, the limitation period commenced in this case on the date of the theft. Naftzger relies upon the following language from *Harpending*: “All the cases agree in this, that a right of action accrues in favor of the owner of goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them. No right of action accrued against the defendant [pawnbrokers] in this case until they took the plaintiff’s property without her assent.” (*Harpending v. Meyer*, *supra*, 55 Cal. at p. 558, emphasis added.) Focusing only on the underscored portion of the quotation, Naftzger contends that in both conversion and theft cases not governed by the 1983 amendment to section 338, the owner must sue within three years of the theft or conversion to prevent title from being quieted in the wrongdoer or his successor. But *Harpending* was a bailment, not a theft case. As we read *Harpending* and its progeny, the rule in this State is that where a bailee converts the property by selling it without the bailor’s permission, the bailor has three years from the date of the conversion to sue the purchaser for the recovery of the property. In that limited context, the *Harpending* court stated the owner’s cause of action had accrued against the pawnbrokers when the goods were “wrongfully taken [by the pawnbrokers] from [the bailor’s] possession.” (55 Cal. at p. 558). In this case, unlike *Harpending*, the “wrongful[] tak[ing]” (*Harpending v. Meyer*, *supra*, 55 Cal. at p. 558) was not the purchase of converted property, but the initial theft of the coins from ANS. *Harpending* does not, in our view, establish a rule quieting title to stolen property in the thief or his successor once three years have elapsed (*sic*) following the theft. [...] “An owner who entrusts his property to another bears some responsibility for creating a situation whereby an innocent purchaser is led to buy goods from an agent who is acting in excess of his authority. The law sometimes protects the innocent purchaser’s title against the defrauded owner, depending upon the circumstances.” (*Naftzger*, *supra*, 42 Cal.App.4th at pp. 429-430)”. See *Naftzger v. American Numismatic Society*, (1999) – referred to as *Naftzger II* –, at 6-7. The distinction made in *Naftzger* seems appropriate and corrects prior misunderstanding as to the relevancy of *Harpending* and *San Francisco Credit Clearing House* to cases dealing with the recovery of stolen personal property. One such misunderstanding can be found in *Society of California Pioneers v. Baker*, (1996), at 782: “*Harpending* and *San Francisco Credit* state the law as it applied to actions for stolen property prior to 1983”.

³²⁹ See *David Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2015), at 1156 citing *San Francisco Credit Clearing House v. C.B. (sic) Wells*, 196 Cal. 701, 707-08 (1925), *Society of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 784 n.13. In *San Francisco Credit Clearing House v. Wells*, the Supreme Court of California rejected the application of the doctrine of adverse possession on the basis of the following considerations: “[referring to section 1007 of the Civil Code of California which instated a prescriptive right at the time the action in recovery of real property is barred by the statute of limitations in case of occupancy] Whether by the adoption of said section it was intended to include personal property or not, it is very clear that the section in nowise modifies or limits the effect of subdivision 3, section 338, Code of Civil Procedure. That subdivision authorizes the commencement of an action by the owner of personal property against a wrongful converter at any time within three years from the day that the wrongdoer receives the property into his possession. The acts of ‘taking,’ ‘detaining,’ etc., the property relate to the person who wrongfully has the property in his possession at the time action is commenced against him, and the fact that others may have wrongfully possessed it for fragmentary portions of the statutory period, which, taken together, would exceed the period that bars the remedy, is not a defense of which the wrongdoer, who has not possessed the property for the full period of three years may avail himself. This construction seems to be in harmony with *Harpending v. Meyer*, 55 Cal.

have underpinned the non-application of the doctrine of adverse possession: even though a stolen chattel is held openly and notoriously, it is considered too difficult for the owner to determine the chattel's exact whereabouts.³³⁰ More specifically, prior to 1983, the CCCP did not distinguish cultural property from other types of personal property,³³¹ as Section 338 (3) CCCP merely governed actions for the recovery of personal property.

§ 338 CCCP – Within three years: [...] (3) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

Whilst this provision set the statute of limitations at three years from the accrual of the cause of action for an action in recovery of personal property,³³² there was no judicial or legislative guidance as to when the cause of action was to accrue in cases dealing with the recovery of stolen personal property.³³³ Following the adjudication of the *O'Keefe* contention by the New Jersey Supreme Court in 1980, California became an exponent of the discovery rule for the recovery of cultural property;³³⁴ despite the rule's existence since 1917 in the ambit of medical malpractice,³³⁵ it had hitherto never been extrapolated to the problematic of the recovery of stolen cultural property. The rule was, therefore, anchored in a second sentence of Section 338 (3)³³⁶ of the CCCP in 1982³³⁷ – taking effect on the 1 January 1983³³⁸ –, which reads as follows:

555, and would afford some protection to persons as to their ownership of personal property which is an ambulatory and movable character, and easy of concealment. Less baneful consequences would probably flow from a rule that would require a fixedness or stability of possession before an owner of property, without fault on his part, could be deprived of its use and enjoyment than that which would follow the confusion of 'tacking' the possession of many holders of various durations, residing in various neighborhood and with the situation further embarrassed by the difficulties of identification. A careful examination of the decisions of this state has failed to disclose to our investigation a single case in which section 1007, Civil Code, has been applied to the acquisition of title to personal property", at 707-708. This was further corroborated by the Court of Appeal in *Naftzger v. American Numismatic Society*, (1999), at 9: "In the unpublished portion of *Naftzger I*, we pointed out the dearth of California cases applying the doctrine of adverse possession to stolen personal property. We noted that unlike real property, which an owner can protect during the prescriptive period by patrolling and evicting any potential adverse possessor, stolen personal property such as coins can be easily moved and concealed from the defenseless owner. We also cited *San Francisco Credit C. House v. Wells* (1925) 196 Cal. 701, which held that the evidence was insufficient to establish a claim of adverse possession to a piano, without deciding whether such a claim is cognizable as a matter of law. [...] Without deciding whether adverse possession applies to personal property, we conclude substantial evidence supports the trial court's finding that possession was not open and notorious as required to support a claim of adverse possession. Title may not be established by hiding and denying possession of the very property which is being claimed by adverse possession". See also *Society of California Pioneers v. Baker*, (1996), at 785, footnote 13: "The court in *San Francisco Credit C. House v. Wells*, supra, 196 Cal. 701, 707, 239 P. 319, suggested that the doctrine of adverse possession would not apply to personal property, and no California case has been cited in support of such an application. We note that this issue does not appear to be settled. (See, e.g., 4 Witkin, Summary of Cal.Law (9th ed. 1987) Personal Property, § 99, pp. 94–05, stating that the right to acquire personal property by adverse possession seems available)". The non-application of the doctrine of adverse possession to personal property was recently confirmed in *Marei von Saher v. Norton Simon Museum of Art at Pasadena*, Case No. CV 07-2866-JFW (JTLx), (April 2, 2015), at 10 (footnote 7).

³³⁰ *David Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2015), at 1157: "California's decision not to extend the doctrine of adverse possession to personal property recognizes the difficulties faced by owners in discovering the whereabouts of personal property even when held openly and notoriously, and serves to protect the interests of the "rightful owner" over subsequent possessors. It also serves to protect subsequent purchasers to determine the true owner of property before purchasing that property. California's interest in serving these policy goals is especially strong in the context of stolen art". See also *San Francisco Credit Clearing House v. Wells*, (1925), at 706-707, where the Supreme Court of California submitted: "We are unable to perceive, however, that a person can ever be considered a bona fide purchaser of goods from one who has no right to sell, in case where the rule of caveat emptor applies. The law imputes notice to him. Under that rule he is not only put upon inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it. If he has notice in fact, no demand upon him for the property is necessary before commencing the action to recover it".

³³¹ Assembly Bill AB 2765 – Bill Analysis, Assembly Committee on Judiciary (Mike Feuer, Chair), Subject: *Statute of Limitation: Recovery of Stolen Works of Art*, (May 4, 2010), (text available at the following url: http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2751-2800/ab_2765_cfa_20100504_141718_asm_comm.html, last retrieved on 01.03.2018), p. 5 specifying that a new special category for work of "art or artifact" was created by the 1983 changes. The terms "art or artifact" were then replaced by the terminology "article of historical, interpretive, scientific, or artistic significance" (*idem* at 6); Demarsin, (2010-2011), p. 273.

³³² See *Society of California Pioneers v. Baker*, (1996), at 781, footnote 8.

³³³ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 5: "The original statute was silent as to whether the SOL would begin to run at the wrongful taking or at discovery, [...]"; Demarsin, (2010-2011), pp. 272-273; this lack of elucidation as to the accrual of the cause of action was only remedied in 1996 in the case of *Naftzger v. American Numismatic Society*, which is discussed below.

³³⁴ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 5; similar to New Jersey, the rule has been adopted in California to counter the harsh results stemming from a mechanical application of the statute of limitations (Fincham, (2009-2010), p. 196, citing *Lopez v. Snyder*, 300 A.2d 563 (N.J. 1973), at 566) from the time of the unlawful taking. This kind of equitable mechanism serves to balance the interest of repose for the defendant against the hardship of barring the claim of a claimant that was not aware of the cause of action (Fincham, (2009-2010), p. 196).

³³⁵ For an overview of the precedent using the rule borrowed from medical malpractice, see Fincham, (2009-2010), p. 196, footnote 262, citing *Hahn v. Claybrook*, 130 Md. 179 (Md 1917) as the first case in which the rule appeared, and the 1936 California Supreme Court decision of *Hyusman v. Kirsch*, 57 P.2d 908 (Cal. 1938).

³³⁶ See *Naftzger v. American Numismatic Society*, (1996), at 425, footnote 2 where the court explained that the numeration of the subsection was later changed from § 338 (3) to § 338 (c) CCCP. This was further explained in *Society of California Pioneers v. Baker*, (1996), at 781 (footnote 8): "Subdivision (c) was designated as subdivision (3) until 1988".

³³⁷ Demarsin, (2010-2011), p. 272.

§ 338 CCCP – Within three years: [...] (3) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

The cause of actions in the case of theft, as defined in Section 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft.

Through this 1983 codification, California distinguishes itself from the two other jurisdictions under scrutiny in the present chapter in three ways: firstly, it is the only state that has posited specific rules for cultural goods – referred to as “art or artifact”, a qualification that was replaced in 1989 by “any article of historical, interpretive, scientific, or artistic significance” –, therefore differentiating these goods from other types of personal property.³³⁹ Secondly, it is the only one of the three states that has not completely left the interpretation of the accrual of the cause of action to domestic courts but that has, instead, explicitly indicated in its legislation how the cause of action accrues with regard to actions for the recovery of the above-mentioned types of personal property.³⁴⁰ Nonetheless, it should be remarked that the provision merely prescribes the discovery rule without providing further details as to actual or constructive notice;³⁴¹ therefore still allowing some input from the judiciary.³⁴² Thirdly, Section 338 (3) CCCP requires the cognition of the whereabouts of the stolen property, and therefore not of the identity of the possessor.³⁴³ In this regard, the discovery rule codified in 1983 in Section 338 (3) CCCP differed from the discovery rule that had been applied in *O’Keeffe v. Snyder*, which required the cognition of the identity of the possessor and of the whereabouts of the chattel.

Subsequent to the 1983 changes, two cases have been particularly instructive as to how California courts have coped with the introduction of the discovery rule in cases dealing with stolen cultural chattels: *Naftzger v. American Numismatic Society*³⁴⁴ and *Society of California Pioneers v. Baker*.³⁴⁵ Although *Naftzger* specifically addressed the accrual of the cause of action of Section 338 (3) pre-1983 modifications, *Society of California Pioneers* discussed the accrual of the cause of action of Section 338 (3) post-1983 changes.³⁴⁶

Accrual of the cause of action of Section 338 (3) CCCP pre-1983 changes

³³⁸ *Society of California Pioneers v. Baker*, (1996), at 783; Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 4 and 5.

³³⁹ This qualification replaced the terms “art or artifact” which were present in the 1983 version of Section 338 (3) CCCP. See *Society of California Pioneers v. Baker*, (1996), at 780: “A 1989 amendment substituted “article[s] of historical, interpretive, scientific, or artistic significance” for the words “art or artifacts.” (See Amendments, Deering’s Ann.Code Civ. Proc. (1991 ed.) § 338, p. 215)” and at 783-784.

³⁴⁰ “Before 1983, the Legislature left unanswered the general question of whether the cause of action immediately accrues when the theft occurs, or when the owner discovers: (a) the theft, (b) the identity of the thief, or (c) the identity of the person in possession of the stolen property”. *Naftzger v. American Numismatic Society*, (1996), at 424; Hayworth, (1993-1994), p. 338, footnote 6.

³⁴¹ See Assembly Bill AB 2765 – Bill Analysis, (2010), p. 3 reproducing Section 338 (c) (2) of the code, merely prescribing “the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft”.

³⁴² “In 1983, the Legislature provided a partial answer by amending section 338, subdivision (c) to read that the cause of action does not accrue until the owner, the owner’s agent, or the investigating law enforcement agency discovers the whereabouts of the stolen articles, provided that the articles possess historical, scientific, or artistic significance”. *Naftzger v. American Numismatic Society*, (1996), at 424-425.

³⁴³ *Orkin v. Taylor*, 487 F.3d 734, 07 Cal. Daily Op. Serv. 5490, 2007 Daily Journal D.A.R. 7064, (May 18, 2007), at 741; for an explanation as to why the identity requirement is not part of the discovery rule, see *Bernson v. Browning–Ferris Industries of California*, 7 Cal.4th 926, 873 P.2d 613, 30 Cal.Rptr.2d 440, 22 Media L. Rep. 2065, (June 6, 1994), at 932 and ff., where the court explained that a “Doe” complaint entitles the claimant to undertake a further discovery of the identity of the possessor within three years running from the initiation of proceedings for the main cause (for an explanation as to the details of a “Doe” complaint, see the dissenting opinion of Justice Kennard, at 941-942). Nevertheless, an exception exists when the defendant fraudulently conceals his identity: “One should not profit from one’s own wrongdoing. Accordingly, we hold that a defendant may be equitably estopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant’s actual identity. Although several of the out-of-state decisions cited earlier conclude that a tort claim “accrues” only when the identity of the defendant is discovered (e.g. *Spitler v. Dean*, *supra*, 436 N.W.2d at p. 311; *O’Keeffe v. Snyder*, *supra*, 416 A.2d at p. 870), we need not go so far here. It is sufficient to hold simply that, under the circumstances described, the statute may be equitably tolled. [...] Thus, under our holding the statute will toll *only* until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant’s identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may no disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information”. See *Bernson v. Browning–Ferris Industries of California*, (1994), at 936. See also the dissenting opinion of Justice Kennard at 944.

³⁴⁴ *Naftzger v. American Numismatic Society*, 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784, 96 Cal. Daily Op. Serv. 780, 96 Daily Journal D.A.R. 1140, (February 1, 1996).

³⁴⁵ *Society of California Pioneers v. Baker*, 43 Cal.App.4th 774, 50 Cal.Rptr.2d 865, 96 Cal. Daily Op. Serv. 1810, 96 Daily Journal D.A.R. 3079, (March 15, 1996).

³⁴⁶ See *Naftzger v. American Numismatic Society*, (1999), at 7: “In any event, the discussion and criticism of *Naftzger I* in both *Baker* and *Strasberg* is dicta because those cases, unlike this one, were governed by the 1983 amendment to section 338, subdivision (c)”; it is also important to specify that *Society of California Pioneers* also addressed the question of the accrual of the cause of action before the 1983 reforms but, because – in basing its reasoning on *Harpending v. Meyer* despite the fact that this case was about bailment and not about theft (see *Naftzger* below) – it erred in this regard, and therefore this pre-1983 aspect of the judgment will not be relied upon in the present analysis.

In the *Naftzger* case, fifty-eight copper coins minted between 1793 and 1857 were substituted by William Sheldon – a well-known coins classifier, cataloguer and collector – from the New York based American Numismatic Society (hereinafter ANS). ANS acquired the coins in 1937 from Georg H. Clapp by means of donation. Sometime before 1973, ANS allowed Sheldon to consult the collection without supervision. After it decided to catalogue the Clapp collection at around 1973-1974, the society discovered the substitution of many valuable coins with coins of lesser value but of the same variety. This substitution – qualified later in dictum as a “no garden variety crime”³⁴⁷ – required specialised knowledge as to the nature and value of the coins. Although ANS could provide substantial evidence that Sheldon stole the coins, it never undertook any legal steps for the misappropriation against him. In 1988, Delmar Bland – an authority on the type of coins at stake – was mandated by ANS to draft a report of the Clapp collection and was further instructed to identify possible missing pieces. The report, issued in December 1990, was published by ANS two months later. Before the finalization of the report, both Bland and Naftzger were aware of the theft and of Sheldon’s culpability. Nonetheless – despite being informed through many different channels as to the missing coins and of the possible involvement of Sheldon, Roy Naftzger ignored the warnings and – although suspicious as to the involvement of Sheldon in earlier thefts that took place in other collections³⁴⁸ – acquired Sheldon’s collection in 1972. The acquisition was done without undertaking research into the provenance of the coins. In August 1991, the collection was reported in a publication by C. Noyes. This publication enabled ANS to retrace part of the missing coins, and more particularly the part that was in Naftzger’s possession. By a letter dated 12 December 1991, ANS demanded the return of thirty – out of fifty-eight – missing coins to Naftzger, as well as the reimbursement of the value of the twenty coins that had already been sold by the latter. Naftzger refused to return the coins and repelled the accusation, submitting that he was not aware of the theft at the ANS, despite clear and unequivocal indications pointing to the contrary.

Because the theft and the purchase of Sheldon’s collection by Naftzger took place before 1973, and because the proceedings were only brought after 1990, the court in *Naftzger* had to assess the impact of the 1983 changes to the Code of Civil Procedure – and notably the introduction of the discovery rule – upon facts that preceded the amendments to the Code. The Court of Appeal of the Second District – filling a legal vacuum³⁴⁹ and explicitly rejecting the doctrine of unlawful taking running from the moment of the theft³⁵⁰ – specified that there was an implied discovery rule³⁵¹ adjacent to the statute of limitations posited in Section 338 (3) CCCP pre-1983 amendment.³⁵² With this interpretation of the accrual of the cause of action, it applied a strict discovery rule –

³⁴⁷ As was expressed by the court in *Naftzger v. American Numismatic Society*, (1999), at 3.

³⁴⁸ Sheldon used the same process of substitution with regard to the collection of the New Yorker T. James Clarke. When inspecting the collection to purchase it, Naftzger discovered coins that belonged to the Clarke collection, but did not shy away from purchasing Sheldon’s collection. See *Naftzger v. American Numismatic Society*, (1999), at 4.

³⁴⁹ As was noted by the court: “We have found, nor have the parties cited, any California decisions explaining when a cause of action accrues under section 338, subdivision (c) [note author: read subdivision (3)] for the recovery of stolen property”. The court then gave the first interpretation of the accrual of the cause of action under Section 338 (3) CCCP (pre-1983 changes). See *Naftzger v. American Numismatic Society*, (1996), p. 428.

³⁵⁰ “It would be inconsistent to bar the museum, which was unaware of the theft for at least three years, from suing Naftzger, whose identity was unknown within the three years following the undiscovered theft, when the criminal limitations period against the thief did not even commence running until the crime was discovered”. *Naftzger v. American Numismatic Society*, (1996), at 429 and “[...] common sense dictates that the civil cause of action for recovering stolen property under section 338, subdivision (c) does not necessarily accrue when the theft occurs, or even when the owner discovers the theft. For until the owner discovers the identity of the thief or the person in possession of the stolen property, the owner is powerless to institute an action under section 338, subdivision (c) for the return of the property”, at 433.

³⁵¹ “The discovery rule, however, may be implied by judicial decision. Numerous courts have implied a discovery rule decision in other contexts. (*Hysman v. Kirsch* (1936), 6 Cal.2d 302, 312-313, 57 P.2d 908 [medical malpractice]; *April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at pp. 826–833, 195 Cal.Rptr. 421 [breach fiduciary duty and breach of contract]; *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 405–409, 163 Cal.Rptr. 711 [injury to real property]; *Seelenfreund v. Terminix of Northern Cal., Inc.* (1978) 84 Cal.App.3d 133, 148 Cal.Rptr. 307 [negligent breach of oral contract].) The Legislature’s failure, prior to 1983, to express its intent as to when a cause of action accrues under section 338, subdivision (c) [note author: read subdivision (3)], does not preclude us from deciding that question. (Cf. *Neel v. Magana, Olney, Levy, Catbarr & Gelfand* (1971) 6 Cal.3d 176, 190–194, 98 Cal.Rptr. 837, 491 P.2d 421 [judicial adoption of discovery rule in legal malpractice cases]).”

³⁵² Assembly Bill AB 2765 – Bill Analysis, (2010), p. 6; in *Society of California Pioneers*, the issue of retroactivity of the discovery rule to case antedating the 1983 changes to the Code of Civil Procedure was tabled for a second time. More specifically, the Third District Appellate Court rejected the rule that was laid down in *Naftzger* (see Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 6-7). Instead, basing its reasoning upon *Harpending* and *San Francisco Credit*, it gave retrograding effect to the 1983 changes to the Code of Civil Procedure for a maximum period of three years (see Assembly Bill AB 2765 – Bill Analysis, (2010), p. 6). In deciding so, it considered that the discovery rule would apply from 1980 onwards, because the statute of limitations, pre-1983 changes, was set at three years from the conversion and had not yet expired at the time that the newly prescribed discovery rule became applicable (see *Naftzger v. American Numismatic Society*, (1999), at 7 (citing *Society of California Pioneers*): “The amended version of the statute applied, however, because the limitations period under the prior version of the statute had not expired in Kah’s favor when the amended version of the statute took effect”; See also *Society of California Pioneers* at 784; nevertheless, this limitation of the application of the discovery rule to 1980 was erroneous because both *Harpending* and *San Francisco Credit* dealt with a conversion flowing from a bailment, and the court in *Society of California Pioneers* assimilated this situation to a situation of theft. See *Society of California Pioneers v. Baker*, (1996), at 782-783: “*Harpending* and *San Francisco Credit* state the law as it applied to actions for stolen property prior to 1983. [...] Less than three years later, in 1980, Kah acquired it. Thus, according to

requiring actual notice of the identity of the possessor³⁵³ – to pre-1983 thefts.³⁵⁴ Nonetheless, it should be recalled that Section 338 (3) CCCP pre-1983 amendment prescribed the institution of legal proceedings for the recovery of personal property within a period of three years. Therefore, the interpretation given by the court in *Naftzger* is applicable to thefts – and not merely to conversions –, and also to all types of stolen personal property and is, consequently, not limited to the theft of “any article of historical, interpretive, scientific, or artistic significance”.³⁵⁵ The introduction of a discovery rule for this provision was based on the rationale that, unlike in situations of conversion following from bailment – in which the owner can be aware of the conversion and of the parties involved within the statutory period of three years running from the moment of the conversion –, the same is not true in case of theft: it is impossible for the owner, who does not know where his property went, to sue either the thief or an innocent purchaser within a period of three years running from the time of the conversion.³⁵⁶ As such, an implied discovery rule by which the statute of limitations of three years starts running at the time of actual cognition of the identity of the possessor was to be read in Section 338 (3) of the CCCP pre-1983 amendments. What is more, following *Naftzger*, the statute of limitations for actions in replevin directed for the return of personal property only starts running from the day of the actual discovery – i.e. the moment a dispossessed owner discovers the identity of the object’s possessor³⁵⁷ – and no constructive knowledge of the discovery can be imputed to his cognition. Because of the want of constructive notice for the purpose of the pre-1983 version of Section 338 (3) CCCP, *Naftzger* does not require the exercise of due diligence by the owner in retrieving his stolen property.³⁵⁸⁻³⁵⁹

the *Harpending* rule, the statute began to run anew at this time. The limitation period in favor of Kah would have expired in 1983, unless the amendment of section 338 applied to matters in which the statute had not already expired, [...].”

³⁵³ Reference is made to a strict discovery rule because, unlike the discovery rule laid down in *O’Keefe v. Snyder*, the present rule only allows an actual notice and rejects the use of a constructive notice. Because it only allows the discovery rule to materialise at the time of actual discovery of the identity of the possessor, it is stricter in its application than the New Jersey discovery rule.

³⁵⁴ The court in *Naftzger* applied a discovery rule to a theft that took place before 1983, extrapolating the modifications brought by the 1983 modifications to situations governed by the pre-1983 regime. In doing so, the court discarded the obligation of due diligence that was imputed on the dispossessed owner. See *Naftzger v. American Numismatic Society*, (1996), at 433: “For the purpose of this action, filed under the prior version of section 338, subdivision (c) [note author: read subdivision (3)], we hold the limitations period commenced when the owner discovered the identity of the person in possession of the property.” The reasoning underlying this conclusion can be found at 428-433; this was confirmed in *Naftzger v. American Numismatic Society*, (1999), at 2. See also *ibidem* at 8: “As we discussed in *Naftzger I*, until the owner of stolen property knows the identity of the person in possession of that property, the statute of limitations will not begin to run.”; see also Demarsin, (2010-2011), p. 274.

³⁵⁵ *Naftzger v. American Numismatic Society*, (1996), at 426.

³⁵⁶ *Naftzger v. American Numismatic Society*, (1996), at 431-433: “In any conversion situation, the owner, upon discovering the injury, can immediately sue the person who was originally entrusted with possession. Because the identity of that person is known, the owner can file a lawsuit and utilize the civil discovery tools to ascertain the whereabouts of the property and the identities of any remaining Doe defendants. In the theft situation, on the other hand, the owner cannot sue the thief or the innocent purchaser prior to discovering their identities. The stolen property situation thus runs contrary to the general rule in California that knowledge of the identity of the defendant is not essential to a claim and ignorance of the defendant’s identity will not toll the statute of limitations. The general rule, which distinguishes between the plaintiff’s “ignorance of the wrongdoer and ignorance of the injury itself [...] is premised on the common sense assumption that once the plaintiff is aware of the injury, the applicable limitations period (often effectively extended by the filing of a Doe complaint) normally affords sufficient opportunity to discover the identity of all the wrongdoers.” (*Bernson v. Browning-Ferris Industries, supra*, 7 Cal.4th at p. 932, 30 Cal.Rptr.2d 440, 873 P.2d 613.) [...] “That, indeed, is the normal situation for which the fictitious name statute, ... section 474, is designed: when the plaintiff is ignorant of the name of ‘a defendant,’ the plaintiff must file suit against the known wrongdoers, and, when the Doe’s true name is discovered, the complaint may be amended accordingly. (... § 474.)” (*Id.* At p. 933, 30 Cal.Rptr.2d 440, 873 P.2d 613.) Filing a suit against Doe defendants, however, is a meaningless exercise when the owner does not know the identity of the thief or the person in possession of the stolen property, or even which court has jurisdiction. Witkin’s general observation, that a plaintiff has little reason to file suit if he knows nothing of the identity of the wrongdoer, aptly describes why justice requires that the discovery rule be applied to the statute now before us. As Witkin stated: “An injured person does not go to the expense of legal representation and litigation merely because he knows he has been wronged. If he knows something of the identity of the wrongdoer he will sue though ignorant of his true name, and this is of course the use for which the pleading rule was designed. [Citation.] But if he has no knowledge of the wrongdoer’s identity ... it is scarcely expectable that he will file an action and hope that something turns up to make it worthwhile....” (3 Witkin, Cal.Procedure (3d ed. 1985) Actions, § 529, p. 558.)” and “[...] common sense dictates that the civil cause of action for recovering stolen property under section 338, subdivision (c) [note author: read subdivision (3)] does not necessarily accrue when the theft occurs, or even when the owner discovers the theft. For until the owner discovers the identity of the thief or the person in possession of the stolen property, the owner is powerless to institute an action under section 338, subdivision (c) [note author: read subdivision (3)] for the return of the property.” and “For the purpose of this action, filed under the prior version of section 338, subdivision (c), we hold the limitations period commenced when the owner discovered the identity of the person in possession of the property”. This was also confirmed by the same court in *Naftzger v. American Numismatic Society*, (1999), at 8; Assembly Bill AB 2765 – Bill Analysis, (2010), p. 6.

³⁵⁷ See *Naftzger v. American Numismatic Society*, (1999), at 6; see also Assembly Bill AB 2765 – Bill Analysis, (2010), p. 7.

³⁵⁸ *Naftzger v. American Numismatic Society*, (1999), at 8: “Naftzger contends ANS’ cross-complaint is barred by the statute of limitations because ANS failed to exercise due diligence in locating its stolen property. Naftzger has failed, however, to cite any California decision holding that in a non-bailment situation, the limitations period will expire in favor of the possessor of stolen property where the owner failed to exercise due diligence in locating the stolen property. We adhere to our determination in *Naftzger I* that the limitations period does not expire in favor of a thief or his successor due to the owner’s lack of diligence in finding the stolen property. As we stated in

The question of whether the pre-1983 Section 338 (3) CCCP was subject to a constructive notice was further addressed by the United States Court of Appeals (Ninth Circuit) of the Central District of California in the case of *Orkin v. Taylor* (2007).

The case of *Orkin v. Taylor* concerned a painting by Vincent van Gogh entitled “Vue de l’Asile et de la Chapelle de Saint-Rémy” (see picture). The provenance of the painting was ascertainable until Margarete Mauthner’s possession. She owned the painting until 1939, but she fled to South Africa to abscond the Nazis. Upon departure, Mauthner left all her belongings behind in Berlin. It is unclear what exactly happened to the painting after her disappearance, although it was rediscovered in the possession of Alfred Wolf. In the early 1960s, the Wolf estate decided to put the painting up for auction and it was listed in 1963 in Sotheby & Co’s sales catalogue. The catalogue specified that Mauthner had sold the painting to Paul Cassirer,³⁶⁰ – who then sold it to Marcel Goldschmidt –, and that it was subsequently acquired by Wolf. In April 1963, Elisabeth Taylor purchased the painting at the Sotheby’s auction. At the turn of the century, the Orkins – the descendants of Margarete Mauthner – demanded the restitution of the painting to Taylor, who – because the demand was not timely introduced – refused to honor this demand. In 2005, the Orkins instated legal proceedings against Taylor for the recovery of the painting, on the basis of the alleged 1939 theft and of the conversion by Taylor in 1963.



Recognizing the lack of precedent from the California Supreme Court in interpreting the accrual of the cause of action under pre-1983 Section 338 (3) CCCP,³⁶¹ the Federal court extrapolated the application of the discovery rule by the said court from other contexts.³⁶² Basing its decision upon the case of *Jolly v. Eli Lilly & Co.* (1988),³⁶³ the court in *Orkin* affirmed the existence of constructive notice within the discovery rule:³⁶⁴ “In other words, under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property”. Not only did *Orkin* introduce a constructive notice of the identity of the possessor, but it also required that the constructive notice be about the discovery of both the claim and the whereabouts of the property. It then concluded that, as it was bound to apply Californian substantive law as the Supreme Court of California would apply it, it was of the utmost unlikelihood that the Supreme Court would have departed from its 1988 *Jolly* decision.³⁶⁵ Consequently, the Ninth Circuit Court of Appeals concluded that the constructive notice was entrenched in the discovery rule that was applicable in California.³⁶⁶ In its opinion, deciding differently would be inconsistent with the precedent of the California Supreme Court.³⁶⁷ This *ratio decidendi* set a binding precedent for future cases.³⁶⁸ In giving effect to this interpretation of the discovery rule, the court found that the Orkins could have been aware of the whereabouts of the painting and of the identity of its possessor as early as 1963, or – when Elisabeth Taylor put the painting up for auction with Christie’s London – at the very least by the year 1990.³⁶⁹

2010 clarifications

Naftzger I., “We conclude that under the prior version of the statute [section 338, subdivision (c)], the cause of action accrued when the owner discovered the identity of the person in possession of the stolen property, without regard to the owner’s diligence or lack thereof in ferreting out that information.” (*Naftzger I.*, *supra*, 42 Cal.App.4th at p. 425).”

³⁵⁹ Although Naftzger submitted that such a due diligence requirement existed in California law, he failed to mention a California precedent to support his submission. See *Naftzger v. American Numismatic Society*, (1999), at 8. Therefore, a lack of due diligence by ANS would not offset the applicability of the discovery rule.

³⁶⁰ It should be noted here that Mauthner purchased the painting from Cassirer, and not the other way around. See *Orkin v. Taylor*, (2007), at 736-737.

³⁶¹ “The California Supreme Court has never confronted the question of what rule governs accrual of pre-1983 causes of action for theft and conversion”. *Orkin v. Taylor*, (2007), at 741.

³⁶² “The California Supreme Court has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice”. *Orkin v. Taylor*, (2007), at 741.

³⁶³ “In *Jolly v. Eli Lilly & Co.*, the California Supreme Court held that, under California’s discovery rule, “[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her.””. *Orkin v. Taylor*, (2007), at 741, citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988).

³⁶⁴ “In other words, under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property”. *Orkin v. Taylor*, (2007), at 741.

³⁶⁵ “In assessing California law, we conclude that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice”. *Orkin v. Taylor*, (2007), at 741.

³⁶⁶ *Orkin v. Taylor*, (2007), at 741.

³⁶⁷ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 10 Cal. Daily Op. Serv. 575, 2010 Daily Journal D.A.R. 735, (January 14, 2010), at 969.

³⁶⁸ *Von Saher v. Norton Simon Museum of Art at Pasadena*, (2009), at 969: “Under *Orkin*, we are bound to apply a constructive notice standard. In conclusion, Saher’s cause of action began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts. *Orkin*, 487 F.2d at 741”.

³⁶⁹ *Orkin v. Taylor*, (2007), at 741-742.

Noting the disagreement between the California intermediate appellate courts in *Naftzger / Orkin* and *Society of California Pioneers* as to the pre-1983 discovery rule,³⁷⁰ the Californian legislator – through the office of the Assembly Committee on Judiciary – intervened and, in a 2010 Bill analysis, clarified the application of Section 338 CCCP to pre-1983 thefts.³⁷¹ The combined effect of *Naftzger* and *Orkin* was that both cases required either an actual notice of the identity of the possessor or a constructive notice of the discovery of the claim and of the whereabouts of the property. Furthermore, actual or constructive notice was to be applied to any type of chattel that had been stolen before 1983. In this regard, the Bill analysis clarified three important aspects:³⁷² firstly, it confirmed the retroactive application of the discovery rule to pre-1983 situations, as ostensibly correctly instated by the court in *Naftzger*.³⁷³⁻³⁷⁴ The Californian legislator considered that Section 338 (3) CCCP post-1983 amendments was to be given retroactive effect since the discovery rule is not triggered by the date of the theft or of the conversion, but focuses upon the knowledge of the cause of action by the claimant.³⁷⁵ Secondly, the legislator seemed to disagree as to the point of constructive notice of the pre-1983 discovery rule elaborated by the Federal Court acting in diversity in *Orkin v. Taylor*.³⁷⁶ The first clarification in this regard concerned the meaning of constructive notice: constructive knowledge must be understood as the moment at which a person could have discovered the whereabouts of the object and the identity of the possessor through means of reasonable diligence.³⁷⁷ A constructive knowledge implies that the person entitled to exercise the right of action does not sleep on his right,³⁷⁸ and thus undertakes research as to the whereabouts of the stolen object(s). The legislator specifically rejected the use of a constructive discovery, preferring to prescribe an actual discovery only, meaning “that the party bringing the action has express knowledge of the identity and the whereabouts of the person or entity that possesses the article of historical, interpretive, scientific, cultural, or artistic significance, [...]”.³⁷⁹ The discovery rule that was implied in the pre-1983 Section 338 (3) CCCP was, consequently, to be exclusively actual instead of constructive.³⁸⁰ In substantiating its rejection of a constructive notice, the Assembly Committee on Judiciary argued that: “Even when applying the discovery rule, the imputation of “constructive” discovery – which may be appropriate in other contexts – does not lead to equitable results when works may be displayed anywhere in the world and traffickers engage in purposeful concealment”³⁸¹ and “However, several leading cases, in California and elsewhere, have concluded that stolen art is not like other kinds of property, especially given that such thefts are often accompanied by deliberate efforts to conceal the work and its provenance. (See e.g. *Solomon Guggenheim Foundations v. Lubell* (1990) 550 N.Y.S. 2d 618; *Naftzger*, supra at 432–434.)”.³⁸² What is more, the clarifications given by the legislator also specified that the actual discovery is

³⁷⁰ This disagreement was highlighted by the United States Court of Appeals (Ninth Circuit) in the case of *Marei Von Sabor v. Norton Simon Museum of Art at Pasadena*, (2010), at 968-969: “Decisions from California’s intermediate appellate court have reached differing conclusions as to when the statute of limitations under § 338 begins to run for property stolen prior to 1983. In *Naftzger v. American Numismatic Society*, the court held that a cause of action for the return of property stolen before the 1982 amendment “accrue[s] when the owner discovered the identity of the person in possession of the stolen property, and not when the theft occurred.” 49 Cal.Rptr. 2d 784, 786 (Cal. Ct. App. 1996). The *Naftzger* court concluded that “there was a discovery rule of accrual implicit in the prior version of section 338.” 49 Cal.Rptr. 2d at 786. In *Society of California Pioneers v. Baker*, however, the court held that prior to the 1982 amendments, “the statute of limitations began to run anew against a subsequent purchaser.” 50 Cal.Rptr.2d 865, 869–70 (Cal. Ct. App. 1996). The *Pioneers* court specifically noted its disagreement with *Naftzger*. 50 Cal.Rptr. 2d at 870 n. 10.”; see Assembly Bill AB 2765 – Bill Analysis, (2010), p. 3 referring to the decision in *Von Sabor* demonstrating the disagreement between the intermediate appellate courts. It should, nonetheless, be noted that the disagreement was already settled in *Naftzger II* where the court convincingly demonstrated that the *Society of California Pioneers v. Baker* court was mistaken in specifying that the statute of limitations was to run anew from each new conversion instead of prescribing the use of the discovery rule laid down in *Naftzger I*. See the reasoning against the adoption of the unlawful taking doctrine given above.

³⁷¹ Assembly Bill AB 2765 – Bill Analysis, (2010).

³⁷² Assembly Bill AB 2765 – Bill Analysis, (2010), p. 3.

³⁷³ Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 1, 2 and 3.

³⁷⁴ It is particularly important to note the discrepancy resulting from this submission as – unlike what the legislators averred – *Naftzger* did not simply give retrospective effect to the 1983 changes, but instead found an implied actual discovery rule in the rule existing pre-1983 changes, which was broader than Section 338 (3) CCCP post-1983 changes: the difference between a retrospective application of Section 338 (3) CCCP post-1983 changes and what the court in *Naftzger* applied is mirrored in the fact that *Naftzger* explicitly recognised that its discovery rule was applicable to all stolen chattels and not merely to articles of historic, interpretive, scientific or artistic significance. See *Naftzger v. American Numismatic Society*, (1996), at 426. This conclusion seems, nonetheless, not to have been accepted by the Californian legislator. In the Bill Analysis of Bill 2765, the legislator clarified that a strict discovery rule applicable to pre-1983 thefts was appropriate only with regard to articles of historical, interpretive, scientific, cultural or artistic significance (as explained below).

³⁷⁵ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 7: “Indeed, almost by definition of discovery rule does not look to the date of the theft or conversion as the relevant trigger”.

³⁷⁶ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 2.

³⁷⁷ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 7.

³⁷⁸ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 7.

³⁷⁹ Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 2-3.

³⁸⁰ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 2.

³⁸¹ Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 1-2.

³⁸² Assembly Bill AB 2765 – Bill Analysis, (2010), p. 8.

only relevant for articles of historical, interpretive, scientific, cultural or artistic significance,³⁸³ and the rule is, therefore, not applicable to all stolen personal property. As such, the changes were adopted to ensure more equitable outcomes in case of theft of personal property that possess artistic, historic and cultural significance.³⁸⁴ Additionally, the legislator explicitly rejected a constructive imputation of knowledge³⁸⁵ in order to set the tone for future and pending litigation. Consequently, these clarifications have settled discussions as to the question of constructive discovery and of due diligence imputable to the owner for theft of articles of historical, interpretive, scientific, cultural, or artistic significance predating 1 January 1983.³⁸⁶ Thirdly, the pre-1983 Section 338 (3) CCCP is not only subject to an actual discovery but the elements of the actual discovery are modified in order to encompass both the identity of the possessor and the whereabouts of the stolen chattel.³⁸⁷

Accrual of the cause of action of Section 338 (3) CCCP post-1983 changes

In an intermediate case to the *Naftzger I* and *II* judgments – *Society of California Pioneers v. Baker* – the premise of the strict discovery rule as laid down in Section 338 (3) CCCP post-1983 modifications was partly shaken.

The case concerned a golden cane handle that was stolen in 1978 from the Society of California Pioneers. The cane – embellished with inscriptions and a drawing – comprised of the following engraving “[to] Joseph Lee of New York from B. Tallman of California.” on its top, and a Sutter’s Mill engraving – as well as the annotations “Sutter’s Mill” and “Coloma”, both commemorating the 1849 California gold strike – inside the hinge. It had been purchased from the Beverly-Hills Galleries by the father of Christian deGuigne in the early 1960s and was subsequently donated, a couple of years after the purchase, to the Society of California Pioneers. In 1978, an employee stole the cane from the premises of the Society and, subsequently, a man named Roger Jobson – the Society’s executive director – reported the theft to both the board of directors and to the police. The only step undertaken to recover the cane was to advertise a reward for the recovery of the cane in a newspaper’s classified advertisement section.³⁸⁸ The cane reappeared in the hands of Eugene Kah in 1980, who had received it from his mother. After Kah’s mother passed away in 1983, he undertook to establish the origin of the cane and to have it valued. Despite many fruitless efforts to retrace the exact provenance of the cane, and – between 1988 and 1990 – an interim period of pawning, Kah proposed it for sale to Roger Baker – a prominent collector – in 1991. Whilst Baker was mostly concerned with the cane’s authenticity, the circumstances within which Kah acquired the cane pushed Baker to undertake further investigations as to the cane’s provenance. These investigations – including an apparent consultation with deGuigne at an antique show – were, supposedly, inconclusive³⁸⁹ and sufficient to satisfy Baker in his belief that the cane was not stolen. Therefore, Baker purchased it on 18 April 1991 from Kah. Five months after the purchase was completed, deGuigne went to Baker’s house and demanded the restitution of the cane handle, a restitution that was refused by Baker. One year later, the Society instated proceedings for conversion against the latter.

In applying Section 338 (c) CCCP post-1983 changes, the Court of Appeals of the First District submitted that the discovery rule introduced by the 1983 addendum – unlike its restrictive formulation – was not only subject to an actual notice but was also subject to a constructive notice of the whereabouts of the object.³⁹⁰ In adding a constructive notice to Section 338 (c) CCCP post-1983 changes, it imposed a requirement of due diligence upon the owner – in this case the Society – by which adequate steps of inquiries as to the stolen property were required.³⁹¹

³⁸³ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 2.

³⁸⁴ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 2.

³⁸⁵ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 2.

³⁸⁶ The 1983 changes have introduced a discovery accrual rule for actions in recovery addressed at stolen art and stolen artefacts. Redman, (2008), p. 215.

³⁸⁷ Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 2-3 where the Californian legislator incorrectly submitted that it was the cognition of the identity and the whereabouts of the possessor that triggered the running of the statute of limitations. This submission seems flawed when contrasted with the rationale laid down on page 7 of the same document: “Under an “actual” discovery rule, the SOL does not start running until the plaintiff discovers the whereabouts of the stolen object and the identity of its present possessor. Thus the operative trigger is the plaintiff’s actual knowledge of the facts necessary to bring an action for specific recovery”.

³⁸⁸ Christian deGuigne – who became a member of the board of directors – had known of some success in the past with this method of retrieval. Henceforth, the Society proceeded to recover the cane through this unique means of recovery.

³⁸⁹ The affirmations of Baker and of deGuigne seem to contradict one another. See *Society of California Pioneers v. Baker*, (1996), at 778-779.

³⁹⁰ *Society of California Pioneers v. Baker*, (1996), at 783, footnote 10: “In addition, *Naftzger* stated that the plaintiff’s diligence has no bearing on the statute of limitations issue. As we discuss, *post*, if the standard imposed by the amended statute is one of constructive notice, the question of reasonable diligence has some bearing on that issue, since, in some circumstances, one is charged with notice of what a reasonable inquiry might disclose” and 785 to 788, basing its reading of an implied constructive notice in Section 338 (c) CCCP on the Ohio case of *Charash v. Oberlin College*, 14 F.3d 291, 88 Ed. Law Rep. 1011, 1994 Fed.App. 0011P, (January 20, 1994), at 300, but also on Section 19 of the California Civil Code, which reads: “[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact”; Demarsin, (2010-2011), p. 275.

³⁹¹ *Society of California Pioneers v. Baker*, (1996), at 786-787: “The steps a party should take to recover stolen art objects vary according to the facts of each case and are, therefore, subject to proof of the relevant standard in the particular community affected” (citing for example

2010 clarification

Also reacting to the decision in *Society of California Pioneers v. Baker*, the legislator confirmed in its 2010 Bill Analysis that the 1983 changes brought to Section 338 (3) CCCP exclusively introduced an actual discovery.³⁹² As such, the legislator prescribed strict adherence to the wording of Section 338 (c) CCCP and discarded the constructive discovery created by the *Society of California Pioneers* court for Section 338 (3) CCCP post-1983 changes.

2010 modifications to Section 338 CCCP for market professionals

Alongside the clarification brought about by the above-mentioned 2010 Bill Analysis, the Californian legislator – notably in reaction to the on-going *Von Saher v. Norton Simon Museum of Art at Pasadena* litigation (discussed below)³⁹³ – introduced tailor-made rules applicable to art market professionals. Through its Assembly Bill AB 2765 – chaptered during the same year and entering into force on 1 January 2011³⁹⁴ – it brought about some refinements to the legislative regime pertaining to the accrual of the cause of action at stake: firstly, the two sentences of Section 338 (c) CCCP were split in § 338 (c), subparagraph (1) – reproducing the first sentence of § 338 (c) CCCP applicable to the specific recovery of personal property – and § 338 (c), subparagraph (2) – reproducing the second sentence of § 338 (c) CCCP applicable for the recovery of any stolen article of historical, interpretive, scientific or artistic significance – through the 2010 changes.³⁹⁵ Secondly, the addition brought about by the 2010 amendment related to the extension of the statute of limitations from three years to six years from the date of the actual discovery³⁹⁶ of the elements listed in § 338 (c) (3) (A) (i) and (ii) for actions in replevin initiated for stolen works of fine art, provided that the action is brought against a museum,³⁹⁷ a gallery,³⁹⁸ an auctioneer³⁹⁹ or a dealer⁴⁰⁰. This addition was codified in § 338 (c), subparagraph (3) CCCP,⁴⁰¹ which resulted in the following construction:

§ 338 (c) CCCP – (1) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

(2) The cause of action in the case of theft, as described in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.

(3)(A) Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:

Solomon R. Guggenheim Found. v. Lubell (1991), 77 N.Y.2d 311, 567 N.Y.S.2d 623, 627, 569 N.E.2d 426, 430). See *ibidem* at 787 for the assessment of the Society's due diligence in searching for the stolen cane.

³⁹² Assembly Bill AB 2765 – Bill Analysis, (2010), p. 3.

³⁹³ See *Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case No. CV 05-3459-GAF (CTx), 2012 WL 12875771, (May 24, 2012), at 5 and 7, explaining that *Von Saher* invalidated Section 354.3 CCCP because of its unconstitutional character. The invalidation of this provision left victims of the Holocaust without a remedy in searching the recovery of their stolen artworks and the 2010 changes were undertaken to fill the legal void left by *Von Saher* for these victims. See also *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 14 Cal. Daily Op. Serv. 6251, 2014 Daily Journal D.A.F. 7229, (June 6, 2014), at 718-719 where the United States Court of Appeals (Ninth Circuit) specified that the changes were introduced six weeks after the *Von Saher I* judgment was rendered.

³⁹⁴ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2012), at 7; account must also be taken from § 338 (c) (3) B, which gives retrospective effect to the introduced modifications: “§ 338 (c) (3) CCCP – (B) The provisions of this paragraph shall apply to all pending and future actions commenced on or before December 31, 2017, including any actions dismissed based on the expiration of statutes of limitation in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing an appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute”. This provision makes it possible for pending suits or suits for which the period to appeal has not yet lapsed to fall under the ambit of the new provision. See *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613, 13 Cal. Daily Op. Serv. 13, 245, 2013 Daily Journal D.A.R. 15, 986, (December 9, 2013), at 617.

³⁹⁵ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2013), at 617.

³⁹⁶ “(i) “Actual discovery,” notwithstanding Section 19 of the Civil Code, does not include any constructive knowledge imputed by law”. Section 338 (c) (3) (C) (i) CCCP.

³⁹⁷ “(vi) “Museum or gallery” shall include any public or private organization or foundation operating as a museum or gallery”. Section 338 (c) (3) (C) (vi) CCCP.

³⁹⁸ *Idem*.

³⁹⁹ “(ii) “Auctioneer” means any individual who is engaged in, or who by advertising or otherwise holds himself or herself out as being available to engage in, the calling for, the recognition of, and the acceptance of, offers for the purchase of goods at an auction as defined in subdivision (b) of Section 1812.601 of the Civil Code”. Section 338 (c) (3) (C) (ii) CCCP.

⁴⁰⁰ “(iii) “Dealer” means a person who holds a valid seller's permit and who is actively and principally engaged in, or conducting the business of, selling works of fine art”. Section 338 (c) (3) (C) (iii) CCCP.

⁴⁰¹ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2013), at 617.

- (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.
- (ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.

The rationale predicated by the Californian legislator for extending the statute of limitations against professional dealers was – *inter alia* – notably because these stakeholders are considered to be “sophisticated purchasers who deal in a large volume of works and are typically insured”.⁴⁰² As such, these specialised parties have access to methods that enable them to ferret out the provenance of works of art, thus facilitating the discovery of flaws in the chain of transfer of titles.⁴⁰³ The same cannot be said about dilettantes purchasing cultural objects, who will then be subjected to the three-year period prescribed under the statute of limitations⁴⁰⁴ in accordance with subparagraphs (1) or (2) of § 338 (c) CCCP. Furthermore, unlike subparagraph (1) and (2), subparagraph 3 is applicable to works of fine art. Fine art is defined in § 338 (c) (3) (C) (v) as follows:

§ 338 (c) (3) (C) CCCP – (v) “Fine art” has the same meaning as defined in paragraph (1) of subdivision (d) of Section 982 of the Civil Code.

Section 982 (d) (1) CCC defines fine art in the following terms:

§ 982 (d) CCC – (1) “Fine art” means any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).

Additionally, unlike subparagraph (2), the new paragraph is applicable to “an unlawful taking or theft, as described in Section 484 of the Penal Code, [...], including a taking or theft by means of fraud or duress”. This new provision includes, therefore, taking or theft by fraudulent means or by means of duress.⁴⁰⁵

Next to the extension of the period of the statute of limitations from three to six years, paragraph (c) (3) (A) of Section 338 of the CCCP requires for the actual discovery of the elements posited in § 338 (c) (3), subparagraphs (A) (i) and (ii):⁴⁰⁶

§ 338 (c) (3) CCCP – (A) Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:

- (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.
- (ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.

Section 338 (c) (3) (C) (i) CCCP reiterates the rejection of any ‘constructive knowledge imputed by law’ for the purpose of paragraph (3), supporting the need of having the actual knowledge of the facts relevant to the accrual of the cause of action triggering the six-year period under the statute of limitations.⁴⁰⁷ Unlike § 338 (c) (1) and (2) CCCP, the elements necessary to trigger the running of the statute of limitations are: a) the identification of the work of fine art, b) an acknowledgment of the whereabouts of the said work and c) the discovery of sufficient information or facts to give notice to the claimant of the existence of a claim for possessory interest in the stolen work of fine art. Although not explicitly stated in the provision, the following information or facts that may be sufficient to give notice to the claimant may be inferred from the last element: the identity of the possessor, the

⁴⁰² Assembly Bill AB 2765 – Bill Analysis, (2010), p. 9. Other reasons are given by the Assembly Committee on Judiciary in Bill Analysis AB 2765. See *ibidem*, pp. 8 and 9. For example, this change takes into account difficulties that claimants might have in finding appropriate legal counsel and for fact-finding considerations.

⁴⁰³ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2012), at 24 and 25.

⁴⁰⁴ Assembly Bill AB 2765 – Bill Analysis, (2010), p. 9.

⁴⁰⁵ Albeit the fraudulent aspect of a taking is not alien to the definition of theft that is laid down in Section 484 of the Penal Code of California, that section does not refer to duress. Instead, it should be recalled that § 338 (c) (3) CCCP was added in the context of the *Von Saher* litigation. *Von Saher* deals with the recovery of works of art that were sold by force during the Second World War, resulting in the present addition of misappropriations by duress.

⁴⁰⁶ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2013), at 621; Demarsin, (2010-2011), p. 298.

⁴⁰⁷ This repugnance exonerated *Von Saher* from any obligation to prove having exercised diligence in retracing the stolen Cranachs that it attempted to retrieve. See *Marei von Saher v. Norton Simon Museum of Art At Pasadena*, (2015), at 4.

acknowledgement of the theft or the cognition of an interest in the stolen work of fine art. As made explicit in the text of the provision, conditions a), b) and c) are cumulative and must be discovered by the aggrieved party or his or her agent. Unlike § 338 (c) (2) CCCP, § 338 (c) (3) (A) CCCP does not take into account the law enforcement agency that originally investigated the theft for the purpose of the accrual of the cause of action.

This newly instated provision undisputedly favours dispossessed owners as it makes it possible to properly cognise the cause of action before allowing the statute of limitations to run – i.e. actual discovery of the cumulative elements listed in (i) and (ii) – and prescribes a longer period to initiate legal proceedings – i.e. six years instead of three years –, thus only punishing negligent claimants that are sleeping on their right. Because of the beneficial nature of this regime to dispossessed owners, and in order to balance the relative rights of the parties,⁴⁰⁸ subparagraph (5) makes it possible for defendants to invoke any equitable defences of avail in order to counter actions based upon paragraph (3) of Section 338 (c) CCCP.

§ 338 (c) CCCP – (5) A party in an action to which paragraph (3) applies may raise all equitable and legal affirmative defenses and doctrines, including, without limitation, laches and unclean hands.

It is therefore possible for a museum, a gallery, an auctioneer or a dealer that is subjected to a recovery claim based on § 338 (c) (3) CCCP to rely on equitable doctrines against the claimant. Although the case of *San Francisco Credit Clearing House* specified that the equitable doctrine of laches does not supplant statutes of limitations,⁴⁰⁹ § 338 (c) (5) CCCP instates a specific derogation to this rule.

Summarizing the above, for thefts that took place before 1983, California applies a statute of limitations of three years coupled with a strict discovery rule of the identity of the possessor and of the whereabouts of the stolen article of historical, interpretive, scientific, cultural or artistic significance (which equates to a retroactive application of present Section 338 (c) (2) CCCP, with an addition relating to the identity of the possessor). Post-1983, California knows of a statute of limitations of three years coupled with a strict discovery rule, defined as the moment at which the claimant has express knowledge of the whereabouts of a stolen article of historical, interpretive, scientific, cultural or artistic significance (currently Section 338 (c) (2) CCCP). Since 2010, alongside Section 338 (c) (2) CCCP, California prescribes a statute of limitations of six years for actions in recovery initiated against a museum, gallery, auctioneer, or dealer running from the strict discovery of the identification of the work of fine art, of the whereabouts of the said work, and of sufficient information or facts to give notice to the claimant of the existence of a claim for possessory interest in the stolen work of fine art (currently Section 338 (c) (3) CCCP).

Much like the tolling effect of the discovery rule in New Jersey, the practical effect of the strict discovery rule prescribed in California tolls the running of the statute of limitations until the discovery by the claimant of the cause of action.⁴¹⁰ Furthermore, unlike in New Jersey, the strict discovery rule does not allow a constructive notice on dispossessed owners and, concomitantly, repudiates the imposition of any duty to exercise due diligence by the owner.⁴¹¹ What is more, because the focus of the doctrine is upon the knowledge of the dispossessed owner, the strict discovery rule is applicable against any possessor, including thieves.⁴¹² Therefore, despite its existence in California law,⁴¹³ fraudulent concealment does not seem to bring any added value to the statute of limitations because the tolling created by the discovery rule has the same effect as fraudulent concealment.

⁴⁰⁸ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2012), at 24 and 25.

⁴⁰⁹ See *San Francisco Credit Clearing House v. Wells*, (1925), at 707: “This being an action at law, the statute of limitations, rather than the doctrine of laches, furnishes the rule of decision. *Brownrigg v. de Frees et al.* (Cal. Sup.) 238 P. 714; *Anzar v. Miller*, 90 Cal. 342, 27 P. 299; 10 Cal. Jur. 522”. Compare with *David Cassirer v. Thyssen-Bornemisza Collection Foundation*, D.C. No. 2:05-cv-03459-JFW-E, (July 10, 2017), at 51 where the United States Court of Appeals for the Ninth Circuit seems to accept the relevance of laches to the application of the statute of limitations.

⁴¹⁰ *Nafziger v. American Numismatic Society*, (1996), at 428: “These general principles have been significantly modified by the common law ‘discovery rule,’ which provides that the accrual date may be ‘delayed until the plaintiff is aware of her injury and its negligent cause.’ (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at p. 1109, 245 Cal.Rptr. 658, 751 P.2d 923.)” (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931, 30 Cal.Rptr.2d 440, 873 P.2d 613). “The discovery rule protects those who are ignorant of their cause of action through no fault of their own. It permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at issue. [Citation.]” (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832, 195 Cal.Rptr.421.)”.

⁴¹¹ Demarsin, (2010-2011), p. 275; as demonstrated above, the Californian legislator has consistently rejected the use of a constructive notice for articles of historical, interpretive, scientific, cultural or artistic significance. The same is true for works of fine art, since Section 338 (c) (3) CCCP explicitly requires the actual discovery of the elements listed under subparagraphs (i) and (ii).

⁴¹² See *Society of California Pioneers v. Baker*, (1996), at 784, footnote 11: “By restricting application of the discovery rule to thieves, respondent’s interpretation would negate the apparent intent of the amendment, which was to extend the period in which stolen art objects could be recovered, without regard to the culpability of the defendant”.

⁴¹³ Fraudulent concealment is also applicable in California when the defendant conceals the whereabouts of the property to the owner, irrespective of whether the action is based on fraud or not. See *Bernson v. Browning-Ferris Industries of California*, (1994), at 931, citing *Pashley v. Pacific Elec. Ry. Co.*, *supra*, 25 Cal.2d at pp. 231–232, 153 P.2d 325.

(4) New York| Demand and Refusal

As against a purchaser in good faith, New York law neither follows the doctrine of unlawful taking,⁴¹⁴ nor of adverse possession.⁴¹⁵ Instead, the period of time to reclaim possession of personal property starts running after the owner demands the return of the converted property from its actual possessor and after this request has been refused.⁴¹⁶ This practice – known as the ‘demand and refusal rule’ – is uniquely applied in New York⁴¹⁷ where it has been established by its judiciary.⁴¹⁸ As such, a purchaser who acts in good faith is deemed to be in lawful possession until the demand has been made and the said purchaser has refused to reconstitute the property.⁴¹⁹ These two elements are considered essential to the cause of action in replevin.⁴²⁰ Therefrom, the tortious act of conversion materialises, and only then does the statute of limitations start to run.⁴²¹ The rationale underlying the rule is that one who came into possession of the personal property but who is not entitled to retain it, must be given the opportunity to correct his defective possession by surrendering the property to the rightful owner, and thus be afforded a genuine opportunity not to be unnecessarily subjected to legal proceedings.⁴²² As was elucidated by the Court of Appeals in *Gillet v. Roberts*: “The rule is a reasonable and just one, that an innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a *tortfeasor* for a wrongful conversion”.⁴²³ Furthermore, the court in *Gillet* remarked that the conversion would only materialise from the

⁴¹⁴ *Menzel v. List*, (1966), at 304-305: “In replevin, [...] the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant’s refusal to convey the chattel upon demand. *Cohen v. M. Keizer, Inc.*, 246 App.Div. 277, 285 N.Y.S. 488 (1st Dept. 1936) [replevin]”; this is notably because this doctrine of unlawful taking is less protective of the rights of the owner. *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623, (February 14, 1991), at 318: “While the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property. Less protective measures would include running the three-year statutory period from the time of the theft even where a good-faith purchaser is in possession of the stolen chattel, or, alternatively, calculating the statutory period from the time that the good-faith purchaser obtains possession of the chattel (*see generally*, Weil, *Repose*, 8 IFAR [Intl Found for Art Research] Rep., at 6–7 [Aug.–Sept. 1987])”.

⁴¹⁵ It remains disputable as to whether the doctrine of adverse possession exists alongside the doctrine of demand and refusal. This is notably mirrored in the case of *Kunstsammlungen Zu Weimar v. Elicofon* or in *Board of Managers of Sobo International Arts Condominium v. City of New York*. In *Elicofon* the court tested the situation to the doctrine of adverse possession and – similarly to the court in *O’Keefe* – concluded that the private display of the two Dürer paintings was not sufficient to provide the KZM with “a reasonable opportunity to discover their whereabouts”. See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, (May 5, 1982), at 1164 (footnote 25). In *Board of Managers of Sobo International Arts*, the United States District Court of the Southern District – relying on *Lightfoot v. Davis* (198 N.Y. 261, 262 (1910)) and upon *Rabinhoff (sic) v. United States of America*, (329 F.Supp. 830, 841 (S.D.N.Y.1971) – specified that adverse possession was available for personal property (*Board of Managers of Sobo International Arts Condominium v. City of New York*, Not Reported in F.Supp.2d, 2005 WL 1153752, 75 U.S.P.Q.2d 1025, (May 13, 2005)); nevertheless, in *Solomon R. Guggenheim v. Lubell*, the Appellate Division of the New York Supreme Court rejected the application of the doctrine of adverse possession to personal property. *Solomon R. Guggenheim v. Lubell*, (1990), at 149-150: “[...] but in the absence of a statute establishing title by virtue of the mere lapse of time (*compare*, CPLR 212[a]), we think it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long”; furthermore, it has been argued that New York was one of the first jurisdictions within the United States that converted the doctrine of adverse possession into another more equitable doctrine regarding disputes between an owner and a good faith purchaser relating to works of art. See *Sherlock*, (2000), p. 488.

⁴¹⁶ *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848: “Under New York law, in an action to recover converted property from a bona fide purchaser an owner must prove that the purchaser refused, upon demand, to return the property. *Gillet v. Roberts*, 57 N.Y. 28 (1874)”; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 394; Margules, (1991-1992), p. 634.

⁴¹⁷ O’Keefe, P. J., *Le Commerce des Antiquités – Combattre les Destructons et le Vol*, (Unesco: Paris, 1999), p. 102; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 394; Gerstenblith, (2009), p. 310.

⁴¹⁸ The use of the doctrine was, for example, affirmed in the 1874 case of *Gillet v. Roberts*, where the Court of Appeals substantiated its reliance upon this doctrine by submitting that a bona fide purchaser of personal property could not be held liable for conversion before the demand has been formulated by the owner for the recovery of the converted property and this demand has been refused. *Gillet v. Roberts*, 12 Sickels 28, 57 N.Y. 28, 1874 WL 11171, (January 1, 1874), at 28 and 30, relying on *Ely v. Ehle*, 3 N.Y. 506, 3 Comst. 506, (July 1, 1850), at 509-510, *Barrett v. Warren*, 3 Hill 348, (July 1, 1842), at 349, and *Twinam v. Swart*, 4 Lans., 263; Pinkerton, (1990), p. 3.

⁴¹⁹ Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 398; Pinkerton, (1990), p. 4.

⁴²⁰ *In re Peters*, 34 A.D.3d 29, 821 N.Y.S.2d 61, 2006 N.Y. Slip Op. 06480, (September 14, 2006), at 34, citing *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 [1964].

⁴²¹ See *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1161: “Under New York law, an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner’s demand for their return. Until the refusal the purchaser is considered to be in lawful possession. *MacDonnell v. Buffalo L., T. & S.D. Co.*, 193 N.Y. 92, 85 N.E. 801 (1908); *Gillet v. Roberts*, 57 N.Y. 28 (1874) (conversion); *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept. 1964) and 267 N.Y.S.2d 804, 49 Misc.2d 300 (Sup.Ct.N.Y.Co.1966), modified on other grounds, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967), modification rev’d, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969) (conversion); *Cohen v. M. Keizer, Inc.* 246 A.D. 277, 285 N.Y.S. 488 (1st Dept. 1936) (replevin); *Restatement (Second) of Torts*, s 229 (comment h); *W. Posser, The Law of Torts* 84 (4th ed. 1971)”. See also the dissenting opinion of Judge Handler in *O’Keefe v. Snyder* (1980), at 510; *In re Peters*, (2006), at 34.

⁴²² Demarsin, (2011), p. 642, footnote 99, citing *Butler v. Wolf Sussman, Inc.* 46 N.E.2d 243, 244 (Ind. 1943).

⁴²³ *Gillet v. Roberts*, (1874), at 34.

moment that the good faith purchaser explicitly expresses his defiance as to the rights of the owner.⁴²⁴ It is, therefore, important that the demand be refused before the cause of action accrues.

Demand and refusal need not be formalised through the specific use of the terms ‘demand’ and ‘refusal’: for a demand to be properly effectuated, it is sufficient for the dispossessed owner to express an exclusive claim of ownership as an owner against another that possesses the property without authorization.⁴²⁵ The only exceptions to the formulation of a demand for the recovery of a converted chattel is when the purchaser wrongfully took possession or acted in good faith at the time of the acquisition, but became aware of his defect in title and of the identity of the owner afterwards.⁴²⁶ When the purchaser is aware of these two elements, the requirement of notification of the wrongful possession through the formulation of a demand is deprived of its purpose, and this formulation therefore becomes otiose. In other words, no demand is required when such a demand would be futile.⁴²⁷ Similarly, a refusal need not be formalised by using the specific word ‘refusal’, so long as the unwillingness to accept the demand can be clearly inferred from the behaviour of the defendant.⁴²⁸ For example, in *Borumand v. Assar*, the United States District Court for the Western District of New York went as far as specifying that there was no obligation for the refusal to be conveyed in words.⁴²⁹ Instead, a refusal is implied when an intention to interfere with the possession of the demander can be inferred from the actions of the possessor, which constitute an “overt and positive act of conversion”.⁴³⁰ Consequently, it is the outward expression of the intention to oppose the claim of the owner by the purchaser who acts in good faith that will amount to conversion.⁴³¹ The possibility to infer implicit refusal results in an earlier triggering of the statute of limitations, which sometimes may work to the detriment of the unwary claimant.⁴³² At last, it should be remarked that the process of implicit demand and refusal leaves discretion to the court seized to determine whether demand and refusal can be inferred from the situation, sometimes frustrating the possibility for a dispossessed owner to recover the property.⁴³³

In the context of recovery of cultural objects, the doctrine of demand and refusal constitutes an important exception to the widespread discovery rule. In contrast to New Jersey⁴³⁴ and California,⁴³⁵ New York

⁴²⁴ *Gillet v. Roberts*, (1874), at 28 where the court specified: “Where words are relied upon to constitute a conversion, they must be uttered in proximity to the property, under such circumstances, as to show a determination to exercise dominion and control over it, and a defiance of the owner’s rights”. This was reiterated in almost the same words at 33, citing *Bristol v. Burt*, 7 Johns., 255; *Murray v. Burling*, 10 Johns., 172; *Reynolds v. Shuler*, 5 Cow., 323; *Connah v. Hale*, 23 Wend., 462.

⁴²⁵ Demarsin, (2011), p. 668, citing the *Appellate Division of New York in Feld v. Feld*, 720 N.Y.S.2d 35 (App. Div. 2001), at 37.

⁴²⁶ *Employers’ Fire Ins. Co. v. Cotten*, (1927), at 106: “Since the rule, regarded in many jurisdictions as unduly technical, requiring demand and refusal prior to the institution of a replevin action is based, according to the observations of judges in this state, upon the reason that one in lawful possession shall not have such possession changed into an unlawful one until he ‘be informed of the defect of his title and have an opportunity to deliver the property to the true owner,’ the rule does not apply, even within our jurisdiction, when the facts are that prior to the institution of the action defendant had full information relating to her own defect in title and the identity of the true owner”.

⁴²⁷ *Schanbarger v. Edward Dott’s Garage, Inc.*, 1978, 61 A.D.2d 243, 245-46, 402 N.Y.S.2d 72, 74 (3d Dep’t), at 245, referring to *Employer’s Fire Ins. Co. v. Cotten*, 245 N.Y. 102 (1927), 156 N.E. 629, 51 A.L.R. 1462 (cited in Alexander, V. C., ‘Practice Commentaries’, *McKinney’s CPLR § 7101 – § 7101. When an action may be brought*, NY CPLR § 7101).

⁴²⁸ *Grosz v. Museum of Modern Art*, (January 2010), at 483: “A refusal need not use the specific word ‘refuse’ so long as it clearly conveys an intent to interfere with the demander’s possession or use of his property.” *Feld v. Feld*, 279 A.D.2d 393, 395, 720 N.Y.S.2d 35 (N.Y.App. Div. 1st Dep’t 2001) [...].” See also *ibidem*, at 494; Demarsin, (2011), p. 668, citing the Appellate Division of New York in *Feld v. Feld*, 720 N.Y.S.2d 35 (App. Div. 2001), at 37.

⁴²⁹ *Grosz v. Museum of Modern Art*, (January 2010), at 484; Demarsin, (2011), p. 668, citing *Borumand v. Assar*, No. 01-CV-6258P, 2005 WL 741786, at *14 (W.D.N.Y. Mar. 31, 2005).

⁴³⁰ *Grosz v. Museum of Modern Art*, (January 2010), at 484: “In line with *Feld* and *Borumand*. (*sic*) a court must analyze the actions as well as his words of a person who receives a demand before deciding whether and when it was refused. If either the recipient’s words or actions evidences “an intent to interfere with the demander’s possession or use of his property,” see *Feld*, 279 A.D.2d at 395, 720 N.Y.S.2d 35—which is an “overt and positive act of conversion,” see *Borumand*, 2005 WL 741786, at *14—then the demand has been refused and the cause of action accrues, even if the words “I refuse your demand” were not explicitly used. This conclusion comports with the purpose behind the demand-and-refusal rule, which is to give an innocent purchaser the opportunity to turn over chattel in his possession after learning that it had been stolen from someone else. Nothing in the rule’s history or purpose suggests that a party who receives a demand, and who thereafter acts in a manner that is inconsistent with the demander’s claim to ownership, should be held not to have “refused” the demand simply because he failed to recite some magic words of rejection. Action, as we all know, can sometimes speak louder than words”; Demarsin, (2011), p. 668, citing *Borumand v. Assar*, No. 01-CV-6258P, 2005 WL 741786, at *14 (W.D.N.Y. Mar. 31, 2005).

⁴³¹ *Gillet v. Roberts*, (1874), at 30.

⁴³² Demarsin, (2011), p. 670.

⁴³³ Demarsin, (2011), pp. 665 and ff. about implicit demand and refusal.

⁴³⁴ In *Joseph v. Lesniewich*, the Appellate Division of the Superior Court of New Jersey specifically rejected the application of the doctrine of demand and refusal: “As to such persons [referring to different types of converters], the weight of authority is that a demand and refusal is not necessary to trigger the accrual of the cause of action held by the true owner. Posser, *Torts* (2d ed. 1955), s 15, pp. 72-73, text at notes 74, 75. Compare Mueller v. Technical Devices Corp., 8 N.J. 201, 208, 84 A.2d 620 (1951)”. *Joseph v. Lesniewich*, (1959), at 355; in *O’Keefe v. Snyder*, the Supreme Court of New Jersey implicitly confirmed this rejection by applying the discovery rule instead (see *O’Keefe v. Snyder*, (1980), discussed above). This can be contrasted with the dissenting opinion of Justice Handler at 509: “The statute of limitations defense was raised by defendant Snyder, but it is not available here because Snyder’s acts of conversion his purchase of the paintings from

has specifically rejected the adoption of the discovery rule for personal property,⁴³⁶ but has, instead, retained a ‘demand and refusal’ rule for the purposes of the accrual of the cause of action.⁴³⁷ This choice is notably justified on the basis that New York offers an important platform for the sale of cultural property to the art and antiquities market.⁴³⁸ In the context of the replevin of stolen cultural property, the demand and refusal rule was first coined in *Menzel v. List*,⁴³⁹ extended in *DeWeerth v. Baldinger* and, finally revisited in *Solomon R. Guggenheim Foundation v. Lubell*. A seriatim account of the evolution of the demand and refusal in the context of the accrual of the cause of action is provided below.

Demand and Refusal – Menzel v. List

In *Menzel v. List*, the Menzel spouses left a painting by Marc Chagall entitled “Le paysan à l’échelle” in their Brussels apartment whilst they were in the process of absconding from the Nazi regime in March 1941. At the end of the Second World War and some six years after their departure, the Menzels returned to Brussels and discovered a receipt issued for the painting deposited in their apartment. The receipt – issued by the Nazis – specified that the painting had been taken by the *Einsatzstab der Dienststellen des Reichsleiters Rosenberg*, supposedly for safekeeping. Although the whereabouts of the painting remained unknown hereafter, the painting reappeared in the hands of Albert List in 1955. List had acquired it from the Perls spouses, who themselves acquired the painting during the same year from the Galerie Art Moderne in Paris, France. Unbeknownst that it had been stolen during the Second World War to the Perls, they mostly relied upon the good reputation of the gallery at the time of the purchase and made no inquiries as to the provenance of the painting. Several months after the purchase, they sold the Chagall to List. Meanwhile, the Menzel couple had been looking for their painting ever since their return to Brussels in 1947, although without any success. In 1962, Menzel retraced the painting in a publication that reproduced a picture of it, and which disclosed List as its possessor. Due to this discovery, Menzel was able to demand the restitution of the painting, – which was refused by List –, which enabled her to subsequently initiate proceedings in replevin before the New York courts.

third-party defendant Frank and his refusal to return them to plaintiff O’Keeffe upon demand constituted independent tortious acts each of which occurred well within six years of the commencement of plaintiff’s lawsuit”. In this opinion, Justice Handler proposed relying on the doctrine of demand and refusal and justified it in the following terms: “It is understandable that both lower courts in addressing the merits of the controversy dealt with the defenses of the statute of limitations and adverse possession since those courts were bound by *Redmond v. New Jersey Historical Society*, 132 N.J.Eq. 464, 28 A.2d 189 (E. & A. 1942), and at least constrained by *Joseph v. Lesnevich*, 56 N.J.Super. 340, 153 A.2d 349 (App.Div.1959). This Court, however, is not required to follow either decision; it is, therefore, less explicable as to why the Court has permitted itself to become entangled in these abstruse doctrines as applied to stolen or lost works of art” (at 509). Nevertheless, his opinion is not authoritative in New Jersey where preference is given to the discovery rule.

⁴³⁵ Similar to New Jersey, California law rejected the application of the doctrine of demand and refusal in *Harpending v. Meyer* (1880). See notably *Harpending v. Meyer*, (1880), at 559-560, where the Supreme Court of California submitted that no demand was necessary for the purpose of maintaining an action in replevin (citing *Gahlin v. Bacon*, 2 Fairf. 28, and adding that the same conclusion was reached in Michigan and Vermont). The Supreme Court justified its rejection of the doctrine of demand and refusal as follows: “[referring to the doctrine of demand and refusal] We are unable to perceive, however, that a person can never be considered a *bona fide* purchaser of goods from one who has no right to sell, in a case where the rule of *caveat emptor* applies. The law imputes notice to him. Under that rule he is not only put upon inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it. If he has notice in fact, no demand upon him for the property is necessary before commencing the action to recover it. If he is chargeable with constructive notice, the result in all other cases is the same. But, as we have before stated, the operation of a rule which exempts a *bona fide* purchaser from being sued until after demand made, is, in all the cases to which it has been applied, favorable to the *bona fide* purchaser, and it is claimed to have been devised for his protection. If applied to this case, its operation is exactly the reverse of that. To hold that the statute did not commence running in favor of these defendants from the time of the delivery of the goods to them, because at that time they were conscious of no wrong-doing, which, if they had been conscious of, would have set the statute in motion in favor, involves an absurdity. And when one construction of the law will lead to absurd consequences and another will not, it is the duty of the Court to adopt the latter” (*ibidem*, at 560-561).

⁴³⁶ In the determination of the accrual of the cause of action, New York has purposely decided not to follow the discovery rule for specific reasons: Bill 11462-A, purporting to modify the demand and refusal rule in existence by a discovery rule in proceedings against certain non-profit organisations, was presented in 1986 to both houses of its legislature. The Bill was to provide for the running of the statute of limitations from the moment that the institutions concerned would give notice of their possession, in accordance with a procedure laid down in the Bill. This construction, which was intended to provide constructive notice of the identity of the possessor and of the whereabouts of the object, was seen as particularly problematic. The rule was, subsequently, vetoed as it was considered that it might not provide a reasonable opportunity for dispossessed owners to reclaim their property and that it, concurrently, created a haven for stolen cultural property (see *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 319). The prominent position of New York as a centre of art trade has imperatively contributed to the adoption of tailored made rules to the recovery of stolen cultural objects that are unique in their genre. See Foutty, (1990), p. 1845; see also *Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex.*, 87 N.Y.2d 36, 660 N.E.2d 1121, 637 N.Y.S.2d 342, 27 UCC Rep.Serv.2d 1285, (November 1, 1995), at 44 where the Court of Appeals of New York specified that the accrual of the cause of action was not upon discovery or by the exercise of due diligence in discovering the cause of action, thus rejecting the discovery rule with actual or constructive notice.

⁴³⁷ *DeWeerth v. Baldinger*, (1987), at 694.

⁴³⁸ Demarsin, (2010-2011), p. 272.

⁴³⁹ *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43, (October 6, 1964), 49 Misc.2d 300, 267 N.Y.S.2d 804, (February 10, 1966), modified, 28 A.D.2d 516, 279 N.Y.S.2d 608, (May 11, 1967), rev’d, 24 N.Y.2d 91, 246 N.E.2d 742, 746, 298 N.Y.S.2d 979, 984 (February 26, 1969); Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 394.

In *Menzel v. List*, the Supreme Court of New York clarified that an action in replevin to recover a stolen painting was subject to the doctrine of demand and refusal.⁴⁴⁰ Furthermore, *Menzel v. List* brought about a further qualification explaining the working of the demand and refusal doctrine: following the Appellate Division of the Supreme Court in *Menzel*, a distinction must be drawn between a substantive and a procedural demand requirement.⁴⁴¹ A procedural demand requirement implies that a right of relief exists and that the demand is merely procedural in nature.⁴⁴² Because of this procedural character, § 206 (a) CPLR governs⁴⁴³ and is, therefore, deemed applicable to the demand requirement.⁴⁴⁴

§ 206 CPLR – Computing periods of limitation in particular actions.

(a) Where demand necessary. Except as provided in article 3 of the uniform commercial code, where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete, [...]

Henceforth, the statute of limitations will start running at the moment the right to make the demand is complete and will merely be seen as a condition to maintain the action, and not a substantial part thereof.⁴⁴⁵ In the case of a substantive demand requirement, the demand is an element of the cause of action⁴⁴⁶ and there exists no right to relief for the claimant until this condition has been fulfilled.⁴⁴⁷ This means that the statute of limitations will only run from the moment that a demand is formally made and formally rejected.⁴⁴⁸ Albeit the distinction between the two types of demand was sometimes overlooked in previous cases,⁴⁴⁹ this distinction is of paramount importance because the statute of limitations will start running from a different time onwards, depending on whether the demand element is deemed either procedural or substantive.⁴⁵⁰ In the former situation, the statute of limitations will start running when the ‘right to make the demand is complete’⁴⁵¹ – which may be assimilated to the moment at which the defendant entered into possession of the property⁴⁵² –, whilst in the latter situation, the statute of limitations will run after a demand has been refused. The court in *Menzel v. List* specified that a demand by the rightful owner is substantive in nature in proceedings for an action in replevin or conversion introduced by the said owner.⁴⁵³

⁴⁴⁰ *Menzel v. List*, (1966), at 304-305, citing *Cohen v. M. Keizer, Inc.*, (1936), at 246.

⁴⁴¹ *Menzel v. List*, (1964), at 647; see also *Continental Casualty Co. V. Stronghold Insurance Co.*, 77 F.3d 16, 64 USLW 2564, (February 13, 1996), at 21: “New York courts do not instinctively apply CPLR 206(a) in every case where a demand is a predicate to suit. Rather, they distinguish between substantive demands and procedural demands. See *Dickinson v. Mayor of New York*, 92 N.Y. 584, 591 (1893) (construing § 206(a)’s statutory predecessor); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir.1982); see generally 1 Jack B. Weinstein et al., *New York Civil Practice* ¶ 206.01 (1995). This distinction derives from earlier statutes, which CPLR 206(a) merely rephrased, see 2 N.Y.Adv.Comm.Rep. 53 (1958), and which expressly applied only “where a right exists, but a demand is necessary to entitle a person to maintain an action.” 1 Weinstein, *supra*, ¶ 206.01, at 2-241 (quoting statutory predecessors to § 206(a)). Thus, when a demand is an essential element of the plaintiff’s cause of action, as in bailment cases, see, e.g., *Ganley v. Troy City Nat’l Bank*, 98 N.Y. 487, 493-96 (1885), and replevin cases involving good-faith purchasers of stolen art, see, e.g., *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 319, 567 N.Y.S.2d 623, 627, 569 N.E.2d 426, 430 (1991), CPLR 206(a) does not apply”, cited in McKinney’s Consolidated Laws of New York Annotated, Civil Practice Law and Rules, Computing periods of limitation in particular actions, NY CPLR § 206.

⁴⁴² See McKinney’s Consolidated Laws of New York Annotated, Civil Practice Law and Rules, Computing periods of limitation in particular actions, NY CPLR § 206.

⁴⁴³ *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1161; McKinney’s Consolidated Laws of New York Annotated, Civil Practice Law and Rules, Computing periods of limitation in particular actions, NY CPLR § 206.

⁴⁴⁴ *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848: “If the demand required is merely procedural in nature, N.Y.C.P.L.R. s 206 (a) applies, which provides that the cause of action accrues at “the time the right to make the demand is complete,” in this case, in 1946, when Elicofon purchased the paintings”. Gerstenblith, P., *Art, Cultural Heritage, and the Law, Cases and Material*, (Carolina Academic Press, Third Edition, 2004), p. 398.

⁴⁴⁵ *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848 referring to *Dickinson v. Mayor of New York*, 92 N.Y. at 590 (1883).

⁴⁴⁶ *Menzel v. List*, (1964), at 647; *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848: “A substantive demand is one which is “a part of the cause of action,” *Dickinson v. Mayor of New York*, 92 N.Y. 584 (1883), [...]”.

⁴⁴⁷ McKinney’s Consolidated Laws of New York Annotated, Civil Practice Law and Rules, Computing periods of limitation in particular actions, NY CPLR § 206.

⁴⁴⁸ *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848: “If the demand is of a substantive nature, the statute of limitations runs only after a demand has been made and refused, in this case, October 1966. *Frigi-Griffin, Inc. v. Leeds*, 52 A.D.2d 805, 383 N.Y.S.2d 339 (1st Dep’t 1976)”; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 398.

⁴⁴⁹ See the cases *Federal Insurance Co. V. Fries*, 78 Misc.2d 805, 355 N.Y.S.2d 741 (N.Y.Civ.Ct., N.Y.Co.1974) and *Straganoff-Scherbatoff v. Weldon*, 420 F.Supp. 18 (S.D.N.Y.1976) mentioned in *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 849.

⁴⁵⁰ Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 398.

⁴⁵¹ Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 398.

⁴⁵² See for example *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848.

⁴⁵³ *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848: “In *Menzel v. List*, [...] it was held that “a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner.” Accordingly, the court in *Menzel* found that the statute of limitations did not begin running until demand and refusal.” 22 A.D.2d at 647, 253 N.Y.S.2d at 44. Accord, *Duryea v. Andrews*, 34 St.R. 774, 12 N.Y.S. 42 (2d Dep’t. 1890)” (citing *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43, 44 (1st Dep’t. 1964), on remand, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup.Ct.N.Y.Co.1966), modified on other grounds, 28 A.D. 516, 279

As posited in *Menzel v. List*, the doctrine of demand and refusal generates conspicuous difficulties. Although meant to protect innocent purchasers who act in good faith, the doctrine as laid down in *Menzel* has the opposite effect: in fact, because the accrual of the cause of action materialises after both the demand and refusal have taken place, it is possible for an owner to postpone the initiation of legal proceedings indefinitely.⁴⁵⁴ This protraction conjoins an extension of the period to which the good faith purchaser may be subjected to proceedings for the recovery of the chattel, irrespective of the efforts made to attempt at identifying a title in the transferor as part of the good faith requirement.⁴⁵⁵ Ultimately, the resulting unfettered exposure to recovery proceedings would wane any incentive to verify the legitimate origin of an object⁴⁵⁶ and, ostensibly, this favours acquisitions that have not been carried out in good faith (see below).⁴⁵⁷ Furthermore, the *Menzel* demand and refusal entails that the exercise of due diligence by the original owner is irrelevant,⁴⁵⁸ and that non-diligent owners will benefit at the expense of a good faith purchaser.⁴⁵⁹ Noting the difficulties with the demand and refusal as applied in *Menzel v. List*, Demarsin has remarked that the court in *Menzel v. List* might have erred in declaring the demand and refusal accrual of the cause of action as being substantive in nature.⁴⁶⁰ Instead, as was noted – *inter alia* – by the court in *Stroganoff v. Weldon*, Section 206 (a) CPLR is relevant to the demand requirements and specifically requires that the statute of limitations be “computed from the time when the right to make the demand is complete”.⁴⁶¹ Therefore, New York courts have consistently interpreted the completeness of the demand to take place at the moment when the wrongful act occurs.⁴⁶² Consequently, the statute of limitations is to run from the moment the claimant is entitled to make his demand, which is tantamount to the moment the defendant takes wrongful possession.⁴⁶³ Nonetheless, it must be reiterated that the substantive nature given to the demand requirement in *Menzel v. List* is authoritative in cases dealing with the acquisition of stolen personal property by good faith purchasers.⁴⁶⁴ In fact, the demand requirement is deemed procedural in

N.Y.S.2d 608 (1st Dep’t. 1967), modification rev’d, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969)). This submission was later on reiterated by the court in *Elicofon* (ibidem, at 848) and the Court of Appeals in *DeWeerth v. Baldinger* (*DeWeerth v. Baldinger*, (1987), at 107). In justifying its decision to consider demand and refusal as substantive elements of a cause of action, the court in *Elicofon* – echoing *Gillet v. Roberts* – advanced that the possession of an innocent good faith possessor is lawful up until the owner demands the return of the chattel and this demand is rejected. *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 848: “The legal principle underlying the rule that the demand and refusal are substantive elements of the cause of action against the bona fide purchaser is that the bona fide purchaser’s possession is initially lawful, and only becomes unlawful once he has refused, upon demand, to return the property to the true owner. *Tompkins v. Fonda Glove Lining Co.*, 188 N.Y. 261, 80 N.E. 933 (1907); *Cohen v. Keizer, Inc.* 246 App.Div. 277, 285 N.Y.S. 488 (1st Dep’t 1936). “Possession by a bona fide purchaser is not in itself a sufficient serious interference with the owner’s rights to amount to a conversion.” *Posser, Law of Torts* 84 (4th ed.); [footnote 19: A demand and refusal are not necessary if the bona fide purchaser has sufficiently interfered with the owner’s right in some other way so as to constitute a conversion, for instance, where he sells the property, *Pease v. Smith*, 61 N.Y. 477 (1875), or where he continues to possess the property as his own after learning that it was stolen, *Employer’s Fire Ins. v. Cotten*, 245 N.Y. 102, 156 N.E. 629 (1927).] The legal principle has a practical purpose as stated in *Gillet v. Roberts*, 57 N.Y. 28, 34 (1874): The rule is a reasonable and just one, that an innocent purchaser of personal property from a wrongdoer shall first be informed of the defect in his title and have an opportunity to deliver the property to the true owner before he shall be made liable as a tortfeasor for wrongful conversion”. See also *Gillet v. Roberts*, (1874), at 34.

⁴⁵⁴ See for example *In re Peters*, 34 A.D.3d 29 (2006), at 37; Demarsin, (2011), p. 644; as noted by the court in *In re Peters*, the use of the demand and refusal rule does not mean that it is possible for the claimant to postpone the formulation of a demand as wished. Instead, the Appellate Division of the New York Supreme Court clarified in the case of *Austin v. Board of Higher Educ. of City of N.Y.* (5 N.Y.2d 430, 186 N.Y.S.2d 1, 158 N.E.2d 681 [1959]) that the demand could not be extended indefinitely. This was also made clear in the context of the recovery of stolen personal property since the 1947 *Heide v. Glidden Buick Corp.* decision (188 Misc. 198, 67 N.Y.S.2d 905 [1947]).

⁴⁵⁵ Demarsin, (2011), pp. 642-643.

⁴⁵⁶ Demarsin, (2011), pp. 642-643.

⁴⁵⁷ Demarsin, (2011), pp. 643. Although Demarsin notes that it will not always be possible for a thief or a bad faith possessor to benefit from a statute of limitations running from the unlawful taking onwards. The doctrine of fraudulent concealment and equitable estoppel might be raised as defence against a stale statute of limitations against thieves or bad faith possessors. See Demarsin, (2011), p. 644, footnote 104.

⁴⁵⁸ Preziosi, (1997-1998), p. 235.

⁴⁵⁹ Redman, (2008), p. 218.

⁴⁶⁰ Demarsin, (2011), p. 644.

⁴⁶¹ Demarsin, (2011), p. 645.

⁴⁶² Demarsin, (2011), p. 645, citing *Federal Insurance Co. V. Fries*, 355 N.Y.S.2d 741, 747-48 (Civ. Ct. 1974); Hayworth, (1993-1994), p. 338, citing *Sporn v. MCA Records, Inc.*, 448 N.E.2d 1324 (N.Y. 1983), at 1326-1327; *Federal Insurance Co. V. Fries*, 355 N.Y.S.2d 741, 747-48 (Civ. Ct. 1974): “In short, the statute of limitations runs, not from the demand, but from the time when the bank was entitled to make the demand. Were the rule otherwise, a plaintiff might extend the statute indefinitely, merely by postponing the making of a demand”.

⁴⁶³ Demarsin, (2011), p. 645, citing *Federal Insurance Co v. Fries*, 355 N.Y.S.2d 741, 747-748 (Civ. Ct. 1974).

⁴⁶⁴ See *DeWeerth v. Baldinger*, 836 F.2d 103, 56 USLW 2402, (December 30, 1987), at 107: “However, section 206(a) applies only where the demand requirement is a procedural as opposed to a substantive element of the cause of action. *Frig-Griffin, Inc. v. Leeds*, 52 A.D.2d 805, 806, 383 N.Y.S.2d 339, 341 (1st Dep’t 1976). In *Menzel v. List*, *supra*, a case involving stolen art, the New York Appellate Division held that “with respect to bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than procedural, prerequisite to the bringing of an action for conversion by the owner.” 22 A.D.2d at 647, 253 N.Y.S.2d at 44. Since, in the pending case, the defendant is a good-faith purchaser, the statute of limitations does not begin to run until demand and refusal actually occur. *Id.*; see also *Kunstsammlungen Zu Weimar v. Elicofon*, *supra*, 678 F.2d at 1161-63 (section 206 does not apply to actions to recover property from a good-faith purchaser).” In *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), the United States Court of Appeals of the Second Circuit of New York explained why it agreed with the *Menzel* qualification of the demand requirement (at 1162-1163): “*Elicofon* next contends that New York

nature in cases where it is easier for the owner to determine who is in possession of the personal property, such as in situations of mistaken delivery. This is notably so because in these situations – in which his right to relief exists – the owner can promptly formulate his demand, unlike in situations of theft where it is particularly difficult to retrieve the identity of either the thief or of the purchaser in good faith.⁴⁶⁵

Extended Demand and Refusal Rule – DeWeerth v. Baldinger I

The rule as instated by the court in *Menzel v. List* was soon to be revised in the case of *DeWeerth v. Baldinger*. In this case, the United States Court of Appeals of the Second Circuit (New York) expanded the already well-known demand and refusal rule by imposing an additional duty of reasonable diligence upon the dispossessed owner.⁴⁶⁶

In *DeWeerth v. Baldinger*, American soldiers stole a painting by Claude Monet entitled “Champs de Blé à Vetheuil” at the end of WWII in Germany. The painting, stolen from the sister of the plaintiff, was the property of Gerda Dorothea De Weerth (hereinafter referred to as DeWeerth) who inherited the picture from her father in August 1922. Prior to 1943, DeWeerth had never parted with the painting nor did she entrust it to anyone else, with the exception of her mother and only for a short period of two years. In 1943, in order to ensure the painting’s safekeeping, DeWeerth sent the Monet – among other valuable pieces – to her sister, Gisela von Palm in Oberbalzheim, Southern Germany. In the fall of 1945, the painting disappeared, contemporaneously to the end of the war and of the departure of American troops. At the time, it proved impossible to unveil the identity of the perpetrator(s) of the theft. From 1946 onwards, DeWeerth started searching for the painting and undertook the following steps:⁴⁶⁷ firstly, she contacted the military government responsible for the administration of the Bonn-Cologne region after the war (1946); secondly, for insurance purposes, she required the assistance of her lawyer, inquiring as to whether there was anything that could be done about the stolen painting (1948); thirdly, she contacted an art expert – Dr. Alfred Strange – to ask for his help in retracing the painting, and sent him a picture of the missing canvas (1955); she also reported the missing painting along with other chattels substituted during the war at the West German federal bureau of investigation (*Bundeskriminalamt*) in Bonn (1957). The inquiries undertaken proved to be of no avail and no further attempts were made at locating the painting. In-between 1957 and 1982, the painting had passed through several hands and was deposited at the New York based Wildenstein art gallery in a consignment from François Reichenbach (1956). Reichenbach was himself an art dealer operating in Geneva, Switzerland. Wildenstein sold the painting to Baldinger in June 1957, and she kept it in her residence from June 1957 to April 1987. During this period of thirty years, the painting was lent on two occasions, in October-November 1957 and May 1970 respectively. In 1981, DeWeerth – through the help of her nephew – discovered in a 1974 publication on Monet’s work that Wildenstein’s name was associated with the painting. DeWeerth contacted Wildenstein to attempt at discovering the identity of the possessor and the whereabouts of the painting, but the gallery owner refused to disclose Baldinger’s identity. Subsequently, DeWeerth sued Wildenstein demanding “disclosure to aid in bringing an action”. In 1982, the New York Supreme Court found in favour of DeWeerth, and Wildenstein was obliged to unveil the identity of Baldinger. In December of the same year, DeWeerth asked the painting back from Baldinger, a demand that was refused in February 1983.

Contrary to the findings in *Menzel v. List*, the court in *DeWeerth v. Baldinger*⁴⁶⁸ emphasised that – in cases where the accrual of the cause of action is mandated by a substantive requirement – New York law requires the demand

cases decided subsequent to *Menzel* cast doubt on its continued validity and compel the different conclusion that § 206(a) is applicable to substantive demands and that therefore the cause of action arose in 1946. Of the four post-*Menzel* cases cited to us, only one involves a bona fide purchaser. *Stroganoff-Scherbatoff v. Weldon*, 420 F.Supp. 18, 22 n.5 (S.D.N.Y.1976). We cannot accord weight to its statement contrary to *Menzel* since it was dictum in a gratuitous footnote which amounted to unnecessary effort by a federal district court to interpret state law. The decision in *Federal Insurance Co. v. Fries*, 78 Misc.2d 805, 355 N.Y.S.2d 741 (N.Y.Civ.Ct.1974), is clearly distinguishable since it held in a mistaken delivery case (unlike a bona fide purchaser case) that the cause of action accrues upon the mistaken delivery, not upon demand. In addition, its validity is doubtful since it neither discusses the established New York substantive/procedural distinction nor alludes to *Menzel*, a precedent by a higher court in the same department. Similarly, we cannot accord much weight to *Smith v. Driscoll*, 69 A.D.2d 857, 415 N.Y.S.2d 455 (2d Dept. 1979), where in a case also not involving a bona fide purchaser the Appellate Division, in one short sentence and without any discussion of *Menzel* or of the substantive/procedural distinction, affirmed the lower court’s dismissal of a conversion claim as time-barred, relying on *Fries*. Finally, in *Al-Roc Product Corp. v. Union Dime Savings Bank*, 74 A.D.2d 834, 425 N.Y.S.2d 525 (2d Dept. 1980), the court’s one-sentence statement is a skeletal memorandum opinion that a cause of action against a wrongful possessor accrues upon the wrongful possession is dictum, since the court held that the conversion action was timely. Having reviewed these decisions, we do alter our conclusion that *Menzel* and its underlying principles are controlling”.

⁴⁶⁵ *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1163 (footnote 22): “In a mistaken delivery case the rightful deliverer is likely to complain. Since the deliverer who made the mistake is known to the owner, the owner has a much greater ability to identify the wrong deliverer and locate the goods than does an owner of stolen goods. In contrast, the thief is usually unknown and the good faith purchaser, also unknown to the owner, is ignorant of both the defect of his title and the origin of the goods”.

⁴⁶⁶ Kelly, (1995-1996), p. 42.

⁴⁶⁷ *DeWeerth v. Baldinger*, (1987), at 691.

⁴⁶⁸ *DeWeerth v. Baldinger*, (December 1987), hereafter referred to as *DeWeerth v. Baldinger I*.

not to be unreasonably delayed.⁴⁶⁹ This conclusion was not without precedent: in *Kunstsammlungen Zu Weimar v. Elicofon* – the facts of which are given above –, the United States District Court of the Eight District of New York accepted the demand and refusal rule as laid down in *Menzel v. List*, and added to the doctrine that a demand could not be unreasonably delayed.⁴⁷⁰ Consequently, the main thrust in both *DeWeerth* and *Elicofon* pivoted on whether the demand was timely formulated or unreasonably delayed.⁴⁷¹ Following the *DeWeerth* Court of Appeals, the dispossessed owner cannot unreasonably delay his demand for the restitution of the object,⁴⁷² conjoining that the owner is, therefore, under “a duty of reasonable diligence in attempting to locate the stolen property”.⁴⁷³ It was, therefore, not sufficient for the plaintiff to bring her claim to the court once the demand had been refused, and within the imparted period of three years from the accrual of her cause of action. Instead, *DeWeerth* posited that the dispossessed owner must promptly formulate a demand when, through the use of reasonable diligence, he would have the opportunity of knowing about the whereabouts of the object.⁴⁷⁴ Consequently, the *DeWeerth* Court of Appeals imposed a positive duty of reasonable diligence upon the claimant to search for the stolen personal property,⁴⁷⁵ adjoined by a duty to formulate a demand for the return of the object within a reasonable time after discovering the identity of the possessor.⁴⁷⁶ The effect of this requirement of reasonable diligence was to extend the scope of the demand and refusal not only to the claimant’s actual knowledge – as required by the *Menzel*’s demand and refusal doctrine –, but also to a constructive knowledge of the whereabouts of the objects.⁴⁷⁷

The introduction of a reasonable diligence requirement was based on several policy considerations: firstly, at the time of adjudicating *DeWeerth v. Baldinger I*, New York had a policy of discouraging stale claims and favouring good faith purchasers.⁴⁷⁸ Secondly, it was considered that the demand and refusal rule – fundamentally different from other accruals of causes of action in other U.S. states – should be brought more in line with these counterparts.⁴⁷⁹ Furthermore, the Court of Appeals in *DeWeerth v. Baldinger I* found a duty of reasonable diligence to be consistent with the demand and refusal rule, as the lack thereof would jeopardise the protection afforded by the rule to good faith purchasers:⁴⁸⁰ allowing the unfettered and belated initiation of proceedings by a

⁴⁶⁹ *DeWeerth v. Baldinger*, (December 1987), at 107, footnote 4.

⁴⁷⁰ *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 849: “[...] a demand cannot be indefinitely postponed by plaintiff because there is a requirement that it be made within a reasonable time. *Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905 (S.Ct.App.T. 1st Dep’t. 1947)” and “As stated previously, under the law of New York a party may not unreasonably delay in making a demand which starts the running of the limitations period. *Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905 (S.Ct.App.T. 2nd Dep’t. 1947)”. In assessing the reasonableness of the delay in making a demand, the court specified that attention is to be given to the circumstances of the case. *Kunstsammlungen v. Elicofon*, (1981), at 849: “The question of what constitutes a reasonable time to make a demand depends upon the circumstances of the case. *Reid v. Board of Supervisors*, 128 N.Y. 364, 28 N.E. 367 (1891); *Nyhus Travel Management Corp.*, 466 F.2d 440 (D.C.Cir.1972)”. The court found that the KZW had undertaken diligent efforts in retrieving the stolen Dürers (for a detailed analysis of the steps undertaken to recover the paintings, see *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 850-851) and that there was, therefore, no need to determine whether an obligation of due diligence was imputed upon the KZM under New York law (*Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 849-850). See also *Continental Casualty Co. V. Stronghold Insurance Co. Ltd.*, 77 F.3d 16, 64 USLW 2564, (February 13, 1996), at 21: “We of course recognize that a plaintiff should not “have the power to put off the running of the Statute of Limitations indefinitely.” *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 435, 599 N.Y.S.2d 515, 518, 615 N.E.2d 999, 1002 (1993)”.

⁴⁷¹ Demarsin, (2011), p. 650 (about *DeWeerth v. Baldinger*).

⁴⁷² *DeWeerth v. Baldinger*, (December 1987), at 107: “Under New York law, even though the three-year limitations period begins to run only once a demand for return of the property is refused, a plaintiff may not delay the action simply by postponing his demand. Where demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed” citing *Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d (05 (1st Dep’t 1947), *Austin Board of Higher Education*, 5 N.Y.2d 430, 442-443, 186 N.Y.S.2d 1, 10-11, 158 N.E.2d 681, 687-688 (1959), *Reid v. Board of Supervisors*, 128 N.Y. 364, 373, 28 N.E. 367, 369 (1891) and *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp. at 849; *DeWeerth v. Baldinger*, 658 F.Supp.688, at 694, citing *Elicofon*, 536 F.Supp. at 849 (citing *Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905 (1st Dept. 1947)); Demarsin, (2011), p. 651.

⁴⁷³ *DeWeerth v. Baldinger*, (December 1987), at 110 where the court rejected unreasonably delayed demands and imposed a duty of reasonable diligence. See also *ibidem*, at 108: “Rather, we believe that the New York courts would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified”; Kelly, (1995-1996), p. 42.

⁴⁷⁴ *DeWeerth v. Baldinger*, (December 1987), at 107.

⁴⁷⁵ *DeWeerth v. Baldinger*, (December 1987), at 109 and 110; Kay, L. M., “The Future of the Past: Recovering Cultural Property”, 4 *Cardozo Journal of International and Comparative Law*, (1996), pp. 33-34.

⁴⁷⁶ *DeWeerth v. Baldinger*, (December 1987), at 108.

⁴⁷⁷ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 147.

⁴⁷⁸ *DeWeerth v. Baldinger*, (December 1987), at 109-110; *DeWeerth v. Baldinger*, 804 F.Supp. 539, 61 USLW 2271, 24 Fed.R.Serv.3d 362, (October 16, 1992), – hereinafter *DeWeerth II* – at 544; Demarsin, (2011), p. 651.

⁴⁷⁹ *DeWeerth v. Baldinger*, (1992), at 544; Demarsin, (2011), p. 651.

⁴⁸⁰ *DeWeerth v. Baldinger*, (December 1987), at 108: “An obligation to attempt to locate stolen property is consistent with New York’s treatment of the good-faith purchaser. The purpose of the rule whereby demand and refusal are substantive elements of a conversion action against a good-faith purchaser is to protect the innocent party by assuring him notice before he is held liable in tort: [...] The rule may disadvantage the good-faith purchaser, however, if demand can be indefinitely postponed. For if demand is delayed, then so is accrual of the cause of action, and the good-faith purchaser will remain exposed to suit long after an action against a thief or even other innocent parties would be time-barred. See, e.g., *Varga v. Credit-Suisse*, supra, 5 A.D.2d at 291, 171 N.Y.S.2d at 677-78 (action against

dispossessed owner would run counter to the very purpose of statutes of limitations, which is to provide finality to proceedings, fairness to the defendant⁴⁸¹ and to release the judicial system from adjudicating on unfounded or stale claims.⁴⁸² As such, the reasonable diligence rule was developed in order to balance the disadvantages created by the demand and refusal rule to the defendant,⁴⁸³ and to afford more protection to the possessor.⁴⁸⁴ What is more, requiring the exercise of reasonable diligence is adequate when dealing with stolen cultural objects since this type of personal property might only be retrieved through means of investigation.⁴⁸⁵

Standard of diligence

Throughout its dictum, the court in *DeWeerth* did not establish a standard of reasonableness,⁴⁸⁶ but instead concluded that the reasonableness of the diligence must be assessed on the basis of the circumstances of the case at hand.⁴⁸⁷ Basing its assessment on the persuasive decision of *O’Keeffe v. Snyder*, it considered that a key circumstance to take into consideration in the assessment of reasonableness is the nature and the value of the personal property at stake;⁴⁸⁸ the more valuable the property subjected to contention, the more stringent the test of reasonableness ought to be.⁴⁸⁹ As such, the Court of Appeals – comparing her inquiries to the ones of the claimant in *Elicofon* – found that DeWeerth had not exercised reasonable diligence and concluded: “In contrast with the “continuous and diligent search” following “many channels” in *Elicofon*, DeWeerth’s investigation was minimal”.⁴⁹⁰ In fact, the court found that the mere filing of the two standard forms with the military government responsible for the Bonn-Cologne region and with the *Bundeskriminalamt*, the inquiries with her lawyer and with the art expert were too superficial to demonstrate conscientiously reasonable inquiries.⁴⁹¹ Almost no information as to the painting or the occurrence of the theft was communicated through these channels in order to establish a real chance of recovery.⁴⁹² Furthermore, DeWeerth was too easily defeated as she abandoned any effort that

converter accrues when property is taken); *Federal Insurance Co. v. Fries*, 78 Misc.2d 805, 810, 355 N.Y.S.2d 741, 747 (Civ.Ct.1974) (action against recipient of mistaken delivery accrues at the time of delivery). As the court in *Elicofon* observed, the unreasonable delay rule serves to mitigate the inequity of favoring a thief over a good-faith purchaser. 536 F.Supp. at 849. [...] A construction of the rule requiring due diligence in making a demand to include an obligation to make a reasonable effort to locate the property will prevent unnecessary hardship to the good-faith purchaser, the party intended to be protected”.

⁴⁸¹ As the court notes: “New York law governing limitations of action also weighs in favor of a duty to attempt to locate stolen property. The New York Court of Appeals has said that the primary purpose of a limitations period is fairness to a defendant (*Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.S.2d 427, 429, 301 N.Y.S.2d 23, 248 N.E.2d 871). A defendant should “be secure in his reasonable expectation that the stale has been wipe clean of ancient obligations, and he ought not to be called on to resist a claim where the “evidence has been lost, memories have faded, and witnesses have disappeared” ’” (*id.*, quoting *Developments in the Law: Statutes of Limitations*, 63 Harv.L.Rev. 1177, 1185).” *DeWeerth v. Baldinger*, (December 1987), at 109.

⁴⁸² *DeWeerth v. Baldinger*, (December 1987), at 109: “There is also the need to protect the judicial system from the burden of adjudicating stale or groundless claims. *Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473, 476–77, 497 N.Y.S.2d 890, 892–93, 488 N.E.2d 820, 822–23 (1985) (citation omitted). These policies would be frustrated if plaintiffs were free to delay actions for the return of stolen property until the property’s location fortuitously came to their attention. Conceivably, those claiming to be owners, or their heirs, could wait idly for decades or even centuries before any legal obligation arose to pursue their claims. In such cases, all of the problems of lost evidence, faded memories, and unavailable witnesses would undoubtedly be exacerbated. Additionally, fraudulent and groundless claims would be encouraged as defendants would face a heavy burden of refuting proffered testimony related to events of the distant past” and “This case illustrates the problems associated with the prosecution of stale claims. Gisela von Palm, the only witness who could verify what happened to the Monet in 1945 is dead. Key documents, including DeWeerth’s father’s will and reports to the military authorities, are missing. DeWeerth’s claim of superior title is supported largely by hearsay testimony of questionable value. Memories have faded. To require a good-faith purchaser who has owned a painting for 30 years to defend under these circumstances would be unjust. New York law avoids this injustice by requiring a property owner to use reasonable diligence in locating his property. In this case, DeWeerth failed to meet that burden”; See also *DeWeerth v. Baldinger*, (1992), at 544.

⁴⁸³ Margules, (1991-1992), p. 637.

⁴⁸⁴ Margules, (1991-1992), p. 637.

⁴⁸⁵ *DeWeerth v. Baldinger*, (December 1987), at 109: “A rule requiring reasonable diligence in attempting to locate stolen property is especially appropriate with respect to stolen art. Much art is kept in private collections, unadvertised and unavailable to the public. An owner seeking to recover such property will almost never learn of its whereabouts by chance. Yet the location of stolen art may frequently be discovered through investigation” citing F. Feldman & B. Burnham, *An Art Archive: Principles and Realization*, 10 Conn.L.Rev. 702, 724 (1978) where it is submitted that French and Italian authorities have advanced that registries and investigations drastically increase recovery rates (up to 75%).

⁴⁸⁶ Demarsin, (2011), pp. 651-652.

⁴⁸⁷ *DeWeerth v. Baldinger*, (January 1987), at 694, citing *Elicofon*, 536 F.Supp. at 849 (citing *Reid v. Board of Supervisors*, 128 N.Y. 364, 28 N.E. 367 (1891) and *Nyphus v. Travel Management Corp.*, 466 F.2d 440 (D.C.Cir.1972); *DeWeerth v. Baldinger*, (1987), at 110 (*op. cit.*), citing *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp. at 849.

⁴⁸⁸ *DeWeerth v. Baldinger*, (December 1987), at 110: “When the action is for the return of stolen property, one of the key circumstances is the nature and value of the property at issue. See *O’Keeffe v. Snyder*, 83 N.J. at 499, 416 A.2d at 873”.

⁴⁸⁹ *DeWeerth v. Baldinger*, (December 1987), at 110: “It has been recognized that when the property is valuable art, the search efforts that may reasonably be expected of an owner may be more exacting than where the property is of a different kind or of a lesser value”. *Id.*”.

⁴⁹⁰ *DeWeerth v. Baldinger*, (December 1987), at 111. For a detailed analysis of the court’s reasoning court, see *ibidem*, at 111-112.

⁴⁹¹ *DeWeerth v. Baldinger*, (December 1987), at 111.

⁴⁹² *DeWeerth v. Baldinger*, (December 1987), at 111.

was met with little or no success.⁴⁹³ Instead, the Court of Appeals focused on the steps that DeWeerth had failed to take in retrieving the paintings, such as her lack of participation in a specific program adopted at the end of the Second World War to help locate art that had been stolen during the war or the non-publication of the missing painting in the databases that were available to museums, galleries and collectors.⁴⁹⁴ The lack of a reasonably diligent search for twenty-four years was also held against DeWeerth, including a lack of research into catalogues and in the *catalogues raisonné* that could have resulted in the discovery of the whereabouts of the painting and which were published during this period of time.⁴⁹⁵ More specifically, the lack of research into the *catalogue raisonné* was qualified by the Court of Appeals as “particularly inexcusable”.⁴⁹⁶ What is more, DeWeerth’s elderly age and the fact that she was an individual – and not a state – did not excuse her delay.⁴⁹⁷ The accessibility of the publications within which the relevant information could be found was also considered in assessing DeWeerth’s exercise of reasonable diligence.⁴⁹⁸

(5) New York Laches

Demand and refusal versus laches – Solomon R. Guggenheim Foundation v. Lubell

The findings of the court in the case of *DeWeerth* were, nevertheless, reconsidered by the Appellate Division of New York’s Supreme Court, as well as by the Court of Appeals of New York in the case of *Solomon R. Guggenheim Foundation v. Lubell*.⁴⁹⁹

In *Solomon R. Guggenheim Foundation v. Lubell*, an action in replevin for a 1912 gouache by Marc Chagall was brought by the Foundation against Lubell. The gouache – a preparatory work to Chagall’s painting entitled *Le Marchand de Bestiaux* – was donated by Solomon R. Guggenheim to the museum bearing his name in 1937, a museum operated by the Solomon R. Guggenheim Foundation. Although it remains unclear how the painting disappeared, it is believed that a staff member – most likely a mailroom employee – stole the gouache in the mid-1960s from the New York-based museum. The foundation was unable to point at a specific year of disappearance: although it did note in the mid-1960s that the painting could not be found, it was only able to confirm the loss by the end of 1969 / beginning 1970 when it undertook to inventorise the museum’s collection. Meanwhile, the Lubell spouses bought the gouache in May 1967 from the Robert Elkon Gallery – a prominent Manhattan gallery – that was unaware of the illicit origin of the painting. The bill of sale to the Lubell spouses did specify that the gouache originated from an individual collector, who was later on identified as a mailroom employee of the Guggenheim museum, the same employee that was previously suspected of the theft. The rediscovery of the gouache was fortuitous. In 1985, a private art dealer brought a transparency of the gouache to Sotheby’s, where it was recognised by an employee of Sotheby’s who previously worked at the Guggenheim museum and who was well-aware of the missing pieces of the latter’s collection. The employee of Sotheby’s then notified the museum of the reappearance of the gouache at their office. In August 1985, the foundation was informed of the Lubell spouses’ possession and made a demand for the restitution of the painting in January 1986, a demand that was subsequently refused.

Although the trial court applied the *DeWeerth* demand and refusal doctrine and found that the foundation had unreasonably delayed its demand,⁵⁰⁰ the Appellate Division of the New York Supreme Court predicated the application of the *Menzel* demand and refusal rule.⁵⁰¹ In substantiating its predilection for *Menzel*, it stated that the court in *DeWeerth* had erred in the application of New York law.⁵⁰² Imposing a reasonable diligence requirement in the application of the demand and refusal accrual of the cause of action was seen by the *Solomon* court as a

⁴⁹³ *DeWeerth v. Baldinger*, (December 1987), at 111.

⁴⁹⁴ *DeWeerth v. Baldinger*, (December 1987), at 111-112; Demarsin, (2011), p. 652.

⁴⁹⁵ *DeWeerth v. Baldinger*, (December 1987), at 112; Demarsin, (2011), p. 652.

⁴⁹⁶ *DeWeerth v. Baldinger*, (December 1987), at 112; as a counter-argument, it can be advanced that the two cases were not comparable since the character of the parties was clearly distinguishable: DeWeerth and the German government differed in experience, knowledge and resources. See Demarsin, (2011), p. 650.

⁴⁹⁷ *DeWeerth v. Baldinger*, (December 1987), at 111: “But in 1957, when DeWeerth made her last attempt to locate the painting, she was only 63 years old. [...] Finally, although an individual, DeWeerth appears to be a wealthy and sophisticated art collector; even if she could not have mounted a more extensive investigation herself, she could have retained someone to do it for her”.

⁴⁹⁸ *DeWeerth v. Baldinger*, (December 1987), at 111.

⁴⁹⁹ *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623, (February 14, 1991).

⁵⁰⁰ The museum had done nothing for almost twenty years, except search for the painting within its building. See Demarsin, (2011), p. 654.

⁵⁰¹ *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 315: “We agree with the Appellate Division that the timing of the museum’s demand for the gouache and the appellant’s refusal to return it are the only relevant factors in assessing the merits of the Statute of Limitations defense. We see no justification for undermining the clarity and predictability of this rule by carving out an exception where the chattel to be returned is a valuable piece of art”; Demarsin, (2011), p. 655, referring to a “pure demand and refusal” and further citing *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 429.

⁵⁰² *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 317; Kay, (1996), p. 34.

misapprehension of New York law⁵⁰³ for several reasons: firstly, the mere expiration of a period of time could not affect the relative possessory rights of the parties.⁵⁰⁴ Secondly, imputing a burden of reasonable diligence upon a dispossessed owner would contribute to supporting the illicit trafficking in cultural objects in New York.⁵⁰⁵ Thirdly, the demonstration of reasonable diligence by the owner in searching for a stolen chattel was considered as a particularly intricate – and, therefore, undesirable – exercise.⁵⁰⁶ Such showing might impose a subjective legal standard upon dispossessed owners, resulting in arbitrary outcomes.⁵⁰⁷ Thenceforth, the court favoured assessing a lack of diligence in searching for the stolen property as a separate issue that was not relevant to the expiration of the statute of limitations.⁵⁰⁸ In doing so, the Appellate Division subsumed the requirement of reasonable diligence laid down in *DeWeerth* under the equitable doctrine of estoppel, which operates independently from the running of the statute of limitations.⁵⁰⁹ Therefore, it established that the reasonableness of the inquiries as to the stolen chattel was not a precondition to the application of the demand and refusal

⁵⁰³ *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 318; Demarsin, (2011), p. 653.

⁵⁰⁴ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 149-150: “[...] but, in the absence of a statute establishing title by virtue of the mere lapse of time (*compare*, CPLR 212[a]), we think it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long”; Demarsin, (2011), p. 654.

⁵⁰⁵ *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 320: “Further, our decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work (*sic*) unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser”; Demarsin, (2011), p. 657. See also Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), pp. 421-422.

⁵⁰⁶ *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 320: “Further, the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence” and “In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art (*see*, Burnham, *Art Theft: Its Scope, Its Impact and Its Control*), it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen artwork would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin. All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of the variables and that would not unduly burden the owner”.

⁵⁰⁷ Demarsin, (2011), p. 656, citing *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 430-431.

⁵⁰⁸ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 149: “[...] we prefer to characterize the defense urged here—lack of diligence in searching for stolen property, as opposed to unreasonable delay in making a demand upon a known possessor—as laches”. The distinction between the statute of limitations / laches made by the court in *Solomon* was in plain contradiction with *DeWeerth I*, where the obligation of reasonable diligence had been specifically distinguished from laches: the *DeWeerth I* court recognized the existence of laches as an equitable defence whereas it assimilated the given obligation of reasonable diligence to a “legal doctrine based exclusively on an unexcusable lapse of time” *DeWeerth v. Baldinger*, (1987), at 107: “While this proscription against unreasonable delay has been referred to as “laches”, the New York courts have explained that the doctrine refers solely to an unexcusable lapse of time and not to the equitable principle of laches, which requires prejudice to the defendant as well as delay. See *Devens v. Gokey*, 12 A.D.2d 135, 137, 209 N.Y.S.2d 94, 97 (4th Dep’t), *aff’d*, 10 N.Y.2d 898, 223 N.Y.S.2d 515, 179 N.E.2d 516 (1961); *Curtis v. Board of Education*, 107 A.D.2d 445, 448, 487 N.Y.S.2d 439, 441 (4th Dep’t 1985). [...] By contrast, the unreasonable delay rule, applicable to this case as a substantive requirement, specifies that whenever a demand would be required to start the limitations period, that demand may not be unreasonably delayed. This rule, focusing on the plaintiff’s conduct, conceptually starts the limitations period at the point where the plaintiff has had an opportunity to use due diligence in locating the property and making a demand, and has failed to do so”. Consequently, *DeWeerth I* considered that the two ought to be clearly differentiated. The same distinction is to be inferred from the case of *Kunstsammlungen Zu Weimar v. Elicofon*: in laying down the steps undertaken by the KZM in recovering the two painting of Albrecht Dürer for the purpose of assessing whether the demand had been unreasonably delayed, the court noted that these steps – which constituted reasonable and excusable delay to the court – were equally effective as to the defense of laches raised by Elicofon. *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 852 (footnote 20): “Our discussion of the reasonableness of the delay in making the demand for the paintings also disposes of Elicofon’s assertion of the defense of laches, asserted in his answer as the Fifth Affirmative Defense” and *ibidem*, at 110: “Although Judge Broderick subsumed the laches issue into his discussion of the statute of limitations, 658 F.Supp. at 693 n. 7, the two issues are distinct. Laches is an equitable defense that requires a showing of delay and prejudice to the defendant, whereas the reasonably prompt demand principle involved in this case is a legal doctrine based exclusively on an unexcused lapse of time. See *Dervens v. Gokey*, *supra*, 12 A.D.2d at 137, 209 N.Y.S.2d at 97”. Nevertheless, *Solomon* reversed these decisions by specifying that the delay in initiating proceedings because of want of diligence in searching for the stolen property prejudices the defendant in laches, and cannot be understood as affecting the running of the statute of limitation (*Solomon R. Guggenheim Foundation v. Lubell* (1990), at 149: “We agree that if actual knowledge of the whereabouts of stolen property is relevant to a determination of the timeliness of a replevin action, then, as a matter of logic, if not policy, imputed knowledge should be relevant too. Where we disagree is that delay alone can make a replevin action untimely even when knowledge of the whereabouts of the property is actual”; Demarsin, (2011), p. 655). In the opinion of the court in *Solomon*, “there is no reason to obscure its [i.e. the demand and refusal rule] straightforward protection of true owners by creating a duty of reasonable diligence”. *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 319; Demarsin, (2011), p. 656. This reasoning was affirmed by the Court of Appeals that contended that the statute of limitation merely runs from the moment the demand is formulated and rejected (*Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 315 and 318) without any further requirement not to unreasonably delay the demand. See Demarsin, (2011), p. 655, citing *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 430.

⁵⁰⁹ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 148-149.

rule,⁵¹⁰ but – *a contrario* – that a lack of diligence in searching for the stolen property was relevant to the application of the equitable defence of laches.⁵¹¹

Laches is best understood as an equitable defence⁵¹² that proscribes a party from asserting a right when this assertion has been unreasonably delayed and would result in prejudicing the other party.⁵¹³ Put differently, laches is an affirmative defence that may be asserted when the defendant cannot successfully rely on the technical defence afforded by the expiration of the statute of limitations against the claimant.⁵¹⁴ As such, the defendant may invoke the equitable defence of laches against a claim for the recovery of a stolen chattel that was duly introduced, so as to mitigate the unfairness stemming from an unnecessarily protracted formulation of the demand.⁵¹⁵ Nevertheless, if invoked, the burden of proving laches is imputed upon the defendant.⁵¹⁶ Because it is an equitable doctrine, laches is grounded upon the premise that “Equity aids the vigilant, not those who sleep on their rights”.⁵¹⁷ In the context of recovery of stolen personal property, it is an appropriate doctrine because it takes the vigilance of both parties into consideration;⁵¹⁸ it “involves a multi-factor balancing of all equities, including the owner’s diligence, the buyer’s behavior and prejudice to the buyer”.⁵¹⁹ Furthermore, it properly protects the interests of a purchaser who acts in good faith and is unaware that the chattel has been stolen by

⁵¹⁰ The trial court found that a demand could not be unreasonably delayed for the purpose of the application of the statute of limitations, and thus that a dispossessed owner has an obligation to use reasonable efforts to find the stolen property to ensure that the demand is not unreasonably delayed. The Appellate Division of New York’s Supreme Court found that the trial court had erred in this regard. See *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 317.

⁵¹¹ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 146: “We hold that whether plaintiff was obligated to do more than it did in searching for the gouache depends on whether it was unreasonable not to do more, and whether it was unreasonable not to do more is an issue of fact relevant to the defense of laches and not to the statute of limitations. The action, therefore, should not have been dismissed as barred by the statute of limitations” and at 148-149: “Instead, the dismissal in *DeWeerth* appears to have been based not on the lapse of any particular period of time, but on an estoppel. Its gist is that although the plaintiff’s title to the stolen property might be lawful, she should not be heard to assert it because the delay attributable to her lack of diligence in searching for the property prejudiced the defendant in her defense. That is laches. While no express finding of prejudice, a necessary element of laches, was made, because none was thought to be needed, there was, however, an explicit reference to a deceased witness, faded memories, lost documents, hearsay testimony and questionable value, and the “injustice: of having “to defend under these circumstances” (at p. 112)”. See also *ibidem*, at 151: “We take no position as to whether an active approach is more effective than a passive one, and should therefore be encouraged through an accrual rule creating an incentive to investigate. As we see it, the question is not whether the search measures posited by defendant would have likely resulted in an early recovery of the gouache, but whether plaintiff’s failure to take such measures was unreasonable, and regarded as such in the trade in the 1960’s, a question of fact left unresolved on this record”.

⁵¹² As was established in the case of *Wertheimer v. Cirkor’s Hayes Storage Warehouse*, “Fundamental fairness is the sine qua non of the laches doctrine”. *Wertheimer v. Cirkor’s Hayes Storage Warehouse, Inc.*, (2001), at 7, citing *Harris v. Purcell*, 193 Ariz 409, 412.

⁵¹³ “**laches** (**lach-iz**). [Law French “remissness; slackness”] (14c) **1.** Unreasonable delay in pursuing a right or claim — almost always an equitable one — in a way that prejudices the party against whom relief is sought. — Also termed *sleeping on rights*. **2.** The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought. “The doctrine of **laches** ... is an instance of the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair or unjust.” William F. Walsh, *A Treatise on Equity* 472 (1930).” Garner, B. A., *Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Laches; see also *In re Flamenbaum*, (2010), at 1097; Demarsin, (2011), p. 690.

⁵¹⁴ Demarsin, (2011), pp. 657-658, citing *Solomon R. Guggenheim Foundation v. Lubell*, (1991), at 431; Fincham, (2009-2010), p. 197.

⁵¹⁵ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 148: “When this potentiality for staleness becomes an actuality because of the plaintiff’s inexcusable delay in acquainting himself with the facts that would enable him to perform the requisite act, an appeal can be made to the conscience of the court to dismiss the action as untimely notwithstanding that it was commenced within the statutory period, i.e. within three years after the demand”; *In re Flamenbaum*, (2010), at 1097: “The museum filed its claim within three years after the estate rejected its demand. Accordingly, this proceeding is not barred by the statute of limitations. This approach does not mean, however, that in New York, where application of the demand rule is generally protective of owners (77 Am. Jur. POF 3d 259, Proof of Claim Involving Stolen Art or Antiquities § 32), an original owner may be lax in searching for missing or stolen property or may delay unreasonably in making a demand. The owner must be diligent, because even where the statute of limitations has not run, the claim may be barred by the doctrine of laches (*Solomon R. Guggenheim Foundations v. Lubell*, 77 N.Y.2d 311, 321, 567 N.Y.S.2d 623, 569 N.E.2d 426 [1991])”; Demarsin, (2011), p. 658; Redman, (2008), p. 216.

⁵¹⁶ Demarsin, (2011), p. 658.

⁵¹⁷ *Kamat v. Kurtha*, Not Reported in F.Supp.2d, 2008 WL 5505880, (April 14, 2008), at 4: “‘[Laches is based on the maxim, ‘vigilantibus non dormientibus aequitas subvenit,’ meaning ‘equity aids the vigilant, not those who sleep on their rights.’ “ *Ikelionmu v. United States*, 150 F.2d 233, 237 (2d Cir.1998) (quoting *Ivanti Contracting Corp. v. City of New York*, 103 F.2d 257, 259 (2d Cir.1997))”; see also Demarsin, (2011), p. 627, footnote 28 and Fincham, (2009-2010), p. 197.

⁵¹⁸ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 152. In reaction to an argument formulated by the Guggenheim museum which proffered that the purchaser should have exercised diligence in its acquisition whilst ignoring red flags: “‘It was this failure to investigate obvious red flags’, plaintiff argues, not its own ostensible lack of diligence, that led to defendant’s purchase of the gouache. We comment on this argument only to point up that defendant’s vigilance is as much in issue as plaintiff’s diligence, which is another reason why we characterize the defense urged here as laches. The reasonableness of both parties must be considered and weighed”.

⁵¹⁹ Redman, (2008), p. 216, referring to *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E. 2d 426, 431 (N.Y. 1991); see also *Kamat v. Kurtha*, (2008), at 7, citing *United States v. Portrait of Wally, A Painting by Egon Schiele*, No. 99 Civ. 9940(MBM), 2002 WL 553532 at *22 (S.D.N.Y. April 12, 2002) (laches requires a “fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities” “[...]”); *U.S. v. Portrait of Wally*, 663 F.Supp.2d 232 (2009), at 274, citing *Robins Island Pres. Fund., Inc. v. Southold Den. Corp.*, 959 F.2d 409, 423 (2d Cir. 1992), itself quoting *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 30-31, 72 S.Ct. 12, 96 L.Ed. 31 (1951).

taking the diligence of the owner into account.⁵²⁰ What is more, the practical effect in allowing laches to operate in the context of the replevin of personal property is to introduce constructive notice in correlation with the statute of limitations. As was noted by the Appellate Division of the Supreme Court in *Solomon*: “We agree that if actual knowledge of the whereabouts of stolen property is relevant to a determination of the timeliness of a replevin action, then, as a matter of logic, if not policy, imputed knowledge should be relevant too”.⁵²¹ In this excerpt, the Appellate Division acknowledged that notice of the whereabouts of the property to promptly formulate a demand can be constructed upon the owner. Nonetheless, such a constructive notice ought not to stem from the mere lapse of time – or in other words to be constructed in the statute of limitations –, but is to be found in the doctrine of laches: “Where we disagree is that delay alone can make a replevin action untimely when knowledge is imputed. Indeed, we question whether delay alone can make a replevin action untimely, even when knowledge of the whereabouts of the property is actual. [...] we prefer to characterize the defense urged here—lack of diligence in searching for stolen property, as opposed to unreasonable delay in making a demand upon a known possessor—as laches. Indeed, we do so mainly in order to point up that if such defense is to be deemed meritorious, prejudice must be articulated in addition to delay”.⁵²²

Technically, in order for laches to be successful, four conditions must be fulfilled: firstly, there must be a certain conduct of the defendant that results in the complainant seeking a remedy. Secondly, the complainant must have had notice or knowledge of the defendant’s conduct and he must have been given the opportunity to initiate legal proceedings, but has delayed asserting his rights against the defendant. Thirdly, the defendant must not have received notice or have been aware of the fact that the complainant was going to assert the right he is relying upon. Finally, accepting relief for the claimant in applying laches must result in an injury or prejudice to the defendant.⁵²³ Because of the fact-sensitiveness of this defence,⁵²⁴ the determination of its merits is left to the discretion of the trial courts,⁵²⁵ except when the owner’s carelessness is so extreme that it could be decided as a matter of law.⁵²⁶ Nonetheless, the main thrust in assessing laches is that a court must weigh the elements of unreasonable delay and prejudice and, subsequently, apply this balancing exercise to the facts of the case.⁵²⁷ These two conditions are discussed in more detail below.

⁵²⁰ *Kamat v. Kurtha*, (2008), at 5: “‘The doctrine of laches sufficiently safeguards the interests of a good faith purchaser of lost art by weighing in the balance of competing interests the owner’s diligence in pursuing her claim’”, citing *Hoelzer v. City of Stamford*, 933 F.2d 1131, 1137–38 (2d Cir.1991); *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, Not Reported in F.Supp.2d, 1999 WL 673347, (August 30, 1999), at 7: “[t]he doctrine of laches ... safeguards the interests of a good faith purchaser of lost or stolen art ... by weighing in the balance of competing interests the owner’s diligence in pursuing his claim.” *Czurtoyyski-Borbon v. Turcotte*, N.Y.L.J., Apr. 28, 1999, at 27 col. 2 (Sup.Ct.N.Y.Cty.1999)”.

⁵²¹ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 149.

⁵²² This can be contrasted with the *Menzel* demand and refusal rule, which merely requires an actual notice, as mirrored in the mere requirement of formulating a demand.

⁵²³ These conditions are enumerated in *DeWeerth v. Baldinger*, (April 1987), at 693, footnote 6, citing *Dednjak v. Madonado*, 115 Misc.2d 211, 214, 453 N.Y.S.2d 965, 968 (N.Y. City Civ.Ct.1982) citing 36 N.Y.Jur., Limitations & Laches, Sec. 153 at 141 (1964); See also *DeWeerth v. Baldinger*, (December 1987), at 107, citing *Devens v. Gokey*, 12 A.D.2d 135, 137, 209 N.Y.S.2d 94, 97 (4th Dep’t), *Aff’d*, 10 N.Y.2d 898, 223 N.Y.S.2d 515, 179 N.E.2d 516 (1961) and *Curtis v. Board of Education*, 107 A.D.2d 445, 448, 487 N.Y.S.2d 439, 441 (4th Dep’t 1985).

⁵²⁴ *Kamat v. Kurtha*, Not Reported in F.Supp.2d, 2009 WL 103643, (January 15, 2009) at 3 (footnote 1): “[about laches] This is a highly fact specific inquiry. *Tri-Star Pictures v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994) (“The equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case.”); Demarsin, (2011), p. 677.

⁵²⁵ *DeWeerth v. Baldinger*, (1992), at 553: “Because of the particularly fact-sensitive nature of the laches inquiry and the lack of any objective standard pursuant to which a laches defense will be held to bar an otherwise valid claim, an assessment of whether a plaintiff is guilty of laches is committed to the sound discretion of the trial court. See *Stone I*, supra, at 623–624.”; see also *Kamat v. Kurtha*, (2008), at 6: “While a finding of laches rests within the discretion of the trial court, “[t]he equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case. The inquiry is a factual one.” *Tristar Pictures*, 17 F.3d at 44 (finding that the record is not “so clear that we can conclude with certainty” that plaintiff’s claim is time barred by laches); see also *Country Floors, Inc. V. P’ship Composed of Gepner and Ford*, 930 F.2d 1056 (3d Cir.1991) (“[I]f the correct disposition of the equitable defense of laches can only be made by a close scrutiny of the particular facts and a balancing of the respective interests and equities of the parties, as well as of the general public’ [and, thus,] usually requires the kind of record only created by full trial on the merits.”) (quoting 2 J. McCarthy Trademarks and Unfair Competition 573 (2d ed.1984))”.

⁵²⁶ *Kamat v. Kurtha*, (2009), at 3 (footnote 1): “Courts are reluctant to find as a matter of law that an owner has failed to act diligently in demanding the return of his property. Courts make such findings when, for example, the owner’s delay in demanding the return of the property was extreme. See, e.g., *Robins Island Preservation Fund, Inc. V. Southold Development Corporation*, 959 F.2d 409, 424 (2d Cir.1992) (the Court granted summary judgment in favor of the defendants on the laches claim because plaintiff knew the location of the property and chose not to lay claim to the land for approximately two centuries)”. See also Demarsin, (2011), pp. 677–678.

⁵²⁷ *DeWeerth v. Baldinger*, (1992), at 553: “In reviewing a laches defense, a court must balance the two factors of delay and prejudice, and then apply that balancing test to the facts of the case. *Stone v. Williams*, 873 F.2d 620, 623–625 (2d Cir.1989) (“*Stone I*”), rev’d on other grounds 891 F.2d 401 (2d Cir.1989) cert.denied 496 U.S. 937, 110 S.Ct.3215, 110 L.Ed.2d 662 (1990) (“*Stone II*”).”; *Kamat v. Kurtha*, (2008), at 4, citing *Peysner v. Searle Blatt & Co., Ltd.*, No. 99 Civ. 10785(WK), 2000 WL 1071804, at *4–5 (S.D.N.Y. Aug.2, 2000) and *Jose Armando Bermudez & Co. v. Bermudez Int’l*, No. 99 Civ. 9346(AGS), 2000 (citing *Tri-Star Pictures Inc. v. Leisure Time Prods., B.V.*, 17 F.2d 38, 44 (2d Cir. 1994). A mere delay in timely formulating a demand due to a lack of diligence is not sufficient to affect the relative rights of the parties, as prejudice to the defendant must also be demonstrated. *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 149–150: “[...] but, in the absence of a statute establishing title by virtue of the mere lapse of time (*compare*, CPLR 212[a]), we think it plain that the relative

Unreasonable delay – lack of reasonable diligence

Although not able to test its dictum to the case,⁵²⁸ the New York Supreme Court Appellate Division in *Solomon R. Guggenheim Found. v. Lubell* was the first to address the question of unreasonable delay in the context of the replevin of stolen cultural property. It established that, in order to assess an unreasonable delay, the emphasis should be on the lack of reasonable diligence in searching for the stolen personal property, and not merely upon the belatedness in formulating a demand.⁵²⁹ This clarification entails that an unreasonable delay cannot be measured by the mere expiration of a specific period of time.⁵³⁰ On the contrary, unreasonable delay depends on whether the claimant or his predecessor in interest – such as family members⁵³¹ – is reasonably diligent in searching for the stolen property⁵³² or – *a contrario* – whether it is unreasonable for the claimant not to do more in his inquiry, which in both instances constitutes exclusively an issue of fact.⁵³³

The need to exercise reasonable diligence presupposes, in first instance, that the owner is looking for his property because he believes it still exists. In the case of *Sotbeby's Inc. v. Shene*,⁵³⁴ the German State of Baden-Württemberg believed that the manuscript that was the subject of the litigation had been destroyed during World War II.⁵³⁵ Consequently, it undertook no steps to retrieve the manuscript for nearly sixty years.⁵³⁶ Nevertheless, from the moment that the claimant discovered that the book had survived the war, it undertook sensible and diligent steps to recover the property, thus discarding unreasonable delay for the purpose of laches.⁵³⁷ It is thus important for the owner to have been aware of the claim.⁵³⁸

possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long. Indeed, rather than harming defendant, delay alone could be viewed as having benefited her, in that it gave her that much more time to enjoy what she otherwise would not have had (cf. *Marxus v. Village of Mamaronck*, 283 N.Y. 325, 332, 28 N.E.2d 856)”; see also *Kamat v. Kurtha*, (2008), at 5. *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 150, where the court noted that the court in *DeWeerth I* failed to address the element of prejudice. In *DeWeerth v. Baldinger*, (1992), at 553, the court submitted: “It is also important to recognize that “[l]ack of diligence, standing alone is insufficient to support a claim of laches; the party asserting the claim also must establish that it was prejudiced by the delay.” *Majorica, S.A. v. R.H. Macy & Co. Inc.*, 762 F.2d 7, 8 (2d Cir.1985); *Angustine v. Szwed*, 77 A.D.2d 298, 432 N.Y.S.2d 962, 965 (App.Div. 4th Dept 1980)”. See also *Kamat v. Kurtha*, (2008), at 5.

⁵²⁸ As Gerstenblith reports, the Solomon case was settled as both Lubell and the gallery owner that sold the gouache to Lubell paid the museum in order for her to be able to retain the gouache. Thenceforth, there was no determination of what constituted a lack of diligence for the purpose of the doctrine of laches in this case. See Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 423.

⁵²⁹ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 149 and at 147-148: “The theory is that if delay in making a demand with knowledge of the whereabouts of the property is relevant in determining the timeliness of a replevin action, delay should also be relevant if the whereabouts of stolen property could have been known with a reasonably diligent search”; Demarsin, (2011), p. 654; see also *Kamat v. Kurtha*, (2008), at 5, citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d at 315–321, 567 N.Y.S.2d 623, 569 N.E.2d 426 and *Sanchez v. Trs. Of the Univ. of Penn.*, No. 04 Civ. 1253(JSR), 2005 WL 94847, at 2 (S.D.N.Y. Jan.18, 2004) “(finding laches on motion for summary judgment where “no reasonable fact-finder could find that plaintiff’s efforts [to recover painting] were diligent” where it delayed for more than thirty years). But once a stolen painting has been located, an unreasonable delay in demanding the painting back may also result in a finding of laches. See *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 183 (2d Cir.2000) (“a plaintiff may not unreasonably delay in making a demand for the property whose location is known”). See also *Kamat v. Kurtha*, (2009), at 3 (footnote 1).

⁵³⁰ *Kamat v. Kurtha*, (2008), at 5: “Courts have found such prejudice and, thus, made a laches determination, even where a party’s delay in asserting its rights was less than one year. See, e.g., *Allens Creek/Corbetts Glen Preservation Group, Inc. v. Caldera*, 88 F.Supp.2d 77, 83 (W.D.N.Y.2000) (plaintiffs’ eight-month delay between learning of defendant’s alleged violation of Clean Water Act and commencement of legal action challenging construction project was unreasonable delay supporting defendant’s laches defense); *Matter of Gen. Bldg. Contractors of New York State v. Egan*, 106 A.D.2d 688, 689, 483 N.Y.S.2d 746 (3rd Dep’t 1984) (petitioner’s more than six-month delay in pursuing appeals was unreasonable and supported a finding of laches). Moreover, the exact duration of delay is not the determining factor in establishing laches. See *N. Pac. R.R. Co. v. Boyd*, 228 U.S. 482, 508, 33 S.Ct. 554, 57, L.Ed. 931 (1913) (“the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another.”).

⁵³¹ *Bakalar v. Vavra*, (2011), at 303, citing *Bakalar v. Vavra*, 2006 WL 2311113, at 3, *Sanchez v. Trustees of the Univ. of Perm.*, 04 Civ. 1253(JSR), 2005 WL 94847, at 2–3 and *Wetheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, 300 A.D.2d 117, 752 N.Y.S.2d 295, 297 (2002). See also *ibidem* at 305: “Indeed, as to Vavra and Fischer personally, the applicability of laches is doubtful given that Vavra only became an heir to the Grunbaum estate in 1994, and Fischer only became aware of the existence of Grunbaum’s estate in 1999. But ultimately, both Vavra’s and Fischer’s ancestors were aware of their relationship to the Grunbaums and their eventual deaths in concentration camps. Given this knowledge, this court finds by a preponderance of the evidence that Defendant’s ancestors were aware of—or should have been aware of— their potential intestate rights to Grunbaum property, and Vavra and Fischer are bound by the knowledge of their respective families. See *Wertheimer*, 752 N.Y.S.2d at 297 (noting plaintiff’s grandfather’s lack of diligence); *Sanchez*, 2005 WL 94847, at 3 (same)”.
⁵³² *In re Flammenbaum*, (2010), at 1099: “It is not the length of the delay that is dispositive; rather, the issue is whether the delay was reasonable under the circumstances (*Solomon R. Guggenheim Found. V. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 [1991])”; Demarsin, (2011), p. 677.

⁵³³ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 146; Demarsin, (2011), p. 677.

⁵³⁴ *Sotbeby’s, Inc. v. Shene*, Not Reported in F.Supp.2d, 2009 WL 762697, (March 23, 2009).

⁵³⁵ Demarsin, (2011), pp. 681-682.

⁵³⁶ *Sotbeby’s, Inc. v. Shene*, (2009), at 4.

⁵³⁷ *Sotbeby’s, Inc. v. Shene*, (2009), at 4: “However, it was only in 2004 that Baden-Württemberg even learned that the book still existed. Until then, it reasonably believed that the book, like many other artifacts with which it was stored, had been destroyed in a fire. Baden-Württemberg has demonstrated that it diligently pursued claims for other objects that it believed had been stolen, rather than destroyed, even if Baden-Württemberg had publicly announced that the book had been stolen, it is highly unlikely that it would have been able to recover it meaningfully sooner, since the book apparently spent decades sitting on Doty’s bookshelf at home. When the book was

On the assessment of reasonable diligence post-*Guggenheim*, courts have been particularly sensitive to the behaviour of the owner in researching his property. Therefore, inertia in searching for the stolen property has been assimilated to unreasonable delay.⁵³⁹ Cases such as the *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.* appropriately illustrate how idleness can work to the detriment of the owner.⁵⁴⁰

In *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, a tenth century palimpsest – a copy of the two famous works of Archimede “On Floating Bodies” and “Methods of Mechanical Theorems” – disappeared from the collection of the Greek Orthodox Patriarchate of Jerusalem sometime during the twentieth century. Throughout the ages, the palimpsest had made its way into the Library of the Patriarchate and was subsequently transferred to the Metochion of the Holy Sepulchre, a Monastery in Constantinople – now Turkish Istanbul – owned by the Patriarchate. During the 1930s, a hoard of manuscripts belonging to the Metochion collection was moved from the Monastery to Athens, Greece. The palimpsest was not reported as being amongst the books moved to Greece, but it was concurrently noted that it had disappeared from the Patriarchate’s collection. In fact, it was acquired in the 1920s by Sirieix, a French civil servant and businessman. Because the Metochion lacked authority to sell or remove any of the manuscripts in its collection without the authorisation of the Patriarchate, the acquisition by Sirieix was most likely unlawful. In 1956, Sirieix died and his daughter, Guersan, inherited the book. The Guersans attempted to sell the Palimpsest on several occasions. In the early 1970s, they issued two hundred brochures about it and distributed these among interested stakeholders. Although many reactions followed, the manuscript remained unsold. In 1993, it was consigned to Christie’s, sent to Oxford for further research and, finally, put up for auction in New York in 1998. Prior to the auction, Christie’s informed Greece that the palimpsest was soon to be auctioned. One week before the scheduled sale, the Patriarchate informed Christie’s that it was the rightful owner of the manuscript. It promptly initiated legal proceedings to prevent the palimpsest from being auctioned, although without success. After the sale, the Patriarchate amended its claim to include the buyer in its action for conversion. In pleading the case, the defendants averred that the action was barred on the basis of the equitable doctrine of laches.

In assessing the reasonableness of the Patriarchate’s diligence, the court established that it had not been diligent for two reasons: firstly, it was unaware of the theft despite clear indications that it had gone missing since the 1930s.⁵⁴¹ Instead, the Patriarchate only discovered the disappearance in 1998, when the manuscript was put up for sale by Christie’s. Secondly, the court noted that the Patriarchate had never claimed other manuscripts belonging to the Metochion collection back and that it had never reported any manuscript from the said collection as being missing.⁵⁴² Both elements pointed to a clear failure by the Patriarchate in searching for the stolen property. Similarly, in *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, a complete lack of inquiries by the claimant and his family members as to a painting of Camille Pissarro during a period of almost fifty years amounted to an unreasonable delay.⁵⁴³ In the same vein, the Surrogate’s Court in *In re Flamenbaum* conceded that inactivity by the museum owning the litigated Assyrian tablet for a period of fifty-one years constituted an unreasonable delay.⁵⁴⁴ A similar conclusion was reached in *Bakalar v. Vavra* where no efforts had been made by

ultimately sold by Captain Doty’s family to Margulis, and by Margulis to Shene, this was done in private transactions which the German owner could not have learned about. Once the Staatsgalerie and Baden–Württemberg finally learned of the book’s existence in 2004, as a result of contacts from Sotheby’s, they moved swiftly and diligently to assert a claim to the book”; Demarsin, (2011), p. 682.

⁵³⁸ In this regard, see *Bakalar v. Vavra*, (2011), at 303 and 304. For a more detailed explanation as to what notice of the claim entails, see pp. 304 and 305.

⁵³⁹ Demarsin, (2011), pp. 679 and ff.; much like statutes of limitations, laches witnesses of a policy against inertia in initiating legal proceedings. Demarsin, (2011), p. 627.

⁵⁴⁰ *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, (1999), at 6 and ff. In this case, the Patriarchate advanced that New York law, instead of French law, was to be applied to the contention (at 5). The court decided in favour of French law, but submitted that the result under both laws would not be different, because of the demands of the doctrine of laches under the law of New York (at 6).

⁵⁴¹ *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, (1999), at 10.

⁵⁴² *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, (1999), at 10.

⁵⁴³ *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, (2001), at 7: “With respect to the unreasonableness of the delay, plaintiff does not even attempt to justify his lack of diligence. The Wertheimer family literally did nothing to recover the Pissarro painting since the early 1950s. The last act taken by the Wertheimers with respect to the painting was to absolve Germany in 1960 from any responsibility for the painting’s disappearance. The painting apparently surfaced for a lengthy period, when it was advertised for sale by the Schoneman Galleries in New York City. Wertheimer was made aware by his grandmother in the early 1970s that some of the family property had been looted during the war. Plaintiff and his family did not report the Pissarro painting missing to the Art Loss Register, or contact galleries or museums regarding the painting”.

⁵⁴⁴ *In re Flamenbaum*, (2010), at 1098: “[...] the executor cites the conduct of the museum, which took no steps to report the tablet missing or to investigate or attempt to recover the tablet from the time it was discovered absent from the museum in 1945 until the present action was commenced in 2006. The tablet was never reported to any legal authority in any country as stolen; it was never listed as missing on any international art registry. Even after the museum learned in 1954 that the tablet was seen in the hands of a New York dealer, the museum made no attempt to contact the dealer, the New York City Police Department or Interpol or to otherwise seek recovery of the tablet. Instead, the museum allowed an additional 51 years to pass before reporting the tablet missing or making inquiry as to its whereabouts” and at 1099: “[...] the disappearance of the tablet was only noted in the museum’s internal record; it was not reported to authorities or listed on any registries. Further, although counsel for the museum repeatedly asserts that claimant had “no inkling of the

Vavra or any other family member prior to 1998 in recovering both the “Seated woman With Bent Left Leg (Torso)” gouache and a crayon drawing by Egon Schiele.⁵⁴⁵ Next to inertia, courts post-*Guggenheim* have demonstrated particular sensitivity to adequate steps undertaken by a dispossessed owner to publicise the theft. In *United States v. Fireman’s Fund Insurance Co.*,⁵⁴⁶ the dispossessed owner promptly reported the theft to the police, his insurer and the gallery where the painting had been purchased.⁵⁴⁷ These steps were considered as reasonable and appropriate, considering that the victim was a dilettante.⁵⁴⁸ In *Wertheimer v. Cirker’s Hayes Storage Warehouse*, the non-reporting by the claimant or his family members of the theft to the Art Loss Register or the non-informing of museums or galleries about the theft weighed negatively in the determination of reasonable diligence.⁵⁴⁹ In *In re Flamenbaum*, the Surrogate’s Court of Nassau also emphasised that the missing tablet had not been reported stolen to any national authorities or to any international missing art register.⁵⁵⁰ In fact, the court noted that even though the museum had, at a certain point, been informed that the tablet was in the possession of a New York dealer, it failed to approach either the dealer, the New York Police Department or Interpol.⁵⁵¹ What is more, the court will take the character of the owner into consideration when determining the degree of diligence expected. This had already occurred in the pre-*Guggenheim* era in *DeWeerth v. Baldinger*. In *DeWeerth*, the District Court took the age of DeWeerth into consideration in the degree of efforts undertaken.⁵⁵² Furthermore, it clearly distinguished the efforts of DeWeerth from the efforts made by the KZM in *Elicofon*, where the claimant was a government-owned museum disposing of “resources, knowledge and experience” that an individual does not have.⁵⁵³ In the post-*Guggenheim* case of *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, in an attempt at justifying its inaction of more than sixty years, the Patriarchate relied upon this factor by submitting that it could not be expected from an order of monks to undertake inquiries to retrieve the palimpsest.⁵⁵⁴ What is more, it argued that the Patriarchate was not equipped with the tools required to undertake the necessary diligence.⁵⁵⁵ The court rejected both arguments because of the speed with which the Patriarchate had obtained legal counsel for the purpose of instating prompt proceedings before the Christie’s sale.⁵⁵⁶ In the opinion of the court, if the Patriarchate was able to obtain legal help on such short notice, it was equally able to seek assistance from a third party to search for the manuscript throughout the seven decades during which the palimpsest was missing.⁵⁵⁷ Furthermore, courts will take the difficulties or the likelihood of discovering the identity of the possessor into consideration in their assessment of reasonable diligence.⁵⁵⁸ For example, in *DeWeerth v. Baldinger*, the court took the degree of difficulty in accessing documents about Claude Monet that would have disclosed the identity of the current possessor into its assessment of unreasonable delay.⁵⁵⁹ Finally, courts will also take failure to consult instruments developed to help victims in retrieving their property into account in addressing the reasonableness of the diligence.⁵⁶⁰ In doing so, courts are scrutinizing the reasonable diligence of the dispossessed owner by evaluating the information available in the owner’s sphere of influence.⁵⁶¹ The more advanced the available means of retrieving information about the stolen object, the higher the bar will be set as to the standard of reasonable diligence expected.⁵⁶²

whereabouts of the Object until ... 2006” (Post-trial brief dated Nov. 23, 2009, p. 11), the evidence shows that the museum took no action after being given information about the tablet’s whereabouts in 1954. It is not the length of the delay that is dispositive; rather, the issue is whether the delay was reasonable under the circumstances [...]. The court finds that the museum’s lack of due diligence was unreasonable”.

⁵⁴⁵ *Bakalar v. Vavra*, (2011), at 305.

⁵⁴⁶ *U.S. v. Fireman’s Funds Ins. Co.*, No. 99 Civ. 2622 (BSJ), 2001 U.S. Dist. LEXIS 804, at 1 (S.D.N.Y. Jan. 30, 2001), cited in Demarsin, (2011), p. 681.

⁵⁴⁷ Demarsin, (2011), p. 681.

⁵⁴⁸ Demarsin, (2011), p. 681.

⁵⁴⁹ *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, (2001), at 7.

⁵⁵⁰ *In re Flamenbaum*, (2010), at 1098.

⁵⁵¹ *In re Flamenbaum*, (2010), at 1098.

⁵⁵² *DeWeerth v. Baldinger*, (April 1987), at 694.

⁵⁵³ *DeWeerth v. Baldinger*, (April 1987), at 694-695: “Moreover, any comparison with *Elicofon* is inapposite. There the plaintiff was a government-owned art museum, with resources, knowledge and experience that far exceeded any means an individual such as Mrs. DeWeerth could muster to carry on a credible search for a missing painting”.

⁵⁵⁴ *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, (1999), at 10: “The only excuse the Patriarchate raises for its utter lack of diligence is that, as an order of monks, it could not be expected to search for a painting”. Note that the court erroneously submitted that the Patriarchate averred that it cannot be expected from an order of monks to undertake searches for a painting. The case concerned a palimpsest, and not a painting.

⁵⁵⁵ *Greek Orthodox Patriarchate of Jerusalem v. Christie’s Inc.*, (1999), at 10.

⁵⁵⁶ *Greek Orthodox Patriarchate of Jerusalem v. Christie’s Inc.*, (1999), at 10.

⁵⁵⁷ *Greek Orthodox Patriarchate of Jerusalem v. Christie’s Inc.*, (1999), at 10.

⁵⁵⁸ Demarsin, (2011), p. 684, citing *In re Peters*, 821 N.Y.S.2d 61, 68-69 (App. Div. 2006).

⁵⁵⁹ *DeWeerth v. Baldinger*, (April 1987), at 694.

⁵⁶⁰ Demarsin, (2011), p. 685.

⁵⁶¹ Demarsin, (2011), p. 685.

⁵⁶² Demarsin, (2011), p. 685.

Unreasonable delay – constructive notice

In *In re Flamenbaum*, the Appellate Division of the Supreme Court elucidated a similar misapprehension of New York law than the one that led the court in *Solomon* to overrule *DeWeerth v. Baldinger I*. In accordance with *DeWeerth's* *ratio decidendi*, the Supreme Court adopted the following line of reasoning that was delivered in *DeWeerth*: “To place the burden of locating stolen art-work on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art”.⁵⁶³ Because New York law never intended to impose a positive duty of reasonable diligence upon the owner, lackluster efforts by the owner cannot be dispositive in assessing an unreasonable delay. This misapprehension of the concept of unreasonable delay was already apparent in *Bakalar v. Vavra*, where the court – trying to give substance to the obligation of reasonable diligence – struggled with formulating diligence guidelines that Vavra or his family members ought to have followed; although it found that any diligent effort to recover stolen personal property – even remotely linked to the recovery of artworks –, might have been sufficient,⁵⁶⁴ it conceded at the same time that intermittent efforts would also have been sufficient, provided these efforts were made. Consequently, two years after the Surrogate’s Court’s decision, the Appellate Division in *In re Flamenbaum*⁵⁶⁵ overruled the lower court on the issue of unreasonable delay. In doing so, it clarified that it was not sufficient for the possessor to demonstrate a lack of reasonable diligence in searching for the stolen property. Instead, it is crucial for the possessor to demonstrate that, had the claimant exercised the required diligence, he ought to have discovered the identity of the possessor at some earlier time and was, therefore, dilatory in formulating his demand.⁵⁶⁶ As such, the emphasis should not merely be upon the owner’s lack of reasonable diligence in searching for the property, but upon an unreasonable delay in formulating a demand due to the owner’s lack of reasonable diligence. The decision of the Appellate Division therefore had the effect of constructing the unreasonable delay requirement – which is complementary to the requirement of prejudice – as a constructive notice of the whereabouts of the stolen property.⁵⁶⁷ Furthermore, it coincides with findings in legal precedents: in *DeWeerth v. Baldinger*, the court specified “Where a plaintiff delays in bringing suit because she is “justifiably ignorant of the facts giving rise to the cause of action,” a laches defense will not operate”.⁵⁶⁸ In *In re Peters v. Sotheby’s*, a failure by the owner to formulate a demand whilst knowing the identity of the possessor resulted in the finding of an unreasonable delay.⁵⁶⁹ In *Kamat v. Kurtha*, the owner waited sixteen months after having been informed of the possession of the property before demanding its return.⁵⁷⁰ Furthermore, the court noted that the owner had also failed to formulate a demand when the painting had priorly been offered for sale to him.⁵⁷¹ To the District Court of New York’s Southern District, this notification of the sale of the property was sufficient to put the owner on notice that his right to the property was being challenged.⁵⁷²

Prejudice to the defendant

Aside from a lack of reasonable diligence, the possessor relying upon the defence of laches must establish prejudice.⁵⁷³ Without proving this, the defence of laches is considered to be deficient.⁵⁷⁴ Prejudice can be demonstrated in many ways, but it mainly relates to difficulties in defending the case against the owner due to the unreasonable delay.⁵⁷⁵ In general, prejudice has been said to exist when – because of the loss of evidence and

⁵⁶³ As affirmed by the Court of Appeals *In re Flamenbaum*, 22 N.Y.3d 962, 1 N.E.3d 782, 978 N.Y.S.2d 708, 2013 N.Y. Slip Op. 07510, (November 14, 2013), at 966.

⁵⁶⁴ *Bakalar v. Vavra*, (2011), at 306.

⁵⁶⁵ *In re Flamenbaum*, 95 A.D.3d 1318, 945 N.Y.S.2d 183, 2012 N.Y. Slip Op. 04165, (May 30, 2012).

⁵⁶⁶ *In re Flamenbaum*, (2013), at 965-966: “Furthermore, the Estate provides no proof to support its claim that, had the Museum taken such steps, the Museum would have discovered, prior to the decedent’s death, that he was in possession of the tablet (*compare Peters v. Sotheby’s, Inc.*, 34 A.D.3d 29, 37–38, 821 N.Y.S.2d 61 [1st Dept.2006], *lv. Denied*, 8 N.Y.3d 809, 834 N.Y.S.2d 90, 865 N.E.2d 1257 [2007] [laches barred claim where owner had actual knowledge of the identity of the party in possession but did not demand return of the property])”.

⁵⁶⁷ *In re Flamenbaum*, (2012), at 1320: “The executor’s contention that the museum failed to exercise reasonable diligence by not reporting the tablet stolen to law enforcement authorities or listing it on an international stolen art registry is not, under the circumstances of this case, dispositive. The executor’s argument that, had the museum taken such steps, the tablet would have surfaced earlier, is mere conjecture and, moreover, is not supported by expert or other evidence”.

⁵⁶⁸ *DeWeerth v. Baldinger*, (1992), at 553, citing *In Re Estate of Barbash (sic)*, 334 N.Y.S.2d at 895, 286 N.E.2d at 271 and *Stone I*, supra, 624–625.

⁵⁶⁹ *In re Peters v. Sotheby’s*, (2006), at 37. In *In re Peters*, the owner of the painting under litigation tried to repurchase the painting “Strasse in Kragero” by Edward Munch, believing that his brother had legally transferred ownership of the painting. For this reason, he never formulated a demand for the return of the painting.

⁵⁷⁰ *Kamat v. Kurtha*, (2008), at 6.

⁵⁷¹ *Kamat v. Kurtha*, (2008), at 6.

⁵⁷² *Kamat v. Kurtha*, (2008), at 6.

⁵⁷³ *DeWeerth v. Baldinger*, (1992), at 553, citing *Majorica, S.A. v. R.H. Macy & Co. Inc.*, 762 F.2d 7, 8 (2d Cir.1985); *Angustine v. Szwed*, 77 A.D.2d 198, 432 N.Y.S.2d 962, 965 (App.Div. 4th Dept 1980); *Schönenberger*, (2009), p. 129.

⁵⁷⁴ *In re Flamenbaum*, (2010), at 1099-1100.

⁵⁷⁵ See *In re Flamenbaum*, (2012), at 185-186.

faded memories due to the passage of time, the death of witnesses, or a detrimental change of position⁵⁷⁶ of the defendant “in reliance upon the absence of a suit” – it becomes more difficult for a defendant to defend himself against a claim.⁵⁷⁷ There is increasing recognition by New York courts that prejudice can materialise through the passage of time.⁵⁷⁸ The disappearance of evidence constitutes an important prejudice to the detriment of the defendant;⁵⁷⁹ when it becomes virtually impossible for the defendant to prove that he, or a bequeather, has, or had, a validly acquired title, then the prejudice will be substantiated.⁵⁸⁰ Conflicting accounts of the property’s prior transfers⁵⁸¹ and the presence of documents reporting contradictory information⁵⁸² due to belated proceedings may also constitute prejudice to the defendant. The death of key witnesses – including the parties to the original conversion⁵⁸³ – will also be determinative.⁵⁸⁴ Furthermore, “injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such delay” can also result in a finding of prejudice.⁵⁸⁵ What is more, New York courts must also take underlying values of repose into consideration, as well as any egregious behaviour by the claimant leading to a detriment to the defendant.⁵⁸⁶ At last, there must be causality between the unreasonable delay in formulating a demand and the prejudice.⁵⁸⁷

In certain scenarios, no prejudice is suffered by the defendant: there is no prejudice when the possessor has recourse against the seller of the recovered chattel.⁵⁸⁸ Moreover, courts have also found that a defendant that

⁵⁷⁶ *In re Flamenbaum*, (2012), at 186.

⁵⁷⁷ *DeWeerth v. Baldinger*, (1992), at 553: “The prejudice which will support a laches defense may take several forms. The passage of time may make it more difficult for a defendant to defend against a claim by virtue of the death of witnesses, lost evidence or faded memories, or a defendant may have changed position in reliance upon the absence of a suit. *Stone I*, 873 F.2d at 625; *Augustine*, 432 N.Y.S.2d at 965–966. Courts should also consider the underlying value of repose when reviewing a laches argument and reject a laches defense where a defendant has engaged in egregious conduct which would obviate any prejudice the defendant might have suffered. *Stone I* at 626; *Stone II*, 891 F.2d at 404; *Augustine* at 966”; see Demarsin, (2011), p. 687, citing *In re Flamenbaum* 899 N.Y.S.2d 546, 554 (Sur. Ct. 2010) (itself citing *Glensck v. Guidance Realty Corp.*, 321 N.Y.S.2d 685, 688 (App. Div. 1971).

⁵⁷⁸ Demarsin, (2011), p. 677.

⁵⁷⁹ In *Bakalar v. Vavra*, the unreasonable delay created difficulties for Bakalar to gather the evidences necessary for the vindication of his rights (*Bakalar v. Vavra*, (2011), at 306). This unreasonable delay “resulted in deceased witnesses, faded memories, lost documents, and hearsay testimony of questionable value” (*Bakalar v. Vavra*, (2011), at 306, citing *Sanchez*, 2005 WL 94847, at 3); Demarsin, (2011), p. 686.

⁵⁸⁰ In *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, the court noted that key witnesses and key documents had disappeared, making it virtually impossible for the Guersan to obtain crucial evidence that demonstrated innocent acquisition. The prejudice suffered by the defendant was thus that this belated initiation of the proceedings rendered it utterly difficult for the defendant to prove ownership. The loss of a proof of acquisition due to the late initiation of the proceedings justified, therefore, barring the claim of the Patriarchate on the basis of the doctrine of laches. See *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, (1999), at 10; *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, (2001), at 7, repeated in *In re Peters v. Sotheby’s*, (2006), at 37, reaffirmed in *In re Flamenbaum*, (2010), at 1100; Demarsin, (2011), p. 686, citing *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.* No. 105575/00, 2011 N.Y. Misc. LEXIS 693 (Sup. Ct. Sept. 28, 2001), *aff’d*, 752 N.Y.S.2d 295 (App. Div. 2002), at 18–19, where the parties to the original bailment had all passed away before the proceedings were initiated.

⁵⁸¹ *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, (2001), at 7.

⁵⁸² *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, (2001), at 7.

⁵⁸³ *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, (2001), at 7.

⁵⁸⁴ Demarsin, (2011), p. 687; *Bakalar v. Vavra*, (2011), at 306.

⁵⁸⁵ *In re Flamenbaum*, (2010), at 1099–1100: “A defense of laches “is deficient if it fails to include allegations showing not only a delay, but also injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such delay” (*Glensck v. Guidance Realty Corp.*, 36 A.D.2d 852, 853, 321 N.Y.S.2d 685 [2d Dept. 1971] [internal citation omitted]); see *Greek Orthodox Patriarchate of Jerusalem v. Christie’s Inc.*, 1999 WL 673347, No.98 Civ. 7664 (KMW), Aug. 30, 1999, at 10, citing *Robins Island*, 959 F.2d at 424 (citing *Stone*, 873 F.2d at 625) for the argument that a change in position due to delay will amount to prejudice; see also *In re Flamenbaum*, (2012), at 186 for an application of equities.

⁵⁸⁶ *DeWeerth v. Baldinger*, (1992), at 553, citing *Stone I*, supra, at 626, *Stone II*, supra, at 404 and *Augustine*, supra, at 966; in *Kamat v. Kurtha*, the claimant had known where the property was located for a long time before claiming it back. The court noted that, had the proceedings been started earlier, the current possessor would never have purchased the painting. *Kamat v. Kurtha*, (2008), at 6: “The prejudice caused by Defendant’s delay in asserting his right is clear. Had defendant asserted his right in a timely fashion, Wood would not have consigned the Painting to 108 Contemporary Fine Art, who, in turn, would not have sold the Painting to Louise Kosman. Most importantly, Plaintiff would never have purchased the Painting from Kosman, and this suit would have been entirely unnecessary”.

⁵⁸⁷ In *Sotheby’s, Inc. v. Shene*, Shene had borrowed an important sum of money in anticipation of the sale of the book concerned and averred that the loan was prejudicial. This argument was not sustained by the court, as Shene had taken the loan after having been informed that the state of Baden–Württemberg was asserting a claim to the book. *Sotheby’s, Inc. v. Shene*, (2009), at 5.

⁵⁸⁸ In *DeWeerth II*, Judge Broderik found that there was no prejudice suffered by the defendant as it would still be possible to have recourse to a remedy against the seller for want of care in purchasing the object. *DeWeerth v. Baldinger* (1992), at 541 and 552–553: “I have reconsidered the question and conclude that my original findings in the April 20 Order should be amplified to reflect the importance of the presence in the case of a nonbankrupt third-party defendant, permitting defendant to pursue responsibility for lack of care in purchasing and reselling the art up the chain of possession. Thus, plaintiff’s delay does not put the innocent purchaser without recourse, whereas a ruling for defendant would leave plaintiff, as the theft victim, with no recourse at all. The balancing of the equities, with due consideration to the difficulty of an owner who lacks institutional resources to trace stolen art, favors rejection of the laches claim here” but also at 554: “Defendant, of course, has possessed the Monet for many years—constituting an advantage of value since monies would have had to be paid to rent the painting for that period, but also doubtless exacerbating the pain which will be incident to loss of the art object. Like plaintiff, defendant had, of course, been victimized by an unknown wrongdoer or wrongdoers—the original thief and those who passed on the painting with knowledge or suspicion of its theft or lack of due care in buying and selling it. But defendant also has recourse at least one step backward up the chain of custody”; Demarsin, (2011), p. 662.

is aware or that could have been aware of the wrongful holding of the chattel does not suffer a prejudice.⁵⁸⁹ Furthermore, a defendant that gratuitously acquired the chattel would obtain a windfall if he was entitled to rely upon the defence of laches,⁵⁹⁰ and thus will suffer no prejudice. Interestingly, in *Solomon R. Guggenheim Found. v. Lubell*, it was not possible for Lubell to prove prejudice since the court argued that she was able to enjoy the aesthetic qualities of the gouache throughout the time of her uncontested possession.⁵⁹¹ It is rather unclear where the court was going with this argument, as this would be the case for any possessor of a cultural chattel that is obliged by a claim in restitution.

New York's (seemingly?) anomalous treatment of good faith possessors

Next to the regime of demand and refusal applicable to good faith possessors,⁵⁹² it has been reported that New York's regime pertaining to the replevin of stolen personal property is embedded with an anomaly, as it appears to treat bad faith possessors more favourably than innocent possessors.⁵⁹³ To understand this anomaly, three remarks must be formulated.

Firstly, it must be emphasised that the accrual of the cause of action is interpreted differently depending upon the distinction between the bad / good faith possessor.⁵⁹⁴ In fact, New York courts draw a distinction between the accrual of the cause of action depending on notice of the wrongfulness of the possession to the defendant.⁵⁹⁵ On the one hand, if the replevin is formulated against a thief or other bad faith possessor, the three years laid down in § 214 (3) CPLR starts to run from the time of the unlawful taking,⁵⁹⁶ which, respectively, means either the time of the theft or of a subsequent conversion.⁵⁹⁷ This accrual is operationalised irrespective of

⁵⁸⁹ In *Sotheby's, Inc. v. Shene*, the District court of the southern district of New York considered that the failure of the purchaser of the book to fully investigate the book's provenance – despite red flags raised by stamps from the *Staatsgalerie* from which it originated on every page of the book – implied that he had suffered no prejudice. *Sotheby's, Inc. v. Shene*, (2009), at 5; *In re Flammenbaum*, (2013), at 966: “Additionally, the Estate failed to demonstrate “the essential elements of laches, namely prejudice” (*Matter of Barabash*, 31 N.Y.2d 76, 82, 334 N.Y.S.2d 890, 286 N.E.2d 268 [1972]). While the Estate argued that it had suffered prejudice due to the Museum's inaction, there is evidence that at least one family member (decendent's son) was aware that the tablet belonged to the Museum. And, although the decendent's testimony may have shed light on how he came into possession of the tablet, we can perceive of no scenario whereby the decendent could have shown that he held title to this antiquity”.

⁵⁹⁰ In *Hoelzer v. City of Stamford*, murals painted by James Daugherty were removed from Stamford High School and ended up in the possession of Hoelzer, a Manhattan based professional art restorer. The murals had been removed during a renovation of the school and were, against the will of the school, left on a pile of construction trash by workmen. A teacher of the school rescued the murals, which finally made their way into the hands of Hoelzer for the purpose of being restored with public money. Although Hoelzer had received the murals with the intention to restore them for the Government of the United States, the City of Stamford was informed of his possession and demanded the recovery of the murals without payment for the restoration work done. Hoelzer initiated legal proceedings to quiet title to the murals, believing he was entitled to retain them. In addressing the question of prejudice for the purpose of the laches defence, the District Court of the Southern District of New York noted that he had not acquired the murals for value, and would therefore not be prejudiced by an unreasonable delay in demanding the return of the murals. *Hoelzer v. City of Stamford, Conn.*, 722 F.Supp. 1106, (October 16, 1989), at 1113: “There are important differences between this case and *DeWeerth*. Perhaps the most significant is that Mr. Hoelzer is not a good faith purchaser. He did not give any value for the mural, expecting to buy it. Rather, he expected to return it to the appropriate owner at the appropriate time”. Instead, the court remarked that the equitable defense of laches was not meant to provide a windfall to the possessor, but only to protect a possessor that would suffer a genuine prejudice such as a purchaser in good faith. *Hoelzer v. City of Stamford, Conn.*, (1989), at 1113: “Instead of being damaged by being forced to return the mural, as a good faith purchaser would be, Mr. Hoelzer would receive a windfall by being allowed to keep it. The equitable rule in *DeWeerth* was not designed for this inequitable result”.

⁵⁹¹ Demarsin, (2011), p. 655, citing *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 622.

⁵⁹² Contrary to what it said above, the demand and refusal rule is not only applicable to purchaser's *sensu stricto*, but instead it applies equally to the beneficiaries of a bequeather. Wallace, (2012), p. 26.

⁵⁹³ See for example *Wertheimer v. Cirkler's Hayes Storage Warehouse, Inc.*, (2001), at 6 or *Songbyrd, Inc. v. Estate of Grossman*, 23 F.Supp.2d 219, (September 21, 1998), at 222.

⁵⁹⁴ *Wallace Wood Properties v. Wood*, 117 F.Supp.3d 493, (July 24, 2015), at 497 (footnote 2), citing *Baiul v. William Morris Agency, No. 13 Civ. 8683*, 2014 WL 1804526, at *11 (S.D.N.Y. May 6, 2014); whilst good faith had no relevancy to the transfer of title of a stolen chattel because of the *nemo dat* principle and the ensuing impossibility for a third-party protection by means of good faith possession, its presence during the acquisition of a stolen object plays a crucial role in the resolution of contentions about stolen personal property. See Fincham, (2009-2010), p. 151.

⁵⁹⁵ *DeWeerth v. Baldinger*, (December 1987), at 106: “The date of accrual depends upon the identity of the party from whom recovery is sought”; Wallace, (2012), p. 22.

⁵⁹⁶ Demarsin, (2011), p. 640; Redman, (2008), p. 214; Henson, (2001-2002), p. 1143; Hayworth, (1993-1994), p. 337.

⁵⁹⁷ *DeWeerth v. Baldinger*, (December 1987), at 106: “Where an owner pursues the party who took his property, the three years period begins to run when the property was taken. See *Sporn v. M.C.A. Records, Inc.*, 58 N.Y.2d 482, 487-488, 462 N.Y.S.2d 413, 415-416, 448 N.E.2d 1324, 1326-1327 (1983)” and at 108, citing *Varga Credit-Suisse*, 5 A.D.2d at 291, 171 N.Y.S.2d at 677-678. This can be contrasted with the dictum in *DeWeerth v. Baldinger*, (1994), at 1273: “In New York, the three-year statute of limitations starts running against thieves once the owner discovers that the art object has been stolen, [...]”; *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 146: “As against a thief, a cause of action for replevin accrues, and the limitations period therefore begins to run, immediately upon the occurrence of the theft”, citing *DeWeerth v. Baldinger*, 836 F.2d 103, at 106 (citing *Sporn v. M.C.A. Records, Inc.*, 58 N.Y.2d 482, 487-488, 462 N.Y.S.2d 413, 415-416, 448 N.E.2d 1324, 1326-1327 (1983)) and at 108 (citing *Varga Credit-Suisse*, 5 A.D.2d at 291, 171 N.Y.S.2d at 677-678); see also *Gross v. Museum of Modern Art*, 772 F.Supp.2d 473 (January 6, 2010), at 481-482: “Under New York law, the statute of limitations for conversion and replevin automatically begins to run against a bad faith possessor on the date of the theft or bad faith acquisition—even if

the dispossessed owner's awareness of the hostile taking.⁵⁹⁸ On the other hand, when the demand is against the purchaser in good faith, the cause of action accrues at the moment when the demand is formulated and subsequently rejected by the defendant,⁵⁹⁹ as was explained at length in the above sections. The differentiation in treatment is substantiated in that the *bona fide* possessor commits no wrong by taking possession of a stolen chattel. Instead, he only becomes a wrongdoer after having been notified of the wrongfulness of his possession and having opposed the demand of the owner.⁶⁰⁰ By the effectuation of a demand, the *bona fide* purchaser is notified of the wrongful possession and is given the opportunity to correct the wrong before being held liable.⁶⁰¹ It is only when this demand is rejected that the conversion by the possessor in good faith takes place and that the cause of action accrues. As long as no demand is made, there is no conversion, no cause of action and, thus, the statute of limitations does not start running.⁶⁰² Because no demand is required when the possessor is well aware that he has no right upon the thing – as for example when the defendant is a thief or a bad faith possessor –, the statute of limitations will start running at the moment of the unlawful taking, and not when the possessor is notified of the illicit nature of his possession.⁶⁰³ Thus, New York courts have generally allowed the statute of limitations to accrue at an earlier point in time when the possessor acts in bad faith. Concurrently, the said courts have generally postponed the accrual of the cause of action for conversions carried out by possessors acting in good faith.⁶⁰⁴ Hence, it is advanced that the anomaly gives more protection to a bad faith possessor than to a possessor in good faith, as it becomes possible for a dispossessed owner to institute proceedings against the latter throughout a longer period of time than, for example, against a thief.⁶⁰⁵

Secondly, although New York courts have applied different rules depending upon the knowledge of the tainted nature of the stolen property, the said courts have generally refrained from addressing the semantics of the notion of good faith.⁶⁰⁶ Instead, these courts have generally understood good faith in context and have interpreted it in a traditional and exclusionary manner,⁶⁰⁷ focusing upon the lack of good faith instead of trying to identify its content.⁶⁰⁸ For the purpose of the set differentiation,⁶⁰⁹ the UCC defines good faith in Article 1-201 (b) (20) UCC:

§ 1-201 (b) UCC – (20) "Good faith," [...], means honesty in fact and the observance of reasonable commercial standards of fair dealing.

the true owner is unaware the chattel is missing, *Close-Barzgin v. Christie's, Inc.*, 51 A.D.3d 444, 444, 857 N.Y.S.2d 545 (N.Y.App.Div.1st Dep't 2008)" but also *Mirrish v. Mott*, (2010), at 274-275 where the court noted that "Where replevin is sought against the party who converted the property, the action accrues on the date of conversion (*Matter of Peters v. Sotbeby's Inc.*, 34 A.D.3d 29, 36, 821 N.Y.S.2d 61 [2006], *In. Denied* 8 N.Y.2d 809, 834 N.Y.S.2d 90, 865 N.E.2d 1257 [2007])".

⁵⁹⁸ *DeWeerth v. Baldinger*, (December 1987), at 106: "This is so even where the property owner was unaware of the unlawful taking at the time it occurred. See *Varga v. Credit-Suisse*, 5 A.D.2d 289, 291-92, 171 N.Y.S.2d 674, 677-78 (1st Dep't), *aff'd*, 5 N.Y.2d 865, 182 N.Y.S.2d 17, 155 N.E.2d 865 (1958); *Two Clinton Square Corp. V. Friedler*, 91 A.D.2d 1193, 1194, 459 N.Y.S.2d 179, 181 (4th Dep't 1983)".

⁵⁹⁹ *DeWeerth v. Baldinger*, (December 1987), at 106: "In contrast, where the owner proceeds against one who innocently purchases the property in good faith, the limitations period begins to run only when the owner demands return of the property and the purchaser refuses. *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43, 44 (1st Dep't 1964), *on remand*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup.Ct.1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *modification rev'd*, 24 N.Y.2d 742 (1969), *Duryea v. Andrews*, 12 N.Y.S. 42 (2d Dep't 1890) and *acord Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp. 829, 848-849 (E.D.N.Y. 1981) (applying New York law), *aff'd*, 678 F.2d 1150, 1161 (2d Cir. 1982). Until demand and refusal, the purchaser in good faith is not considered a wrongdoer, *Gillet v. Roberts*, 57 N.Y. 28 (1874), even though this rule somewhat anomalously affords the owner more time to sue a good-faith purchaser than a thief" also reiterated by the Appellate Division of the New York Supreme Court in *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 146.

⁶⁰⁰ *DeWeerth v. Baldinger*, (December 1987), at 1076, citing *Gillet v. Robert* 57 N.Y. 28 (1874).

⁶⁰¹ *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 147, citing *DeWeerth v. Baldinger*, 836 F.2d 103, at 106 and 108 (citing *Gillet v. Robert* 57 N.Y. 28 (1874)).

⁶⁰² *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 147.

⁶⁰³ See *State of New York v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 774 N.E.2d 702, 746 N.Y. Slp Op. 04464, (June 4, 2002), at 711: "Naturally, if demand would be futile because the circumstances show that the defendant knows it has no right to the goods, demand is not required (see *Cotten*, 245 N.Y. at 104-106, 156 N.E. 629). One such circumstance, of course, arises when the defendant is a thief (see *Lubell*, 77 N.Y.2d at 318, 567 N.Y.S.2d 623, 569 N.E.2d 426)"; Demarsin, (2011), p. 640, footnote 91; Wallace, (2012), p. 20.

⁶⁰⁴ For example, Henson specifies that the demand and refusal is only applicable as against purchasers in good faith under the law of New York, whilst the same statute of limitations runs from the moment of the theft against a thief. See Henson, (2001-2002), p. 1143; see also Hayworth, (1993-1994), p. 337, citing *Sporn v. MCA Records, Inc.*, 448 N.E.2d 1324, 1326-27 (N.Y. 1983).

⁶⁰⁵ *DeWeerth v. Baldinger*, (December 1987), at 106-107 and 108, reiterated by the Appellate Division of the New York Supreme Court in *Solomon R. Guggenheim Foundation v. Lubell*, (1990), at 147.

⁶⁰⁶ Fincham, (2009-2010), p. 178-178.

⁶⁰⁷ Fincham, (2009-2010), p. 177.

⁶⁰⁸ See the many examples provided in White and Summers, (2010), p. 210, footnote 13; Fincham, (2009-2010), pp. 177-178.

⁶⁰⁹ Gerstenblith has raised concerns as to how good faith must be defined in the present context. See Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 423.

The definition of good faith in New York law that is posited in Article 1-201 (19) of the New York Uniform Commercial Code – hereinafter NYUCC –, although formulated differently, encapsulates the essence of Article 1-201 (b) (20) UCC.

§ 1-201 NYUCC – (20) "Good faith" means honesty in fact in the conduct or transaction concerned.

Following this provision, good faith can be understood as an honest belief in fact that the object acquired is not stolen. This means that in the assessment of the good faith of a possessor, it has been advanced that courts have generally required him to conduct due diligence inquiries.⁶¹⁰ Or, as was noted by Pinkerton, “If the circumstances of the transaction would cause a reasonable and honest buyer to ask questions about title or provenance of a work of art, the particular buyer must do so”.⁶¹¹ This entails that, no differently than in the three European jurisdictions addressed in the previous chapter, the presence of red flags during the acquisition may affect the ‘good / bad’ characterisation of the faith of the purchaser, depending on how conscientiously these red flags are investigated. Art dealers will be held to a more stringent threshold of good faith.⁶¹²

Thirdly, the danger with the anomaly is that acquirers might intentionally want to be considered as wrongdoers in order to disbar the owner of his claim three years after the conversion took place.⁶¹³ This danger, which has been recognised by certain courts wary of the anomaly’s predicament, has led these courts to consider the defendant as acting in good faith despite clear indications to the contrary. This was notably the case in *Grosz v. Museum of Modern Art*, whereby the District Court of the Southern District of New York – recognising the anomaly⁶¹⁴ – considered that the Museum was a good faith acquirer for the purpose of applying the demand and refusal rule, despite conspicuous indications that the museum was well aware of the questionable origins of the litigious painting.⁶¹⁵

But for these few remarks, it has been advanced that the presence of an anomaly is merely specious, as it is possible to prevent a bad faith defendant from asserting a defence based on the statute of limitations,⁶¹⁶ through both the doctrines of fraudulent concealment⁶¹⁷ or of equitable estoppel.⁶¹⁸⁻⁶¹⁹ Although it is generally accepted that fraudulent concealment will toll the statute of limitations until the concealment ceases (see above), equitable estoppel will be applied when allowing a defendant to rely on a statute of limitations defence would create an injustice.⁶²⁰ This would be the case when the defendant has thwarted the claimant from timely introducing an action by means of fraud, of misrepresentation or of deception towards the claimant.⁶²¹ Nonetheless, the implications of estoppel in pais on the running of the statute of limitations are disputed. On the

⁶¹⁰ Henson, (2001-2002), p. 1151.

⁶¹¹ Pinkerton, (1990), pp. 17 and 18.

⁶¹² See *Bakalar v. Vavra*, (2011), at 306: “Defendants argue that because Bakalar did not inquire into the provenance of the Drawing when he purchased it and failed to investigate its provenance for over forty years, any prejudice to Bakalar was due to his own conduct, rather than the Defendants’ delay. However, this Court previously found that Bakalar purchased the Drawing in good faith, and there is no reason to disturb that finding. Moreover, Bakalar, as an ordinary non-merchant purchaser of art, had no obligation to investigate the provenance of the Drawing, and this court will not saddle him with a greater duty than the law requires. See *Graffman v. Espel*, 96 Civ. 8247(SWK), 1998 WL 55371, at 6 (S.D.N.Y. Feb. 11, 1998) (“As a matter of law, the [purchasers] had no obligation to investigate the provenance of the Painting . . . [They] are not art dealers and are under no obligation to adhere to commercial standards applicable to art dealers.”); cf. N.Y.U.C.C. § 2-103 (“Good faith *in the case of merchant* means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” (emphasis added)); *Morgold*, 891 F.Supp. at 1368 (under New York law, “a *dealer* in art must take reasonable steps to inquire into the title to a painting.” (emphasis added))).

⁶¹³ Demarsin, (2011), p. 676, citing the example of *Martin v. Briggs*, 663 N.Y.S.2d 184, 186 (App. Div. 1997).

⁶¹⁴ *Grosz v. Museum of Modern Art*, (January 2010), at 481-482.

⁶¹⁵ *Grosz v. Museum of Modern Art*, (January 2010), at 483.

⁶¹⁶ Demarsin, (2011), p. 672.

⁶¹⁷ As noted by Petrovich, “It is generally recognized that the limitations period will not run during the time when the stolen property is being fraudulently or wrongfully concealed”. Petrovich, (1979-1980), p. 1131, footnote 36.

⁶¹⁸ Equitable estoppel is defined as “A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way”. See Garner, B. A., *Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Estoppel. Additionally, Black’s Law Dictionary specifies “This doctrine is founded on principles of fraud. The five essential elements of this type of estoppel are that (1) there was a false representation or concealment of material facts, (2) the representation was known to be false by the party making it, or the party was negligent in not knowing its falsity, (3) it was believed to be true by the person to whom it was made, (4) the party making the representation intended that it be acted on, or the person acting on it was justified in assuming this intent, and (5) the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds” (*idem*).

⁶¹⁹ Demarsin, (2011), p. 644, footnote 104.

⁶²⁰ *Grosz v. Museum of Modern Art*, 403 Fed.Appx. 575, 2010 WL 5113311, (December 16, 2010), at 577.

⁶²¹ *Grosz v. Museum of Modern Art*, (December 2010) at 577-578, citing *Zumpano v. Quinn*, 6 N.Y.3d 666, 673-74, 816 N.Y.S.2d 703, 849 N.E.2d 926 (2006).

one hand, the court in *Elicofon* – relying upon *General Stencils, Inc. v. Chiappa*⁶²² – rejected the presence of any anomaly on the basis of equitable estoppel. In *Chiappa*, this estoppel was invoked by the plaintiff against a statute of limitations defence raised by a wrongdoer who had embezzled money from the plaintiff. In its *ratio decidendi*, the court in *Chiappa* court endowed the doctrine with a broad spectrum, by advancing that “equitable estoppel should be applied—because of defendant’s affirmative wrongdoing and concealment—to prevent defendant from asserting the Statute of Limitations. The principle that a wrongdoer should not take refuge behind the shield of his own wrong is a truism. The United States Supreme Court has espoused the doctrine in these terms: “To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations”.⁶²³ Based on this rationale,⁶²⁴ the court in *Chiappa* concluded that equity⁶²⁵ would not entitle a bad faith possessor to rely upon a statute of limitations defence,⁶²⁶ and that he was thus to be favoured as against a purchaser in good faith. The practical effect of the doctrine, as posited in *Chiappa*, is to toll the statute of limitations up until the moment that the claimant discovers his cause of action. Nevertheless, the same court also added that the bad faith possessor could rely upon a negligence or acquiescence by the claimant in discovering the cause of action in order to dismiss the equitable estoppel defence.⁶²⁷ In a synopsis, *Chiappa* stands for the proposition that it is possible for a claimant to rely upon the doctrine of equitable estoppel to bar a bad faith possessor from relying upon a statute of limitations defence against the former, subject to the *caveat* that the claimant ought not to have been negligent in discovering his cause of action or did acquiesce to the conversion.⁶²⁸ In *Elicofon*, the New York Court of Appeals reaffirmed the broad interpretation given to the doctrine of equitable estoppel in *Chiappa*, insisting on the fact that it was confident that both a thief or bad faith purchaser were not favoured over a good faith purchaser.⁶²⁹ Instead, it affirmed *Chiappa* by validating the proposition that it is impossible for a wrongdoer to rely on a statute of limitations defence when by doing so he would be able to benefit from his own wrong.⁶³⁰

⁶²² *Kunstsammlungen Zu Weimar v. Elicofon*, (1981), at 849: “[...] a thief who conceals his possession and thereby makes it impossible for the owner to institute suit within the limitations period may be estopped from asserting the statute of limitations as a defense. *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169 (1966)”; Kennon, (1995-1996), p. 393, citing *Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

⁶²³ *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337, (July 7, 1966), at 127-128, citing *Glus v. Brooklyn East. Term.*, 359 U.S. 231-232—233, 79 S.Ct. 760, 762, 3 L.Ed.2d 770 (1959). See also Wallace, (2012), p. 20.

⁶²⁴ This broad interpretation is inferred from the purpose of the doctrine of equitable estoppel, which relates to the fairness of allowing a wrongdoer to repudiate the consequences of his wrongful act. As was noted in the New Jersey case *Howard v. West Jersey & S.S.R. Co.*, 1 Backes 517 (1928) (upon which *Glus v. Brooklyn East. Term.* relies): “Also it should be noted that, while the doctrine of estoppel in pais rests upon the ground of fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive; the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct; whether the author of a proximate cause may justly repudiate its natural and reasonably anticipated effect; fraud, in the sense of a court of equity, properly including all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Story Eq. Juris. § 187”. *Howard v. West Jersey & S.S.R. Co.*, 1 Backes 517, 102 N.J. Eq. 517, 141 A. 755, (May 10, 1928), at 521.

⁶²⁵ See also *Zampano v. Quinn*, (2006), at 673: “The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense”.

⁶²⁶ *General Stencils, Inc. v. Chiappa*, (1966), at 128: “Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations, where it is the defendant’s affirmative wrongdoing—a carefully concealed crime here—which produced the long delay between the accrual of the cause of action and the institution of the legal proceedings. (Feinberg v. Allen, 143 App.Div. 866, 128 N.Y.S. 906 (3d Dept., 1911), *aff’d*. 208 N.Y. 215, 101 N.E. 890 (1913); Safrin v. Friedmann, *supra*)”; Kennon, (1995-1996), p. 393, citing *General Stencils, Inc. v. Chiappa*, 219 N.E.2d 169 (N.Y. 1966) at 170.

⁶²⁷ *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1163: “Thus in *Chiappa* itself the Court states that the very fact of defendant’s thievery entitles plaintiff to litigate the estoppel issue, and went on to say that plaintiff may not prevail if defendant can show that plaintiff’s non discovery of the theft was due to plaintiff’s own negligence or acquiescence” (footnote 23). See also *Bainl v. William Morris Agency, LLC*, 2014 WL 1804526, at 8 and 11.

⁶²⁸ *General Stencils, Inc. v. Chiappa*, (1966), at 171: “Consequently, the admitted thievery of defendant entitles the plaintiff to litigate the issue of equitable estoppel. This is not to say that plaintiff will necessarily prevail. In reply to the assertion of equitable estoppel defendant may well be able to show, as she alleges on this appeal, that it was solely due to the negligence of plaintiff and the acquiescence of its corporate officers that it was unable to discover the conversion until several years had elapsed”.

⁶²⁹ *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1163: “We are persuaded by the decision of the New York Court of Appeals in *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169 (1966), that the Menzel rule does not prefer the thief or bad faith purchaser over the bona fide purchaser. In *Chiappa* the court held that familiar principles of equitable estoppel will prevent a wrongdoer from asserting the statute of limitations defense and thereby “take refuge behind the shield of his own wrong.” 272 N.Y.S.2d at 127, 219 N.E.2d 169”.

⁶³⁰ *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1163, citing *General Stencils, Inc. v. Chiappa*, 219 N.E.2d 169 (N.Y. 1966) at 169. The court in *Elicofon* further submitted: “Fairly read, *Chiappa* stands for the general proposition, resting on estoppel principles, that a defendant who commits affirmative wrongdoing should not be afforded the benefits of the statute of limitations defense. See, e.g., *Greenfield v. Kanwit*, 87 F.R.D. 129 (S.D.N.Y.1980) (broad estoppel rationale underlies *Chiappa*); *Clark v. United States*, 481 F.Supp. 1086, 1095 (S.D.N.Y.1979) (affirmative concealment, fraud, misrepresentation or deception will toll the statute of limitations under *Chiappa*.” (footnote 23). See also *Lightfoot v. Davis*, “the tort-feasor cannot allege his own wrong for the purpose of carrying back the

Nevertheless, recognising the legal quandary underlined above, the court in *Elicofon* alternatively held that the tolling of the statute of limitations against a bad faith possessor up until the owner demands the return of the good and this demand has been refused would be sound in logic.⁶³¹ Consequently, the court held that both a thief and a purchaser in bad faith might not aver a statute of limitations defence before the demand and refusal have been formulated, therefore correcting any potential anomaly.⁶³²

On the other hand, other New York courts have favoured a narrower reading of the equitable estoppel doctrine.⁶³³ In giving substance to the notion of wrongdoing, these courts have emphasised the need for the defendant to perform “egregious, affirmative acts of concealment”,⁶³⁴ which are separate from the wrongdoing relating to the cause of action⁶³⁵ for equitable estoppel to work as a valid defence. This narrower reading presupposes that an affirmative wrongdoing by the defendant – which was performed with the intention to delay the initiation of legal proceedings by the claimant –, has prevented a claimant that relied upon the said wrongdoing⁶³⁶ from initiating legal proceedings in due time.⁶³⁷ Therefore, this strict construction of equitable estoppel puts the emphasis upon the affirmative steps adopted by the bad faith possessor to seek failure by the claimant to initiate legal proceedings within the imparted time, e.g. by concealing the facts necessary for the

injury to a time which will let in the statute [of limitations]”. *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 581, (April 5, 1910), at 269, cited in Wallace, (2012), p. 20.

⁶³¹ *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1164, where the court specified that “[referring to the discrepancy between treatment of a thief and a purchaser in good faith mirrored in the difference in the accrual of the cause of action] Even if such anomaly existed, which we do not believe to be the case in view of Chiappa, a logical approach would be to toll the statute of limitations against the thief until demand and refusal, thus insuring that the thief and the good faith purchaser would be on an equal footing vis-à-vis the statute of limitations” (footnote 24).

⁶³² See also the conclusion of Wallace, submitting that “If these doctrines are coherently and consistently applied, there should be no perverse incentive for possessors to assert that they are wrongdoers so as to assert the statute of limitations defense, because there is no advantage to be gained”. Wallace, (2012), p. 20; additionally, the court added that – contrary to what had been asserted – a thief was no more favoured as against a purchaser in good faith because he could be held liable for any loss or damage that the property had suffered before the demand and refusal occurred. *A contrario*, a purchaser in good faith would not be subjected to the same liability. See *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1164, citing *Gillet v. Roberts*, 57 N.Y. 28 (1874); *Honey v. Bromley*, 33 N.Y.S. 400 (5th Dept. 1895). Although not clearly ousted by the *Elicofon* court, the tolling of the running of the statute of limitations and the imputability of liability for loss or damage are also relevant for other possessors in bad faith, which the court seemed to assimilate to the thief for the purpose of its ruling. See *Kunstsammlungen Zu Weimar v. Elicofon*, (1982), at 1163-1164.

⁶³³ The rationale for a narrower reading was given in *Zumpano v. Quinn*, (2006), at 674: “Citing *General Stencils*, plaintiffs argue that defendants cannot be permitted to benefit from their own wrongdoing. In *General Stencils*, defendant was plaintiff’s head bookkeeper who stole from her employer and concealed her theft for several years by misrepresenting the state of plaintiff’s finances. We held that defendant was equitably estopped from asserting a statute of limitations defense precisely because her affirmative conduct in concealing the crime prevented plaintiff from timely bringing its action (see 18 N.Y.2d at 128, 272 N.Y.S.2d 337, 219 N.E.2d 169). A defendant/wrongdoer cannot take affirmative steps to prevent a plaintiff from bringing a claim and then assert the statute of limitations as a defense. However, if the doctrine of equitable estoppel were to be applied as broadly as plaintiff suggest, the statute of limitations would rarely be available as a defense. [...] It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit (see *Matter of Steyer*, 70 N.Y.2d 990, 993, 526 N.Y.S.2d 422, 521 N.E.2d 429 [1988])”; see also Demarsin, (2011), p. 672 and ff.

⁶³⁴ Demarsin, (2011), p. 673; *Simcusi v. Saeli*, 44 N.Y.2d 442, 377 N.E.2d 713, 377 N.E.2d 713, (May 4, 1978), at 448-449: “It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. (*General Stencils v. Chiappa*, 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169; *Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 214 N.Y.S.2d 849, mot. for rearg. and mot. for lv. to app. den. 14 A.D.2d 509, 217 N.Y.S.2d 576, app. dsm. 11 N.Y.2d 754, 226 N.Y.S.2d 692, 181 N.E.2d 629, supra; see *Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations*, Ann. 43 A.L.R.3d 429.)” reiterated in *Grosz v. Museum of Modern Art*, (December 2010), at 2; see also *Tenamee v. Schmukler*, 438 F.Supp.2d 438, RICO Bus.Disp.Guide 11, 117, (July 13, 2006), at 444: “Under New York’s doctrine of equitable estoppel, a defendant can be barred from raising a statute of limitations defense if he fraudulently induces a plaintiff to refrain from filing suit in a timely manner. See *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157, 167 (App. Div. 1st Dep’t 2003) (citing *Simcusi v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259, 377 N.E.2d 713, 716 (1978)). The doctrine derives from the maxim that no party should benefit from its own wrong. See *Arbutina v. Bahyleyan*, 75 A.D.2d 84, 428 N.Y.S.2d 99, 100 (App. Div. 4th Dep’t 1980) (citing *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959)). Equitable estoppel can apply when a defendant either affirmatively makes a false statement that plaintiff relies upon in not filing a complaint, or deliberately conceals facts underlying a claim which he is under a duty to disclose. *Jordan v. Ford Motor Co.*, 73 A.D.2d 422, 426 N.Y.S.2d 359, 361 (App. Div. 4th Dep’t 1980) (citing *Simcusi*, 406 N.Y.S.2d 259, 377 N.E.2d at 716 and *General Stencils v. Chiappa*, 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169, 170 (1966))”.

⁶³⁵ See for example *Tenamee v. Schmukler*, (2006), at 445: “New York law is clear that the same act of non-disclosure cannot underlie both the argument for estoppel and the related cause of action. See *Kaufman*, 760 N.Y.S.2d at 167 (stating that “equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiffs underlying cause of action”); *Chesrow v. Galiani*, 234 A.D.2d 9, 650 N.Y.S.2d 158, 160 (App. Div. 1st Dep’t) (citing *Rizk v. Cohen*, 74 N.Y.2d 98, 538 N.Y.S.2d 229, 535 N.E.2d 282, 285 (1989)). Rather, equitable estoppel applies only when a defendant covers up an earlier wrongdoing to prevent plaintiff from suing on the initial wrong. See *Smith v. Smith*, 830 F.2d 11, 13 (2d Cir.1987)”.

⁶³⁶ *Zumpano v. Quinn*, (2006), at 683 “[...] plaintiffs must demonstrate that they relied on defendant’s fraud, misrepresentation, and deception to their detriment (see *Securities Inv. Protection Corp. V. BDO Seidman*, 95 N.Y.2d 702, 709, 723 N.Y.S.2d 750, 746 N.E.2d 1042 [2001]; *People v. Begole*, 27 N.Y.2d 138, 148, 313 N.Y.S.2d 744, 261 N.E.2d 655 [1970])”.

⁶³⁷ See for example *Zumpano v. Quinn*, (2006), at 683: “The question is whether the actions of the defendants contributed to the plaintiff’s failure to timely seek redress”.

commencement of legal proceedings. It is only once these egregious and affirmative steps cease to exist that the claimant must exercise due diligence in unveiling the facts necessary so as to initiate legal proceedings within a reasonable period of time,⁶³⁸ a period that cannot accordingly exceed three years.⁶³⁹ In discord with New Jersey's due diligence requirement, New York's equitable estoppel due diligence entails that the claimant must promptly commence legal proceedings against the defendant as soon as he becomes aware of the misrepresentation.⁶⁴⁰ This rule is inoperable when the egregious and affirmative acts of concealment have ceased to exist within the relevant period of limitation or within a reasonable time before the expiration of the said period.⁶⁴¹

4. LEGAL EFFECTS

No less peripheral to the determination of the accrual of the cause of action, the legal effect flowing from the expiration of statutes of limitations requires careful consideration. Similar to prescription in Belgian, French and Dutch law, statutes of limitations can either extinguish the right or discard the remedy. Whilst the United States Supreme Court specified in the authoritative case of *Campbell v. Holt* that the expiration of the statute of limitations only affects the remedy and has no repercussions for the merits of the case,⁶⁴² this dictum has not found ground in all jurisdictions. But for this lack of harmony, the distinction has far-reaching implications for possessors of stolen personal property that have successfully relied upon a statute of limitations defence.⁶⁴³

(1) New Jersey| Adverse possession

When adverse possession is adjoined to the statute of limitations, the legal effect operated by the former doctrine is to confer a right of ownership upon the possessor. As was noted by the Supreme Court of Alabama – and latter on confirmed by the U. S. Supreme Court in *Campbell v. Holt*⁶⁴⁴ – “It is, however, sufficient to observe that when property, whether real or personal, is held adversely, the statute operates on the title, and when the bar is complete, the title of the original owner is defeated, and the adverse possessor has the complete title”.⁶⁴⁵ Similarly, in *Lightfoot v. Davis*, the New York Court of Appeals indicated that it was possible for the statute of limitations to operate a transfer of title to property in case of adverse possession.⁶⁴⁶ In laying down the

⁶³⁸ *Tenabee v. Schmukler*, (2006), at 445: “Even if plaintiff establishes that he was prevented from bringing a suit by defendant’s fraudulent misrepresentation or concealment, he must further demonstrate that he commenced his suit within a reasonable time after the fraud has ceased to be operational. *Simuski*, 406 N.Y.S.2d 250, 377 N.E.2d at 717”; *Pahlad ex rel. Berger v. Brustman*, 33 A.D.3d 518, 823 N.Y.S.2d 61, 2006 N.Y. Slip. Op. 07767, (October 26, 2006), at 519-520: “Moreover, the plaintiff must demonstrate reasonable reliance on the defendant’s misrepresentation (*Zumpano v. Quinn*, 6N.Y.3d 666, 674, 816 N.Y.S.2d 703, 849 N.E.2d 926 [2006]; *Simuski*, 44 N.Y.2d at 449, 406 N.Y.S.2d 259, 377 N.E.2d 713), and due diligence on the part of the plaintiff in ascertaining the facts, and in commencing the action, is an essential element when plaintiff seeks the shelter of this doctrine (*id.* at 450, 406 N.Y.S.2d 259, 377 N.E.2d 713; *Putter v. N. Shore Univ. Hosp.*, 25 A.D.2d 539, 541, 807 N.Y.S.2d 624 [2006])”.

⁶³⁹ See notably the discussion in *Simuski v. Saelti*, (1978), at 450-451 where the Court of Appeals of New York explained the legal effect of the equitable estoppel: “The preferable analysis, however, holds that due diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel, to be demonstrated by the plaintiff when he seeks the shelter of the doctrine (see Plaintiff’s Diligence as Affecting His Right to Have Defendant Estopped From Pleading the Statute of Limitations, Ann., 44 A.L.R.3d 760, s 7, pp. 774-779). Under this approach, which we endorse, the burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts given rise to the estoppel have ceased to be operational. Whether in any particular instance the plaintiff will have discharged his responsibility of due diligence in this regard must necessarily depend on all the relevant circumstances”. The court in *Simuski* also predicated a maximum period to exercise diligence similar to the length of the statute of limitations after the facts leading to the equitable estoppel have ceased: “The length of the legislatively prescribed period of limitations is sometimes said to be relevant, and courts have held that in no event will the plaintiff be found to have exercised the required diligence if his action is deferred beyond the date which would be marked by the reapplication of the statutory period, i. e., that the length of the statutory period itself sets an outside limit on what will be regarded as due diligence” (*idem*).

⁶⁴⁰ *Zumpano v. Quinn*, (2006), at 683: “By due diligence, the Court means that as soon as the plaintiff learns of the misrepresentation, plaintiff must seek to bring an action against defendant [...]”, inferring this conclusion from *Simuski v. Saelti*, (1978).

⁶⁴¹ See *Simuski v. Saelti*, (1978), at 449-450: “If the conduct relied on (fraud, misrepresentation or other deception) has ceased to be operational within the otherwise applicable period of limitations (or perhaps within a reasonable time prior to the expiration of such period), many courts have denied application of the doctrine on the ground that the period during which the plaintiff was justifiably lulled into inactivity had expired prior to the termination of the statutory period, and that the plaintiff had thereafter had sufficient time to commence his action prior to the expiration of the period of limitations. (E.g., 509 Sixth Ave. Corp. v. New York City Tr. Auth. 24 A.D.2d 975, 265 N.Y.S.2d 429; see Plaintiff’s Diligence as Affecting His Right to Have Defendant Estopped From Pleading the Statute of Limitations, Ann., 44 A.L.R.3d 760, ss 5,6, pp. 768-774; Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations, Ann., 43 A.L.R.3d 429, s 6, pp. 453-454”.

⁶⁴² *Campbell v. Holt*, (1885), at 626 (see also 622-623).

⁶⁴³ As noted by Judith Wallace, the distinction between right / remedy is particularly important when addressing the consequences of subsequent transfers of possession to third parties. Wallace, (June 2012), p. 9.

⁶⁴⁴ *Campbell v. Holt*, (1885), at 625.

⁶⁴⁵ *Jones v. Jones*, 18 Ala. 248, 1850 WL 377, (June 1, 1850), at 253: “It is, however, sufficient to observe that when property, whether real or personal, is held adversely, the statute operates on the title, and when the bar is complete, the title of the original owner is defeated, and the adverse possessor has the complete title.” citing --*Howell v. Hair*, 15 Ala. 194; *McElmoyle v. Cohen*, 13 Pet. 312; *Shelby v. Guy*, 11 Wheat. 371; *Bent (sic) v. Chapman*, 5 Cranch, 358; *Angell on Lim.*, 18 to 20”.

⁶⁴⁶ *Lightfoot v. Davis*, (1910), at 264.

underlying reasoning to this conclusion, the court moved to discuss provisions relating to adverse possession for real property and the absence of specific provisions to this effect for personal property.⁶⁴⁷ Extrapolating its conclusion from the case law of other states, it concluded that title to personal property could be acquired by means of adverse possession.⁶⁴⁸ In New Jersey, the Appellate Division of the Superior Court in *O’Keeffe v. Snyder* confirmed that upon the expiration of the statutory period of limitations, the adverse possessor is embedded with a prescriptive right.⁶⁴⁹ To support its dictum, it relied upon the persuasive Alabama precedent of *Rowe v. Bonneau-Jeter Hardware Co.*⁶⁵⁰ In *Rowe v. Bonneau-Jeter* – a case that dealt with adverse possession of real property – the Supreme Court of Alabama attributed two effects to the expiration of the statute of limitations adjoined by adverse possession in situations of recovery of property: although it recognised that the expiration of the statute of limitations has, by itself, a direct effect upon the availability of a remedy to a dispossessed owner, it concurrently emphasised that a correlative effect to the expiration translates in the passing of the right of recovery, and therefore the right of ownership, to the defendant.⁶⁵¹ Furthermore, – although not explicitly substantiated in the decision – the court advanced that this paired effect was at the basis of the decision in *Redmond v. New Jersey Historical Society*.⁶⁵² The court in *Redmond* was – *inter alia* – inspired by the writings of Dean James Barr Ames, who found it difficult to accept that a dispossessed owner would have “an immortal right to bring an eternally prohibited action”, therefore justifying the passing of title resulting from a stale statute of limitations.⁶⁵³ The decision of the Superior Court was affirmed in 1980 by the Supreme Court of New Jersey.⁶⁵⁴ Consequently, in suits for the replevy of stolen personal property, a successful defence based on adverse possession will simultaneously confer title upon the adverse possessor and extinguish the remedy.⁶⁵⁵

⁶⁴⁷ *Lightfoot v. Davis*, (1910), at 265, specifying “Thus, in the case of our statutory provisions as to the adverse possession of real property, the statute not only bars the remedy, but confers title on the party who has held the land adversely during the prescribed period. *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387. We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state”.

⁶⁴⁸ *Lightfoot v. Davis*, (1910), at 265: “Nevertheless, it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. Through there are no decisions in our courts on the question, they are numerous in other jurisdictions. *Brent v. Chapman*, 5 Cranach, 358, 3 L. Ed. 125; *Layne v. Norris*, 16 grat. (Va.) 236; *Newby v. Blakey*, 3 Hen. & Mun. (Va.) 57; *Dragoo v. Cooper*, 72 Ky. (9 Bush) 629; *Carr v. Barnett*, 21 Ill. App. 137; *Gaillard v. Hudson*, 81 Ga. 738, 8 S. E. 534; *Connor v. Hawkins*, 71 Tex. 582, 9 S. W. 684; *Chapin v. Freeland*, 142 Mass. 383, 8 N. E. 128, 56 Am. St. Rep. 701”.

⁶⁴⁹ *O’Keeffe v. Snyder*, (1979), at 846: “With respect to property, real or personal, the bar by limitation extinguishes not only the remedy afforded to recover the property, but the right thereto as well. [...] “And it is true of chattels as of land that a prescriptive title is as effective for all purposes as a title to grant.” Ames, “The Disseisin of Chattels,” 3 Harv.L.Rev. 317, 321 (1889-90). The “perpetual injunction” against enforcement of the true owner’s rights to his property virtually destroys that right. Id. [...] *** We so hold. The statute of limitations did not bar complainants’ right of recovery. (132 N.J.Eq. at 475, 28 A.2d at 195)”.

⁶⁵⁰ *Rowe v. Bonneau-Jeter Hardware Co.*, 245 Ala. 326, 16 So.2d 689, 158 A.L.R. 1266, (December 16, 1943).

⁶⁵¹ *O’Keeffe v. Snyder*, (1979), at 846: “This concept received express recognition in *Rowe v. Bonneau-Jeter Hardware Co.*, 245 Ala. 326, 16 So.2d 689, 694, 158 A.L.R. 1266 (Sup.Ct.1943), in the following terms: [emphasis] Although as a general rule the statute of limitations operates only on the remedy, not on the right, as to the recovery of property it operates as to both. *** So that in such suits the statute of limitations serves to cut the plaintiff off from the enforcement of his right of recovery by vesting such right in the respondent by adverse possession. As a defense to such a suit the statute of limitations and adverse possession are inseparable. [end emphasis] See also, 51 Am.Jur.2d, Limitation of Actions § 22 at 606”.

⁶⁵² *O’Keeffe v. Snyder*, (1979), at 846: “Although not expressly enunciated, *Redmond v. New Jersey Historical Society*, supra, was decided on that basis. [...] That *Redmond* viewed the defenses of limitations and adverse possession as but one defense is disclosed in the language of its holding: [emphasis] Its (Society’s) possession was not “adversary.” On the contrary, its possession, in our opinion, was merely “permissive” however otherwise presently characterized by either party, and, therefore, no claim of “adverse possession” can be successfully maintained by the Society” referring to *Redmond v. New Jersey Historical Society*, 31 Backes 464, 132 N.J. Eq. 464, 28 A.2d 189, (September 8, 1942).

⁶⁵³ *O’Keeffe v. Snyder*, (1979), at 846: “Dean Ames reached the same conclusion in rejecting the view that as to property, statutes of limitation bar only remedies, not rights: “An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand.”, Ames, supra at 319”.

⁶⁵⁴ *O’Keeffe v. Snyder*, (1980), at 494: “The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. R. Brown, *The Law of Personal Property* (3d ed. 1975) § 4.1 at 33 (Brown). Adverse possession does not create title by prescription apart from the statute of limitations. Walsh, *Title by Adverse Possession*, 17 N.Y.U.L.Q.Rev. 44, 82 (1939) (Walsh); see *Developments in the Law of Statutes of Limitations*, 63 Harv. L.Rev. 1177 (1950) (Developments)”.

⁶⁵⁵ See also *Van Antwerp v. Van Antwerp*, (1941), at 101: “Again: “As applied to suits for personal property adversely held, the statute of limitations does not affect the remedy merely, as in suits for debts, but it acts on the title, operating to transfer it to the possessor.” *Grunewald Co. v. Copeland*, 131 Ala. 345, 30 So. 878”. See also *Petrovich*, (1979-1980), pp. 1125 and 1140-1141. As noted by *Petrovich* “the passing of the limitations period results not only in the owner’s inability to sue in replevin, but also in the complete divestment of his title, and the vesting of good title in the possessor”, citing R. Brown, *The Law of Personal Property* § 4.1, at 33 (3d ed. 1975), which avers that “While in form these statutes merely limit the right of the owner to bring legal proceedings to repossess his property or to recover its value in case of conversion, all but universally in the United States the expiration of the statutory period has the effect, not only of barring the legal remedy, but also of extinguishing the owner’s title and of transferring it to the adverse possessor or possessors”. *Petrovich* also makes reference to *Van Antwerp v. Van Antwerp*, 242 Ala. 92, 5 So. 2d 73 (1941); *Henderson v. First Nat’l Bank*, 254 Ark. 427, 494 S.W.2d 452 (1973); *Woodcliff Gin Co. v. Kittles*, 173 Ga. 661, 161 S.E. 119 (1931); *Isham v. Cudlip*, 33 Ill. App. 2d 254, 179 N.E.2d 25 (1962); *Robbins v. Sackett*, 23 Kan. 301 (1880); *Mory v. Haggerty*, 122 Me. 212, 119 A. 527 (1923); *Chapin v. Freeland*, 142 Mass. 383, 8 N.E. 128 (1886); *Wells v. Halpin*, 59 Mo. 92 (1875); *O’Keeffe v. Snyder*, 170 N.J. Super. 75, 405 A.2d 840 (1979); *Redmond v. New Jersey Historical Society*, 132 N.J. Eq.

Furthermore, because both the statute of limitations and the adverse possession are connected, a failure to prove adverse possession entails that the defence of limitation will also fail.⁶⁵⁶

If the possession complies with the conditions of adverse possession, then the possessor is entitled to keep the stolen good after the expiration of the statutory period:⁶⁵⁷ title – which existed at the time of the taking of possession⁶⁵⁸ – is confirmed in the adverse possessor.⁶⁵⁹ The practical effect of this assertion is that the possessor acquires a better title⁶⁶⁰ to the property upon the expiration of the statute of limitations.⁶⁶¹ Adverse possession therefore constitutes one of the few exceptions to the *nemo dat* principle.⁶⁶² Because of this prescriptive right, it is impossible for the statute of limitations to run anew against a subsequent possessor because there is no new act of conversion.⁶⁶³ This entails that the adverse possessor can dispose of the property as he pleases and that it is impossible for the dispossessed owner to sue any subsequent acquirer.⁶⁶⁴

(2) New Jersey Discovery rule

In line with its *ratio decidendi* in case of adverse possession, the Supreme Court of New Jersey in *O’Keeffe v. Snyder* confirmed the existence of a ‘prescriptive right’ adjacent to the discovery rule. As the court noted:

“Our ruling [referring to the introduction of the discovery rule] not only changes the requirement for acquiring title to personal property after an alleged unlawful taking, [...]. Read Literally, the effect of the expiration of the statute of limitations under N.J.S.A. 2A:14-1 is to bar an action such as replevin. The statute does not speak of divesting the original owner of title. By its terms the statute cuts off the remedy, but not the right of title. Nonetheless, the effect of expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor”.⁶⁶⁵

In commanding the creation of a prescriptive right, the Supreme Court invoked historical, rational, as well as common sense considerations to justify this novelty. With regard to the first thought, the court found comfort in

464, 23 A.2d 189 (1942); *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582 (1910); *Reynolds v. Bagwell*, 200 Okla. 550, 198 P.2d 215 (1948); *Priester v. Millman*, 161 Pa. Super. 507, 55 A.2d 540 (1947); *Dee v. Hyland*, 3 Utah 308, 3 P. 388 (1883); *Merrill v. Bullard*, 59 Vt. 389, 8 A. 157 (1887).

⁶⁵⁶ *O’Keeffe v. Snyder*, (1979), at 847: “Hence, actions for the recovery of property, real or personal, of the character required by the law of adverse possession has persisted throughout the statutory period of limitations. [...] With respect to personal property, that period is six years. In both cases, however, the property must be possessed for the required period in the required manner. If one of the essential ingredients to adverse possession is missing, the claim for the property is simply not barred. When the trial judge rejected the defendant’s claim of title to the paintings by adverse possession, he necessarily disposed of the defense of limitation as well. Hence, by reason of *Redmond*, supra, and its necessary implications which we have attempted to explore herein, the elements of adverse possession have become part and parcel of the statute of limitations governing replevin actions. Where the elements, or any of them, are absent, the claim is not barred whenever the right may have accrued, or however long the converter’s possession may have persisted, as has traditionally been the rule with respect to real property. As applied to the present case, the failure of defendant to establish that his and his predecessor’s possession was sufficiently visible and notorious necessarily required not only that his defense of adverse possession be rejected, but the defense of limitation as well. They were, in truth, the same defense”.

⁶⁵⁷ *Preziosi*, (1997-1998), p. 233; *O’Keefe*, (1996), p. 54; *Symeonides*, (2005), p. 1196; *Sherlock*, (2000), p. 488.

⁶⁵⁸ See *Petrovich*, (1979-1980), p. 1141 where it is averred that “the adverse possessor is treated as the owner of property, subject to the right of the dispossessed true owner to recapture his property. By barring this right to recapture, the passage of the limitations period acts to confirm and make irrevocable the defeasible title which the wrongdoer already possessed”, citing *R. Brown, The Law of Personal Property*, § 4.1, at 33 (3d ed. 1975).

⁶⁵⁹ *Sherlock*, (2000), p. 488; *Gerstenblith*, (1988-1989), p. 120, footnote 5, citing 3 *American Law of Property* § 15.2 (A. Casner ed. 1952), at 760-61.

⁶⁶⁰ “**title** (15c) 1. The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself [...]” *Garner, B. A., Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Title.

⁶⁶¹ *Henson*, (2001-2002), p. 1136.

⁶⁶² In *Lightfoot v. Davis*, the New York Court of Appeals emphasised “if the original owner has not by lapse of time lost title to the property, he is not barred from maintaining legal proceedings to recover possession of it”, *Lightfoot v. Davis*, (1910), at 268.

⁶⁶³ *O’Keeffe v. Snyder*, (1979), at 847, citing *Joseph v. Lesnevich*, 56 N.J. Super 340, 346, 153 A.2d 349 (App.Div. 1959).

⁶⁶⁴ *O’Keeffe v. Snyder*, (1979), at 846: “Indeed, the only vice to the title of the person in possession of such property is the right of the true owner to assert his own title. Once that vice is removed by passage of time, the prescriptive right obtained by the possessor entitles him to pass his own good title to others, including the owner. Indeed, once title to adverse possession vests, the true owner can only regain title by purchase, gift or by himself proving the requisites of an adverse possession”.

⁶⁶⁵ *O’Keeffe v. Snyder*, (1980), at 500. In deciding as such, the court has constructed an acquisition of title in Article 2A:14-1 N.J.S.A. to the benefit of the possessor under both the doctrine of adverse possession and the discovery rule (see *O’Keeffe v. Snyder*, (1980), at 501). Following the court, said construction is also in accordance with the reading of Article 2A:14-6 N.J.S.A. for realty. Article 2A:14-6 N.J.S.A. does not prescribe an acquisitive title for the possessor, although Articles 2A:14-30 and 14-31 of the N.J.S.A. create this title and this construction has been applied *mutatis mutandis* to Article 2A:14-6 N.J.S.A. Henceforth, Article 2A:14-6 N.J.S.A. has been embedded with this acquisitive right at the end of the statutory period for adverse possession (citing *Brane v. Fleck*, 23 N.J. 1, 16, 127 A.2d 1 (1956)) and there seems to be no reason not to apply this construction to Article 2A:14-1 N.J.S.A. in case of adverse possession or under the discovery rule. See *O’Keeffe v. Snyder*, (1980), at 501.

the doctrine of disseisin.⁶⁶⁶ Disseisin favours a wrongful possessor who has continuous possession to the detriment of the dispossessed owner, leaving the latter merely with a personal right to ‘recapture his property’ when the circumstances allow.⁶⁶⁷ Relying on Dean Ames’s work – and, therefore, confirming the impossibility to exercise an eternal right over a chattel⁶⁶⁸ –, the court established that the only ‘vice’ in the title of the possessor existed in the right of the original owner to repossess the property.⁶⁶⁹ Furthermore, the Supreme Court conceded that accepting a ‘metaphysical notion of title in the owner’ would be of little interest to the owner and might even have important repercussions on the rights of the possessor and of third parties.⁶⁷⁰

Furthermore, it is important to note that New Jersey does not consider that the taking of possession by an unauthorised person after the expiration of the statute of limitations constitutes a new conversion, for which a new statute of limitations starts running.⁶⁷¹ The majority of the New Jersey Supreme Court specifically rejected this outcome in *O’Keeffe v. Snyder*.⁶⁷² Citing the work of Walsh, the court noted: “Uncertainty is created by cases which hold that each successive purchaser is subject to a new cause of action against which the statute begins to run from that time, in this way indefinitely extending the time when the title will be quieted by operation of the statute. [...] and there is strong reason back of the argument that the statute runs anew against each succeeding cause of action”.⁶⁷³ What is more, relying upon Dean Ames’ work, the court tabled the absurd results that would ensue from a renewed limitations period: whenever a purchaser in good faith would acquire from the convertor, the period of limitations would run anew and, therefore, weaken the position of the possessor, whilst a convertor would benefit from the protection after several years of continuous possession.⁶⁷⁴ Consequently, the court found that mandating the creation of a prescriptive right would lead to less uncertainty and prove more sensible.⁶⁷⁵ Finally, it should be remarked that although the prescriptive effect given by the New Jersey Supreme Court in *O’Keeffe* to the expiration of the statute of limitations contradicts the legal effect recognised by the United States Supreme Court in *Campbell v. Holt*, the creation of a prescriptive right is in accordance with the dissenting opinion of Justice Bradley in the said case.⁶⁷⁶

(3) California Strict Discovery Rule

In 2015, a seminal case adjudicated by the United States District Court for the Central District of California in the *Marei von Saher v. Norton Simon Museum of Modern Art at Pasadena* saga has brought important clarifications as to the effect of the staling of the statute of limitations in California law.⁶⁷⁷

⁶⁶⁶ *O’Keeffe v. Snyder*, (1980), at 500, citing Brown, 3 Am.Jur.2d, Adverse Possession, s 202 at 290-292; 3 American Law of Property, s 15.16 at 834.

⁶⁶⁷ *O’Keeffe v. Snyder*, (1980), at 500, citing Brown, 3 Am.Jur.2d, Adverse Possession, s 4.1 at 34.

⁶⁶⁸ *O’Keeffe v. Snyder*, (1980), at 501: “As Dean Ames wrote: “An immortal right to bring an eternally prohibited act is a metaphysical subtlety that the present writer cannot pretend to understand””, citing Ames, The Disseisin of Chattels, 3 Harv.L.Rev. 313, 321 (1890), at 319.

⁶⁶⁹ *O’Keeffe v. Snyder*, (1980), at 501.

⁶⁷⁰ *O’Keeffe v. Snyder*, (1980), at 501.

⁶⁷¹ *O’Keeffe v. Snyder*, (1980), at 503: “We reject the alternative of treating subsequent transfers of a chattel as separate acts of conversion that would start the statute of limitations running anew. At common law, apart from the statute of limitations, a subsequent transfer of a converted chattel was considered to be a separate act of conversion. In his dissent, Justice Handler seeks to extend the rule so that it would apply even if the period of limitations had expired before the subsequent transfer. Nonetheless, the dissent does not cite any authority that supports the position that the statute of limitations should run anew on an act of conversion already barred by the statute of limitations. Adoption of that alternative would tend to undermine the purpose of the statute of quieting titles and protecting against stale claims. Brown, supra, s 4.3 at 38” and “Nevertheless, under the cases, new actions in conversion arise against successive purchases of the converted property, and there is strong reason to back of the argument that the statute runs anew against each succeeding cause of action”.

⁶⁷² *O’Keeffe v. Snyder*, (1980), at 503.

⁶⁷³ *O’Keeffe v. Snyder*, (1980), at 503.

⁶⁷⁴ *O’Keeffe v. Snyder*, (1980), at 504.

⁶⁷⁵ *O’Keeffe v. Snyder*, (1980), at 504, citing Dean Ames’ work “A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller’s tort, the disposed owner’s right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself, a conclusion as shocking in point of justice as it would be anomalous in law. (Ames, supra at 323, footnotes omitted)”. In line with the reasoning posited by Dean Ames, the court pursued as follows: “It is more sensible to recognize that on expiration of the period of limitations, title passes from the former owner by operation of the statute. Needless uncertainty would result from starting the statute running anew merely because of a subsequent transfer. 3 American Law of Property, s 15.16 at 837” (at 504).

⁶⁷⁶ *Campbell v. Holt*, (1885), at 630 and ff. In the words of Justice Bradley: “Remedies are the life of rights, and are equally protected by the constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away” (*ibidem*, at 631).

⁶⁷⁷ Ray, K. P., ‘Von Saher: Court Says Statute of Limitations for Recovery of Stolen Art Runs Anew Against Subsequent Purchasers/Transferees’, *Cultural Assets – Legal Analysis and Commentary on Art and Cultural Property – A Greenberg Traurig Blog*, (1 May 2015), pp. 2-3.

The *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*⁶⁷⁸ case concerned a sixteen-century diptych – two oil paintings on wood depicting Adam and Eve in the Garden of Eden –, by Lucas Cranach the Elder. Although the provenance of the panels remains unclear, it was established that they had been taken by the Bolsheviks from their owner during the 1917 Bolshevik Revolution.⁶⁷⁹ In 1931, the Soviet State put the diptych up for sale at Rudolf Lepke's auction house in Berlin as part of the sale of the Stroganoff collection, where it was purchased by the art dealer Jacques Goudstikker. At the outset of the Second World War, Goudstikker – forced to flee The Netherlands to avoid Nazi persecution – left his estate behind. In 1940, Nazi leader Hermann Göring acquired the diptych from the Goudstikker company. Soon after the war, The Netherlands recovered the panels in accordance with the policy of external restitution. Subsequently, the Dutch government adopted specific procedures to the avail of Holocaust victims for the recovery of their misappropriated properties. Goudstikker, in his exile from the Netherlands, had been the victim of a fatal accident on a ship, leaving his widow – Dési Goudstikker – as a surviving follower in interest. In requesting the annulment of the forced sale of the Goudstikker real estate, Dési successfully obtained the annulment of part of the Nazi acquisitions because the real estate had been sold under market value. Nonetheless, she made the deliberate choice not to request the annulment of the sale of art works, including among others the two panels. Many years transpired without further claims being raised by the Goudstikker family. When the deadline for bringing restitution claims expired in 1951, the Dutch government was left with the possession of the panels. In 1966, the government sold the diptych to George Stroganoff-Scherbatoff, an heir of the Stroganoff family. George Stroganoff-Scherbatoff claimed that his family owned four paintings – all four actually in the possession of the Dutch state – before the Bolshevik Revolution, and that he was entitled to their restitution. In attempting to retain one of these paintings, which was a Rembrandt, the Dutch government reached a settlement with the Russian family in 1971 whereby it was to sell the Cranachs to George Stroganoff-Scherbatoff. Upon recovering the panels, Stroganoff-Scherbatoff sold these to the Norton Simon Museum of Art in Pasadena, California. In 1996, both Dési and her son Edo died, leaving Marei von Saher – Jacques Goudstikker's daughter-in-law – as the direct heir. In an attempt to recover the diptych, Marei initiated recovery proceedings before the California courts against the Norton Simon Museum of Art.

The 2015 judgment of the District Court is particularly instructive of the legal implications of the expiration of the statute of limitations for an action in claim and delivery. Although previous courts had, since 1996, asserted that a statute of limitations would run anew against a new possessor of stolen property,⁶⁸⁰ it was yet to be settled whether the statute could be replenished if it had staled for a previous conversion.⁶⁸¹ In tackling this conundrum, the court in *Von Saher* – basing its reasoning on the *caveat emptor* principle⁶⁸² – clarified that for every new act of

⁶⁷⁸ *Marei von Saher v. Norton Simon Museum of Art at Pasadena, et al.*, Case No CV 07-2866-JWF (JTLx), (April 2, 2015).

⁶⁷⁹ Although it was advanced that the paintings might have been taken from the Stroganoff-Scherbatoff family, it had been documented in the 1920s that the panels were to be found in the Holy Trinity Gate Church and could have been given by the Ukrainian Church to the Holy Trinity Gate Church. For more discussion on this point, see Cronin, (2016), pp. 9 and ff.

⁶⁸⁰ See for example *Society of California Pioneers v. Baker*, (1996), at 782-783. See also *Naftzger v. American Numismatic Society*, (1999), at 7; in the case *Harpending v. Meyer*, the California Supreme Court established that every transfer of the property to a new possessor results in the materialization of a new conversion. See *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 8, referring to *Harpending v. Meyer*, 55 Cal. 555 (1880) (itself citing *Wells v. Ragland*, 31 Tenn. 501 (1852) at 560).

⁶⁸¹ *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 8: “However, it is an open question in California whether a subsequent possessor who acquires stolen property after the statute of limitations has already expired is subject to a renewed limitations period. See *Soc’y of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 783 n.4 (1996) (“[W]e need not decide whether a purchaser who acquired the item after the statute expired would be subject to renewal of the limitations period.”); *Naftzger v. American Numismatic Soc’y*, 42 Cal. App. 4th 421, 433 (1996) (“We do not decide, for example, if an owner who fails to file a lawsuit under the prior version of section 338, subdivision (c) within three years of discovering the property’s whereabouts will be time barred if the thief or subsequent possessor later moves the stolen property to an unknown location, sells, or continues to withhold the stolen property.”).

⁶⁸² *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 9: “In order to reach its conclusion, the Court considers the well-established rationale for treating each transfer of stolen property as a new act of conversion, as discussed in cases dating back to the 1800s. As the Supreme Court of Oregon aptly explained in *Velzian v. Lewis*, 15 Or. 539 (1888): At first blush, it may seem strange that one who takes possession of goods or chattels under a contract of purchase from one who had no right to sell should be treated as a wrongdoer, but the explanation of the principle lies in the common-law maxim *caveat emptor*, which applies to the transfer of personal property. It is the buyer’s own fault if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake. Nothing can be plainer than that no one can sell a right when he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, acts in derogation of the rights of the owner, and in hostility to his authority, and consequently can neither acquire themselves, nor confer on the purchaser any right or title of such owner. *Id.* At 541-42 (internal citations omitted). In other words, “a thief cannot convey valid title to an innocent purchaser of stolen property” and “[s]tolen property remains stolen property, no matter how many years have transpired from the date of the theft.” *Naftzger v. American Numismatic Soc’y*, 42 Cal. App. 4th 421, 432 (1996). As the California Supreme Court stated: “We are unable to perceive . . . that a person can ever be considered a *bona fide* purchaser of goods from one who has no right to sell, in a case where the rule of *caveat emptor* applies. The law imputes notice to him. Under that rule he is not only put on inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it.”. *Harpending v. Meyer*, 55 Cal. 555, 560 (1880). Accordingly, the subsequent purchaser “has no lawful claim to this property as against the rightful owner.” *Strasberg v. Odyssey Group, Inc.*, 51 Cal. App. 4th 906, 921 (1996).

conversion, a new cause of action materialises, thereby triggering the running of another statute of limitations.⁶⁸³ The court found that this clarification was true even though a statute of limitations had already expired for a previous conversion.⁶⁸⁴ Hence, the effect of the expiration of the statute of limitations was neither to divest the owner from his title to the object, nor to convey a new title to a thief or other subsequent acquirer. Instead, the court averred that the expiration of the prescribed period merely affects the availability of a remedy against the actual possessor.⁶⁸⁵ As such, the staling of the statute of limitations renders the remedy obsolete but it does not extinguish the cause of action.⁶⁸⁶ This conclusion is directly opposite to the prescriptive right established by the New Jersey Supreme Court in *O’Keefe v. Snyder*, but it is in harmony with the dissenting opinion of Justices Fritz⁶⁸⁷ and Handler.⁶⁸⁸ This means that, contrary to the discovery rule’s prescriptive right accepted in New Jersey,⁶⁸⁹ a staled statute of limitations does not confer title upon the possessor in California law.⁶⁹⁰

⁶⁸³ *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 8: “Under California law, each time stolen property is transferred to a new possessor, a new tort or act of conversion has occurred. As the California Supreme Court stated in *Harpending v. Meyer*, 55 Cal. 555 (1880), favorably citing the holding of *Wells v. Ragland*, 31 Tenn. 501 (1852): [I]t is distinctly held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking of possession under such circumstances constitutes a new conversion on the part of the person taking it, and that from the time of the commission of that act, the statute will commence running. *Id.* At 560; *see also Culp v. Signal Van & Storage*, 142 Cal. App. 2d Supp. 859, 861 (1956) (“One who, though honestly and in good faith, purchases personal property from one having no title thereto or right to sell the same is guilty of conversion.”). Accordingly, California courts have held that the statute of limitations in an action seeking to recover stolen property begins to run anew against each subsequent purchaser. *See, e.g., Soc’y of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 782-83 (1996) (holding that the statute of limitations in actions concerning stolen property began to run anew against a subsequent purchaser); *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 707 (1925) (holding that a former version of California Code of Civil Procedure § 338, which provided for a three-year statute of limitations, allowed an owner of personal property to commence an action against a wrongful converter at any time within the three years from the day the wrongdoer obtained possession of the property). The new or subsequent possessor commits a new act of conversion, and a new statute of limitations begins to run, even if the new possessor purchases the property honestly and in good faith. *See, e.g., First Nat’l Bank v. Thompson*, 60 Cal. App. 2d 79, 82 (1943) (“The facts prove a conversion by respondents though innocent purchasers of the property.”); *Demarsin*, (2010-2011), p. 275.

⁶⁸⁴ *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 10: “Consistent with this rationale, the fact that the statute of limitations may have expired as to an owner’s claim against the thief (or prior possessor) is irrelevant. [...] Accordingly, because the thief cannot convey valid title no matter how much time has passed, the subsequent possessor’s acquisition of stolen property constitutes a new conversion. Because a new tort has occurred, the owner is entitled to a new limitations period. [...] However, Defendants fail to appreciate the crucial distinction between the statute of limitations and the law of torts. *Cf. O’Keefe (sic) v. Snyder*, 83 N.J. 478, 510 (1980) (Handler, J. Dissenting) (“The New York rule of subsequent conversion which creates a new cause of action, the statute of limitations is not “reset” or “revived”, but begins anew as to each subsequent possessor” and footnote 8: “Under California law, each transfer of stolen property constitutes a new act of conversion or new tort which triggers a new statute of limitations. *See, e.g., Harpending v. Meyer*, 55 Cal. 555, 561 (1880) (“We shall hold . . . that the defendants having acquired the possession of plaintiff’s property by and through the tortious acts of Baux, and not otherwise, such possession was tortious from its commencement, and constituted a conversion of plaintiff’s property, for which she might at any time within three years thereafter have maintained an action . . .”). Contrary to Defendants’ argument, such a rule is not a common-law accrual rule that acts as an alternative to the discovery, but rather it is based on the substantive law of torts. Although defendants heavily rely on *O’Keefe (sic) v. Snyder*, 83 N.J. 478 (1980), New Jersey law is directly contrary to the law in California and thus inapposite. Compare *O’Keefe (sic)*, 83 N.J. 478, 503 (1980) (rejecting the treatment of subsequent transfers of chattel as separate acts of conversion and allowing “tacking”) with *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 708 (1925) (treating subsequent transfers of chattel as separate acts of conversion and rejecting “tacking”).”

⁶⁸⁵ *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 10: “Expiration of the statute of limitations merely extinguishes the owner’s right to seek a remedy from the thief or possessor; it does not thereby divest the owner of title or convey title to the thief or possessor. *See Western Coal and Mining Co. v. Jones*, 27 Cal. 2d 819, 828 (1946). (“The general rule is that the running of the statutory period does not extinguish the cause of action, but merely bars the remedy.”); *In re Marriage of Klug*, 130 Cal. App. 4th 1389, 1399 (2005) (“Statutes of limitation are legislative enactments that limit the time period in which a plaintiff can bring his or her cause of action in court. They do not alter the legal obligation and injury underlying plaintiff’s claim.”). Compare with *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (2012), at 21, where the United States District Court of the Central District of California noted that there was hitherto no clarification as to the legal effect produced by the expiration of the statute of limitations, and more specifically that no precedent gives title to the possessor at the expiration of the period prescribed by the statute.

⁶⁸⁶ In 2012, a federal court sitting in diversity jurisdiction and applying California State law already explicitly stated that the expiration of a limitation period does not affect the right, but only the remedy. *See Cassirer v. Thyssen-Bornemisza Collection Fdn.*, No. CV 05-3459-GAF, slip op. at 2 (C.D. Cal. May 24, 2012), cited in Wallace, (2012), p. 23.

⁶⁸⁷ The dissenting opinion of Justice Fritz in the appeal in *O’Keefe v. Snyder* highlighted the problems inherent in the conclusion reached by the majority of the Superior Court that adverse possession for personal property resulted in the acquisition of ownership for the adverse possessor. Although this *obiter dictum* relates to the normative effects of adverse possession, the rationale underlying the opinion is indicative of the reasons that have led the judges in the 2015 *Marei von Saher* decision to extinguish the remedy instead of the right. *See O’Keefe v. Snyder*, (1979), at 848 and ff. for an in-depth explanation.

⁶⁸⁸ *See O’Keefe v. Snyder*, (1980), at 510 and ff. In its dissenting opinion, Judge Handler fiercely criticised the majority for rejecting the principle of subsequent conversions, a principle that also exists in New York law.

⁶⁸⁹ Hayworth, (1993-1994), p. 376; Fincham, (2009-2010), p. 189.

⁶⁹⁰ The Court of Appeals in *Naftzger* already pointed at the misconception that the expiration of a statute of limitations would result in the acquisition of title by the current possessor. *Naftzger v. American Numismatic Society*, (1999), at 7, footnote 13: “Implicit in *Baker’s* analysis of whether the limitations period had been extinguished in Kah’s favor is the erroneous notion that valid title to stolen property may be acquired upon the expiration of the limitations period in favor of one who purchased the stolen property either from a thief or a

Consequently, the owner's right remains unaffected by thefts and every new conversion provides the owner with an opportunity to recover his property. This conclusion was already prognosed in the 1999 *Naftzger* decision, where the Court of Appeals of the Second District established that California law imposed "a continuing affirmative duty to restore stolen property to its rightful owner".⁶⁹¹ Therefore, a stolen chattel remains stolen irrespective of how many years have passed since the theft.⁶⁹² Finally, it should be remarked that because each transfer of a stolen chattel constitutes a new conversion, it is impossible for a new possessor to rely upon the notion of tacking.⁶⁹³

(4) New York| Demand and Refusal

In New York law, the statute of limitations is seen as forming part of the procedural rules and, therefore, it will only affect the remedy and not the right.⁶⁹⁴ Thenceforth, the expiration of a statute of limitations has the effect of discarding the owner's remedy, but it does not divest him from his right of ownership.⁶⁹⁵ This principle was affirmed in the 1910 case of *Lightfoot v. Davis*.⁶⁹⁶ Since the right survives after the staling of the period of limitations, the owner can pursue his claim upon the property whenever a new act of conversion takes place,⁶⁹⁷ in a similar manner to what is prescribed by California law.

(5) New York| Laches

Unlike the above, there exists no precedent addressing the legal effect of a successful defence of laches. Based upon *Solomon R. Guggenheim Foundation v. Lubell*, Wallace has theorised that a successful laches defence seems to affect the remedy and not the right.⁶⁹⁸ As the Appellate Division in *Guggenheim* noted, the doctrine of laches merely affects the possessory rights of the parties.⁶⁹⁹ Henceforth, a successful laches argument does not divest the owner from his right to the object and only has the effect of cancelling out the remedy.⁷⁰⁰ Nevertheless, because the behaviour of the owner in searching for the stolen property controls in laches, it is not unreasonable for a subsequent convertor to re-argue the validly established lack of diligence against a previous convertor in its laches defence.

subsequent purchaser. As even *Baker* acknowledges, under California law, "the statute of limitations in an action concerning stolen property begins] to run anew against a subsequent purchaser. [Citations.]" (*Baker, supra*, 43 Cal.App.4th at pp. 782-783.) Valid title cannot be acquired through a thief. Accordingly, the fact that the limitations period has not been extinguished in Kah's favor should have been irrelevant to *Baker's* analysis of whether the action had been timely filed against the defendant".

⁶⁹¹ *Naftzger v. American Numismatic Society*, (1999), at 8.

⁶⁹² The 2015 judgment is in fact very sensitive to what the court had already ascertained in *Naftzger*: "Stolen property remains stolen property, no matter how many years have transpired from the date of the theft". See *Naftzger v. American Numismatic Society*, (1996), at 432; *Naftzger v. American Numismatic Society*, (1999), at 8.

⁶⁹³ *Society of California Pioneers v. Baker*, (1996), at 785, footnote 13: "Even if we held that the doctrine of adverse possession applies to personal property, which we do not, it would not help respondent Baker, for the concept of tacking: does not apply in California, and Baker himself did not hold the item for three years. (*San Francisco Credit C. House v. Wells, supra*, 196 Cal. 701, 707-708, 239 P. 319 [wrongful possessor may not add the time of possession of his predecessor to his own possession]); *Bufano v. City & County of San Francisco* (1965) 233 Cal.App.2d 61, 71, 43 Cal.Rptr.223 [application of the doctrine not well established]".

⁶⁹⁴ *Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48, 710 N.E.2d 250, 687 N.Y.S.2d 604, 1999 N.Y. Slip Op. 02633, at 54, citing *Martin v. Dierck Equip. Co.*, 43 N.Y.2d 583, 588, 403 N.Y.S.2d 185, 374 N.E.2d 97.

⁶⁹⁵ *Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48, 710 N.E.2d 250, 687 N.Y.S.2d 604, 1999 N.Y. Slip Op. 02633, at 54, citing *Hulbert v. Clark*, 128 N.Y. 295, 297, 28 N.E. 638 and Siegel, N.Y. Prac § 34, at 38 [2d ed]. *Hulbert v. Clark* specifically relied upon *Campbell v. Holt* in concluding that the expiration of the statute of limitations bars the remedy and does not affect the right. In *Campbell v. Holt*, the United States Supreme Court – relying upon *Townsend v. Jemison* (50 U.S. 407, 9 How. 407, 1850 WL 6883, 13 L.Ed. 194) – specified that statutes of limitations "strictly affect the remedy, and not the merits"; Hayworth, (1993-1994), p. 383; Wallace, (2012b), p. 9.

⁶⁹⁶ *Lightfoot v. Davis*, (1910), at 264, relying upon *Hulbert v. Clark*, 128, N.Y. 295, 28 N.E. 638, 14 L. R. A. 59 and specifying "while the statute of limitations may bar the remedy, it does not cancel or discharge the debt".

⁶⁹⁷ Wallace, J., 'New York's Distinctive Rule Regarding Recovery of Misappropriated Art After the Court of Appeals' Decision in *Mirvish v. Mott*', 3(1) *Spencer's Art Law Journal*, (June 2012), p. 9.

⁶⁹⁸ Wallace, (January 2012), p. 23.

⁶⁹⁹ *Solomon R. Guggenheim v. Lubell*, (1990), at 149-150: "[...] in the absence of a statute establishing title by virtue of the mere lapse of time (*compare*, CPLR 212[a]), we think it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long".

⁷⁰⁰ Wallace, (January 2012), pp. 24-25.

SUMMARY

Introductory remark – To resume the above, it should be recalled that despite having played a prominent role in the establishment of the UNIDROIT convention, the United States of America has not become a party to the convention to date. Instead, the rules applied to the transfer of stolen cultural property are the state laws transposing the provisions of the Uniform Commercial Code. Following these laws, the three jurisdictions that were scrutinised in the present chapter – i.e. New Jersey, California and New York – do not afford third-party protection to acquirers who have acted in good faith, unlike the three European legal systems that were discussed in the previous chapter, i.e. Belgium, France and The Netherlands. Consequently, a third party can never legally acquire a stolen object through means of third-party protection in New Jersey, California or New York. Thenceforth, the dispossessed owner can always recover a stolen object on the basis of these laws. Nevertheless, this possibility to recover depends primarily on the timeliness of the claim. If the owner does not sue within the prescribed time period, his right might become unenforceable.⁷⁰¹

Theft – In order to successfully recover a stolen object, the claimant will first have to prove that a theft has taken place. New Jersey recognises an unlawful taking or unlawful disposition, deception and extortion – as respectively specified in Sections 2C:20-3, 2C:20-4 and 2C:20-5 NJCCJ – as theft. Both California and New York have more specific definitions of theft, which are respectively laid down in Section 484 CPC and paragraph 155.05 NYPS (the paragraph whereby theft is assimilated to larceny). All three definitions give a broader appreciation of theft than the definitions that are found in Articles 461 BCrC, 311-1 FCrC and 310 DCrC.⁷⁰²

Cultural objects – Stolen cultural objects are subsumed under the regime applicable to personal property. Each state uses its own narratives for the recovery of stolen cultural objects: New Jersey prescribes for the recovery of ‘goods’,⁷⁰³ California addresses the recovery of ‘personal property’⁷⁰⁴ and New York directs its rules on recovery to ‘chattels’.⁷⁰⁵⁻⁷⁰⁶

Legal remedy – Unlike the three European jurisdictions analysed above, the remedies prescribed in the three American jurisdictions are to be found in the realm of tort law instead of property law. This is notably because theft is assimilated to the act of conversion, which constitutes an interference with the owner’s property rights. The two most important remedies to conversion of avail to a dispossessed owner are the action in replevin and the action in conversion. Replevin is a more desirable remedy when it comes to dealing with personal property of a cultural nature, as it allows a claimant with a stronger title to recover possession of the stolen property. To successfully obtain the recovery of a stolen chattel on the basis of the action in replevin, it is important for the claimant to demonstrate the following elements: firstly, that the chattel subject to the contention is the one that was stolen; secondly, that the claimant has a title or right of possession upon the object and that this title is superior to the one of the possessor; thirdly, the claimant must demonstrate that the good is unlawfully detained, in demonstrating that the owner did not permit the removal of the object; finally, the claimant must prove that the defendant is in wrongful possession (with the exception of New York where the purchaser is under a duty to verify the provenance, a reason why the latter has the obligation to demonstrate that there was no theft). New Jersey knows of the action in replevin, as codified in Section 2B:50-1 of the NJRS. California prescribes the action of claim and delivery – as laid down in Sections 511.010 and ff. of the CCCP – for replevy. In New York law, Article 71 of the New York CPLR lays down the procedure for the recovery of a chattel.⁷⁰⁷

Statutes of limitations – In order for a dispossessed owner to recover a stolen object successfully, the claim must be timely introduced. Therefore, it should be emphasised that the claim of the owner can be barred by a stale statute of limitations. The expiration of a SOL often constitutes the primary defence that is used by defendants in proceedings for the recovery of stolen personal property. Consequently, this defence is particularly important to acquirers who have acted in good faith and who do not enjoy third-party protection in the three US jurisdictions under scrutiny in this chapter. Statutes of limitations for the recovery of stolen personal property range from one to six years from the accrual of the cause of action. The periods in New Jersey, California and

⁷⁰¹ Cf. sections A. and A. 1. (1) above.

⁷⁰² Cf. section A. 1. (2) above.

⁷⁰³ Cf. Section 12A:2-107 NJRS.

⁷⁰⁴ Cf. Articles 658-662 CCC.

⁷⁰⁵ Cf. Section 15 GCL.

⁷⁰⁶ Cf. section A. 1. (3) above.

⁷⁰⁷ Cf. section A. 1. (4) above.

New York are, respectively, three years,⁷⁰⁸ three or six years⁷⁰⁹ and three years.⁷¹⁰ Although the length of the periods of limitations is given, the accrual of the cause of action has been left undefined, with the exception of California. Instead, domestic courts have been entrusted with the task of defining the contours of this notion: the accrual of the cause of action refers to the moment in time where all the prerequisites to the initiation of legal proceedings by the claimant are disclosed to him. It is for the courts to determine which facts or events are of relevance for the cause of action to accrue.⁷¹¹

Nemo dat quod non habet – Similar to Belgian, French and Dutch law, the laws of New Jersey, California and New York abide by the *nemo dat quod non habet* principle. In New Jersey, the principle is codified in Article 12A, Section 2-403 of the NJSA. In California, in Section 2403 of the CUCC. New York has transposed the *nemo dat* principle into Section 2-403 of the NYUCC. The principle has also been reaffirmed in the case law of these three states. The *nemo dat* principle entails that a thief can never pass title to a stolen object to any subsequent possessor and, therefore, that a dispossessed owner will prevail in a conflict against another possessor, provided his claim is timely introduced. In fact, all six jurisdictions under scrutiny abide by the *nemo dat* principle, but differ as to how they deal with exceptions to the principle: whilst the three European jurisdictions know of exceptions through means of third-party protection for *bona fide* possessors, the three U.S. jurisdictions do not prescribe means of third-party protection, but they rather impose technical limitations to the owner's right of action in the form of statutes of limitations. The owner can, therefore, only be disbarred from his action for the recovery of stolen cultural property on the basis of a technicality.⁷¹²

Third party protection – The distinction between voluntary and involuntary loss of possession is not as pronounced in the three American jurisdictions than in the European states that were scrutinised in the previous chapter. In fact, the three American jurisdictions know of three general exceptions to the *nemo dat* principle in case of voluntary loss of possession, notably in case of voidable title,⁷¹³ statutory estoppel⁷¹⁴ or equitable estoppel. These exceptions are, nonetheless, irrelevant in case of theft as they flow from voluntary losses of possession. Therefore, the owner dispossessed by means of theft can always recover the stolen property, provided that the action is brought within the imparted time limitations. Third parties will, thenceforth, only find protection in the defence of the statutes of limitations. It is thus of paramount of importance to determine when a cause of action accrues to determine when the period of limitation starts and when it expires.⁷¹⁵

Unlawful taking – In giving meaning to the accrual of the cause of action, many U.S. jurisdictions have, at first, applied the doctrine of unlawful taking. This doctrine posits that in the absence of concealment or fraud, the statute of limitations for conversion starts running at the time of the unlawful taking of possession. This rule flows from the rationale that the cause of action materialises at the moment that the tortious act is committed. Hence, the statute of limitations starts running at the time of the conversion, irrespective of whether the dispossessed owner knows of the unauthorised appropriation. The problem with this doctrine is that the owner can be deprived of his property even though he is unaware of the theft or of the identity of any subsequent possessor. Thenceforth, courts have resorted to other interpretations of the accrual of the cause of action.⁷¹⁶

New Jersey| Adverse possession – In New Jersey, the accrual of the cause of action has been adjoined to adverse possession. Adverse possession is to be differentiated from other interpretations of the accrual of the cause of action in that it allows the possessor to acquire a right of ownership in the object at the end of the period of limitations because of the adversity of his possession. The doctrine was originally applied for land, and has been subsequently extrapolated to personal property. This doctrine focuses upon the behaviour of the possessor. Therefore, it is the adversity of the possession that allows the SOL to run. For the SOL to start running, the adverse possession must be “adverse, hostile, open, notorious, actual, visible, exclusive and continuous”. The period of limitation will only start running when the adverse possession complies with the eight attributes given above. On the one hand, if the possession has been adverse for the period prescribed by the statute of limitations – irrespective of who has held the possession and of how many times the property has switched hands –, then the owner is deprived of reclaiming the stolen object. More specifically, this will be the

⁷⁰⁸ Cf. Section 2A:14-1 NJRS.

⁷⁰⁹ Cf. Sections 338 (2) and (3) CCCP.

⁷¹⁰ Cf. Section 214 (3) CPLR.

⁷¹¹ Cf. section A. 1. (5) above.

⁷¹² Cf. section A. 2. (1) above.

⁷¹³ Cf. Section 2-403 (1) UCC.

⁷¹⁴ Cf. Section 2-403 (2) UCC.

⁷¹⁵ Cf. section A. 2. (2) above.

⁷¹⁶ Cf. section A. 3. above.

result when the owner does not promptly initiate recovery proceedings from the moment that he is put on notice by the adverse possession. Importantly, the possession must be open and notorious so that the owner can have actual or constructive notice of the adverse possession. On the other hand, if the possession fails to comply with one of the eight attributes, the possession is not considered to be adverse and the owner can recover the stolen object from the possessor. A further nuancing has been formulated by Gerstenblith and ought to be taken into consideration: in cases of fraudulent concealment or fraud exercised by the thief, the period of limitations is tolled for the duration that the fraudulent concealment or the fraud is on-going. Then, the focus is shifted from the behaviour of the possessor to notification of the adverse possession to the owner. In shifting the focus to the owner, he is given a fair chance to recover his property by means of actual or constructive notice. The owner is thus given a right of notice when the possessor has acted in bad faith. Instead, when the possessor is innocent, and thus unaware of the theft, the focus remains upon the behaviour of the adverse possessor. Provided the adverse possession complies with the eight attributes given above, then it is possible for the innocent possessor to acquire through means of adverse possession, irrespective of the notification to the owner. The eight attributes are meant to put the owner on notice of the adverse possession so as to enable him to undertake legal action promptly. Only the owner's dilatory behaviour should be punished. Nevertheless, adverse possession does not sit comfortably in the context of personal property, and notably with regard to cultural property. This is notably due to the fact that these objects are often used for personal – and, therefore, often private – enjoyment. This problem was highlighted in *O'Keeffe v. Snyder*, where a museum type of display was deemed appropriate to give sufficient notice to the adverse possession of cultural property. Although adverse possession is meant to put the owner on notice, it fails to do so with regard to personality when the possessor is innocent. This is notably because even the most diligent owner might never come to know of the adverse possession that complies with the eight prerequisites, since the owner does not know where that property is. Instead, it is clear that this doctrine is more suitable for land since an owner knows where his land is located and would then be able to perceive an open and notorious, hostile, – etc. –, adverse possession within due time. Only in case of bad faith possession does the doctrine fulfill its function of giving notification to the owner.⁷¹⁷

New Jersey | Discovery rule – In response to the flaws in adverse possession, other doctrines relating to the accrual of the cause of action have been considered. Unlike the doctrine of unlawful taking and adverse possession, these doctrines – based on equity –, give a fair chance to a dispossessed owner to discover his cause of action by identifying the possessor before the statute of limitations starts to run. From the 1980s onwards, certain states have developed alternative doctrines to provide the owner with a genuine opportunity to recover his stolen property. In New Jersey, this change was effectuated by the New Jersey Supreme Court in *O'Keeffe v. Snyders* (1980) through the introduction of the discovery rule. Through the discovery rule, the Supreme Court of New Jersey introduced equitable considerations into the statute of limitations in replevin, allowing for an accommodation of the rights of the parties. The discovery rule makes it possible to toll the running of the statute of limitations up until the moment when the owner knows the facts which form the basis of a cause of action or up until the moment he should have known of such a cause of action by the exercise of reasonable diligence or intelligence. This translates into a tolling of the SOL up until the identity of the possessor and the whereabouts of the stolen property become known (i.e. actual notice) or ought to have been known (i.e. constructive notice). Unlike adverse possession, the emphasis of the discovery rule is put upon the behaviour of the owner in verifying whether the owner has been diligent in searching for his stolen property. Furthermore, it has a working that is similar to the doctrine of fraudulent concealment, as it will toll the statute of limitations up until the owner discovers his cause of action. The discovery rule is not automatically applied and cannot, thus, always be relied upon. In deciding whether the rule applies to the case at hand, the court seized with the contention must “identify, evaluate, and weight the equitable claims of all parties.” Therefore, owners sleeping on their right by not being duly diligent in searching for their property may not rely upon the discovery rule. Instead, the court is to apply the unlawful taking accrual of the cause of action when the owner has not been duly diligent in searching for his property. As was established by the New Jersey Supreme Court in *O'Keeffe*, an owner that wants to make use of the discovery rule must be able to establish facts that would justify tolling the statute of limitations. In applying the discovery rule, it has been established that the owner that wants to rely upon the rule must have exercised due diligence in searching for the stolen property. Due diligence has been left undefined but is determined by a “specific analysis which will vary depending on the facts of each case, including the ‘nature and value of the property’”. Although there exists no specific standard of due diligence, it is appropriate to undertake all the efforts that are reasonable in light of the circumstances of the case. Furthermore, due diligence requires substantial and meaningful steps to be undertaken by the owner in attempting to retrieve his property. Intelligent and targeted inquiries are, therefore, valued in assessing due diligence. Importantly, the exercise of due

⁷¹⁷ Cf. section A. 3. (1) above.

diligence depends upon the character of the party concerned: for example, a state – which benefits from more resources – is held to a higher threshold of diligence than a mere dilettante. What is more, failure to report the theft to the competent authorities and failure to conduct a diligent search into the whereabouts of the property and of the identity of the possessor will constitute a lack of due diligence.⁷¹⁸

California | Strict discovery rule – Unlike in New Jersey, California has neither favoured the doctrine of unlawful taking, nor the doctrine of adverse possession for personal property. Instead, pre-1983, § 338 CCCP submitted that an action for the taking of any goods or chattels – including actions for the specific recovery of personal property – should be introduced within three years from the accrual of the cause of action. This paragraph was applicable to the recovery of stolen cultural property before 1983. Nonetheless, it was unclear when the cause of action would accrue. Following the adjudication of the *O’Keefe* case by the New Jersey Supreme Court, California also became a supporter of the discovery rule. Therefore, the rule was codified in a second sentence of § 338 (3) CCCP for the recovery of any stolen art or artifact in 1982 (with entry into force on 1 January 1983). This second sentence – now to be found in § 338 (2) CCCP – specifies that the cause of action is to accrue from the moment that “the aggrieved party, his or her agent or the law enforcement agency which originally investigated the theft” discovers the whereabouts of the stolen property. In 1989, ‘art or artifact’ was replaced by ‘article[s] of historical, interpretive, scientific, or artistic significance’. Later on, clarification was brought to the accrual of the cause of action for thefts that took place before 1983. In *Nafziger*, it was clarified that the discovery rule posited in the second sentence of § 338 (3) CCCP was implicit in the pre-1983 CCCP. Nevertheless, the discovery rule as applied in California is stricter than the one applied in New Jersey since the notice of the whereabouts of the property must be actual and may not be constructive. California seemed thus to explicitly reject a requirement of due diligence and of constructive notice in the application of its discovery rule. The question of constructive notice was later on addressed in the case of *Orkin v. Taylor*. In this case, the Federal court entrusted with the dispute – in an attempt to decide the issue in a similar manner as to what it believed the California Supreme Court would do – extrapolated the constructive notice to the discovery rule laid down in Section 338 (3) CCCP from the *Jolly v. Eli Lilly & Co.* precedent. Consequently, due to both the disagreement between courts as to the issue of actual and constructive notice and as to the retroactive application of the discovery rule that was posited in Section 338 (3) CCCP in 1982, the Californian legislator intervened in 2010 to clarify Section 338 CCCP. It established that the discovery rule introduced in 1983 was to be applied to pre-1983 situations and that no constructive notice was to be inferred from the said discovery rule. Furthermore, the clarifications given specified that the discovery rule was only relevant to article[s] of historical, interpretive, scientific, or artistic significance. Regarding thefts that took place after 1983, the question of constructive notice was also deemed to be problematic: the Court of Appeals of the First District in *Society of California Pioneers v. Baker* established that the discovery rule introduced in 1982 was also embedded with a constructive notice. In the same 2010 reaction by the Californian legislator, *Baker’s* reading of Section 338 (3) CCCP was criticised since the legislator had explicitly prescribed an actual discovery and not a constructive discovery. This means that no constructive notice can be inferred from either the pre- or post-1983 interpretation of Section 338 CCCP. In 2010, a new provision was added to Section 338 (c) CCCP (formerly Section 338 (3) CCCP) with regard to the recovery of stolen works of fine art against museums, galleries, auctioneers or dealers.⁷¹⁹ This new section was introduced against these specialised categories of stakeholders because of their sophistication and of the advanced knowledge that these parties have of the means of retracing the provenance of a work of fine art. Section 338 (c) (3) CCCP prolongs the statute of limitations to six years from the date of the actual discovery by the claimant or his agent of both (i) the identity and whereabouts of the work of fine art and (ii) information or facts sufficient to indicate to the claimant that he has a claim for a possessory interest in the misappropriated work of fine art. A constructive knowledge of these elements is explicitly rejected by § 338 (c) (3) (C) (i) CCCP. The new section applies to misappropriations that are defined in Section 484 of the California Penal Code, as well as taking or theft by fraudulent means or by means of duress. It should also be noted that § 338 (c) (5) CCCP makes it possible for the defendant museum, gallery, auctioneer or art dealer to invoke all equitable and legal affirmative defences and doctrines of avail, such as laches and unclean hands. Section 338 (c) (3) (A) CCCP distinguishes itself from Section 338 (c) (2) CCCP in that the law enforcement agency that originally investigated the theft is not taken into consideration in the discovery rule. The practical effect of the strict discovery rule is to toll the running of the statute of limitations until the owner is given a fair chance to discover his cause of action. Additionally, the strict discovery rule deprives fraudulent concealment of any relevance in the present context. Finally, because the focus is upon the behaviour of the dispossessed owner in searching for his property, it does not make any difference whether the possessor of the stolen property acts in good or bad faith.⁷²⁰

⁷¹⁸ Cf. section A. 3. (2) above.

⁷¹⁹ Cf. § 338 (c) (3) CCCP.

⁷²⁰ Cf. section A. 3. (3) above.

New York | Demand and refusal – New York has neither favoured the doctrine of unlawful taking or of adverse possession as against a good faith acquirer. Instead, New York has predicated the use of the demand and refusal accrual of the cause of action against a possessor in good faith. The New York legislature has specifically rejected the adoption of the discovery rule for the recovery of cultural property and has instead favoured the demand and refusal rule. The rule presupposes that a good faith purchaser is deemed to have lawful possession until demand has been formulated – thus notifying the possessor of the unlawfulness of his possession – which then has to be rejected by the purchaser. The conversion materialises at the time of refusal, at which the possessor clearly opposes the right of the owner. Therefore, a demand and refusal is necessary to give the possessor that is not entitled to the property an opportunity to correct his defective possession by surrendering the property to the rightful owner. In doing so, the possessor is given the opportunity to overcome unnecessary legal proceedings. Although it is argued that the demand and refusal affords protection to a good faith possessor, this doctrine in its most basic form is in fact more protective of the rights of the owner: the Supreme Court of New York clarified in *Menzel v. List* (1964) that the demand and refusal requirement was substantive in nature. This entails that both demand and refusal must have materialised in order for the cause of action to accrue. This seems to make it possible for an owner to postpone the demand as long as he wants and works, therefore, to the detriment of the good faith purchaser. Nevertheless, the Appellate Division of the New York Supreme Court established in *Solomon R. Guggenheim Foundation v. Lubell* (1991) that an owner cannot unreasonably delay his demand, based upon the equitable defence of laches.⁷²¹

New York | Laches – Laches is an equitable defence, which proscribes a party from asserting a right when this assertion is unreasonably delayed and would lead to a prejudice to the detriment of the other party. As such, laches constitutes an important alternative to the defence of the expiration of the SOL for the possessor to prevail in a suit for the recovery of stolen cultural property. Nevertheless, the defendant has the burden of proving laches. In the context of cultural property theft, laches constitutes an adequate doctrine because it takes the vigilance of both parties into consideration, as it involves a multi-factor balancing of all equities, including the owner's diligence, the buyer's behaviour and prejudice to the purchaser. It also properly affords protection to an innocent buyer since it takes the diligence of the owner into account. Laches requires an unreasonable delay in asserting a right to cause a prejudice to the defendant. Consequently, the appreciation of laches is fact-dependent and is, therefore, left to the appreciation of the court seized. In assessing the conditions of unreasonable delay, the Appellate Division of the New York Supreme Court established in *Solomon R. Guggenheim Foundation v. Lubell* (1991) that the emphasis should be on the lack of diligence in searching for the stolen personal property and not on the belatedness of the formulation of a demand. Therefore, unreasonable delay cannot be measured by the expiration of a specific period of time, but instead it depends on the circumstances of the case at hand. Unreasonable delay depends on whether the claimant is reasonably diligent in his search or whether it would have been unreasonable for him to have put more effort in searching for the stolen property. The lack of diligence must be from the claimant or any predecessor in interest. Furthermore, inertia in searching for the property that cannot be justified is assimilated to an unreasonable delay. What is more, courts appear to be sensitive to the adequate steps that an owner has undertaken to publicise the theft. The adequateness of these steps depends upon the character of the dispossessed owner, and so does the exercise of reasonable diligence. The latter thus depends on the character of the party that is searching for the property: the more sophisticated this party is, the more stringent the test of reasonableness will be. Furthermore, the likelihood of discovering the identity of the possessor is also computed into the reasonable diligence equation. Failure to use the instruments developed to help dispossessed owners to retrieve their stolen property will also be taken into consideration in assessing the reasonable diligence criterion. The more advanced these instruments are, the more advance the threshold of diligence will be. Courts will, therefore, consider any information that ought to be in the owner's sphere of influence. Building upon its decision in *Solomon R. Guggenheim v. Lubell*, the Appellate Division of New York's Supreme Court established in *In re Flamenbaum* (2013) that it is not sufficient for the defendant to merely demonstrate that the claimant had failed to exercise reasonable diligence. Instead, what matters is to demonstrate that, had the claimant exercised reasonable diligence, then he would have discovered the identity of the possessor at an earlier stage. Subsequently, due to the lack of reasonable diligence, the identity of the possessor was not discovered when it should have been discovered and the demand is thus considered to be dilatory. With regard to unreasonable delay, laches imputes a constructive notice upon the dispossessed owner as it presupposes that the he ought to be aware of the whereabouts of the property so as to promptly formulate a demand. Following the Appellate Division, the requirement of unreasonable delay must, therefore, be assimilated to a constructive notice, as laches is not operative against a person that is justifiably ignorant of the facts giving

⁷²¹ Cf. section A. 3. (4) above.

rise to the cause of action. Next to unreasonable delay, the defendant must also demonstrate that he has suffered a prejudice due to this delay. Prejudice can be demonstrated in many ways, but its main crux stems from the difficulties in defending the case against the owner due to the unreasonable delay. In general, prejudice has been said to exist when – because of the loss of evidence and faded memories due to the passage of time, the death of witnesses, or a detrimental change in the position of the defendant “in reliance upon the absence of a suit” – it becomes more difficult for a defendant to defend himself against a claim. New York courts have increasingly recognised that prejudice can materialise through the passage of time. Prejudice suffered as a result of the passage of time, such as the death of key witnesses, loss of proofs, the presence of conflicting accounts as to the property of the stolen chattel, impossibilities to assert titles, change of position, or any other disadvantages for the defendant resulting from the unreasonable delay will be taken into consideration when assessing the prejudice requirement. Courts also need to take underlying values of repose into consideration, as well as any egregious behaviour of the claimant resulting in the prejudice. Moreover, causality between the unreasonable delay and the prejudice must be present. In certain instances, there is no prejudice suffered by the defendant: this is notably the case when the defendant still has a recourse against the seller, but also when the defendant could have been aware of the wrongful holding, or when the property was acquired gratuitously.⁷²²

New York’s anomaly – As against a possessor that has not acted in good faith, New York law appears to favour bad faith acquisitions over good faith acquisitions. This stems from the fact that the cause of action accrues at a different time depending upon the good faith / bad faith distinction: when the action in replevin is directed against a possessor in bad faith, the cause of action accrues at the time of the conversion. Instead, when the action in replevin is directed against a possessor in good faith, the demand and refusal accrual requires to put the possessor on notice of the wrongfulness of his possession at first. Subsequently, a refusal by the possessor to return the property is assimilated to a conversion, by which the cause of action will accrue. This difference in treatment results in a detrimental treatment of the good faith possessor, against whom proceedings can be protracted longer than against a possessor that is aware that the property was stolen. In drawing a distinction between good and bad faith for the purpose of determining the accrual of the cause of action, New York courts have not positively defined good faith. Instead, these courts have identified good faith by means of exclusion, and thus by determining what is not good faith in a given case. Good faith is defined in § 1-201 (20) of the NYUCC as “honesty in fact in the conduct or transaction concerned”. Much like the good faith requirement that is found in Belgian, French and Dutch law, this entails that when the circumstances of the transaction cause a reasonable and honest buyer to ask questions about the title to or the provenance of a work of art, the buyer must undertake diligence inquiries to satisfy his concerns. This means that New York law also requires a possessor to be responsive to red flags if he wants to be considered as such for the purpose of the accrual of the cause of action. Art dealers are held to a higher threshold of good faith than mere dilettantes. Coming back to the anomaly resulting from the difference in treatment between good and bad faith possessors, the danger stemming from the anomaly relates to the fact that possessors are more likely to acquire stolen objects, as bad faith acquisitions trigger the running of the limitation period sooner than in the case of good faith acquisitions. Nevertheless, some commentators have argued that there is no anomaly, as both the doctrines of equitable estoppel and of fraudulent concealment will disbar a bad faith possessor from invoking a statute of limitations defence against the claimant. Although fraudulent concealment will toll the running of the statute of limitations throughout the entire concealment, the effect of relying upon the doctrine of equitable estoppel for the purpose of disbarring the bad faith possessor from relying upon the statute of limitations defence is unclear. If the doctrine of equitable estoppel is given a broad reading, then a thief will not be able to rely upon the statute of limitations defence because the doctrine dictates that he cannot benefit from his own wrong. Therefore, the broad interpretation of the doctrine of equitable estoppel tolls the statute of limitations until the claimant discovers his cause of action. Nevertheless, the defendant may counter argue that the claimant was negligent in not discovering the cause of action or acquiesced to the conversion in the first place. In the alternative, the New York Court of Appeals held in *Elicofon* that if this equitable estoppel ought not to be interpreted broadly, alternatively a bad faith possessor should also be subjected to the demand and refusal rule. Applying the demand and refusal accrual of the cause of action to both good and bad faith possessors would help to correct any anomaly. Alongside this broad reading, the doctrine of equitable estoppel has also been interpreted narrowly. Following this narrower reading, only egregious, affirmative acts of concealment, which are separate from the wrongdoing relating to the cause of action, will trigger the application of the doctrine of equitable estoppel. These acts – performed for the purpose of delaying the initiation of legal proceedings by the claimant – must have prevented the claimant from initiating the proceedings in due time. Once these acts have ceased to exist, the claimant must exercise due diligence so as to unveil the facts necessary to be able to initiate the legal proceedings within a reasonable period of time, a period that cannot exceed the length of the statute of

⁷²² Cf. section A. 3. (5) above.

limitations itself. Due diligence as required by this narrower reading of equitable estoppel has a different meaning than the concept of due diligence that is prescribed for in New Jersey, as it requires the exercise of due diligence in discovering the facts that are necessary for the initiation of legal proceedings once the affirmative acts of misrepresentation have ceased. In conclusion, the reported anomaly exists when the doctrine of equitable estoppel is given a narrow meaning, but it does not exist when a broad meaning is favoured.⁷²³

Legal effects – In regard of the legal effect flowing from the expiration of statutes of limitations, it should be noted that the expiration of the statute either affects the right or the remedy. Although the United States Supreme Court specified in *Campbell v. Holt* that the statutes operate on the remedy, and not on the right, this decision has not found acceptance in the three jurisdictions under scrutiny in this chapter: in New Jersey, when the statute of limitations used to be adjoined to the doctrine of adverse possession, its expiration was met with the same legal effect as the one given to the adverse possession of land. Therefore, the adverse possessor was given a right of ownership to the property he held at the end of the period prescribed by the statute of limitations. Title, which existed at the time of the adverse taking, was thus confirmed in the possessor. Hence, the possessor would acquire a better title to the property than the one of the dispossessed owner. Consequently, the statute operated upon the title, as the original owner's title was defeated and the adverse possessor acquired title to the property that was adversely held. What is more, because of this prescriptive right it is impossible for the statute of limitations to run anew against a subsequent possessor. The adverse possessor is thus free to dispose of the property as he pleases, and a subsequent possessor cannot be sued by the dispossessed owner any longer. At the same time, the expiration of the statute of limitations through means of adverse possession would also discard the remedy. Adverse possession thus constitutes an exception to the *nemo dat* principle.⁷²⁴ Inspired by the doctrine of adverse possession, the New Jersey Supreme Court decided in *O'Keeffe v. Snyder* that the expiration of the statute of limitations similarly confers a prescriptive right in favour of the possessor when the discovery rule is applied.⁷²⁵ Furthermore, New Jersey does not consider that the statute of limitations runs anew against any subsequent convertor. In case of adverse possession, this is notably due to the fact that it is possible to tack periods of adverse possession of prior possessors. Nevertheless, tacking is not relevant when the discovery rule is applied, since the accrual of the cause of action depends upon the knowledge that has been acquired by the claimant, and not upon the periods of possession by different possessors.⁷²⁶ In California, the United States District Court for the Central District of California clarified in *Von Saher* (2015) that with every new conversion, a new cause of action accrues, and with it a new statute of limitations begins to run. Furthermore, this is also deemed true in cases where the statute of limitations has expired for a previous conversion. This means that, unlike in New Jersey, the legal effect of the expiration of the statute of limitations in California is merely to extinguish the availability of a remedy, and does not affect the right of the dispossessed owner. In accordance with the fact that the expiration of the SOL only affects the remedy, California law imposes a continuing affirmative duty to restore stolen property to its rightful owner. Therefore, a stolen chattel remains stolen, irrespective of how many years have transpired since the theft.⁷²⁷ In accordance with California law, New York law presumes that the expiration of the statute of limitations only affects the remedy and not the right. Because of this, a dispossessed owner that has not instated recovery proceedings within the imparted time can sue any subsequent convertor.⁷²⁸ Moreover, when the defence of laches is relied upon, it only appears to extinguish the remedy and it does not affect the right. Nevertheless, this does not mean that a subsequent possessor will not be able to successfully rely on laches against the claimant at a later date.⁷²⁹

⁷²³ Cf. section A. 3. (5) above.

⁷²⁴ Cf. section A. 4. (1) above.

⁷²⁵ Cf. section A. 4. (2) above.

⁷²⁶ Cf. sections A. 4. (1) and (2) above.

⁷²⁷ Cf. section A. 4. (3) above.

⁷²⁸ Cf. section A. 4. (4) above.

⁷²⁹ Cf. section A. 4. (5) above.

	Belgian law	French law	Dutch law	New Jersey law	California law	New York law
Ownership						
Definition	Art. 544 BCC	Art. 544 FCC	Art. 5:1 (1) and (2) DCC			
Characteristics	Absolute (but relative), exclusive and inprescriptible right	Absolute (but relative), perpetual, exclusive and inprescriptible right	Absolute (but relative) right	-	-	-
Possession						
Definition	Art. 2228 BCC	Art. 2255 FCC	Art. 3:107 (1) DCC			
Characteristics	<ul style="list-style-type: none"> ▪ Factual control over a thing for oneself ▪ Legal fact with legal effects ▪ Cannot be transferred ▪ Presumption of ownership 	<ul style="list-style-type: none"> ▪ Factual control over a thing for oneself ▪ Legal fact with legal effects ▪ Cannot be transferred ▪ Presumption of ownership 	<ul style="list-style-type: none"> ▪ Factual elements (Art. 3:107 (2) and (3) DCC) ▪ Factual or legal character ▪ Can be transferred (Art. 3:114 DCC) 			
Constitutive elements	<p>CORPUS: factual control over an object</p> <ul style="list-style-type: none"> ▪ Material acts ▪ <i>Possessio animo suo, corpore alieno</i> (Art. 2228 BCC <i>in fine</i>) 	<p>CORPUS: factual control over an object</p> <ul style="list-style-type: none"> ▪ Right bearer's behaviour (<i>bonus paterfamilias</i>) ▪ <i>Possessio animo suo, corpore alieno</i> (Art. 2255 FCC <i>in fine</i>) 	<p>CORPUS: factual control over an object</p> <ul style="list-style-type: none"> ▪ Factual acts ▪ <i>Possessio animo suo, corpore alieno</i> (Art. 3:108 (2) and (3) DCC) 			

<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Intention must always be present during the exercise control Exercised directly Presumption possession for oneself (Art. 2230 BCC) Objective appreciation (e.g. <i>ausa detentioni</i>) 	<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Exercised directly Presumption of possession for oneself (Art. 3:109 DCC) Objective appreciation (Art. 3:108 DCC) 	<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Additionally, the will to exercise a right must be present Exercised directly Presumption of possession for oneself (Art. 2256 FCC) Objective appreciation (e.g. use of the object) 	<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Exercised directly Presumption of possession for oneself (Art. 3:109 DCC) Objective appreciation (Art. 3:108 DCC) 	<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Additionally, the will to exercise a right must be present Exercised directly Presumption of possession for oneself (Art. 2256 FCC) Objective appreciation (e.g. use of the object) 	<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Exercised directly Presumption of possession for oneself (Art. 3:109 DCC) Objective appreciation (Art. 3:108 DCC) 	<p>ANIMUS: <i>animus rem sibi habendi</i></p> <ul style="list-style-type: none"> Exercised directly Presumption of possession for oneself (Art. 3:109 DCC) Objective appreciation (Art. 3:108 DCC)
Detention						
Definition	CORPUS but no ANIMUS	CORPUS but no ANIMUS	CORPUS but no ANIMUS	CORPUS but no ANIMUS	CORPUS but no ANIMUS	-
Theft						
Definition	Art. 461 BCrC	Art. 461 BCrC	Art. 311-1 FCrC	Art. 310 DCrC	Section 2C:20-3 to 20-5 NJCCJ	Section 484 CPC
Voluntary loss of possession cannot be qualified as theft (e.g. abuse of confidence or swindle)	Voluntary loss of possession cannot be qualified as theft (e.g. abuse of confidence or swindle)	Voluntary loss of possession cannot be qualified as theft (e.g. abuse of confidence or swindle)	Voluntary loss of possession cannot be qualified as theft (e.g. qualified as theft (e.g. embezzlement)	Voluntary loss of possession cannot be qualified as theft (e.g. qualified as theft (e.g. embezzlement)	Voluntary loss of possession can be qualified as theft (e.g. unlawful disposition or deception)	Voluntary loss of possession can be qualified as theft (e.g. fraudulent acquisition of entrusted property)
Cultural objects						
Assimilated to	Corporal movable objects (cf. Art. 516 and 528 BCC)	Corporal movable objects (cf. Art. 516 and 528 FCC)	Corporal movable objects (cf. Art. 3:2 and 3:3 (2) DCC)	Corporal movable objects (cf. Art. 3:2 and 3:3 (2) DCC)	Goods (Section 12A:2-105 NJRS)	Personal property (cf. § 658 – 663 CCC)
					Article of historical, interpretive, scientific, or artistic significance (cf. Section 338 (c) (2) CCCP)	Chattels (Section 15 GCL)
					Works of fine art (cf. Section 338 (c)(3) CCCP)	

Remedy	Revindication (Art. 5:2 DCC)	Revindication (Art. 5:2 DCC)	Replevin (Section 2B:50-1 NRJS)	Claim and delivery (Sections 511.010 and ff. CCCP)	Replevin (Art. 71 CPLR)
	Revindication (Petitory action)	Revindication (Petitory action)	Replevin (Possessory action)	Claim and delivery (Possessory action)	Replevin (Possessory action)
Requirements	<ul style="list-style-type: none"> ▪ Prove ownership (1315 BCO), possession or detention ▪ Prove dispossession by theft ▪ Prove that the claimed property is similar to the one stolen 	<ul style="list-style-type: none"> ▪ Disprove that the defendant is title-holder: <ul style="list-style-type: none"> - Prove detention at time of theft - Prove dispossession by theft - Prove that the claimed property is similar to the one stolen 	<ul style="list-style-type: none"> ▪ Prove having a superior title to the one of the possessor ▪ Prove wrongful detention of the property ▪ Prove that the claimed property is similar to the one stolen ▪ Prove wrongful possession by the defendant 	<ul style="list-style-type: none"> ▪ Prove having a superior title to the one of the possessor ▪ Prove wrongful detention of the property ▪ Prove that the claimed property is similar to the one stolen ▪ Prove wrongful possession by the defendant 	<ul style="list-style-type: none"> ▪ Prove having a superior title to the one of the possessor ▪ Prove wrongful detention of the property ▪ Prove that the claimed property is similar to the one stolen
Used by	<ul style="list-style-type: none"> ✓ Owner ✓ Possessor ✓ Detentor entrusted by the owner 	<ul style="list-style-type: none"> ✓ Owner ✓ Possessor must rely on possessory action (Art. 3:125 DCC) ✗ Detentor must rely on Art. 3:125 (3) DCC 	<ul style="list-style-type: none"> ✓ Person with a superior title 	<ul style="list-style-type: none"> ✓ Person with a superior title 	<ul style="list-style-type: none"> ✓ Person with a superior title
Use against	<ul style="list-style-type: none"> ✓ Actual possessor ✓ Actual detentor 	<ul style="list-style-type: none"> ✓ Any person in possession 	<ul style="list-style-type: none"> ✓ Person in wrongful possession 	<ul style="list-style-type: none"> ✓ Person in wrongful possession 	<ul style="list-style-type: none"> ✓ Person in wrongful possession
	claim where the object is	claim from a possessor	claim where the object is	claim where the object is	claim where the object is

				with immediate or mediate possession or from a detentor with immediate or mediate detention		
Limitations						
Type of Limitation	Prescription (Article 2219 BCC)	Prescription	Prescription	Prescription	Limitation right of action	Limitation right of action
Extinctive prescription	Art. 2262 BCC (N/A)	Art. 2224 FCC (N/A)	Art. 3:306 DCC	-	-	-
Acquisitive prescription	Art. 2219 BCC	Art. 2258 FCC	No general provision	-	-	-
Length	- short (good faith) (Art. 2279 BCC) - long (bad faith) (Art. 2262 BCC)	- short (good faith) (Art. 2276 FCC) - long (bad faith) (Art. 2272 BCC)	- short (good faith) (3:99 DCC) - long (Art. 3:105 (1) DCC)			
Statute of limitation	-	-	-	Section 2A:14-1 NJRS	Sections 338 (2) & (3) CCCP	Section 214 (3) CPLR
Length				6 years	3 – 6 years	3 years
Accrual				Section 1:3-1 NJRC	§ 12 and ff. CCCP	Section 203 (a) CPLR

Belgian law	French law	Dutch law
<p>Merits</p> <p><i>Nemo dat quod non habet</i></p> <p>Limitation of the right of action</p> <p>No (imprescriptibility of revindication)</p> <p>Exception(s)</p> <p>Acquisitive prescription (short and long)</p>	<p>Merits</p> <p><i>Nemo dat quod non habet</i></p> <p>Limitation of the right of action</p> <p>No (imprescriptibility of revindication)</p> <p>Exception(s)</p> <p>Acquisitive prescription (short and long)</p>	<p>Merits</p> <p><i>Nemo dat quod non habet</i></p> <p>Limitation of the right of action</p> <p>Yes, after 20 years (Art. 3:306 <i>juncto</i> 3:105 (1) DCC)</p> <p>Exception(s)</p> <p>1) Correction of the transfer of possession 2) Acquisitive prescription (short and long)</p>
<p>1) CORRECTION OF THE TRANSFER OF POSSESSION</p> <p>A. Revindication within 3 years following day of the theft: no third-party protection</p> <p>Consumer market overt exception (Art. 3:86 (3) (a) DCC)</p> <p>B. Revindication after 3 years following day of the theft: third-party protection</p> <p>N.B.: the period of three years can be interrupted (Art. 3:86 (4) DCC) → new period starts running</p> <p>Requirements for third-party protection</p> <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. Right must be transferable (Art. 3:83 (1) DCC) 2. Possessor acquired on the basis of a <i>justa causa detentio</i> (Art. 3:84 (1) DCC). 3. Possessor acquired on the basis of a valid act of delivery (Art. 3:90 and 3:91 DCC) 		

4. For value acquisition (Art. 3:86 (1) DCC)

5. Acquisition in good faith (Art. 3:86 (1) DCC)

- Good faith (Art. 3:118 *in toto* 3:11 DCC)
- At the time of the passing of possession
- Presumption of good faith (Art. 3:118 (3) DCC)
- Actual or constructive knowledge
- Standard: objective appreciation of imputed knowledge based upon a standard of reasonable judgment (red flags)
- Duty of inquiry when the circumstances so require

Exception to the third-party protection

Obligation of disclosure exception (Art. 3:87 DCC)

- no protection by Art. 3:86 DCC when possessor does not disclose sufficient information to retrace the whereabouts of the seller
- within three years following the acquisition

LEGAL EFFECT

A. Revindication **within 3 years** following day of the theft: object must be returned

Consumer market overt exception

- Possessor is entitled to keep the object

B. Revindication **after 3 years** following day of the theft:

- Third party acquires ownership to the property by means of correction of the transfer
- Right of the dispossessed owner is extinguished

<p>ACQUISITIVE PRESCRIPTION – SHORT (ART. 2279 BCC)</p> <p>A. Revindication within 3 years following day of the theft: no third-party protection</p> <p>Market overt exception (Art. 2280 BCC)</p> <p>B. Revindication after 3 years following day of the theft: third-party protection</p> <p>Requirements for third-party protection</p> <ul style="list-style-type: none"> - No need to produce a title - Gratuitous and for value acquisitions <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. Good must be one that can be acquired through acquisitive prescription 2. Possession must be real, <i>pro suo</i> (cf. Art. 2230 BCC), and free of defects (Art. 2229 BCC) 3. Acquisition in good faith <ul style="list-style-type: none"> - Good faith (Art. 550 BCC) - <i>Iusta causa detentionis</i> required - At the time of the acquisition (Art. 2269 BCC) - Presumption of good faith (Art. 2268 BCC) - Actual or constructive knowledge - Standard: <i>culpa levis in abstracto</i> (red flags) - Duty of inquiry imposed when circumstances so require (assessed <i>in concreto</i>) 	<p>ACQUISITIVE PRESCRIPTION – SHORT (ART. 2276 FCC)</p> <p>A. Revindication within 3 years following day of the theft: no third-party protection</p> <p>Market overt exception (Art. 2277 FCC)</p> <p>B. Revindication after 3 years following day of the theft: third-party protection</p> <p>Requirements for third-party protection</p> <ul style="list-style-type: none"> - No need to produce a title - Gratuitous and for value acquisitions <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. Good must be one that can be acquired through acquisitive prescription 2. Possession must be effective, genuine (cf. Art. 2256 FCC) and free of defects (Art. 2261 FCC) 3. Acquisition in good faith <ul style="list-style-type: none"> - Good faith (Art. 550 FCC) - <i>Iusta causa detentionis</i> required - At the time of the acquisition (Art. 2275 FCC) - Presumption of good faith (Art. 2274 FCC) - Actual and constructive knowledge - Standard: objective assessment of all the circumstances of the acquisition (red flags) 	<ul style="list-style-type: none"> - Revindication dispossessed owner discarded - Any subsequent acquirer is protected as against the dispossessed owner <p>2) ACQUISITIVE PRESCRIPTION – SHORT (ART. 3:99 DCC)</p> <p>Revindication always possible, unless acquisitive prescription of 3 years</p> <p>Requirements for third-party protection</p> <ul style="list-style-type: none"> - Gratuitous acquisitions <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. All movable things can be acquired through acquisitive prescription 2. Possession must be present and continuous 3. Good faith required (as explained above) <ul style="list-style-type: none"> - Additionally, <i>iusta causa detentionis</i> required (cf. Art. 3:84 DCC) - If no good faith at the time of the acquisition, period of acquisitive prescription only starts running from the moment that the possessor is in good faith
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LEGAL EFFECT	LEGAL EFFECT	LEGAL EFFECT
<p>A. Revindication within 3 years following day of the theft: object must be returned</p> <p>Market overt exception</p> <ul style="list-style-type: none"> - Possessor is entitled to the reimbursement of the purchase price - Possessor has a right of retention until payment has been effectuated <p>B. Revindication after 3 years following day of the theft:</p> <ul style="list-style-type: none"> - Third party acquires ownership to the property by means of acquisitive prescription - Right of the dispossessed owner is extinguished - Revindication dispossessed owner discarded - Any subsequent acquirer is protected as against the dispossessed owner 	<p>A. Revindication within 3 years following day of the theft: object must be returned</p> <p>Market overt exception</p> <ul style="list-style-type: none"> - Possessor is entitled to the reimbursement of the purchase price - Possessor has a right of retention until payment has been effectuated <p>B. Revindication after 3 years following day of the theft:</p> <ul style="list-style-type: none"> - Third party acquires ownership to the property by means of acquisitive prescription - Right of the dispossessed owner is extinguished - Revindication dispossessed owner remains - Any subsequent acquirer is protected as against the dispossessed owner 	<p>Revindication always possible, unless acquisitive prescription of 3 years</p> <ul style="list-style-type: none"> - Third party acquires ownership to the property by means of acquisitive prescription - Right of the dispossessed owner is extinguished - Revindication dispossessed owner discarded - Any subsequent acquirer is protected as against the dispossessed owner
<p>A. Revindication within 3 years following day of the theft: object must be returned</p> <p>Market overt exception</p> <ul style="list-style-type: none"> - Possessor is entitled to the reimbursement of the purchase price - Possessor has a right of retention until payment has been effectuated <p>B. Revindication after 3 years following day of the theft:</p> <ul style="list-style-type: none"> - Third party acquires ownership to the property by means of acquisitive prescription - Right of the dispossessed owner is extinguished - Revindication dispossessed owner discarded - Any subsequent acquirer is protected as against the dispossessed owner 	<p>ACQUISITIVE PRESCRIPTION – LONG (ART. 2262 BCC)</p> <p>Revindication always possible, unless acquisitive prescription of 30 years</p> <p>Requirements for third-party protection</p> <ul style="list-style-type: none"> - No need to produce a title - Gratuitous and for value acquisitions <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. Good must be one that can be acquired through acquisition 	<p>ACQUISITIVE PRESCRIPTION – LONG (ART. 2272 FCC)</p> <p>Revindication always possible, unless acquisitive prescription of 30 years</p> <p>Requirements for third-party protection</p> <ul style="list-style-type: none"> - No need to produce a title - Gratuitous and for value acquisitions <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. Good must be one that can be acquired through acquisitive prescription
<p>ACQUISITIVE PRESCRIPTION – LONG (ART. 2262 BCC)</p> <p>Revindication always possible, unless acquisitive prescription of 30 years</p> <p>Requirements for third-party protection</p> <ul style="list-style-type: none"> - No need to produce a title - Gratuitous and for value acquisitions <p><u>Conditions</u></p> <ol style="list-style-type: none"> 1. Good must be one that can be acquired through acquisition 	<p>ACQUISITIVE PRESCRIPTION – LONG (ART. 3:306 <i>juncto</i> 3:105 (1) DCC)</p> <p>Revindication possible within 20 years following the day another enters in possession</p>	<p>ACQUISITIVE PRESCRIPTION – LONG (ART. 3:306 <i>juncto</i> 3:105 (1) DCC)</p> <p>Revindication possible within 20 years following the day another enters in possession</p>

<p>2. Possession must be real, <i>pro suo</i> (cf. Art. 2230 BCC), and free of defects (Art. 2229 BCC)</p> <p>3. Acquisition in bad faith</p> <p style="text-align: center;">LEGAL EFFECT</p> <p>Possessor acquires a right of ownership after thirty years of possession that complies with the conditions set above</p>	<p>2. Possession must be effective, genuine (cf. Art. 2256 FCC) and free of defects (Art. 2261 FCC)</p> <p>3. Acquisition in bad faith</p> <p style="text-align: center;">LEGAL EFFECT</p> <p>Possessor acquires a right of ownership after thirty years of possession that complies with the conditions set above</p>	<p style="text-align: center;">LEGAL EFFECT</p> <p>At the end of the 20 years of possession by another, the revindication of the dispossessed owner expires and the possessor acquires, therefore, a right of ownership to the property</p>
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New Jersey	California	New York
<p>Merits</p> <p><i>Nemo dat quod non habet</i> (Art. 12A, Section 2-403 NJSA)</p> <p>Limitation of the right of action</p> <p>STATUTE OF LIMITATIONS Section 2A:14-1 NJRS</p> <p>LENGTH 6 years</p> <p>COMPUTATION Section 1:3-1 NJRC</p> <p>ACCRUAL(S) CAUSE OF ACTION Discovery rule</p> <p><u>DISCOVERY RULE (O'KEEFE V. SNYDER, 1980)</u></p> <ul style="list-style-type: none"> ▪ Equitable doctrine ▪ Actual / constructive notice ▪ Triggering: discovery identity of the possessor and the whereabouts of the property. ▪ Due diligence imputed on claimant 	<p>Merits</p> <p><i>Nemo dat quod non habet</i> (Section 2403 CUCC)</p> <p>Limitation of the right of action</p> <p>STATUTE OF LIMITATIONS Sections 338 (2) / (3) CCCP</p> <p>LENGTH 3 – 6 years</p> <p>COMPUTATION § 12 and ff. CCCP</p> <p>ACCRUAL(S) CAUSE OF ACTION Strict Discovery rule</p> <p><u>STRICT DISCOVERY RULE (SECTION 338 (3) CCCP)</u></p> <ul style="list-style-type: none"> ▪ Statutory doctrine ▪ Actual notice (no due diligence requirement) ▪ Pre-1983 (Section 338 (3) CCCP) <ul style="list-style-type: none"> • 3 years • Accrual: (implied) strict Discovery rule • Triggering: discovery whereabouts of any article of historical, interpretive, scientific, or artistic significance [1983-1989: read art or artefact] and the identity of its possessor by aggrieved party, his agent or the law enforcement agency originally investigating the theft 	<p>Merits</p> <p><i>Nemo dat quod non habet</i> (Section 2-403 NYUCC)</p> <p>Limitation of the right of action</p> <p>STATUTE OF LIMITATIONS Section 214 (3) CPLR</p> <p>LENGTH 3 years</p> <p>COMPUTATION Section 203 (a) CPLR</p> <p>ACCRUAL(S) CAUSE OF ACTION</p> <ol style="list-style-type: none"> 1) Demand and refusal accrual (good faith) 2) Unlawful taking (bad faith) <p><u>1) DEMAND AND REFUSAL ACCRUAL (GOOD FAITH)</u></p> <ul style="list-style-type: none"> ▪ Equitable doctrine ▪ Actual notice ▪ Triggering: demand and refusal ▪ Equitable defence: <p><u>Laches</u></p> <ol style="list-style-type: none"> 1. Unreasonable delay (constructive notice) 2. Prejudice resulting from the unreasonable delay

▪ **Post-1983** (Section 338 (3) (2) C.C.C.P.)

- 3 years
 - Accrual: strict Discovery rule
 - Triggering: discovery whereabouts any article of historical, interpretive, scientific, or artistic significance [1983-1989: read art or artefact] by aggrieved party, his agent or the law enforcement agency originally investigating the theft
- **2010 addition** (Section 338 (c) (3) C.C.P.)
- 6 years
 - Unlawful taking or theft (as described in Section 484 of CPC, including fraud and duress)
 - Accrual: strict Discovery rule
 - Triggering: discovery identity and whereabouts of works of fine art, information of facts sufficient to indicate that the claimant has a possessory interest in the work of fine art (= identity possessor, knowledge of the theft and cognition of the interest in the stolen work of fine art) by aggrieved party or his agent
 - Brought against: museum, gallery, auctioneer or dealer
 - Equitable defences available (§ 338 (c) (5) C.C.C.P.)

2) UNLAWFUL TAKING: ACCRUAL (BAD FAITH)

- Equitable doctrine
- Accrual: conversion
- Equitable estoppel: broad v. narrow interpretation
 - When acts of concealment cease, the limitation period is tolled provided the owner exercises due diligence in searching for the property
 - Due diligence must be exercised before the expiration of the limitation period in order to be tolled

FRAUDULENT CONCEALMENT	FRAUDULENT CONCEALMENT	FRAUDULENT CONCEALMENT
<ul style="list-style-type: none"> ▪ Equitable doctrine ▪ Triggering: active and intentional concealment of the elements required for the accrual of the cause of action by the possessor ▪ Tolling accrual cause of action until owner finds his property by exercise of due diligence ▪ Due diligence imputed on the owner <p style="text-align: center;">LEGAL EFFECT</p> <ul style="list-style-type: none"> ▪ Prescriptive right to the benefit of the possessor ▪ Affects the right ▪ No new conversion with new possession 	<ul style="list-style-type: none"> ▪ Equitable doctrine ▪ Triggering: active and intentional concealment of the elements required for the accrual of the cause of action by the possessor ▪ Tolling accrual cause of action until owner finds his property by exercise of due diligence ▪ Due diligence imputed on the owner <p style="text-align: center;">LEGAL EFFECT</p> <ul style="list-style-type: none"> ▪ Extinguishes the remedy of the claimant against the actual possessor ▪ Affects the remedy ▪ New conversion with new possession ▪ New SoL ▪ New remedy 	<p style="text-align: center;">LEGAL EFFECT</p> <ul style="list-style-type: none"> ▪ Extinguishes the remedy of the claimant against the actual possessor ▪ Affects the remedy ▪ New conversion with new possession ▪ New SoL (?) ▪ New remedy (?)

Chapter 4 |

Cultural Property Theft – The Unidroit Solution

CHAPTER 4| CULTURAL PROPERTY THEFT – THE UNIDROIT SOLUTION

INTRODUCTION 299

A. PREREQUISITES TO LODGING A CLAIM IN RESTITUTION 301

- 1. Claimant 301
- 2. Superior right of possession..... 303
- 3. Identification of the stolen cultural object..... 304

B. TIMELINESS OF THE CLAIM IN RESTITUTION..... 306

- 1. General Rule..... 306
 - (1) Relative Period 308
 - (2) Absolute Period 314
 - (3) Interruption and suspension 316
- 2. Exceptions 317
 - (1) Cultural objects concerned 318
 - (2) Exception 328
 - (3) Exception to the exception 329
- 3. Legal effects 330
 - (1) Relative period 331
 - (2) Absolute period 332

C. RESTITUTION..... 334

- 1. Principle of mandatory restitution 334
 - (1) Reprimanding theft 335
 - (2) Appropriate response to the illicit traffic in stolen cultural objects 335
 - (3) Tailor-made solution for cultural objects 336
- 2. Operationalization 336
 - (1) Possessor 337
 - (2) Return 338
 - (3) Person to whom the stolen cultural object is returned 339

D. ENTITLEMENT TO COMPENSATION 341

- 1. Indemnified party 341
 - (1) Good faith possessor 341
 - (2) For value and gratuitous acquisitions 343
 - (3) Protecting innocent acquisitions 345
- 2. Burden of proof..... 347
- 3. Innocent acquisition..... 349
 - (1) Acquisition in good faith 349
 - (2) Due diligence 352

E. FAIR AND REASONABLE COMPENSATION 354

- 1. Compensation 354
- 2. Fair and reasonable..... 354
- 3. Method of computation..... 357

F. MODALITIES OF PAYMENT 362

- 1. Who? 362
 - (1) Claimant 362
 - (2) Subsidiarity 362
 - (3) Claimant’s right to recover the compensation 364
- 2. When? 364
- 3. Legal implications of non-payment 364

SUMMARY 366

Introduction

In the introductory chapter to the present research, it was posited that a contention between a dispossessed owner and a purchaser in good faith of a stolen cultural object could result in paradoxical outcomes depending upon the applicable law that is being relied upon. To illustrate this paradox, Chapters 2 and 3 above discussed the rules regulating the triangular quandary in six different jurisdictions: Belgium, France, The Netherlands, New Jersey, California and New York. This comparative analysis was, on the one hand, undertaken with the objective of illustrating how thieves can – and often do – make use of disparities between domestic laws in order to launder title to stolen cultural objects. Thieves' exploitation of legal loopholes resulting from the aforementioned discrepancies was the lynchpin of the criminal enterprise that the convention was set to correct. On the other hand, the comparative analysis provided above serves to clarify the regime of the convention and, at the same time, to appreciate its appropriateness in dealing with cultural property theft. As is apparent from the analysis, a conspicuous difficulty in the drafting process of the convention was to find a compromise between the different solutions that are found in national laws.¹ Therefore, in seeking a balance, the drafters of the convention had the difficult task of reconciling the conflicting interests of the two innocent parties concerned:² the intricate question of who should suffer the consequences of the theft was a crucial element in drafting the future instrument.³ Nevertheless, because it was conceded that none of these two parties should be penalised by the newly established regime, the propounded solution that was finally adopted shifted the focus away from the classical dilemma towards a regime that would be the most effective in hampering the illicit trafficking of cultural property.⁴ Two considerations weighted in establishing this new regime: firstly, it is often advanced that the strict application of the *nemo dat* rule enhances the fight against the theft of cultural goods.⁵ Secondly, the protection of legal relationships by the protection of acquisition in good faith remains an important expression of legal certainty that deserves to be protected.⁶ In fact, the convention adopts an intermediary position: the stance

¹ Droz, G. A. L., 'La Convention d'UNIDROIT sur le Retour International des Biens Culturels Volés ou Illicitement Exportés (Rome, 24 juin 1995)', 86 (2) *Revue Critique de Droit International Privé*, (1997), p. 247.

² The 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the UNIDROIT Secretariat' specified that: "From the outset of the work on the draft Convention a realisation emerged that the essential difficulty was that of the reconciliation of two equally legitimate interests: that of the person (usually the owner) who has been dispossessed of a cultural object by theft and that of a purchaser in good faith of such an object". See Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings*, Rome, June 1995 (1996), CONF. 8/3, December 1994, p. 26; Carducci, G., 'Complémentarité Entre les Conventions de l'UNESCO de 1970 et d'UNIDROIT de 1995 sur les Biens Culturels', 11 *Revue de Droit Uniforme*, (2006), p. 99; Calvo Caravaca, A. L., "Private International Law and the Unidroit Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects", in: H. -P. Mansel, *Festschrift für Erik Jayme*, (European Law Publishers, Sellier: München, 2004), p. 95; Lalive, P., 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', 1 *Revue Suisse de Droit International et de Droit Européen*, (1997), p. 32; Forbes, S. O., 'Securing the Future of Our Past: Current Efforts to Protect Cultural Property', 9 (1) *The Transnational Lawyer*, (1996), p. 247; Bengs, B., 'Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law,' 6 *Transnational Law & Contemporary Problems*, (1996), p. 527.

³ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), pp. 19 and 32.

⁴ Schneider, M., "Le Projet de Convention d'Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 145; this was also reflected in the discussion about alternative I and II that were contained in the Preliminary draft Convention. See UNIDROIT, *The International Protection of Cultural Property. Summary report on the third session of the UNIDROIT study group on the international protection of cultural property*, held at the seat of the Institute from 22 to 26 January 1990 (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 18, Rome, May 1990, p. 11. See also 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 26.

⁵ See 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 93 where it is specified that "[...] many expert studies since the date of the 1970 Convention have noted that the protection of the "good faith" purchaser generally facilitates the illicit trade and that the only way to substantially hinder the illicit trade in cultural property is to ensure the return of cultural objects to the original holder after theft, even at the costs of changing the rule in many European legal systems protecting the bona fide purchaser of stolen goods [...]" and which further refers to the studies conducted by Châtelain (Châtelain, J., *Means of Combating the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC* (Commission of the European Communities) Doc. XII/757/76-E (1976) 114), Fraoua (Fraoua, R., *Le trafic illicite des biens culturels et leur restitution* (Editions universitaires, Fribourg) 195, 179), Rodotà (Rodotà, S., 'Explanatory Memorandum' in Council of Europe, *The Art Trade* (1988) 8), O'Keefe and Protz (O'Keefe and Protz, *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, Paris) (UNESCO Doc. CLT/83/WS/16 1983, 141 pp. 126-130) and Reichelt (Reichelt, G., 'International Protection of Cultural Property' (1985) *Uniform Law Review*, 1, 43; 'Second Study Requested from UNIDROIT by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural property in the Light also of the Comments Received on the First Study' (1988) *Uniform Law Review*, 1, 53; Lalive, 'La convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 32.

⁶ Legal certainty is an important aspect of international commerce. Without legal certainty, individuals would refrain from investing money in cultural objects, see Reichelt, G., 'International Protection of Cultural Property by Gerte REICHELT', Univ. Dozent Vienna Institute of Comparative Law', *Uniform Law Review*, (1985), p. 61.

taken in the final version consolidates the *nemo dat* rule by mandating restitution in favour of the dispossessed person in all instances, but it also embraces a compensatory regime for possessors that acted diligently during the acquisition. Some commentators have qualified this position as justified but poorly innovative,⁷ and others have perceived it as more detrimental to the honest acquirer of cultural objects,⁸ further substantiating that the convention does not offer sufficient protection to an honest purchaser.⁹ In order to shed light on the choices operated by the drafters of the convention, the present chapter will analyse the regime concerning the restitution of stolen cultural objects that is laid down in Chapter II of the 1995 UNIDROIT convention.

The present overview gives a sequential account of the introduction of a claim in restitution for a stolen cultural object based on Chapter II of the convention. Section A explains who is entitled to bring a claim in restitution on the basis of this chapter, and what conditions must be respected before a claim in restitution can be lodged; section B addresses the timeliness of the action in restitution. Subsequently, provided that the claim is timely introduced – and thus deemed admissible –, section C describes the inner workings of restitution as prescribed by Chapter II. Subsequently, section D elaborates on a duly diligent possessor's entitlement to fair and reasonable compensation as a counterpart to restitution. Complementarily, section E addresses the meaning of fair and reasonable compensation. Finally, section F discusses the modalities of payment of the said compensation.

⁷ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 37.

⁸ Jolles, A., 'Un Regard Critique sur la Convention d'Unidroit', in: C. Breiter, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 54; Lenzner, N. R., 'The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcoming of the Unesco Convention?', 15 (3) *University of Pennsylvania Journal of International Business Law*, (1994-1995), p. 496.

⁹ Jolles, (1997), p. 54.

A. Prerequisites to lodging a claim in restitution

Chapter II of the convention entitles a claimant to bring a claim in restitution for a stolen cultural object before the domestic courts of a contracting state. Furthermore, notwithstanding the fact that the notion of ‘claimant’ is not defined by the convention, it is used for the purpose of assessing both the timeliness of the action in restitution¹⁰ and the payment of fair and reasonable compensation to a duly diligent acquirer.¹¹ Thenceforth, account must first be given to the meaning of the term ‘claimant’. Subsequently, attention is devoted to the prerequisites that a claimant must take into consideration before lodging the claim in restitution on the basis of Chapter II.

1. CLAIMANT

In discussing the future convention, the members of the Study Group contemplated the idea of enabling many different types of possessors¹² to make use of Chapter II, including the owner, a temporary holder of the object – e.g. a museum having the object on loan –, an intermediary person – e.g. a gallerist holding the object in bailment for the owner, or the restorator of the work of art having a right of retention until payment for the work executed is completed –, or the holder of a security right in the cultural object, e.g. a bank with a right of pledge on the item.¹³ The SG correctly understood that it was possible for persons other than the owner to recover a stolen object in civil proceedings, provided that they satisfy the preconditions to bringing a possessory action to recover.¹⁴ Although in an earlier preliminary draft convention issued by the SG,¹⁵ the term ‘dispossessed person’ was used,¹⁶ it was later on decided to adopt the general qualification ‘claimant’ in order to garner the different categories of persons into one concept, without further specification.¹⁷ The use of this general term means that the claim in restitution is not only limited to a dispossessed person, but can also be relied on by other parties that have an interest in the matter. Domestic courts are entrusted with deciding which parties qualify as claimant for the purpose of relying on Chapter II of the convention. Nevertheless, these courts should not merely apply their procedural rules on legal standing to decide whom is to be considered a claimant, and this is the case for two reasons: firstly, the convention abstains from appreciating that, in certain instances, it is possible that the claimant of a stolen cultural object might not even have a recognised legal personality. As illustrated by the English case of *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*,¹⁸ the question of legal standing can become particularly problematic when inanimate entities are made party to the suit for the recovery of the stolen object.

The *Bumper* case concerned an Indian statue depicting the Hindu god Shiva Nataraja bought in good faith by Bumper Development Corporation Ltd, a Canadian company. Suspecting that the idol had been stolen, the Commissioner of Police of the Metropolis of London seized the nataraja whilst it was at the British Museum for the purpose of appraisal and conservation. This confiscation forced the foreign company to sue the Commissioner in order to recover the statue. The Nataraja (see illustration) was allegedly stolen from the ruins of a 12th century temple located in Pathur, Tamil Nadu, India. Therefore, four other plaintiffs joined the proceedings to recover possession: the Union of India, the state of Tamil Nadu, T. S. Sadagopan – a next friend and custodian of the Arul Thiru Viswanatha



¹⁰ Cf. Articles 3 (3) and (4) that will be discussed respectively in sections B.1 and B.2 below.

¹¹ Cf. Article 4 (1) that will be addressed in ‘section D – Entitlement to compensation’ below.

¹² The notion of possession must be interpreted in accordance with the meaning given in American law. See section C. (2) (1) below for more details in this regard.

¹³ UNIDROIT, (1990), Study LXX – Doc. 18, p. 14.

¹⁴ UNIDROIT, (1990), Study LXX – Doc. 18, p. 14.

¹⁵ See UNIDROIT, The International Protection of Cultural Property – Summary report of the second session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 13 to 17 April 1989 (prepared by the Unidroit Secretariat), Study LXX – Doc. 14, Rome, June 1989.

¹⁶ UNIDROIT, (1990), Study LXX – Doc. 18, p. 14.

¹⁷ Proposals were made to specify whom could initiate a procedure in restitution. The German delegation proposed adding the following paragraph to Article 3: “The owner, or any other person able to derive rights of ownership from the owner, is entitled to return [note author: read restitution (explained below)] of the cultural object”. UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of Governments on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Germany), Study LXX – Doc. 27, Rome, January 1992, p. 1; furthermore, the United States delegation proposed defining the term ‘claimant’ in Article 2 of the convention. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Working documents submitted during the fourth session of the committee (Rome, 29 September to 8 October 1993), Study LXX – Doc. 47, G.E./C.P. 4th session, Misc. 24, Rome, February 1994, p. 39.

¹⁸ *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362. For the specific facts of the case, see *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1364-1366 and *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, 1991 WL 839377, at 1-3.

Swamy Temple –, the Temple itself and the Sivalingam, a phallic stone idol. The question of legal standing became salient during the proceedings as the English court had to determine which of these five parties had a superior right of possession over the idol.

Although the Court of Appeal found in favour of the temple – represented by Sadapogan¹⁹ –, the fact that both the temple and the Sivalingam were made party to the proceedings illustrates the difficulties that may arise when dealing with cultural objects from indigenous or tribal communities. Both the temple and the Sivalingam lacked the legal personality required under English procedural law and, as a result, they could not have legal standing before the English courts. Consequently, the status of these ‘juristic entities’²⁰ had to be assessed.²¹ In doing so, the English trial judge scrutinised the status of the temple and of the idol on the basis of Hindu law.²² Subsequently, he gave recognition to both through the application of the comity of nations doctrine.²³ Although, Ian Kennedy J. recognised the legal personality given to both the temple and the idol in first instance,²⁴ the Court of Appeals found it sufficient to establish that the temple had legal standing. As witnessed by the Bumper case, certain communities may believe that their deities have their own personality and that the task of recovering the stolen property in the name of the community is not incumbent upon the community itself or upon its members, but upon the deity or the stolen object’s repository. Secondly, Chapter II provides a remedy for ‘the claimant’,²⁵

¹⁹ See for example *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, 1991 WL 839377, at 26: “The third claimant is R. Sadogopan who was a public official appointed to control the affairs of the Temple under the provisions of the H.R. and C.E. Act. The fourth claimant is the Temple itself. These were the claimants throughout the trial. However, the fifth claimant, the Sivalingam of the Temple, was added in March 1987 at the conclusion of the evidence. At the same time a number of consequential amendments were, with leave, made to the Re-re-amended Statement of Claim. The Sivalingam was a stone relic in the form of a phallus which had been an important idol and an (*sic*) focal point of worship when the Temple was in active worship. It had, for a matter of centuries, survived amongst the ruins of the Temple. It was said to represent or alternatively to remain endowed with the continuing pious intentions of the twelfth century benefactor who endowed the Temple. By the Re-re-amended Statement of claim paragraph 3(a) the Sivalingam “as a consecrated Idol and main and presiding deity of the Temple” sued for the recovery of the Nataraja through the third claimant as a fit person or trustee” and at p. 39: “Certainly there was no evidence upon which he could be cloaked with any rights to claim the Nataraja otherwise than as the representative claiming on behalf of some juristic entity entitled to claim the Nataraja, i.e. the Temple as enshrining the Sivalingam or the Sivalingam itself. In our view whilst the third claimant does not qualify as a juristic entity as a result of his appointment under the H.R. and C.E. Act, he is certainly qualified to act in Tamil Nadu as a representative of the fourth and fifth claimants”.

²⁰ The Court of Appeal defined a juristic entity “as being a person, body of persons or object who or which is recognized by the law concerned as being capable of enjoying legal possession of or title to an object and of suing or being sued in respect thereof”. See *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1368.

²¹ “The question whether a foreigner can be a party to proceedings in the English courts is one to be determined by English law as the *lex fori*. In the case of an individual no difficulty usually arises. And the same can be said of foreign legal persons which would be recognized as such by our law, the most obvious example being a foreign trading company. It could not be seriously suggested that such a company could not sue in the English courts to recover property of which it was the owner by the law of the country of its incorporation. The novel question which arises is whether a foreign legal person which would not be recognized as a legal person by our law can sue in the English courts. The particular difficulty arises out of English law’s restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognizing as a party entitled to sue in our courts something which on one view is little more than a pile of stones”. *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1371.

²² “(1) Neither God nor any supernatural being can be a person in law. A practical illustration of the truth of this statement is that if the endowments were to vest in God as a supernatural being litigation between different temples over their respective rights would be impossible. In any event the same “person” would be both plaintiff and defendant since, as Dr. Mukherjee points out, all Hindus always worship the one Supreme Being. That there is much litigation between temples in India is clear beyond a peradventure. (2) Property dedicated by the founder of a temple is disposed for the pious spiritual purposes of that founder. This purpose must of necessity include that the public shall benefit by and from the worship of God in the building which the founder has provided, and through the idols he has caused to be brought into being. This purpose is unaffected by the founder’s pious expectation that he will benefit from his donation in the hereafter. The dedication is for benefit of the public. (3) While there is difficulty in holding that the dedicated property can reside in the pious aim or purpose itself, it can reside, in the case of a public temple, in the physical idol as representing and symbolizing that same pious aim or purpose. In the case of maths and other non-temple institutions it can vest in the institution itself. I would add: (4) Any juristic person must be capable of identification. This necessitates that ‘person’ having a name or description. Since every Hindu idol is a manifestation of one Supreme Being, on must look elsewhere than to the name of God for identification. The Pathur Temple bears the name of its founder in its title: and that appears to be the custom in Tamil Nadu. So any idol must in practice be referred to by association with the name of the temple in which it is”. *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, 1991 WL 839377, at 40.

²³ As was noted by the Court of Appeal: “The touchstone for determining whether access should be given or refused is the comity of nations, defined by the *Shorted Oxford English Dictionary*, 3rd ed. (1933) as: “The courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests””. See *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1372.

²⁴ “On the second stage the judge held that the fourth claimant, namely the temple, suing by its fit person, custodian or next friend, the third claimant, had proved a title to the Nataraja superior to that of the title of Bumper. Alternatively the judge held that the pious intention of the 12th century notable who gave the land and built the Pathur Temple remained in being and was personified by the Sivalingam of the temple which itself had a title superior to that of Bumper”. *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1367.

²⁵ Whilst it was left undefined in the final version of the convention, the notion of ‘claimant’ appears several times in the wording of Articles 3 and 4. Despite the lack of any definition in the convention, this notion refers to the party that is initiating legal proceedings for

leaving collectivities – such as indigenous groups – *a priori* outside of its scope.²⁶ Nevertheless, the Australian delegation submitted during the DC that the return of their stolen cultural objects was important for indigenous and tribal groups.²⁷ Therefore, these communities should be entitled to recover an object of traditional or ritual use on the basis of Article 3 (8) of the convention. *Ergo*, the terminology ‘claimant’ does not sit well with claims that are brought on the basis of Article 3 (8) by these communities as a collectivity. The reason for singularising the notion of claimant is probably due to the Western presumption of individual property rights instead of collective property rights – also known as communal property –, which is not fully recognised in Western societies.²⁸ Domestic courts should thus stretch the notion of claimant when the beliefs of tribal or indigenous communities so require, or when the community sues collectively.²⁹

2. SUPERIOR RIGHT OF POSSESSION

To benefit from the provisions of Chapter II, the claimant will have to show a superior right of possession over the cultural object that he tries to recover.³⁰ It is, thus, important for the claimant to be able to prove a *causa possessionis* over the object:³¹ in fact, he will first have to prove that he was either the owner or a possessor of the object and that he was dispossessed by means of theft.³² The demonstration of these two elements constitutes the *actori incumbit probatio*, which simply reflects the elements that the parties have to demonstrate in order to prove their claims and contentions.³³ Since the possessor of a stolen cultural object is always obliged to return it,³⁴ he has no right of possession over the stolen property as against a claimant who has a right to possess. As such, the convention seems to embrace the common law idea of relativity of title by which a claimant can reclaim against the possessor, provided that he has a stronger relative right to possess.³⁵ Because the claimant must demonstrate a superior right of possession, the claim in restitution laid down in Chapter II ought to be constructed along the lines of an action in replevin, by which parties vie for the possession of the cultural object. Therefore, claims in restitution based on the convention brought before the domestic courts located in jurisdictions that do neither know the mechanism of replevin – nor the idea of relativity of possession – should be assimilated to claims in replevin.³⁶ Hence, these contracting states should not limit the categories of claimants to the categories authorised to rely on the domestic procedures: for example, a French or Dutch court which ought to adjudicate a claim in restitution based on the convention cannot limit the categories of claimants to owners only (i.e. French law) or owners and possessors (i.e. Dutch law), in accordance with their rules on

the restitution of stolen cultural objects on the basis of Chapter II. Nonetheless, because the mechanism of this chapter is designed for right holders – in the general meaning of the term – this means that the term culls natural or legal persons. See Hoffman, B., ‘How Unidroit Protects Cultural Property: Part II’, 213 (46) *New York Law Journal*, (10 March 1995), p. 1.

²⁶ Last, K., ‘The Resolution of Cultural Property Disputes: Some Issues of Definition’, in: The International Bureau of Permanent Arbitration (ed), *Resolution of Cultural Property Disputes. Papers Emanating From the Seventh PCA International Law Seminar May 23, 2003*, (Kluwer Law International [et al.]: The Hague [et al.], 2004), p. 78.

²⁷ See the commentary of the Australian representative in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13), p. 178.

²⁸ See Last, (2004), pp. 78 and 82-83; see also Cornu, M., Renold, M. A., ‘New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution’, 17 (1) *International Journal of Cultural Property*, (2010), p. 10.

²⁹ As noted by Prott: “The rule that the judge will decide the standing of a plaintiff by the law of the forum may well deprive particular entities (indigenous authorities, religious authorities, special legal persons entrusted with care of important cultural objects) of the right to sue, because, by their very nature, they are likely to be unfamiliar to the law of the forum”. See Prott, L. V., ‘Problems of Private International Law for the Protection of the Cultural Heritage’, in: Académie de Droit International de La Haye / Hague Academy of International Law, *Recueil des cours de l’Académie de droit international de La Haye*, V, Tome 217, (1989), p. 249. Furthermore, Prott noted: “It can be argued that a first step in improving protection of the cultural heritage is for each State to make it absolutely clear in its domestic law, which entities have the right to bring suit for the protection of the cultural heritage. This will not solve the problem of standing in a foreign court if that court judges standing by its own law — though it will certainly assist where that court is prepared to be guided on the issue by the law of the State from which the entity comes. Since a good many important cultural objects are cared for by entities which are not those commonly met in the Western law of the major collecting and market States, there is good reason to consider whether standing should ever, in a case concerning the cultural heritage, be regarded as a matter of procedure to be settled solely according to the law of the forum” (*ibidem*, at 253).

³⁰ Armbrüster, C., ‘La Revendication de Biens Culturels du Point de Vue du Droit International Privé’, *Revue Critique du Droit International Privé*, (2004), p. 731.

³¹ Siehr, (1998), p. 675; Calvo Caravaca and Caamiña Domínguez, (2009), p. 170.

³² Office Fédéral de la Culture (Suisse) (ed), *Transfert International des Biens Culturels. Convention de l’Unesco de 1970 et Convention d’Unidroit de 1995, Rapport du Groupe de Travail*, (l’Office Fédéral de la Culture: Berne, 1998), p. 60.

³³ Das, H., ‘Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence?’, in: The International Bureau of the Permanent Arbitration (ed), *Resolution of Cultural Property Disputes. Papers Emanating from the Seventh PCA International Law Seminar May 23, 2003*, (Kluwer Law International [et al.]: The Hague [et al.], 2004), p. 202.

³⁴ The convention consecrates the *nemo dat* principle in Article 3 (1), as the possessor of a stolen object must always give it back. For more details in this regard, see section C. below.

³⁵ See section A. 1. (1) of ‘Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) - New Jersey, California and New York’.

³⁶ For more information about the replevin action, see section A. 1. (4) of ‘Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) - New Jersey, California and New York’.

revindication.³⁷ Instead, these courts will need to weigh up the relative possessory rights of the parties so as to determine the locus standi of the claimant.

Next to the issues of recognition of legal personality and legal standing, the Bumper decision raises another interesting problem. In *Bumper*, the 12th century temple “had lain in ruins and unworshipped for a matter of centuries”.³⁸ Furthermore, the Shiva Nataraja – although it belonged to the temple in ruins – was excavated close to the temple. It was thus clear that during the period of abandonment of the temple, the statue was either removed from the temple and buried close by, or was enshrouded by layers of dust, debris, silt or soil, depending on its on-site position. Either way, the statue had not been worshipped for such a protracted period that no one realised that it had disappeared. Aside from the problems linked to the legal status of the object,³⁹ this lack of attention raises problems in determining the title over the stolen property, as will be explained below. Another recent example concerning an Acoma Pueblo ceremonial shield further illustrates the problems that are inherent to items used in worshipping rituals.

In 2016, the Acoma community – one of the oldest continuously inhabited native communities in the United States – made the headlines by condemning the auctioning of an Acoma Pueblo ceremonial shield in Paris, France.⁴⁰ In explaining the value of the shield to the community, Kurt Riley – National Governor of Acoma Pueblo, New Mexico, and representative of the community – said: “The Acoma shield is a sacred item that no individual can own, it is not intended for commercial use or ... created for artistic value. The item was created to be used in specific Acoma ceremonies for the benefit of our community”.⁴¹ Additionally, Bradley Marshall of the Hoopa Valley Tribal Council, California, specified that the items made by these communities were considered as beings, who have been given life through the ceremonies conducted by the communities and become kin to them.⁴²

Both examples appropriately illustrate that cultural objects used in rituals may not be owned or possessed in the technical sense given to these notions in Western legal jargon. Instead, an object might have been crafted for the sole purpose of appeasing gods, or acquired its own personality after having been created, and might be left to his own fate afterwards. Therefore, the community to which the object is associated might believe that the item cannot be owned or that egregious acts of possession cannot be exercised over the thing.⁴³ Because a claimant must demonstrate a superior right of possession over the stolen cultural object for the purpose of Chapter II, this seems to imply that claims in restitution of objects originating from groups lacking a valid legal title will not be governed by this chapter.⁴⁴ Nevertheless, the drafters of the convention included a specificity to help indigenous and tribal communities in alleviating difficulties of proving title to the stolen cultural object; as can be inferred from Article 3 (8), it is sufficient for the claimant(s) to demonstrate that the object belonged to, and was used by, a tribal or indigenous community in a contracting state as part of that community's traditional or ritual use for the purposes of demonstrating a superior right of possession over the object.⁴⁵

3. IDENTIFICATION OF THE STOLEN CULTURAL OBJECT

Provided that the claimant has legal standing and can prove having a superior right of possession over the stolen cultural object, it is also important to emphasise that the object must exist: if it has been destroyed after it has been acquired by the possessor, the convention does not prescribe the restitution of a substitute of equal value – which would be tantamount to prescribing restitution in kind – or for the payment of equitable compensation. Instead, it effectively requires that a claim in restitution be directed at the identified cultural object stolen. Therefore, the cultural object claimed must be the same item as the one that was stolen. The issue of correctly

³⁷ See section A. 1. (4), B. 1. (4), C. 1 (4) of ‘Chapter 2 – Cultural Property Theft – Understanding the Paradox (I) - Belgium, France and The Netherlands’.

³⁸ *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1364.

³⁹ Technically, the legal status of the statue becomes particularly problematic as it is unclear whether the item ought to be considered as *res nullius*, *res derelicta*, lost property or treasure. In many legal systems, the distinction between these categories can prove crucial in assessing the superiority of the claimant's right of possession over the property.

⁴⁰ See for example Leveille, D., ‘Paris auction house turns deaf ear to Native American appeals’, *Public Radio International*, 27 May 2016, available at <https://www.pri.org/stories/2016-05-27/paris-auction-house-turns-deaf-ear-native-american-appeals>, last retrieved on 01.03.2018.

⁴¹ *Idem*.

⁴² *Idem*.

⁴³ In this regard, see Protz, (1989), p. 247 where Protz provides several examples in which indigenous communities have had difficulties to prove having a legal interest in the matter because of want of ownership or other proprietary interest in the property.

⁴⁴ Last, (2004), p. 83.

⁴⁵ This approach is also in accordance with recommendations formulated by Protz in 1989: “[...] where the question of legal interest is concerned, it can be questioned whether suit by a legal person who would be held to have a legal interest in a cultural object by the appropriate foreign law, should be denied the right to sue because that “interest” does not meet the test of “legal interest” in the law of the forum (perhaps because it is not a mere economic or property interest)”. See Protz, (1989), p. 253.

identifying the stolen property is relevant to any domestic claim for the recovery of a stolen cultural object,⁴⁶ and was even considered so important in certain jurisdictions that it has been computed in determining the accrual of the cause of action.⁴⁷ Problems in identifying a stolen cultural object were particularly relevant in regard of the Shiva Nataraja that was the subject of contention in the *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis* case that was presented above. An important portion of the discussion about the idol was whether it was the same Shiva Nataraja as the one that was stolen, and proofs had to be adduced by witnesses – including the thieves themselves –, by determining the quantity of Shiva Nataraja on the London market during the period of acquisition and by metallurgical, geological, geomorphological, entomological and stylistic evidence.⁴⁸

In The Netherlands, the on-going case of the Drentse mummy (see illustration) opposing a Dutch collector – Oscar Van Overeem – to the Chinese village of Yangchun, Fujian, China, raises similar difficulties.⁴⁹ In this case, the Chinese villagers aver that the names and markings on the relic in Van Overeem's possession match the ones of the mummy of Zhang Gong that was stolen on 23 October 1995 from the Puzhao temple in Yangchun. Additionally, the villagers further support that no other village in China has reclaimed the mummy, despite national coverage of its whereabouts, therefore confirming their theory.⁵⁰ In replying to these assertions, Van Overeem contests the claims made by the villagers and argues that the stolen mummy is not identical to the one that he purchased in Hong Kong during the same year.⁵¹



⁴⁶ See for example Chapters 2 and 3 above.

⁴⁷ In California, the accrual of the cause of action for the recovery of a work of fine art held by specialised defendants is made dependent upon the correct identification of the stolen property. See Section 338 (c) (3) (A) of the California Code of Civil Procedure: “Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following: (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen. [...]”. This is also the position adopted in the HEAR Act. See Section 5 (1) of the Act: “[...] a civil claim or cause of action against a defendant to recover any artwork or other cultural property unlawfully lost because of persecution during the Nazi era or for damages for the taking or detaining of any artwork or other cultural property unlawfully lost because of persecution during the Nazi era may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of (1) the identity and location of the artwork or cultural property; [...]”. For more details in this regard, see sections A. 1. (5) and A. 3. (3) of ‘Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) - New Jersey, California and New York’.

⁴⁸ See *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, [1991] 1 WLR 1362, at 1365-1367 and *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis*, 1991 WL 839377, at 4-26 for an in-depth discussion as to the identity of the idol subject to the contention.

⁴⁹ Rueb, T., ‘Ik heb jullie mummie niet, zegt de Nederlandse verzamelaar in de rechtbank’, *NRC*, 15 juli 2017, available at: <https://www.nrc.nl/nieuws/2017/07/15/ik-heb-jullie-mummie-niet-zegt-de-nederlandse-verzamelaar-in-de-rechtbank-12067252-a1566782>, last retrieved on 01.03.2018. See also Gargschagen, O., ‘Het gevecht om de mummie in lotushouding’, *NRC*, 13 juli 2017, available at <https://www.nrc.nl/nieuws/2017/07/13/het-gevecht-om-de-mummie-in-lotushouding-12017539-a1566602>, last retrieved on 01.03.2018.

⁵⁰ Gargschagen, (2017), *op. cit.*

⁵¹ See for example Smit, E., ‘Een Nederlandse architect versus de Chinese autoriteiten’, *Follow the Money*, 23 juli 2017, available at <https://www.ftm.nl/artikelen/de-nederlandse-architect-en-de-chinese-boeddha?share=1>, last retrieved on 01.03.2018.

B. Timeliness of the claim in restitution

As was illustrated in Chapters 2 and 3 above, an important consideration in relation to the introduction of an action for the recovery of a stolen cultural object can be found in temporal limitations of the right of action; time constraints are usually applied to claims directed at the recovery of movable property,⁵² thereby playing an important role in striking a balance between the interests of original owners and of *bona fide* acquirers.⁵³ In this regard, it was demonstrated in the previous chapters that these limitations are primordial in weighting the rights and obligations of the concerned parties. They oblige dispossessed owners to undertake prompt inquiries in order to retrieve their stolen objects, while they also protect *bona fide* acquirers from being divested of the object after a certain period of time has lapsed.⁵⁴ In the comparative analysis that was undertaken in Chapters 2 and 3 above, these constraints have either materialised in the form of substantive limitations of the dispossessed owner's right of action through means of third-party protection – such as in Belgium, France and The Netherlands⁵⁵ –, or in procedural limitations of the dispossessed owner's right of action through means of statutes of limitations, such as in New Jersey, California and New York.⁵⁶ Similar to these jurisdictions, the convention has embraced the idea that the restitution of stolen cultural objects cannot be upheld unrestrictedly. The need for finality is even more important due to cultural objects' longevity in comparison to other types of goods.⁵⁷ Thenceforth, this reality has been transposed to the regime of Chapter II, where time limitations – posited in Article 3 (3)-(8) of the UNIDROIT convention – constitute important considerations relating to the admissibility of the claim in restitution of a stolen cultural object.

1. GENERAL RULE

The instatement of time limitations for claims in restitution was considered as an important matter to the governments that were negotiating the convention.⁵⁸ On the one hand, advocates of no time constraints averred that such restrictions would “legitimise a situation which was from the beginning tainted with illegality”;⁵⁹ on the other hand, time limitations in relation to actions in restitution served a laudable purpose: as was noted during the second session of the Committee of Governmental Experts, prescribing time limitations serves “[...] to encourage the possessor to take rapid action, as it was not the function of law to protect those who have been negligent, [...]”, but also “to avoid social disturbance which could result from the bringing of a very old claim”.⁶⁰ In fact, the question of temporal limitations in the context of actions in restitution and requests for return was the most difficult aspect of the negotiations.⁶¹ Notably, the timing for recovering stolen property was a

⁵² Carl, M. H., “Legal Issues Associated With Restitution – Conflict of Law Rules Concerning Ownership and Statutes of Limitations”, in: International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes*, (Kluwer Law International: The Hague, 2004), p. 188; Cottrell, E. M., ‘Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property’, *Chicago Journal of International Law*, (2008-2009), p. 638

⁵³ Carey Miller, D. L., Meyers, D. W., Cowe, A., ‘Restitution of Art and Cultural Objects: A Reassessment of the Role of Limitation’ VI (1) *Art Antiquity & Law*, (2001), p. 1.

⁵⁴ See for example Carey Miller, Meyers and Cowe, (2001), p. 2; “The purpose of a statute of limitations is to “stimulate to activity and punish negligence” and “promote repose by giving security and stability of human affairs”, citation from *Wood v. Carpenter*, reproduced in *O’Keefe v. Snyder* (1980), 83 N.J. 478, at 490. See Gerstenblith, P., *Art, Cultural Heritage, and the Law, Cases and Material*, (Carolina Academic Press, Third Edition, 2004), p. 404.

⁵⁵ For Belgian, French and Dutch law, it was demonstrated that the owner of a stolen cultural object must initiate his claim in revindication within a fixed period of three years running from the day of the theft as against a possessor in good faith. If the possessor has acted in bad faith, the period is prolonged for up to twenty or thirty years, depending on the jurisdiction concerned. After these periods have expired, a third party is protected in its acquisition, making it impossible for the dispossessed person to recover the stolen object. For more details, see ‘Chapter 2 – Cultural Property Theft – Understanding the paradox (I) - Belgium, France, The Netherlands’ above.

⁵⁶ In New Jersey, California and New York, there exists no third-party protection in relation to stolen property, but the owner's right of action is subjected to certain time constraints: for the claim to be timely introduced, it is important that it be introduced within a certain amount of years following the accrual of the cause of action. The accrual of the cause of action has been interpreted differently depending upon the procedural rules of the jurisdiction hearing the contention. For more details in this regard, see ‘Chapter 3 – Cultural Property Theft – Understanding the paradox (II) - New Jersey, California and New York’ above.

⁵⁷ Because of the longevity of cultural goods, time limitations are important aspects of the regulation of property contentions relating to these objects. See Cottrell, (2008-2009), p. 638.

⁵⁸ Protz, *Commentary on the Unidroit Convention*, (1997), p. 30.

⁵⁹ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 27.

⁶⁰ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the second session (Rome, 20 to 29 January 1992) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 30, Rome, June 1992, p. 11. See also ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 27.

⁶¹ Protz, L. V., ‘The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On’, 14 (1-2) *Uniform Law Review*, (2009), p. 217.

particularly controversial aspect throughout the whole drafting process.⁶² The underlying cause of the said difficulties stemmed from the irreconcilability of the interests at stake: a short time limitation is beneficial to possessors because it will not bring their possession into jeopardy for too many years.⁶³ It, furthermore, provides more guarantees for the trade in cultural goods.⁶⁴ Longer time periods tend to favour the dispossessed owner because he is given more time to retrieve his stolen property.⁶⁵ Furthermore, enabling protracted legal proceedings for the restitution of stolen cultural objects has the correlating benefit of requiring more cautiousness from acquirers, leading to a long-term diminution of theft. The agreed outcome – settling for an intermediary position between a short and a long time limitation – is contained in Article 3 (3) of the convention.

Article 3 UNIDROIT Convention (1995) – (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

The time span prescribed by Article 3 (3) is composed of two different periods, a short period – also referred to as the ‘relative period’ – and a long period, known as the ‘absolute period’. Whilst the SG originally envisaged a single period of limitation, one of its members proposed this double construction for cultural property theft during the third session of the group.⁶⁶ Since the SG had already opted for this double construction for the rules on illegal export during its second session,⁶⁷ it was deemed appropriate to introduce the same construction for stolen cultural objects.⁶⁸ Additionally, the adoption of two limitation periods was seen as a compromissory solution in the eyes of the convention’s drafters:⁶⁹ whilst some experts had expressed preference for an unlimited right of action – or one that was subjected to long protraction –, others had favoured short limitation periods running from the moment the claimant acquires sufficient information to initiate restitution proceedings.⁷⁰ This double construction would, henceforth, take the preferences of both groupings into consideration. Furthermore, an alternative proposal had been formulated which established two different time periods depending on the good or bad faith of the possessor;⁷¹ the proposal advanced that if the possessor acquired in good faith, the time period for initiating the restitution would have to be short, whilst had he acted in bad faith, a longer period of limitation would have to be applied.⁷² This proposal was, nevertheless, dismissed on the grounds that it would be impossible to know whether the action in restitution could be instated beforehand.⁷³ What is more, Article 3 of the convention prescribes for restitution irrespective of the exercise of good faith or bad faith.⁷⁴ Consequently,

⁶² Droz, G. A. L., “Mémoire sur le Projet de Convention d’Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés”, in: P. J. I. M. de Waart, G. A. L. Droz, F. Rigaux, C. J. H. Brunner, *Kunsthandel (Inclusief Antiquiteiten) en de Bescherming van Nationaal Cultureel Erfgoed*, 47. (Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, 109), (Kluwer: Deventer, 1994), p. 49; Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 40; Hughes V., Wright, L., ‘International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?’, 32 *The Canadian Yearbook of International Law*, (1994), p. 232; Klein, F.-E., ‘En Relisant la Convention UNIDROIT du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés : Réflexions et Suggestions’ 118 *Zeitschrift für Schweizerisches Recht*, (1999), p. 283; Forbes, (1996), p. 248; Prott, *Commentary on the Unidroit Convention*, (1997), p. 34; Prott, ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On’, (2009), p. 217; discussions about the length of the limitation of the action already took place during the third session of the Study Group (see UNIDROIT, (1990), Study LXX – Doc. 18, p. 14). Whilst the SG had not yet envisaged the use of a double time limitation in the form of a relative and an absolute period (see below), discussions mainly concerned the length of an absolute limitation period: some members were proponents of a short period in order to secure commercial transactions, whilst others advocated a long period so as to protect dispossessed owners from speculative behaviours in the form of long-term investments by which an object could be retained by a possessor for a long period of time and disappear from the market, making it impossible for the owner to retrace it. See UNIDROIT, (1990), Study LXX – Doc. 18, pp. 14-15.

⁶³ Hughes and Wright, (1994), p. 233.

⁶⁴ Hughes and Wright, (1994), p. 233; Prott, *Commentary on the Unidroit Convention*, (1997), p. 34.

⁶⁵ Hughes and Wright, (1994), p. 233; Prott suggests that a long period of time protects the speculative aspects of handling in cultural objects (i.e. purchasing art as an investment). See Prott, *Commentary on the Unidroit Convention*, (1997), p. 34.

⁶⁶ See UNIDROIT, (1990), Study LXX – Doc. 18, p. 15.

⁶⁷ UNIDROIT, (1989), Study LXX – Doc. 14, pp. 17-18.

⁶⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 15.

⁶⁹ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/6, April 1995, p. 95.

⁷⁰ *Idem*.

⁷¹ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the third session (Rome, 22 to 26 February 1993) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 39, Rome, May 1993, p. 14. See also ‘Working Papers submitted to the Committee of the Whole’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/W.P. 8, 8 June 1995, p. 121; it should be noted that this proposal would blend the approaches that are used in civil and common law jurisdictions, as it would subject the right of action to specific time constraints (see for example the regimes discussed in Chapter 3 above) whilst, at the same time, the length of the period would be extrapolated from the distinction that is drawn in civil law jurisdictions (see the three regimes that were discussed in Chapter 2 above).

⁷² UNIDROIT, (1993), Study LXX – Doc. 39, p. 14.

⁷³ UNIDROIT, (1993), Study LXX – Doc. 39, p. 14.

⁷⁴ UNIDROIT, (1993), Study LXX – Doc. 39, p. 14.

distinguishing the periods of limitation on this basis was deemed to be inappropriate for the future instrument.⁷⁵ Instead, Article 3 (3) of the convention requires the claim in restitution to be lodged in accordance with both the relative and the absolute periods.

(1) Relative Period

Article 3 UNIDROIT Convention (1995) – (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, [...]

Following Article 3 (3) *ab initio*, a claim for the restitution of a stolen cultural object must be initiated within a relative period of three years, a period that starts to run from the moment that both the location of the object and the identity of the possessor are actually discovered by the claimant. This mechanism mirrors statute of limitations and, more specifically, reflects the discovery rule,⁷⁶ as known in California and New Jersey:⁷⁷ the assimilation to statutes of limitations stems from the idea codified in Article 3 (1) of the convention (discussed below) that the owner – although constrained by limitations to his right of action – is unreservedly entitled to recover a stolen object and that, concurrently, no third-party protection *sensu stricto* ought to be given to the possessor of a stolen cultural object.⁷⁸ As will be explained below, mandating the restitution of a stolen cultural object was considered to be imperative in fighting cultural property theft. Moreover, the purpose of the relative period is to ensure that the claimant undertakes action as soon as possible,⁷⁹ therefore matching the purpose of statutes of limitations. Consequently, the relative period was established in line with the said statutes. Furthermore, the drafters of the convention did not leave the interpretation of the accrual of the cause of action to domestic courts. Instead, Article 3 (3) specifies that the cause of action is to accrue in accordance with the discovery rule. Compared to other types of accrual of the cause of action,⁸⁰ the appropriateness of the discovery

⁷⁵ UNIDROIT, (1993), Study LXX – Doc. 39, p. 14.

⁷⁶ Forbes, (1996), p. 248, footnote 86.

⁷⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 35. It is important to note that Protz refers to both New Jersey and California when elaborating upon the relative period of Article 3 (3). Nevertheless, this averment must be nuanced: firstly, the discovery rule in New Jersey is based on equitable considerations, meaning that in order for the dispossessed owner to be entitled to rely upon it, an implied requirement of due diligence is imputed on him. This means that, under the New Jersey rule, the accrual of the running of the statute of limitations is tolled if the owner has actively searched for the stolen property, i.e. if he has exercised due diligence in retrieving his property but could not discover the information necessary to replevy. In other words, if the owner was sufficiently diligent in attempting to retrieve his property, the statute of limitations will be tolled and thus his claim will not be barred by an expired statute of limitations. On the contrary, if he makes no effort to trace his property, he will not be entitled to rely upon the discovery rule (see *O’Keefe v. Snyder* 170 N.J. Super 75, 405 A.2d 840, (July 27, 1979) discussed in Chapter 3, section A. 3. (2) above). As such, New Jersey makes it clear that a dispossessed owner cannot rest on his right or he risks losing it. No such obligation of due diligence exists in California law (cf. Chapter 3, section A. 3. (3) above). Correspondingly, no such obligation of due diligence exists for the claimant that relies upon Chapter II of the 1995 UNIDROIT convention for three reasons: first, the relative period is not an equitable estoppel but a formal rule that is codified in Article 3 (1) of the convention; second, due diligence as prescribed by the convention does not relate to the behaviour of the owner in retrieving his property (see below) and third, the lack of imputability of due diligence upon the owner could also be due to the willingness to favour restitution in order to tackle effectively cultural property theft: imposing due diligence upon the owner would have the effect of making restitution more difficult. Thenceforth, Article 3 (3) resembles the strict discovery rule that is found in California law (see Chapter 3, section A. 3. (3) above). Secondly, Article 3 (3) exclusively prescribes actual notice of the elements that are required to trigger the cause of action and no constructive notice can be inferred from this provision (see below). Albeit that the New Jersey discovery rule allows both actual and constructive notice, the California legislature clarified in 2010 that it only recognises actual notice for the purpose of § 338 (c) (2) CCCP. Furthermore, § 338 (3) CCCP specifically excludes any constructive notice for the purpose of the provision (cf. § 338 (c) (3) (A) and (C) (i) CCCP). In the same vein, the convention does not prescribe the use of a constructive notice for the running of the relative period. Consequently, the regime of the convention is more akin to the California strict discovery rule. But for these precisions, it must be remarked that Article 3 (3) leans more towards the New Jersey discovery rule in one respect: Article 3 (3) posits elements of cognition that match the New Jersey discovery rule. It is thus necessary in order for the cause of action to accrue that the claimant discovers both the whereabouts of the object and the identity of the possessor. Instead, § 338 (c) (2) CCCP requires the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft to discover the whereabouts of the object and § 338 (c) (3) CCCP requires the claimant, or his or her agent, to discover both (i) the identity and whereabouts of the object and (ii) the information that is necessary to indicate the existence of a possessory interest, to the benefit of the claimant, in the object that has been wrongfully taken. For more information about New Jersey and California’s accrual of the cause of action, see Chapter 3, sections A. 3. (2) and (3) above.

⁷⁸ It is important to recall that it was established in the above that rules on third-party protection were seen as important contributing factors to cultural property theft (see the introductory chapter to the present research). It is, therefore, unsurprising that the drafters of the convention parted with these rules for the purpose of the convention.

⁷⁹ See for example, UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property, Observations of International Organisations on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (UNESCO, Interpol), Study LXX – Doc. 25, Rome, January 1992, p. 8.

⁸⁰ As was discussed at length in Chapter 3 above, the following types of accrual of the cause of action have been applied by the courts in New Jersey, California and New York: the unlawful taking accrual, adverse possession and the demand and refusal. As was highlighted in the aforementioned chapter, the application of the unlawful taking accrual of the cause of action in relation to cultural objects is not pragmatic since in order for the dispossessed owner to be given a fair chance to recover his property, he needs to know both the identity of the possessor and the whereabouts of the good (see Petrovich, J. G., ‘Comments – The Recovery of Stolen Art: of Paintings, Statues, And Statues of Limitations’, 27 *UCLA Law Review*, (1979-1980), p. 1132). The unlawful taking cause of action allows the statute of

rule to the contemplated situation cannot be understated:⁸¹ echoing the maxim *contra non valentem agere non currit praescriptio*,⁸² the rights of the claimant are safeguarded and justiciable up until the moment he finds himself in the position enabling him to protect the said rights.⁸³ The flexibility offered by this mechanism is appropriate in the present context due to the complexities inherent in retrieving stolen cultural objects in an international setting. In fact, this flexibility provides the claimant with a fair chance to retrieve his property and makes it possible to bring

limitations to run and expire irrespective of the cognition of these elements by the said owner. Adverse possession appears equally problematic as the requirement of open and notorious possession by the adverse possessor is inoperative in relation to cultural objects: as was noted by the Supreme Court in *O’Keefe v. Snyder*, only a museum type of display would suffice to satisfy the requirement of open and notorious possession, making it virtually impossible for a person holding the object by means of a residential display to be protected against a claim for the recovery of the object. This would entail that the owner’s right to reclaim becomes virtually unfettered. Furthermore, it is this exact difficulty that led the Supreme Court of New Jersey to abandon the adverse possession accrual of the cause of action in favour of the more equitable discovery rule. Regarding the demand and refusal, the situation is less clear-cut: Hayworth – an exponent of this type of accrual – posited that the demand and refusal constitutes the soundest policy for the recovery of stolen cultural objects, and not the discovery rule. In her opinion, demand and refusal correctly balances the relative rights and obligations between the two innocent parties (Hayworth, A. E., ‘Stolen Artwork: Deciding Ownership is No Pretty Picture’, 43 *Duke Law Journal*, (1993-1994), p. 374), and provides more certainty than other interpretations of the accrual of the cause of action (*ibidem*, p. 378) for the following reasons: firstly, compared to the requirement of due diligence that is prescribed by the discovery rule, certainty is provided by the simple requirement that the demand be formulated and rejected before the period of limitation can run (*ibidem*, p. 379). Secondly, by making the possession wrongful from the moment that the demand is formulated, possessors have no reason to hide their works of art and thus to drive a stolen object underground (*ibidem*, p. 379). Instead, the discovery rule makes the possession wrongful from its inception, pressing the possessor to push the piece further on to the black market to avoid having to hand it back (*idem*). Thirdly, whilst the demand and refusal rule is the most consistent accrual of the cause of action against the backdrop of the *nemo dat* principle, Hayworth submits that the discovery rule encourages the illicit traffic in cultural materials because of the unascertainable due diligence requirement that is imposed upon the owner (Hayworth, (1993-1994), p. 383). In her opinion, this undefined due diligence requirement weakens the position of the true owner, reducing his chances of recovering the object (*ibidem*, p. 378). More particularly, the problem with the discovery rule is that it is fact-dependent, and thus leads to inconsistency in decisions (Hayworth, (1993-1994), p. 356). Compared to the uncertain due diligence, the demand and refusal rule is more reliable (Hayworth, (1993-1994), p. 368). Fourthly, the demand and refusal remains unaffected by fluctuations in the value of the contentious object: whilst the degree of diligence to be exercised by a dispossessed owner under the discovery rule is to be determined on the basis of the value of the object, a change of value has no incidence in the application of the demand and refusal rule, thereby leading to more certainty for a dispossessed owner (*idem*). Fifthly, the discovery rule disincentivises diligent owners that have not been able to retrieve successfully their object in situations where the possessor has hidden it up to the point where the owner abandons the cause, ultimately thwarting any possibility for the owner to recover because of want of continued diligence (Hayworth, (1993-1994), p. 380). Sixthly, the burden of investigation under the demand and refusal rule is imputed upon the purchaser, who will have to be cautious whilst acquiring an artwork (*idem*). Finally, other commentators have argued that the demand and refusal rule protects a *bona fide* purchaser from unnecessary litigation, forces purchaser to be more inquisitive in their purchases (Henson, E. J., ‘The Last Prisoners of War: Returning World War II Art to its Rightful Owners – Can Moral Obligations be Translated Into Legal Duties’, 51 *DePaul Law Review*, (2001-2002), p. 1143) – increasing cautiousness (Henson, (2001-2002), pp. 1143-1144) and tackling the problematic of secrecy of the art market –, and endorses private dispute resolution (Demarsin, B., ‘Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum’ 59 *Buffalo Law Review* 3, (2011), p. 640).

⁸¹ The popularity of the rule in the United States is evidence of its appropriateness to the contemplated situation: many states in the US have adopted the discovery rule as the standard of accrual of the cause of action (see Pinkerton, L. F., ‘Due Diligence in Fine Art Transactions’, 22 *Case Western Reserve Journal of International Law*, (1990), p. 2), instead of another accrual of the cause of action. This widespread use of the discovery rule was notably recognised by the Assembly Committee on Judiciary of California in Assembly Bill AB 2765 – Bill Analysis, (2010), pp. 3-4: “Courts in California and elsewhere have long recognized that, given the nature of stolen art, the proper trigger for the SOL should be the discovery by the owner of the whereabouts of the work, not the time of theft or even the time of the first public display of the work”. Inspired by the persuasive precedent of *O’Keefe v. Snyder*, the rule has been applied in several US state jurisdictions to actions in replevin involving, notably, cultural objects (Roodt, C., ‘Keeping cultural objects ‘in the picture’: traditional legal strategies’, 27 (3) *The Comparative and International Law Journal of Southern Africa*, (1994), p. 325), including: California (cf. § 338 (c) (2) and (3) CCCP discussed in Chapter 3, section A. 3. (3) above), Columbia, Illinois (Demarsin, (2011), p. 638), Indiana (Bengs, (1996), p. 519; this was notably the case in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*. In the Goldberg case, the district court submitted that the timeliness of an action in replevin is not to be applied from a ‘file-stamp date’, but the circumstances might require the court, for the sake of fairness and equity, to reconsider the timeliness of the claim. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 717 F.Supp. 1374 (August 3, 1989), at 1387; see also Demarsin, B., ‘The ‘Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer – The Limitation and Act of State Defenses in Looted Art Cases’, 28 *Cardozo Arts & Entertainment Law Journal*, (2010-2011), pp. 267-268, but also footnote 70; furthermore, the court seems to have been directly influenced by the *O’Keefe* decision in the present case (Demarsin, (2010-2011), p. 268, footnote 72) and specified that the cause of action did not accrue until the plaintiffs knew or should have known the identity of the possessor. This knowledge could only be acquired at the moment that the mosaics were proposed for sale to the Getty Museum in late 1988. See Symeonides, S. C., ‘A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Objects’, 38 *Vanderbilt Journal of Transnational Law*, (2005), pp. 1181-1182), Maryland (cf. *Erisoty v. Rizik*, Not Reported in F.Supp., 1995 WL 91406, (February 23, 1995), at 10, footnote 5), Massachusetts (*Republic of Turkey v. OKS Partners*, 797 F.Supp. 64 (July 20, 1992). See also Demarsin, (2010-2011), p. 269, footnote 82), New Jersey (see Chapter 3, section A. 3. (2) above but also Demarsin, (2011), p. 638), Ohio (Demarsin, (2011), p. 638), and Pennsylvania (*Erisoty v. Rizik*, (1995), at 10; Demarsin, (2010-2011), p. 269). These states now apply the rule in several tort actions (cf. *Erisoty v. Rizik*, (1995), at 10, notably footnote 5), and also to replevy of stolen cultural objects. Some commentators have submitted that the use of the discovery rule is so widespread in replevin actions for the recovery of personal property of a cultural nature that it has become the majority rule (Hayworth, (1993-1994), citing the State Bar Committee on Legal Aspects of the Arts, ‘Acquiring Title to Stolen Art’, 55 *Texas Bar Journal*, March 1992, at 237-238).

⁸² Which literally means “prescription does not run against a person unable to act”. See Symeonides, (2005), p. 1192.

⁸³ Symeonides, (2005), p. 1192; Grover, S. F., ‘Note – The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study’, 70 *Texas Law Review*, (1991-1992), p. 1460.

claims for the restitution of the object, even after several decades have passed.⁸⁴ The rule thus takes into consideration the difficulties that a dispossessed owner has in retrieving his belongings.⁸⁵ As such, it has been qualified as a “sensible, equitable, and indispensable vehicle for furnishing diligent owners with a fighting chance to recover their stolen property”.⁸⁶ Three additional aspects are particularly important in understanding the inner workings of the relative period: its length, the conditionality of its accrual and the legal effect flowing from its expiration.

Length

Although time limitations were extensively debated during the various meetings of the SG and of the CGE, it was ultimately decided to defer the decision of the length of both the relative and absolute periods to the Diplomatic Conference.⁸⁷ The DC had the choice between adopting either short absolute and relative periods – respectively of thirty years and one year –, or long periods of fifty years and three years respectively.⁸⁸ Ultimately, it was the latter solution that was adopted.

Regarding the relative period, the length of three years was first proposed during the SG’s third session.⁸⁹ Other lengths of one year,⁹⁰ and five years⁹¹ were later on brought forward. Nevertheless, it was the period of three years that was ultimately retained,⁹² despite concerns that this period was too short and might indirectly whet thieves in pursuing their activities.⁹³ A short relative period was only deemed acceptable in combination with the cumulative cognition of both the whereabouts of the object and of the identity of the possessor.⁹⁴ It should be noted that this short period favours art-importing nations in that it is a relatively short period to instate restitution proceedings.⁹⁵ At last, the length of this period can be extended with recourse to Article 9 (1) of the convention⁹⁶ because a longer relative period would favour restitution.⁹⁷

⁸⁴ See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 95.

⁸⁵ Grover, (1991-1992), p. 1460.

⁸⁶ Symeonides, (2005), p. 1191. This is a sturdy pretension considering the important mobility of cultural objects in today’s market (*idem*).

⁸⁷ The CGE noted during its second session that the length of limitation periods was a matter that was typically dealt with at diplomatic conference, a reason why it was preferable to defer the issue to this gathering. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 38; Prott, *Commentary on the Unidroit Convention*, (1997), p. 34; for an in-depth discussion about the length of the limitation periods, see the discussion that took place during the second meeting of the Committee of the Whole, in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, pp. 172 and ff.

⁸⁸ Droz, (1997), p. 251.

⁸⁹ See UNIDROIT, (1990), Study LXX – Doc. 18, p. 15.

⁹⁰ A previous draft of the convention contained a period of one year, although this was seen as an unrealistic period for an instrument that was to operate on the international plane. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 37; several representatives in the CGE noted during the committee’s fourth session that one year was too short for both private persons and states to obtain the necessary information in order to instate legal proceedings (see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the fourth session (Rome, 29 September to 8 October 1993) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 48, Rome, February 1994, p. 16). Moreover, the Japanese delegation noted that one year would be too short for individual claimants considering the distance between Japan and, for example, the United States or Europe. Consequently, the said delegation conceded that a period of three years was more appropriate (cf. second meeting of the Committee of the Whole, in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 174); see also the commentary of Prott submitting that experience has shown that one year is too short to garner the required evidence (cf. ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13) addressed during the third meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 176.

⁹¹ It was also proposed by the CGE to extend this period to five years in order to match the period of five years that was laid down in Chapter III at that time. See for example UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, p. 14. A majority of delegations present during the second session of the Committee of Experts seemed to favour the five year period. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 11.

⁹² Three years was considered by some commentators as necessary because of the difficulties that individuals often face in obtaining the information that is necessary to sue. What is more, this period was also deemed sufficient because it would only start running from the moment that both the whereabouts of the object and the identity of the possessor were known to the claimant. See the commentary of the Albanian delegate made during the second meeting of the Committee of the Whole, in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 175.

⁹³ UNIDROIT, (1992), Study LXX – Doc. 30, p. 11.

⁹⁴ See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 95.

⁹⁵ Calvo Caravaca, (2004), p. 96; Prott, *Commentary on the Unidroit Convention*, (1997), p. 35.

⁹⁶ See ‘Chapter 6 – Application of the Convention’ below, and more particularly section A.4.

⁹⁷ This argument was submitted in the ‘Explanatory report of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects prepared by the UNIDROIT Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3,

Accrual

For the relative period to accrue, Article 3 (3) requires the cumulative cognition of two elements: the identity of the possessor and the whereabouts of the cultural object. It is expected that the claimant that discovers both elements will have three years to collect the information necessary to initiate the procedure in restitution in the foreign jurisdiction.⁹⁸ Three aspects of this accrual require further consideration: the elements that have to be cognised by the claimant and their cumulateness, the manner with which cognition must take place (i.e. actual or constructive cognition) and the imputability of the knowledge from a previous claimant to the actual claimant.

Originally, the SG proposed to make the period run from the moment the claimant knew, or reasonably ought to have known the whereabouts of the object.⁹⁹ A second proposal relating to the discovery of the identity of the possessor was added by the drafting committee operating amidst the SG as an alternative to discovering the whereabouts of the property.¹⁰⁰ The committee justified this adhesion by explaining that the intention of the time limitation was to give a reasonable period for the claimant to sue for the recovery of the object, and that the lack of information as to the identity of the possessor or as to the whereabouts of the good could jeopardise his chances of recovery.¹⁰¹ Therefore, both elements were deemed to be of paramount importance for determining the accrual of the relative period. Nevertheless, in the PDC, the two conditions of cognition were not cumulative. Instead, the claimant was required to know either one of these two conditions,¹⁰² as was apparent from the use of the conjunction ‘or’ that was present in the earlier drafts of the convention. A proposal to have the relative period run from the moment that both conditions were met – thus replacing ‘or’ with ‘and’ – was made during the second session of the CGE.¹⁰³ This proposal was not well-received at first, since the cumulateness of these two elements would have complicated the action in restitution.¹⁰⁴ Hence, during the third session of the CGE, the representatives present were still divided as to the question of cumulateness of the two requirements:¹⁰⁵ some of them favoured a cumulative approach because this would defer the running of the relative period to a later time,¹⁰⁶ whilst others favoured the use of the conjunction ‘or’. At last, a cumulative cognition of the two elements was agreed upon. The *rationale* behind requiring both elements to be met before the relative period accrues was that it would, on the one hand, be dangerous and dubious¹⁰⁷ for a dispossessed owner to intent the action while he only knows of the possessor’s identity; the possessor aware of the action for restitution could hide the object for a certain period of time in a state that is not party to the convention and wait for the extinction of the action in order to secure his right to the property.¹⁰⁸ On the other hand, if the owner knows of the location of the object, but not the identity of the actual possessor – an element that is crucial to the initiation of a restitution procedure –, his ability to reclaim the stolen goods could expire when the period for recovering the property is relatively short and he cannot discover the identity of the possessor within the imparted time.¹⁰⁹ Consequently, Article 3 (3) requires the cumulative cognition of both elements in order to trigger the running of the relative period. Put differently, the cognition of the two requirements has to be secured to afford the claimant a fair opportunity to lodge his claim.¹¹⁰ There is, nonetheless, one major issue with the

December 1994, p. 28. Nonetheless, reference is made to Article 10 of this document, which was the old numbering of what is now Article 9 (1) of the convention.

⁹⁸ UNIDROIT Secretariat, ‘Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report’, 3 *Uniform Law Review*, (2001), p. 508.

⁹⁹ UNIDROIT, (1990), Study LXX – Doc. 18, p. 15.

¹⁰⁰ UNIDROIT, (1990), Study LXX – Doc. 18, p. 15.

¹⁰¹ UNIDROIT, (1990), Study LXX – Doc. 18, p. 15 where the drafting committee explained that it might be difficult for the claimant to sue if he only knows the identity of the possessor but not the whereabouts of the object; or if he only knows the whereabouts of the object but not the identity of the possessor.

¹⁰² See UNIDROIT, The International Protection of Cultural Property. Preliminary draft Convention on Stolen or Illegally Exported Cultural Objects approved by the UNIDROIT study group on the international protection of cultural property, with Explanatory Report (prepared by the Secretariat), Study LXX – Doc. 19, Rome, August 1990, p. 21.

¹⁰³ See UNIDROIT, (1992), Study LXX – Doc. 30, p. 12, referring to UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the second session of the committee (Rome, 20 to 29 January 1992), Study LXX – Doc. 29, Rome, February 1992, Misc. 31.

¹⁰⁴ UNIDROIT, (1992), Study LXX – Doc. 30, p. 12.

¹⁰⁵ UNIDROIT, (1993), Study LXX – Doc. 39, p. 14.

¹⁰⁶ UNIDROIT, (1993), Study LXX – Doc. 39, p. 14. Reference was also made to Article 7 of Directive 93/7/EEC which combined a cumulative solution to a short relative period of one year (*idem*). For more information regarding the Directive, see ‘Chapter 7 – Unidroit and the World’, below.

¹⁰⁷ Droz, (1994), p. 50.

¹⁰⁸ Droz, (1997), pp. 251-252; Prott, *Commentary on the Unidroit Convention*, (1997), p. 37 (quoting Droz).

¹⁰⁹ Droz, (1994), p. 50; Renold, M. A., ‘Les Principales Règles de la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés’, in: M. A. Renold and C. Breiter, *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 27.

¹¹⁰ Renold, (1997), p. 27; Fraoua, R., ‘La mise en œuvre en Suisse de la Convention sur les biens culturels volés ou illicitement exportés’, in: C. Breiter, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels*

requirement of cognition of the identity of the possessor: because the regime of Chapter II contemplates the possibility that different possessors are involved in the contention (see below), it is particularly unclear which possessor's identity ought to be discovered for the purpose of determining the accrual of the relative period. For example, when the stolen cultural object has been acquired by a collector, loaned to a museum that has outsourced transport between the two to a private company and the proceedings are initiated during the transport phase, all three parties are considered to be possessors in accordance with Chapter II – each party having a superior right of possession as against another based on the relativity of title. Nevertheless, as will be explained below, whilst any of the three possessors will be obliged to return the stolen cultural object on the basis of Article 3 (1), only the collector – in his capacity of possessor as of right – may be entitled to fair and reasonable compensation (as can be inferred from Article 4 (1) *in fine*). This lack of clarity is reaffirmed by the possibility, laid down in Article 8 (1), for a claimant to sue in more than one jurisdiction – including the contracting state in which the cultural object is located – and thus against different possessors. But for this shortcoming, this distinction could become crucial for the timely filing of the claim in restitution.

With regard to the means of cognition of the two aforementioned elements, it should be noted that in the earlier drafts of the convention, the relative period was to run from the moment the required knowledge would effectively be cognised by the claimant (i.e. actual notice) or from the moment that this cognition could be inferred (i.e. constructive notice).¹¹¹ An actual notice entails that the claimant effectively cognises the whereabouts of the stolen object and the identity of the possessor. As to the meaning of 'constructive notice', the members of the SG introduced the formulation "or ought reasonably to have known" in light of several cases decided by American courts that gave substance to this terminology.¹¹² Although not conspicuously defined throughout the negotiations, the meaning of this qualification had been previously addressed by the American delegation, which submitted that reasonableness could be understood as meaning that "[...] the court shall consider the conduct of the claimant in reporting the theft and pursuing the object and whether or not the possessor concealed the cultural object in bad faith".¹¹³ Whilst it was accepted that an actual notice gives a fair chance to the claimant to initiate legal proceedings for the recovery of the stolen cultural object, opinions were divided as to the suitability of a constructive notice for the purpose of Chapter II of the convention. In fact, much of the discussion about the relative period that took place throughout the drafting process of the convention focused upon the appropriateness of having a constructive notice at all.¹¹⁴ The purpose of the inclusion of a constructive notice was precisely to alleviate the difficulties that are inherent in an actual notice, for example, in proving when the claimant discovered the information that is necessary for determining the accrual of the relative period.¹¹⁵ As noted by the UNIDROIT Secretariat, it is often particularly difficult – if not impossible – to prove the actual knowledge of the possessor, a reason why – from an evidentiary perspective – the introduction of a constructive notice seemed appropriate.¹¹⁶ Although the constructive notice had been incorporated to alleviate the said difficulties, it was fiercely criticised during the first and second sessions of the CGE as being unclear, open to interpretation and contrary to the interests of developing countries that are often victimised by theft.¹¹⁷ Subsequently, several arguments were raised by the delegation of the United States of America participating in the CGE against reliance on a constructive knowledge in the future instrument: firstly, imposing such a requirement would be tantamount to requiring the owner to find a needle in a haystack;¹¹⁸ secondly, the judge seized by the claim in restitution would be given too much discretion in laying down a list of actions that the claimant should have taken in searching for his object, as was best exemplified by the 1987 *DeWeerth v. Baldinger* decision in New York;¹¹⁹ thirdly, it might not seem appropriate to deprive the claimant from

Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 37; Calvo Caravaca, (2004), p. 96.

¹¹¹ Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), pp. 204-205.

¹¹² UNIDROIT, (1994), Study LXX – Doc. 48, p. 15.

¹¹³ See UNIDROIT, (1992), Study LXX – Doc. 29, p. 19.

¹¹⁴ For example, following the American delegation, opponents of Article 3 would emphasise the constructive notice. See UNIDROIT, (1992), Study LXX – Doc. 29, p. 20.

¹¹⁵ UNIDROIT, (1992), Study LXX – Doc. 30, p. 12.

¹¹⁶ UNIDROIT, (1993), Study LXX – Doc. 39, p. 15 and UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Commentary on the UNIDROIT preliminary draft Convention on Stolen or Illegally Exported Cultural Objects as revised June 1993 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 42, Rome, September 1993, p. 20.

¹¹⁷ See UNIDROIT, (1991), Study LXX – Doc. 23, p. 16, UNIDROIT, (1992), Study LXX – Doc. 30, p. 12, UNIDROIT, (1993), Study LXX – Doc. 39, p. 15 and UNIDROIT, (1994), Study LXX – Doc. 48, p. 15; therefore, the American delegation formulated a proposal after the first session of the CGE in which the constructive notice was deleted. See UNIDROIT, (1992), Study LXX – Doc. 29, p. 18.

¹¹⁸ UNIDROIT, (1992), Study LXX – Doc. 29, p. 20.

¹¹⁹ UNIDROIT, (1992), Study LXX – Doc. 29, p. 20, referring to *DeWeerth v. Baldinger*, 836 F.2d 103, 56 USLW 2402, (December 30, 1987); it is important to remark here that case law in New York has changed considerably since the case of *DeWeerth v. Baldinger* was decided. In this regard, the reader is advised to consult sections A. 3. (4) and (5) of 'Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) – New Jersey, California and New York' where an in-depth account of the evolution of New York's case law is provided.

the action in restitution because he was, supposedly, negligent in trying to retrieve the object:¹²⁰ a constructive notice would sometimes deprive the said claimant from reclaiming when it could be inferred that he should have had notice earlier, thus ultimately debarring the said claimant from the remedy because of the belated initiation of legal proceedings; fourthly, the claimant can be considered as an innocent victim in case of theft, whilst the acquirer might not be as innocent because he has voluntarily engaged into the acquisition without being sufficiently careful.¹²¹ To sketch out a balance, the US delegation also provided arguments in favour of the constructive notice: it argued that imposing a duty of due diligence upon the claimant serves no other purpose than ensuring that claimants undertake action before the expiration of the period of limitation.¹²² Additionally, international equity can be enhanced by requiring victims of theft to notify the crime promptly in order to prevent further complications for good faith acquirers.¹²³ Furthermore, if no absolute period were to be imposed, it might then – without a constructive notice – be possible to bring restitution proceedings indefinitely.¹²⁴ This could have considerable ramifications in many respects – such as for inheritance taxes, ownership rights, taxation, etc. – and could eventually lead to chaos.¹²⁵ What is more, a claimant cannot be advantaged by his negligence in searching for the object.¹²⁶

Following this account, the CGE was divided as to the need to either delete the constructive notice and use a cumulative appreciation of the two elements of cognition – which would delay for as long as possible the running of the relative period, thereby clearly favouring the claimant – or to keep the constructive notice in conjunction with the cognition of one of the two elements, which would clearly favour the possessor because of the prompt running of the relative period;¹²⁷ if any such constructive notice was to be retained, depriving the claimant from his right of action by imposing an obligation of diligence could be regarded as an injustice on this innocent party.¹²⁸ Moreover, it was argued that if such a duty was to be imposed on the claimant, then there should be a correlative duty to publish the possession imposed on the defendant and the absolute period should be discarded when the defendant is unable to prove having been sufficiently diligent during the acquisition of the object.¹²⁹ Furthermore, it had been argued both after the CGE's first session and during its third session that this mechanism should be coupled to a doctrine of laches – by which the conduct of the claimant resulted in an unreasonable delay in the bringing of the claim and in causing a prejudice to the defendant – that could be taken into account in assessing the constructive notice.¹³⁰ What is more, another representative participating in the work of the CGE considered that the introduction of this constructive notice would run contrary to the very purpose of the future convention, which was to facilitate the restitution of stolen cultural objects in favour of dispossessed owners.¹³¹ Another representative had also previously argued that the constructive notice should be removed from the accrual of the relative period because Article 7 of the 1970 UNESCO convention contained no such obligation on the claimant.¹³² From a different perspective, as just specified, only having an actual notice applied to the acts of the claimant, coupled with the knowledge of both the whereabouts of the object and the identity of the possessor, would clearly benefit the claimant, whilst imposing a constructive notice – next to an actual notice –, coupled with the cognition of either one of the two aforementioned elements would benefit the possessor of the object.¹³³ Consequently, in Prot's opinion, a combined use of these two elements could have constituted an appropriate compromise.¹³⁴ Nevertheless, the constructive notice was at last not retained in Article 3 of the final version of the convention.¹³⁵ Instead, there must be actual notice of the required knowledge, and

¹²⁰ UNIDROIT, (1992), Study LXX – Doc. 29, pp. 20-21.

¹²¹ UNIDROIT, (1992), Study LXX – Doc. 29, p. 21.

¹²² UNIDROIT, (1992), Study LXX – Doc. 29, p. 22.

¹²³ UNIDROIT, (1992), Study LXX – Doc. 29, p. 22.

¹²⁴ UNIDROIT, (1992), Study LXX – Doc. 29, p. 22.

¹²⁵ UNIDROIT, (1992), Study LXX – Doc. 29, p. 22.

¹²⁶ UNIDROIT, (1991), Study LXX – Doc. 23, p. 16.

¹²⁷ See UNIDROIT, (1994), Study LXX – Doc. 48, pp. 15-16, but also 'Explanatory report of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects prepared by the UNIDROIT Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 28.

¹²⁸ UNIDROIT, (1991), Study LXX – Doc. 23, p. 16.

¹²⁹ UNIDROIT, (1991), Study LXX – Doc. 23, p. 16.

¹³⁰ See respectively UNIDROIT, (1992), Study LXX – Doc. 29, p. 21 and UNIDROIT, (1993), Study LXX – Doc. 39, p. 15; this proposal might well have been inspired by the 1990 decision of the Appellate Division of the New York Supreme Court in *Solomon R. Guggenheim Foundation v. Lubell* (see *Solomon R. Guggenheim Foundation v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618, (January 25, 1990), at 146, that is discussed in more detail in section A. 3. (4) of 'Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) - New Jersey, California and New York' above.

¹³¹ UNIDROIT, (1993), Study LXX – Doc. 39, p. 15.

¹³² UNIDROIT, (1991), Study LXX – Doc. 23, p. 16.

¹³³ UNIDROIT, (1993), Study LXX – Doc. 42, p. 21.

¹³⁴ UNIDROIT, (1993), Study LXX – Doc. 42, p. 21.

¹³⁵ See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. And 79; CONF. 8/D.C./Doc. 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, p. 288; Forrest, (2010), p. 205.

no constructive notice is to be inferred from the provision. Had it been retained, then the court of the contracting state seized with the contention would have had to make a reasonable assessment of the publicity and notoriety of the acquisition by the possessor, taking into consideration the international character of the situation and – more conspicuously – the fact that the claimant resides in another state.¹³⁶ Nevertheless, Prott noted that if the constructive notice ought not to be retained, it would still be possible for domestic courts to apply the domestic rules on dilatoriness in the initiation of legal proceedings.¹³⁷ As a result, the absence of the constructive notice in the regime of the convention does not make it impossible to hold the claimant to a certain standard of responsibility in researching his stolen property, provided that this standard exists in the domestic law of the court seized.¹³⁸ The unpredictability flowing from this regime forces the claimant to pursue a ‘New-Jersey-Discovery-rule-type’ due diligence to retrieve his stolen cultural property.¹³⁹

Finally, attention should be devoted to the cognition of the elements required by a previous claimant. During its third session, the SG specified that if the behaviour of the possessor’s predecessor was to be imputed to the possessor (and more particularly with regard to due diligence as laid down in Article 4 of the convention),¹⁴⁰ then this should also be the case for the behaviour of the claimant.¹⁴¹ This means that the cognition of the two elements of the relative period by the claimant against the current possessor must also be imputed to the follower in right to the claimant.¹⁴² This would have the effect of having the cause of action of the relative period accrue from the moment that a claimant acquires the required knowledge; and where there is a passing of rights to another – for example through means of inheritance or via a transfer of right – then this will not affect the running of the relative period.

(2) Absolute Period

Article 3 UNIDROIT Convention (1995) – (3) Any claim for restitution shall be brought [...] and in any case within a period of fifty years from the time of the theft.

Alongside the relative period, Article 3 (3) *in fine* requires the claim in restitution to be introduced within an absolute period of fifty years, running from the time of the theft. Although this absolute period is not to be assimilated to a statute of limitations, it is particularly unclear whether it ought to be construed as a statute of repose, a prefix period, a period of extinctive prescription or a period of acquisitive prescription. The distinction is particularly important considering that these different types of limitations have different legal implications, as was illustrated in Chapters 2 and 3 above. Instead, it has only been submitted that the use of an absolute period is intended to help alleviate uncertainties surrounding the title to cultural objects.¹⁴³ In order to better understand the concept, an account of the length of the period and of the conditionality of its accrual is given.

Length

Notwithstanding proposals to have periods of six,¹⁴⁴ ten,¹⁴⁵ thirty¹⁴⁶ and one hundred years,¹⁴⁷ or – similar to the rule found in public international law applicable to the restitution of war booties – no absolute period at all,¹⁴⁸ a

¹³⁶ UNIDROIT, (1993), Study LXX – Doc. 42, p. 21. See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 15.

¹³⁷ UNIDROIT, (1993), Study LXX – Doc. 42, p. 21; this was also confirmed by UNESCO (see ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 95) and by the Chairman of the Committee of the Whole (see the second meeting of the Committee of the Whole, in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, pp. 173-174). See also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. And 79; CONF. 8/D.C./Doc. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 19 June 1995, p. 282.

¹³⁸ UNIDROIT, (1993), Study LXX – Doc. 42, p. 21 and UNIDROIT, (1994), Study LXX – Doc. 48, p. 15.

¹³⁹ See Chapter 3, section A. 3. (2) for more details with regard to this type of discovery rule.

¹⁴⁰ This imputability of knowledge to the follower in right is particularly important in the context of Article 4 (5) concerning donation and bequeathals. See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 33 where it was submitted that the running of the relative period starts from the moment the dispossessed person cognises the whereabouts of the object and the identity of the possessor. The succession or donation does not affect this cognition, since the behaviour of the prior possessor is imputed to the new possessor.

¹⁴¹ UNIDROIT, (1990), Study LXX – Doc. 18, p. 18.

¹⁴² UNIDROIT, (1990), Study LXX – Doc. 18, p. 18.

¹⁴³ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 95.

¹⁴⁴ See for example the proposal by the delegation of the United Kingdom in UNIDROIT, (1992), Study LXX – Doc. 29, G.E./C.P. 2nd session Misc. 26, p. 35. The delegation proposed to instate an absolute period of six years and to make it possible for the contracting state to extend this period through the provisions on rules more favourable to restitution or return (*idem* and UNIDROIT, (1992), Study LXX – Doc. 30, p. 12).

period of fifty years¹⁴⁹ was finally agreed upon. Although fifty years was considered by some commentators to be a too lengthy period that was almost unacceptable,¹⁵⁰ to others, this period constituted an appropriate equilibrium between imprescriptibility and instantaneous prescription through means of third-party protection.¹⁵¹ What is more, some members of the CGE established that a period shorter than fifty years would promote the concealment of stolen cultural objects, thereby emasculating the purpose of the absolute period.¹⁵² During the Diplomatic Conference, the Albanian representative also noted that a period of fifty years was appropriate considering that a lot of time might be needed to retrieve the necessary information as to the fate of the object.¹⁵³ Consequently, the absolute period was adopted in order to favour the claimant – and also source nations¹⁵⁴ – by providing him with a particularly long time to retrieve the object.¹⁵⁵

Accrual

Article 3 (3) *in fine* posits that – unlike the relative period – the absolute period of fifty years starts to run from the time of the theft. During the CGE's second session, a proposal was made to include an article specifying that the time of the theft had to be proved with recourse to official documents.¹⁵⁶ This proposal was not retained, as

¹⁴⁵ See for example the proposition of Sweden in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of Governments on the Preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Canada, Mexico, Sweden, Turkey), Study LXX – Doc. 20, Rome, April 1991, p. 7.

¹⁴⁶ The period of thirty years gained support during the third session of the SG. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 15; 'The Japanese delegation also supported a period of thirty years because it would create less uncertainty for the possessor and it would ensure commercial transactions (more specifically because of difficulties in keeping proofs of transactions after thirty years). See Japan's commentary in 'Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5, Add. 1, April 1995, p. 73 and see also the commentary made by the same delegation during the second meeting of the Committee of the Whole, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 174; Fox, C., 'The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property', 9 (1) *American University International Law Review*, (1993), p. 257, footnote 229.

¹⁴⁷ This proposal was made by Pakistan and was apparently based upon the assumption that the convention could work retroactively. This seemed to constitute a problem for Pakistan which became independent almost fifty years before the ongoing negotiations. If a period of fifty years were to be prescribed, Pakistan believed that it would have little time to bring claims within the prescribed period, a reason why it proposed an absolute period of one hundred years. See 'Comments by Governments on the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Pakistan', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 4, May 1995, p. 83.

¹⁴⁸ This was notably proposed by a majority of delegations during the first session of the CGE. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 15; nonetheless, as was correctly pointed out by another representative during the same session, it is impossible for an uncertain situation to last forever (*idem*). See also UNIDROIT, (1993), Study LXX – Doc. 39, p. 16; see also the proposal of the delegation of the Islamic Republic of Iran in UNIDROIT, (1991), Study LXX – Doc. 23, G.E./C.P. 2nd session Misc. 49, p. 73.

¹⁴⁹ This was proposed during the first session of the CGE. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 15.

¹⁵⁰ Too long a limitation period would lead to more legal insecurity, which would in turn make ratification of the convention less appealing to many importing states (see the second meeting of the Committee of the Whole, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 175); see also Vernet, J., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)' in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 81.

¹⁵¹ See the commentary by Prott in Prott, L. V., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)' in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 83.

¹⁵² UNIDROIT, (1991), Study LXX – Doc. 23, p. 15; a large majority of the representatives present during the second session of the CGE believed that a period of thirty years was too short. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 12, reiterated during the third session of the same committee (UNIDROIT, (1993), Study LXX – Doc. 39, p. 15). In this regard, it should be remarked that – from a law and economics perspective – long time limitations are often prescribed because of the devaluation which an object will be subjected to after this long period of time has expired, leaving a thief with an object that has lost considerable value since it was stolen. Consequently, the thief will not be able to profit from the resale of the stolen object. See Bouckaert, B. and Depoorter, B. W. F., '1200 Adverse Possession – Title-Systems', in: B. Bouckaert and G. De Geest (eds), *Encyclopedia of Law and Economics, Volume II. Civil Law and Economics*, (Edward Elgar: Cheltenham, 2000), p. 25. This argument fails to convince in the case of cultural property, where the value of the object often increases over time and, consequently, rewards a patient thief.

¹⁵³ See the second meeting of the Committee of the Whole, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 13 June 1995, p. 175.

¹⁵⁴ Calvo Caravaca, (2004), p. 96.

¹⁵⁵ Droz, (1997), p. 251.

¹⁵⁶ UNIDROIT, (1992), Study LXX – Doc. 30, p. 12, referring to UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of Governmental delegations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Israel), Study LXX – Doc. 26, Rome, January 1992; The Netherlands also made a proposal to the

it was self-evident that the occurrence would have to be proved through official documentation, such as a copy of the documents that show when the theft was reported to the relevant authorities.¹⁵⁷ Nevertheless, a notable difficulty with the accrual of the absolute period stems from the fact that it remains unclear whether the period is to run from the day of the theft (which could either be similar to statutes of repose, to the expiration period of Article 3:86 (3) DCC or to the prefix periods laid down in Articles 2279 BCC and 2276 FCC) or whether it is to be computed by full days, and, therefore, from the day following the theft (such as the periods of acquisitive prescription of Articles 2262 BCC and 2272 FCC, and of extinctive prescription in Article 3:306 DCC).

(3) Interruption and suspension

An important and non-negligible aspect relevant to the application of the periods of limitation found in Article 3 (3) concerns the possible interruption or suspension of these periods. This aspect was touched upon during the fourth session of the CGE regarding a possible interruption or suspension of the periods of limitation of the convention flowing from war or from the breaking-off of diplomatic negotiations between contracting states.¹⁵⁸ In responding to the participants' contentions, the Chairman of the committee recalled the existence of a general principle of law governing the interruption¹⁵⁹ – and / or suspension¹⁶⁰ – of limitation periods. The problem with this affirmation is that since it is not clear whether the absolute period is to be assimilated to a statute of repose, a prefix period, an expiration period or a period of prescription, it is particularly unclear whether the general principles invoked either refer to the interruption and suspension of periods of prescription, to the interruption of expiration periods or to the interruption or suspension of statutes of repose. This distinction is particularly important since there exist no grounds of interruption or suspension of statutes of repose,¹⁶¹ and of prefix periods, whilst it is possible, however, to interrupt or suspend periods of prescription, or interrupt expiration periods. But for this lack of specificity, what is clear is that in order to interrupt the running of this period, it is sufficient to initiate proceedings for the restitution of the stolen object.¹⁶² In this regard, the moment a suit is initiated against the possessor is germane and not the moment at which the defendant is served with the papers lodging the claim.¹⁶³ Additionally, if the relative period is to be assimilated to a statute of limitations, it is unlikely

effect that the theft should be declared to the police and that a uniform description of the stolen object – including pictures – would have to be registered in a reasonably accessible database that is concerned with stolen cultural objects. See 'Working Papers Submitted to the Committee of the Whole', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 2, 7 June 1995, p. 116. Such a provision would have the effect of clarifying when the absolute period is to run and would ensure that the possessor can discover that the object has been stolen (*idem*). See also 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4 and 6)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 9 June 1995, pp. 183-184.

¹⁵⁷ It is important to note that proving the theft might be particularly problematic in the case of archaeological theft, as it is often unknown when and where the object was stolen, or even if a theft took place at all, due to the lack of knowledge of the existence of the object in the first place. This was notably the reason why the proposal introduced by The Netherlands was subsequently criticised by Prott (see 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4, 6, 7, 18, 21 and 22)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, p. 188). For more information in this regard, see 'Chapter 5 – Archaeological theft' below.

¹⁵⁸ See UNIDROIT, Study LXX – Doc. 48, p. 16. See also 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, pp. 29-30.

¹⁵⁹ UNIDROIT, (1994), Study LXX – Doc. 48, p. 16.

¹⁶⁰ See 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, pp. 29-30; it is important to emphasise that the Chairman of the CGE was referring to general principles applicable to the interruption of periods of limitations (UNIDROIT, (1994), Study LXX – Doc. 48, p. 16), whilst the explanatory report of the Secretariat of UNIDROIT – reporting the discussion that took place during the CGE – refers to the general principles that are applicable to the suspension of periods of limitations. It remains unclear whether the explanatory report is incorrect or whether the discussions that took place during the CGE were only partly reported.

¹⁶¹ "One central distinction between statutes of limitations and statutes of repose underscores their differing purposes. Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." Lozano v. Montoya Alvarez, 572 U.S. 1, —, 134 S.Ct. 1224, 1231–1232, 188 L.Ed.2d 200 (2014). Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances that are beyond a plaintiff's control. See, e.g., Lampf, supra, at 363, 111 S.Ct. 2773 ("[A] period of repose [is] inconsistent with tolling"); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling"); Restatement (Second) of Torts § 899, Comment g (1977)." and "But a statute of repose is a judgment that defendants should "be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." C.J.S. § 7, at 24. [...]". *CTS Corp. v. Waldburger*, (2014), at 2183.

¹⁶² As was correctly established by the Finnish delegation present during the second meeting of the Committee of the Whole. See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 13 June 1995, p. 173.

¹⁶³ *Idem*.

that fraudulent concealment or other doctrines of equitable estoppel are operative with the discovery rule, since the tolling is tied to the actual knowledge of the claimant. Nevertheless, fraudulent concealment could play a crucial role in suspending the absolute period when the object has been concealed, in order to make it impossible for the claimant to discover its whereabouts and thus exercise his right of action in due time.

2. EXCEPTIONS

As a general rule, the double construction of relative and absolute periods laid down in Article 3 (3) is applicable to all cultural objects, as defined in Article 2 of the convention. Nonetheless, Articles 3 (4)-(8) introduce distinctive rules with regard to categories of cultural objects that deserve enhanced protection.¹⁶⁴ Therefore, next to the general regime of Article 3 (3), paragraphs 4 and 5 know of two exceptions for cultural objects that are of importance to contracting states:

Article 3 UNIDROIT Convention (1995) – (4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.

Despite brief references to the category of *res extra commercium* in the early work relating to the future convention,¹⁶⁵ the idea for the future convention to distinguish between limitation periods for certain categories of objects only became palpable after the SG's second session: Chatelain proposed subjecting cultural objects in general to one period of limitation whilst prescribing another period for cultural objects that are given a special protection under national law.¹⁶⁶ His proposition found particular support during the third session of the SG, where some of its members advanced that a limitation period should be applied neither to cultural objects that are of 'very great importance', nor to claims introduced by states.¹⁶⁷ The rationale underlying this proposal was that many domestic laws deem cultural objects owned by the state – such as, for example, goods belonging to the public domain –, to be important, inalienable and imprescriptible.¹⁶⁸ Henceforth, states that have established this kind of differentiation in their domestic laws found it particularly difficult to accept the establishment of time limitations on the claim in restitution or request for return of the said materials.¹⁶⁹ Despite these preliminary considerations, the introduction of concrete provisions directed at a nation's cultural heritage was particularly tardy in the elaboration of the convention: although a provision to this effect had been introduced at first during the third session of the CGE,¹⁷⁰ discussions about these rules governing special categories of cultural objects materialized during the CGE's last meeting.¹⁷¹ During this session, it was noted that paragraph 4 of the draft convention was introduced to provide a specific regime applicable to "[...] the recovery of cultural objects which constituted the hard core of the cultural heritage of each State and which were strictly related to the identity of a

¹⁶⁴ It is important to emphasise that it was not the intention for the convention to become an instrument of public international law directed at the protection of contracting states' cultural heritage. Nonetheless, the rules on the restitution and return of objects belonging to the said heritage posited by the future convention did not go as far as this, even though they would be underlined by a policy of protection. See the commentary of the representative of France in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 179.

¹⁶⁵ See UNIDROIT, The International Protection of Cultural Property – Second Study Requested from Unidroit by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property and in the Light of the Comments Received on the First Study (prepared by Gerthe Reichelt, Univ. Dozent at the Vienna Institute of Comparative Law), Study LXX – Doc. 4, Rome, April 1988, pp. 19 and 20.

¹⁶⁶ UNIDROIT, The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX – Doc. 15), Study LXX – Doc. 16, Rome, December 1989, p. 5.

¹⁶⁷ UNIDROIT, (1990), Study LXX – Doc. 18, p. 15.

¹⁶⁸ Prott, L. V., "Unesco and Unidroit: A Partnership Against Trafficking in Cultural Objects", in N. Palmer (ed), *The Recovery of Stolen Art – A Collection of Essays*, (Kluwer law international, 1998), p. 210.

¹⁶⁹ Prott, (1998), p. 210.

¹⁷⁰ See UNIDROIT, (1993), Study LXX – Doc. 39, p. 16, referring to the proposal made in Study LXX – Doc. 38, Misc. 15. See also UNIDROIT, (1993), Study LXX – Doc. 39, p. 18; when this was first introduced during the third session of the CGE, the proposal was received with dismay by certain representatives because there would be no possibility to review the classification of a public collection made by the state of origin. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 16. Furthermore, the registering of these public collections, it was thought, would not alleviate the problems that are linked to archaeological objects (*idem*). Additionally, some representatives were not ready to discriminate between the categories of cultural objects addressed by the future instrument, rejecting any possibility to distinguish public collections from other cultural objects for the purpose of the convention (*idem*).

¹⁷¹ See UNIDROIT, (1994), Study LXX – Doc. 48, pp. 17 and ff.

people, that is to say those cultural objects which belong to a public collection”.¹⁷² Furthermore, it was recognised by a majority of the representatives present that the exceptions should be narrowly construed because it would be unacceptable to enact special legislation for broad categories of cultural objects:¹⁷³ there were genuine concerns that the combination of a broad definition of public collections and long periods of limitation might constitute an impediment to the ratification of the future convention.¹⁷⁴ Due to the lack of time available to discuss the contemplated rules during the CGE’s last meeting thoroughly, inspiration was drawn from the construction that is found in the second paragraph of Article 7 (1) of Directive 93/7/EEC *on the return of cultural objects unlawfully removed from the territory of a Member State*.¹⁷⁵

Article 7 Directive 93/7/EEC – (1) Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder.

Such proceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. **However, in the case of objects forming part of public collections, referred to in Article 1 (1), and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States laying down a period exceeding 75 years.**

This paragraph requires the return of an unlawfully removed cultural object that originates from a public collection – as is defined in Article 1 (1) of the Directive – and of ecclesiastical goods, both categories being subject to special protection under the national law of the EEC Member State concerned, during a period of seventy-five years, unless the Member State in which the demand for the return is formulated has not limited a request for return to any time limit or has entered into a bilateral agreement with the Member State from which the cultural object has been unlawfully removed in order to posit a longer period. As witnessed by the similarity in the construction between Article 3 (4)-(5) and the second paragraph of Article 7, the specifics of the article of the Directive became the basis for the construction posited in Article 3 (4) and (5).¹⁷⁶ In order to understand the reach of the exceptions laid down in Articles 3 (4) and (5), attention should firstly be paid to the categories of cultural objects that constitute the hard core of the cultural heritage of each contracting state and, therefore, to the categories of cultural objects that are exempted from the regime of Article 3 (3) of the convention.

(1) Cultural objects concerned

As a preliminary remark, it should be noted that there exists a minor terminological discrepancy between the wording of Articles 3 (4) and 3 (5), since the former article is directed at ‘cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection’, ...

Article 3 UNIDROIT Convention (1995) – (4) However, a claim for restitution of a **cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection**, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

... while the latter speaks of ‘a cultural object displaced from a monument, archaeological site or public collection’.

¹⁷² See UNIDROIT, (1994), Study LXX – Doc. 48, p. 17. See also ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 28.

¹⁷³ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

¹⁷⁴ This remark was notably made in the explanatory report pertaining to the draft 1995 UNIDROIT convention that was brought before the Diplomatic Conference. See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 29.

¹⁷⁵ See for example UNIDROIT, (1994), Study LXX – Doc. 48, p. 17 and ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 28.

¹⁷⁶ It is important to recall that the Directive is not concerned with the theft of cultural property but it is merely directed at unlawful removal, which is quintessentially a question of illegal export between Member States of the European Economic Community. Therefore, the Italian representative that took part in the DC deemed a parallel with the Directive as inappropriate. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, p. 181.

Article 3 UNIDROIT Convention (1995) – (5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for **restitution of a cultural object displaced from a monument, archaeological site or public collection** in a Contracting State making such a declaration shall also be subject to that time limitation.

It is not clear what the implications of this terminological discrepancy are – if any –, albeit it can be assumed that the differentiation is merely incidental because both articles need to be read in conjunction, as is already made clear by Article 3 (5) *ab initio*.¹⁷⁷ In fact, notwithstanding these differences, the exceptions laid down in both articles are directed at the following categories of cultural objects: cultural objects forming an integral part of identified monuments (cf. Article 3 (4) and (5)) or of archaeological sites (cf. Article 3 (4) and (5)), cultural objects belonging to public collections (cf. Article 3 (4), (5) and (7)) and sacred or communally important cultural objects belonging to and used by a tribal or indigenous community living in a contracting state as part of that community's traditional or ritual use (cf. Article 3 (4), (5) and (8)). Chapter II treats thus these objects differently as they are often considered imprescriptible according to domestic laws.¹⁷⁸

In order to understand the scope of the two exceptions laid down in Articles 3 (4) and (5), account is given of the meaning of the qualification (a) 'forming an integral part of an identified monument or archaeological site', (b) 'public collections' and (c) 'sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use'.

(a) Forming an integral part of an identified monument or archaeological site

Although much of the debate surrounding the provisions for special categories of cultural objects concentrated on public collections in general, the Greek delegation proposed to introduce distinctive provisions for 'objects forming an integral part of an archaeological or historical monument or site or belonging to a public collection' during the last days of the DC.¹⁷⁹ This was notably because the removal of these objects from these categories of sites or monument would 'destroy the integrity of the whole'.¹⁸⁰ Consequently, instead of widening the definition of public collection that was agreed upon hitherto,¹⁸¹ it was decided to insert additional categories of cultural objects that are worthy of enhanced protection. Thenceforth, the Greek delegation's proposal found its way to the final version of the convention and, thus, for the purpose of the convention, cultural objects detached from an identified monument or an identified archaeological site are subsumed under the regime of Article 3 (4)-(5) of the convention.

This addition was particularly relevant considering that the term restitution implies the movability of a cultural object.¹⁸² Nevertheless, many domestic laws have rules on fixtures, which either consider an object

¹⁷⁷ Vrellis reaches a different conclusion by submitting that it matters little that the monument or archaeological site is identified or not for the purpose of applying Article 3 (4) or (5). In his opinion, because the two provisions are directed at both cultural objects stemming from identified (cf. Article 3 (4)) and non-identified (cf. Article 3 (5)) monuments and archaeological sites, any distinction on this basis is superficial (see Vrellis, S., 'Les biens archéologiques et la Convention d'UNIDROIT (1995) sur les biens culturels volés ou illicitement exportés', 20 *Uniform Law Review*, pp. 579-580 for the underlying reasoning to this argumentation). This affirmation appears incorrect to the present author for the following reasons: firstly, it should be remembered that the requirement that the monument or site be identified for the purpose of the claim in restitution serves to limit the scope of the exceptions posited by Article 3 (4) and (5), which were originally designed to deal with the public collections exception (as explained below). It is, therefore, unlikely that the provision is to be applied broadly so as to encompass cultural objects removed from non-identified monuments and non-identified archaeological sites, which would broaden the scope of the exceptions considerably. Instead, the intention might have been to protect the cultural objects stemming from important monuments and archaeological sites, or at least those that are of a similar importance than cultural objects from public collections; secondly, a textual analysis of paragraphs 4 and 5 of the provision supports a conclusion in discord with the one given by Vrellis: Article 3 (4) subjects claims in restitution of cultural objects forming an integral part of an identified monument or of an identified archaeological site to the exceptions to article 3 (3). Similarly, Article 3 (5) refers to a claim in restitution for an object displaced from a monument, archaeological site or public collection, referring thus to the items forming an integral part of an identified monument, of an identified archaeological site or of a public collection that have been displaced from these settings.

¹⁷⁸ Calvo Caravaca, (2004), p. 96.

¹⁷⁹ See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc.2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 19 June 1995, p. 284, referring to its earlier proposal found in CONF. 8/C.1/W.P. 39.

¹⁸⁰ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc.2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 284.

¹⁸¹ See for example the commentary of the Swiss representative in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc.2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 284.

¹⁸² UNIDROIT, *The Protection of Cultural Property – Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables in 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit*

removed from an immovable to retain the character of immovable property or to become movable due to the said removal.¹⁸³ The domestic qualification may be further modified by the disposal of the fixture in a foreign jurisdiction,¹⁸⁴ rendering the determination of its status somewhat convoluted. Therefore, the qualification given to these objects in the convention is of utmost importance when dealing with objects forming part of an ensemble – such as a monument or an archaeological compound – because the distinction between movable and immovable can become blurred when the object is subtracted from the said compound.¹⁸⁵ This is particularly true in regard of fixtures taken from monuments, for which prior difficulties in classification – as either falling under the regimes instated for immovable or movable cultural property – constituted important flaws in establishing appropriate rules for their protection.¹⁸⁶ Nevertheless, because all monuments are known and owned by either an individual or a state,¹⁸⁷ Chapter II assimilates these objects to cultural objects, the subtraction of which will automatically qualify as theft. Furthermore, these objects will be subject to the exceptions laid down in Article 3 (4) and (5) so as to secure the physical integrity of the monument. Regarding archaeological sites, it is important to specify that the provision applies to cultural objects forming an integral part of an identified archaeological sites, and not from inventoried archaeological sites:¹⁸⁸ although a proposal to this effect had been introduced by a working group established during the DC,¹⁸⁹ this proposal was, ultimately, not retained. As was pointed out by the Tunisian delegation, requiring these objects to be inventoried beforehand would not sit well with cultural objects that are sourced from illicit excavations, as these objects would often not be known and, therefore, would not be inventoried by the source state.¹⁹⁰ Therefore, it suffices for the cultural object to form an integral part of an identified archaeological site. Cultural objects stemming from unidentified archaeological sites will thus not fall within the exceptions posited in Article 3 (4) and (5), but instead will fall within the ambit of Article 3 (2) of the convention.¹⁹¹

(b) Public collections

Next to cultural objects forming an integral part of an identified monument or an identified archaeological site, Article 3 (4) and (5) also apply to public collections of contracting states. Due to the belatedness of the discussion about public collections throughout the drafting of the convention (see above), a participant in the fourth session of the CGE proposed referring to the definition of public collections given in Article 1 (1) of Directive 93/7/EEC so as to give it universal recognition.¹⁹²

Article 1 Directive 93/7/EEC (*in fine*) – For the purposes of this Directive, 'public collections' shall mean collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority; [...]

Nonetheless, a majority of CGE members were in favour of adopting an autonomous definition for public collections instead of referring to Article 1 of Directive 93/7/EEC.¹⁹³ Although, if any such definition was to be

Import, Export and Transfer of Ownership of Cultural Property, (Prepared by Gerte Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law), Study LXX – Doc. 1, Rome, December 1986, p. 23.

¹⁸³ UNIDROIT, (1986), Study LXX – Doc. 1, p. 23; for example, see the categories of immovables by destination discussed with regard to Belgian and French private law in 'Chapter 2 – Cultural Property Theft – Understanding the Paradox (1) – Belgium, France and The Netherlands' above, sections A. 1. (3) and B. 1. (3).

¹⁸⁴ UNIDROIT, (1986), Study LXX – Doc. 1, p. 23.

¹⁸⁵ UNIDROIT, (1986), Study LXX – Doc. 1, p. 23.

¹⁸⁶ Stamatoudi, I., *Cultural Property law and Restitution. A Commentary to International Conventions and European Union Law* (Edward Elgar Publishing, 2011), p. 9.

¹⁸⁷ O'Keefe, P. J., *Le Commerce des Antiquités – Combattre les Destructions et le Vol*, (Unesco: Paris, 1999), pp. 32-33.

¹⁸⁸ Fraoua, R., 'Arab States and the 1995 UNIDROIT Convention', in: UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

¹⁸⁹ The working group was composed of the delegations of Cameroon, Canada, France, Greece, the Islamic Republic of Iran, Japan, Mexico, the Netherlands, the Republic of Korea, Switzerland and the United States of America. See 'Working papers submitted to the Committee of the Whole', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 26 Corr., 14 June 1995, p. 126.

¹⁹⁰ See the commentary of the representative of Tunisia in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13), p. 177. See also 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69, p. 256.

¹⁹¹ For more information about this provision, see 'Chapter 5 – Archaeological Theft' below.

¹⁹² UNIDROIT, (1994), Study LXX – Doc. 48, p. 17. This proposal was also supported by other representatives present during the same session. See *ibidem*, p. 18.

¹⁹³ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18 and 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 28.

drafted, it ought to be restrictive in nature: the purpose of providing a restrictive definition of ‘public collection’ was to limit the categories of cultural objects subject to special rules.¹⁹⁴ The considerable implications for a possessor attached to this special category of cultural objects – i.e. no mandatory absolute period for bringing a claim in restitution – reinforced this feeling that the notion had to be narrowly constructed.¹⁹⁵ Due to the plethora of different domestic conceptions of public collections, the inclusion of a definition of this notion was extensively discussed at the Diplomatic Conference.¹⁹⁶ Opinions were divided as to both the inclusion and the fringes of this notion: for example, although source states supported the inclusion of a broad understanding of public collections and of a long prescription period / repose period,¹⁹⁷ other delegates wanted to remove the notion from the convention because of the intricacies in reaching an agreement as to its meaning.¹⁹⁸ Yet, other delegates reiterated the proposal to refer to the definition of public collections that was contained in Article 1 of Directive 93/7/EEC, calls that had already been made during the CGE.¹⁹⁹ At last, the adoption of an autonomous definition of this notion was deemed to be too complicated²⁰⁰ and, instead, the definition retained was designed in the lines of Article 1 of the EEC Directive.

Article 3 UNIDROIT Convention (1995) – (7) For the purposes of this Convention, a “public collection” consists of a group of inventoried or otherwise identified cultural objects owned by:

- (a) a Contracting State
- (b) a regional or local authority of a Contracting State;
- (c) a religious institution in a Contracting State; or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

Despite having found a source of inspiration in Article 1 of Directive 93/7/EEC, the definition of public collection posited in Article 3 (7) differs from the definition that is laid down in the Directive in three respects: firstly, Article 1 of the Directive does not require that the group of cultural objects belonging to the public collection be inventoried or otherwise identified. Instead, the Directive requires the cultural objects to belong to a collection owned by a Member State of the European Economic Community. Secondly, unlike Directive 93/7/EEC, Article 3 (7) assimilates groups of inventoried or otherwise identified cultural objects owned by religious institutions to public collections. Directive 93/7/EEC considers the inventories of ecclesiastical institutions to be cultural objects for the purpose of the Directive (cf. Article 1 (1) Directive 93/7/EEC *in fine*), and thus not to belong to public collections (see below). Thirdly, Directive 93/7/EEC assimilates collections that are property of an institution situated in a Member State – i.e. an institution that is defined as public institution by the law of that state and that is owned by, or significantly financed by, a Member State or a local or regional authority – to a public collection. The same conditions were not retained in the convention, as the cultural objects falling within the definition of public collections must be owned by an institution that has been established for an essential cultural, educational or scientific purpose and that must be recognised as serving the public interest by the contracting state where it operates. Thus, the convention does not require the state to own the institution or that it be financed by the state in order to fall within the ambit of the exception. The details of Article 3 (7) are further scrutinised below.

¹⁹⁴ UNIDROIT, (1994), Study LXX – Doc. 48, p. 19.

¹⁹⁵ Sidorsky, E., ‘The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration’, 5 (1) *International Journal of Cultural Property*, (1996), p. 32.

¹⁹⁶ Sidorsky, (1996), p. 27.

¹⁹⁷ Hoffman, (10 March 1995), p. 3.

¹⁹⁸ See for example the commentary of the Israeli delegation in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF.8/3; Conf.8/6; Conf. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 177. The Israeli delegation considered that the distinction between cultural objects stolen from private collections and from public collections was inappropriate because of the irrelevance of the distinction with regard to the cultural value of the object. Instead, the delegation opined that a similar treatment ought to be given to all owners – meaning that Article 3 (3) ought to apply to all owners alike –, without there being a need to instate an exception for public collections.

¹⁹⁹ See for example the proposal by the Dutch delegation in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF.8/3; Conf.8/6; Conf. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.3, 8 June 1995, p. 177.

²⁰⁰ See the commentary of the representative of Ireland in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 180.

Inventoried or otherwise identified

Article 3 UNIDROIT Convention (1995) – (7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by: [...]

The need for inventorisation was adopted for the sake of ensuring that documentation was available for the purpose of identifying the stolen cultural object belonging to the public collection.²⁰¹ As such, the condition of inventorisation was a statement of support to the registration of collections by museums, which would help alleviate difficulties when notifying a theft to the competent authorities.²⁰² Furthermore, introducing this requirement would mandate institutions to inventory their collections, if this had not already been done.²⁰³ Nevertheless, the participants to the DC were in discord as to the inclusion of this qualification: some of them believed that a public collection could not be properly identified without being inventoried,²⁰⁴ whilst others noted that there was no formal listing, or even a non-formal listing, of their states' public collections.²⁰⁵ Therefore, as an alternative to the term 'inventoried', it was proposed to require objects of public collections to be 'documented'.²⁰⁶ This requirement stemmed from the need to make the identification of an object belonging to a public collection easier, which could thus be done by means of a photograph or a drawing,²⁰⁷ and would thus not *per se* require an inventorisation of the collection. To facilitate identification from the perspective of acquirers, the Japanese delegation proposed to have items of public collection designated for the purpose of the convention.²⁰⁸ This proposal was considered as being too difficult to put into practice due to the fact that thousands of objects were sold annually through auction houses.²⁰⁹ Instead, the qualification 'inventoried' – although favoured by the drafters – was deemed to be too strict because many precious and valuable cultural objects are often not inventoried, or at least not directly.²¹⁰ To remedy to the limitations of this notion, the Russian delegation proposed to include the qualification 'or otherwise documented' immediately after the word

²⁰¹ See 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 28.

²⁰² *Idem*.

²⁰³ As was noted by the Canadian representative that took part in the DC, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 256.

²⁰⁴ See for example the commentary of the delegation of Lithuania in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 258; but also the commentary of the Dutch representative in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 261; as Cahn – representative of the International Association of Dealers in Ancient Art who participated in the sessions of the Committee of the Whole – specified during the twelfth session of the committee, it was important to ensure that the object is archived, inventoried or documented – the latter term whose introduction in Article 3 (4) was proposed by Cahn – in order to enjoy the protection laid down in Article 3 (4) of the convention (see 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 7, 26 and 64; CONF. 8/C.2/W.P. 18)' addressed during the third meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 12, 14 June 1995, p. 249). Furthermore, the same representative advanced that a photograph of the object at stake was a *conditio sine qua non* to the protection of these objects (*idem*).

²⁰⁵ See the commentary of the representative of Mexico in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 255; as was noted by the representative of Tunisia, in some countries the possibilities to inventory cultural objects were particularly limited. See *ibidem*, p. 256, where the Tunisian delegation pointed to its internal situation, where only five archaeological sites out of twenty-five thousand had been inventoried hitherto; see also the commentary of the representative of Cameroon in *ibidem*, p. 257, and the commentary of the representative of Zambia in *ibidem*, p. 261.

²⁰⁶ See the proposal of the representative of the International Association of Dealers in Ancient Art in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 256.

²⁰⁷ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 256.

²⁰⁸ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, p. 177.

²⁰⁹ See the commentary of the representative of the International Bar Association in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, p. 178.

²¹⁰ See the commentary of the representative of Australia in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 178.

‘inventoried’.²¹¹ Subsequently, the Spanish delegation introduced an alternative formulation ‘or duly identified’.²¹² Building upon both proposals, the final choice operated was to retain the wording ‘or otherwise identified’ so as to include cultural objects that were not *sensu stricto* inventoried prior to the theft.²¹³ This formulation allows states to prove, by any means, that an object is identified as being property of the state without having to inventory the object beforehand.²¹⁴ As such, it ought to be noted that source nations are often confronted with problems regarding archaeological objects that have not yet been discovered: it is particularly problematic to record cultural materials that have not yet been unearthed and, thus, to prove ownership over these objects,²¹⁵ making it impossible to invoke theft.²¹⁶ Therefore, it was noted that the wording of Article 3 (7) is particularly important for African states – including notably sub-Saharan African states²¹⁷ – with regard to objects that have not been registered or inventoried pre-theft.²¹⁸

Owned by

Article 3 UNIDROIT Convention (1995) – (7) For the purposes of this Convention, a **"public collection"** consists of a group of inventoried or otherwise identified cultural objects **owned by:** [...]

To fall within the ‘public collection’ qualification, the group of inventoried or otherwise identified cultural objects must, additionally, be publicly owned. Alternative criteria had been envisaged to define public collections, such as the requirement that a collection be accessible to the public. This criterion of accessibility of the collection was first discussed, but then abandoned, notably because it would be difficult to reconcile with archives and collections conserved in libraries that are not openly accessible.²¹⁹ Nevertheless, the criterion of ownership was retained. In fact, it was the drafter’s intention to only include cultural objects owned by public institutions within the definition of public collection, and not objects that are merely possessed or held by these entities.²²⁰ Therefore, the reference to ownership entails that cultural objects that are lent, for example, to a museum will not fall within the scope of the provision.²²¹ Regarding cultural objects issued from archaeological

²¹¹ ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 258.

²¹² ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 259.

²¹³ See in this regard the commentary against the use of the terminology ‘inventoried’ in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF.8/3; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 177.

²¹⁴ Shyllon, ‘Why African States must Embrace the 1995 Unidroit Convention’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

²¹⁵ Hoffman, (10 March 1995), p. 1.

²¹⁶ Shyllon, (2012), forthcoming.

²¹⁷ Shyllon, (2012), forthcoming; proving ownership and theft of cultural materials seems to be particularly problematic for sub-Saharan African states, which have struggled in the past with reclaiming objects that have been taken from their territories (*idem*). Following Shyllon, this is illustrated by the lack of participation of these states in Interpol’s database of stolen objects: during the 2011 UNESCO Windhoek workshop on illicit traffic in cultural goods, Karl-Heinz Lind – coordinator of the Works of Art Unit of INTERPOL – pointed at the lack of participation of sub-Saharan states in INTERPOL’s database of stolen works of art (*idem*). Around 0,5% of circa 38.000 objects that were reported as stolen through this database came from sub-Saharan African representation. See UNESCO, Harare and Windhoek Cluster Offices, *Report on the Workshop of Prevention and Fight against Illicit Traffic of Cultural Goods in Southern African Region Current Situation and Way Forward*, 14 – 15 September 2011, Windhoek, Namibia, p. 17.

²¹⁸ Shyllon, (2012), forthcoming.

²¹⁹ See the commentary of the representative of France in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 179. See also the commentary of the Spanish representative who advanced that accessibility may be impaired by a lack of available premises, making the condition of accessibility too restrictive to the definition of public collections (*idem*). See also the commentary of the representative of the International Council of Archives echoing the concerns raised by the French representative with regard to archives (*ibidem*, p. 180).

²²⁰ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, pp. 263-264.

²²¹ See for example the commentary of the Irish delegation in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 258, where its representative proposed to replace the term ‘owned’ by ‘is the property of’ to make it possible for the borrowed object to fall within the provision; see also the commentary of the Chairman of the Committee of the Whole in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, p. 259, where he affirms that the object must be owned by the institution listed in the article.

theft, it is important for the contracting state to declare undiscovered objects as state owned in order to be able to rely on the regime that is applicable to public collections.²²²

The definition of Article 3 (7) enumerates four different types of owners and excludes private citizens from its scope.²²³ These institutions must all be recognised by the contracting state in which they operate for the purpose of the provision.²²⁴

Article 3 UNIDROIT Convention (1995) – (7) For the purposes of this Convention, a “public collection” consists of a group of inventoried or otherwise identified cultural objects **owned by**:

- (a) a Contracting State
- (b) a regional or local authority of a Contracting State;
- (c) a religious institution in a Contracting State; or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

Because public collections are, by their very definition, state owned collections, categories (a) and (b)²²⁵ are self-evident. Nonetheless, the same cannot be concluded for categories (c) and (d), which deserve further consideration.

(c) religious institution

Unlike Article 1 of Directive 93/7/EEC, a group of inventoried or otherwise identified cultural objects owned by a religious institution of a contracting state are considered as belonging to a public collection for the purpose of applying the convention.

Article 1 Directive 93/7/EEC – (1) For the purposes of this Directive:

1. 'Cultural object' shall mean an object which:

- is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty, and
- belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of: - public collections listed in the inventories of museums, archives or libraries' conservation collection. [...]
- the inventories of ecclesiastical institutions.

Furthermore, whilst Article 1 of Directive 93/7/EEC clearly refers to cultural objects that form an integral part of inventories of ecclesiastical institutions, the use of a similar classification in the convention would have had the effect of only recognising religious entities belonging to the Christian faith.²²⁶ Because the convention was addressed to the international community as a whole, the drafters preferred to refer to religious, instead of ecclesiastical, institutions, so as to give recognition to all religions.²²⁷ In commenting upon this inclusion, the delegations of Japan and Australia – having in mind that a foreign judge might have to decide whether cultural objects stemming from alternative religions would fall within the public collection exception – noted that it is

²²² In this regard, the reader is advised to consult 'Chapter 5 – Archaeological Theft' below for more detail about state ownership declarations.

²²³ Bungs, (1996), p. 531.

²²⁴ See the commentary of the Chairman of the Committee of the Whole, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 261.

²²⁵ As was correctly noted by the Permanent Bureau of the Hague Conference on Private International Law, there should be no distinction between property owned by local or regional authorities and property owned by states. See 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Permanent Bureau of the Hague Conference on Private International Law', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6 Add. 1, April 1995, p. 110; see also the commentary of the Canadian delegation that took part in the DC submitting that many public collections are often administered by local or provincial authorities, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.3, 8 June 1995, p. 178.

²²⁶ See 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 29.

²²⁷ *Idem*; it is important to remark that Directive 2014/60/EU – the recast of Directive 93/7/EEC – has also modified the reference to ecclesiastical institutions to include other religious institutions. See both Recital 15 of the Preamble and Article 8 (1) of Directive 2014/60/EU.

particularly difficult to determine exactly what a religious institution is.²²⁸ In response, the Chairman of the Committee of the Whole averred that only the religious institutions recognised by the state concerned as serving the public interest would fall within the envisaged category.²²⁹ Reacting upon the concerns raised, the representative of the Holy See that took part in the DC noted that it was not difficult to identify which religious institutions are officially recognised by a state, and that it would suffice for the purpose of the convention to specify that a special relationship should exist between the institution and the state in which it operates.²³⁰ This is the reason why the convention refers to a religious institution in a contracting state, thereby leaving the question of recognition of the religious institution to the domestic law of the contracting state concerned.²³¹

(d) institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

During the CGE's fourth meeting, it was emphasised that many private collections financed through public funds and open to the public should be considered as public collections.²³² The definition of public collection in the EEC Directive did not take this scenario into account, but it was deemed necessary to include it in the definition of public collection of the future convention.²³³ Furthermore, account was to be taken of collections of important museums that were neither owned by a contracting state, nor financed by the said state.²³⁴ Therefore, Article 3 (7) (d) was added so as to incorporate non-profit organisations that were not *per se* owned by contracting states within the regime of the convention.²³⁵ The addition was – *inter alia* – shaped by the United States' desire to come up with a definition of public collections that would not sit uncomfortably with its existing museum collections;²³⁶ as most museums in the USA were privately owned, they were considered as public institutions due to their non-profit making nature and ought thus to be protected in the same way as other public institutions.²³⁷ This translated into the adoption of the qualification “essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest”, which would serve the intended purpose. Furthermore, this addition may have been phrased in these exact words because it had not been the intention to include objects from collections of institutions that marginally offer access to the public.²³⁸ Finally, it was not the intention of the drafters to allow commercial entities to benefit from the regime meant to protect public collections.²³⁹

²²⁸ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 257.

²²⁹ *Ibidem*, p. 258, where the chairman additionally noted that many groups were classifying themselves as religious groups in order to enjoy certain tax exemptions.

²³⁰ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 260.

²³¹ In this regard, see also the commentary of the delegation of Israel in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 260; see also the commentary of the Chairman of the Committee of the Whole in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 261; see additionally the commentary of the representative of Cameroon, in the same source.

²³² UNIDROIT, (1994), Study LXX – Doc. 48, p. 17.

²³³ UNIDROIT, (1994), Study LXX – Doc. 48, p. 17.

²³⁴ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 29.

²³⁵ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 255.

²³⁶ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 39-40.

²³⁷ See the commentary of the United States of America representative in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF.8/3; Conf.8/6; Conf. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.3, 8 June 1995, p. 179.

²³⁸ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 28 where the explanatory report specified that it was not the intention to “[...] cover institutions which open their doors to the public only once each year or only to certain very limited categories of visitors” (*idem*).

²³⁹ This commentary was notably formulated by the delegation of Thailand that took part in the DC. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 256.

(c) Sacred or communally important objects

While the Study Group had not addressed the fate of objects of cult used by traditional communities, the Australian and Canadian delegations that took part in the CGE's fourth meeting pointed out the important ramifications flowing from this omission.²⁴⁰ Most delegations participating in the work of the committee knew little about the importance of objects of cult to traditional communities.²⁴¹ In a synopsis, it should be stressed that these objects are utterly important to the said groupings because the very existence and survival of a community might depend on the existence of the object.²⁴² In fact, the claims made by indigenous people are mostly for repatriation instead of restitution:²⁴³ these groupings often demand the repatriation of the item to a certain location – often a place of worship – instead of claiming the direct possession of the good or the recognition of a right of ownership.²⁴⁴ This means that property considerations are not the main thrust of the demands formulated by indigenous groupings, but instead it is often because the objects concerned are central to the existence of these cultures that the communities have a vital interest in their recovery.²⁴⁵ The loss of an object of cult can considerably impair the exercise of worship and may, subsequently, be fateful to the community to which it belongs.²⁴⁶ As such, these groupings claim the item to secure the survival of their cultural identity – thus ensuring the spiritual health of the community²⁴⁷ – and to be able to practice their traditional ceremonies.²⁴⁸ Ensuring the persistence of living culture thus distinguishes the claims made by indigenous groupings from claims motivated by proprietary or retentionist interests.²⁴⁹ It can, therefore, be argued that when the intrinsic value of a cultural object has a close link with the existence of a living culture, there might be imperative moral grounds that justify the handing back of the object to the community,²⁵⁰ despite an omnipresent lack of legal recognition of these grounds.²⁵¹ Because provisions on public collections had been introduced in the CGE's final phase, there was also support to include sacred and secret objects in the regime of the convention for the sake of not discriminating between the two categories.²⁵² As most of the sacred objects used by indigenous communities are typically not kept in museums, concerns were raised that these objects would be discriminated against because these would not qualify as public collections for the purpose of the convention.²⁵³ This danger of discrimination was reprimanded by certain states because some of them had conferred rights upon these communities that were constitutionally guaranteed and for which these states were bound by correlative duties of protection.²⁵⁴ Furthermore, this specific issue was particularly important to UNESCO as it had just inaugurated the 'Decade of the World's Indigenous People' in 1994.²⁵⁵ Discrimination against cultural objects belonging to indigenous communities would, therefore, have run counter to the development towards an enhanced protection of indigenous groupings that the organisation was trying to secure.²⁵⁶ Hence, due to the collaterality of the issue to the interests advocated by UNESCO, the problem was mentioned in its comments that were prepared for the Diplomatic Conference²⁵⁷ so as to make sure that it could be tabled during the conference. Nevertheless, if any provision for sacred or secret objects belonging to indigenous communities was to be adopted, it was noted that the definition of the categories of objects protected should be restricted,²⁵⁸ in a similar manner to the definition

²⁴⁰ Prot, *Commentary on the Unidroit Convention*, (1997), p. 40; See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 20.

²⁴¹ Prot, *Commentary on the Unidroit Convention*, (1997), p. 40.

²⁴² UNIDROIT, (1994), Study LXX – Doc. 48, p. 20.

²⁴³ Last, (2004), p. 78.

²⁴⁴ Last, (2004), p. 78.

²⁴⁵ Last, (2004), p. 78.

²⁴⁶ Prot, *Commentary on the Unidroit Convention*, (1997), p. 40.

²⁴⁷ As was coined by Webster and reported by Last, in Last, (2004), p. 79, citing Webster, G., 'The Potlatch Collection Repatriation', *University of British Columbia Law Review Special Issue: Material Culture in Flux: Law and Policy of Repatriation of Cultural Property*, (1995), p. 140.

²⁴⁸ Last, (2004), p. 78 citing Byrne, C., 'Chilkat Indian Tribe v. Johnson and Nagpra: Have We Finally Recognized Communal Property Rights in Cultural Objects?' 8 *Journal of Environmental Law & Litigation*, (1993), p. 118.

²⁴⁹ Last, (2004), p. 79.

²⁵⁰ Last, (2004), pp. 79-80, citing Harding, S., 'Value, Obligation and Cultural Heritage', 31 *Arizona State Law Journal*, (1999), p. 309.

²⁵¹ Last, (2004), p. 80; nevertheless, this lack of recognition has become tangential in recent years: objects of cult, principal witnesses to the cultural identity of tribal and indigenous groups, have in the past decades been more often than not subject to claims in restitution (Nafziger J., Kirkwood Paterson, R., 'Cultural Heritage Law', in: J. Nafziger and R. Kirkwood Paterson, *Handbook on the Law of Cultural Heritage and International Trade*, (Edward Elgar Publishing, 2014), p. 6). As such, access to court for claims in restitution of sacred and communally important cultural objects to indigenous people and minority ethnic groups has received more acceptance in recent years (Nafziger, J. A. R., Kirkwood Paterson, R., Dundas Renteln, A., *Cultural Law- International, Comparative and Indigenous*, (Cambridge University Press: Cambridge, 2010), p. 221).

²⁵² UNIDROIT, (1994), Study LXX – Doc. 48, p. 20.

²⁵³ See 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 96.

²⁵⁴ *Idem*.

²⁵⁵ *Idem*.

²⁵⁶ *Idem*.

²⁵⁷ Prot, *Commentary on the Unidroit Convention*, (1997), p. 40.

²⁵⁸ UNIDROIT, (1994), Study LXX – Doc. 48, p. 20.

of public collections. The resulting Article 3 (8) was proposed during the DC as a result of a joint effort between the Australian-Canadian delegations and in collaboration with the United States.²⁵⁹

Article 3 UNIDROIT Convention (1995) – (8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

Article 3 (8) is designed to protect objects that are collectively used by indigenous communities.²⁶⁰ Nonetheless, it could also include cultural objects used by one member of the community since the good would be protected by the provision as long as it is of communal importance.²⁶¹ The focus upon sacred or secret objects would have the merit of limiting the exception to the cultural objects forming the core of the materials used by these communities.²⁶² It should be noted that contrary to the 1970 UNESCO convention – which left discretion to state parties in determining which cultural objects were subject to protection through the mechanism of designation –, the 1995 UNIDROIT convention remedies an important flaw of the former instrument in allowing indigenous people to decide upon the sacred object worthy of protection.²⁶³ What is more, the definition of 'cultural object' that is laid down in the 1970 convention did not list interests of groupings advancing their cultural identity as a significant element of the said definition.²⁶⁴ Thus, unlike the 1970 instrument, its 1995 counterpart reconciles the state interests and the interests of traditional groupings by discarding problems of national cultural dominance.²⁶⁵

For the purpose of Chapter II, sacred or communally important cultural objects belonging to and used by a tribal or indigenous community in a contracting state are not subsumed under the category of public collections laid down in Article 3 (7) of the convention. The rationale for not including these objects within the definition of public collection stemmed from the lack of public access to these objects, making it difficult to assimilate them to public collections.²⁶⁶ Furthermore, such a subsumption was considered inappropriate because Article 3 (7) requires that the said object be inventoried²⁶⁷ or otherwise identified, whilst Article 3 (8) does not require any inventorisation²⁶⁸ or identification. Although cultural objects traditionally or ritually used by tribal or indigenous communities are not assimilated to public collections for the purpose of Chapter II, these objects are subject to the time limitations applicable to public collections (cf. Article 3 (8) *in fine*).²⁶⁹ This assimilation was notably due to the insistence of both the Canadian and Australian representatives to have cultural objects from indigenous groups given the same preferential treatment as the one given to public collections.²⁷⁰

²⁵⁹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 40.

²⁶⁰ See the commentary of the Chairman of the Committee of the Whole in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc.2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 285.

²⁶¹ See notably the commentary of the representatives of Canada, UNESCO, Japan and the United States of America in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc.2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 286.

²⁶² See 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 96.

²⁶³ Last, (2004), p. 64.

²⁶⁴ Last, (2004), p. 64.

²⁶⁵ Last, (2004), p. 64.

²⁶⁶ UNIDROIT, (1994), Study LXX – Doc. 48, p. 20.

²⁶⁷ See the commentary of the delegation of Australia, qualifying as unacceptable any attempt at inventorying cultural objects used by indigenous communities, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 257.

²⁶⁸ See for example the commentary of the Chairman of the Committee of the Whole and the following remarks, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, pp. 257.

²⁶⁹ See the commentary of the representative of Australia in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 178, where it was proposed to provide the same benefit to these categories of sacred and communal objects than the one that is given to public collections.

²⁷⁰ See for example the commentary of the Australian representative echoing the comments of the Canadian representative in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 257; concerns were previously expressed that applying the shorter time limitation could be problematic to these groupings. See the commentary of the representative of Australia in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 13, 16 June 1995, p. 178.

An important drawback of Article 3 (8) is that many of the concepts used in this provision have been left undefined: despite proposals to define indigenous groups in the text of the convention,²⁷¹ this concept was left unqualified. Following Prott, guidelines to understand the terms ‘indigenous’ and ‘tribal’ already exist: the first term is to be understood as having the same meaning as the one given to it by the United Nations in its working practices, while the second term is residual to ‘indigenous’ and encapsulates all remaining groups that are organised in tribes.²⁷² Nonetheless, it remains to be seen how domestic judges will interpret the notions ‘sacred’, ‘communally important’ and ‘traditional or ritual use’.

(2) Exception

After having determined the categories of objects that are subject to the special rules laid down in Articles 3 (4)-(5), this subsection will now turn to explaining the two exceptions to Article 3 (3). The first exception – to be found in Article 3 (4) – discards the application of the absolute period for claims in restitution of cultural objects that form an integral part of identified monuments, of identified archaeological sites or of public collections.

Article 3 UNIDROIT Convention (1995) – (4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, **shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.**

Because the types of objects listed by Article 3 (4) are often considered to be of extreme importance to the national cultural patrimony of contracting states, these states should not lose the possibility to claim these unique objects back.²⁷³ Henceforth, a claim for the restitution of these materials is only subjected to the relative period of three years instated by Article 3 (3), but not to any absolute period. Removing limitation periods for cultural objects that are of particular importance to a state and that were acquired with public money appeared to constitute an appropriate policy of protection of a state’s cultural heritage.²⁷⁴ This entails that Article 3 (4) instates a partial imprescriptibility for the categories of objects listed.²⁷⁵ This solution is the result of a compromise that allows states that have no provisions on imprescriptibility to join the regime of the convention.²⁷⁶ The advantages flowing from this construction were noted by the delegation of New Zealand during the DC: not applying an absolute period to cultural objects stemming from, for example, public collections would empower future generations with a right to claim the restitution of the object when new information as to its whereabouts would be made available.²⁷⁷ Furthermore, the said delegation also opined that not applying an absolute period allows giving recognition to the importance of public collections as representative of a state’s cultural heritage.²⁷⁸ Nevertheless, due to the practical difficulties that would arise from Article 3 (4) after several decades, certain states expressed their willingness to establish a maximum period of time in which a contracting state must bring a claim in restitution²⁷⁹ – a period after which the claim would no longer be justiciable. This possibility found its way into the second exception to Article 3 (3) laid down in Article 3 (5).

²⁷¹ See for example see the joint proposal of the Australian and Canadian delegations, in UNIDROIT, (1994), Study LXX – Doc. 47, p. 29 and UNIDROIT, (1994), Study LXX – Doc. 48, p. 20 where the definition proposed was based on Article 1 of the International Labour Organization *Convention No 169 on Tribal and Indigenous Peoples* (1989) (text available at http://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C169, last retrieved on 01.03.2018). See also the proposal of the representative of Ireland in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 180 to define the notion of indigenous community in accordance with the 1989 I.L.O. convention.

²⁷² Prott, *Commentary on the Unidroit Convention*, (1997), p. 40; see also ‘Chapter 1 – Presentation and Applicability of the Convention’, section B. 2. (4).

²⁷³ See UNIDROIT, (1994), Study LXX – Doc. 48, p. 18, where some participants to the CGE submitted that the *res extra commercium* nature of these objects should supersede considerations of legal certainty due to the cultural importance of these materials; Bengs, (1996), p. 531.

²⁷⁴ See the commentary of the representative of France in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 179.

²⁷⁵ Jolles, (1997), p. 59.

²⁷⁶ Office Fédéral de la Culture (Suisse), (1998), p. 78.

²⁷⁷ See ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (People’s Republic of China, Japan and New Zealand)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 76.

²⁷⁸ *Idem*.

²⁷⁹ This was notably the case for the United Kingdom, The Netherlands and Switzerland. See Prott, *Commentary on the Unidroit Convention*, (1997), pp. 38-39.

(3) Exception to the exception

During the CGE's third session, the members of the committee were divided between either adopting a long time limitation or adhering to the imprescriptibility of claims in restitution of cultural objects that are important to a state's cultural heritage.²⁸⁰ Those supporting imprescriptibility argued that the cultural objects contemplated by the exception were *res extra commercium* and were, therefore, inalienable.²⁸¹ Consequently, these representatives considered that legal certainty was to give precedence to the special nature of these objects.²⁸² Those opposing imprescriptibility advanced that the legal security of international transactions should be given more weight as opposed to other considerations.²⁸³ This was notably due to the constitutional guarantees that were given in certain states to the legal certainty of transactions,²⁸⁴ making an unfettered exercise of the claim in restitution unacceptable.²⁸⁵ Drawing inspiration from Article 7 of the EEC Directive, these representatives submitted that a maximum period of seventy-five years was more appropriate.²⁸⁶ Anecdotaly, it was remarked that the same 'imprescriptibility versus seventy-five years limitation' quandary arose in the drafting of Directive 93/7/EEC and that this almost resulted in the breakdown of the negotiations.²⁸⁷ It was thus deemed virtually impossible to achieve an agreement at the international level whilst the negotiations at the regional level had been so difficult.²⁸⁸ Therefore, the discussion as to the length of the time limitations applicable to these special categories of cultural objects was left to the Diplomatic Conference.²⁸⁹ During the DC, the members of the Committee of the Whole were faced with the task of resolving the deadlock.²⁹⁰ Concerned that the clause on imprescriptibility would be taken out of the future convention, the Thai delegation proposed that each state could accommodate the absolute period to its national preferences.²⁹¹ In its opinion, this would allow every state to become a party to the convention.²⁹² The Thai proposal built upon another suggestion that was made earlier by the Cambodian delegation by which flexibility was to be given to each contracting state to opt for either a period of seventy-five years, a longer period or no period at all.²⁹³ The two propounded solutions were subsequently transposed to the two exceptions currently found in Article 3 (4) and (5). Although Article 3 (4) was pushed for by states that wanted all movables issued from monuments, archaeological sites and public collections to be declared inalienable, other states deemed such a declaration to be unacceptable.²⁹⁴ For political reasons, Article 3 (5) thus became an exception to the exception of Article 3 (4),²⁹⁵ accommodating the preferences of the negotiating states in line with the proposals formulated by the Cambodian and Thai delegations.

²⁸⁰ UNIDROIT, (1993), Study LXX – Doc. 39, pp. 16 and 18.

²⁸¹ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁸² UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁸³ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁸⁴ See the commentary of the representative of Switzerland in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 179.

²⁸⁵ See for example the discussion in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, pp. 267 and ff.; see also the commentary of the UNESCO representative in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 272.

²⁸⁶ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁸⁷ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁸⁸ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁸⁹ UNIDROIT, (1994), Study LXX – Doc. 48, p. 18.

²⁹⁰ See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 269.

²⁹¹ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 272.

²⁹² 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 272.

²⁹³ See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 14 June 1995, p. 181.

²⁹⁴ Protz, *Commentary on the Unidroit Convention*, (1997), p. 38.

²⁹⁵ Protz, *Commentary on the Unidroit Convention*, (1997), p. 38-39.

Article 3 UNIDROIT Convention (1995) – (5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. [...]

Following the first sentence of Article 3 (5), it is possible for a contracting state to derogate from Article 3 (4) by reinstating an absolute period of seventy-five years or any other longer period provided for in its domestic law. Hence, the first sentence of Article 3 (5) functions as an exception to the exception that is laid down in Article 3 (4), thereby allowing states to decide whether the contemplated claims ought to be limited in time or not.²⁹⁶ In order to notify the other contracting states of the choice operated, Article 3 (6) requires that the delimitation of this maximum period of time be made at the moment of signing, ratifying, accepting, approving or acceding to the convention,²⁹⁷ whichever is relevant to the contracting state opting for the exception to the exception.

Article 3 UNIDROIT Convention (1995) – (6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.

It is evident that the choice made by the contracting state is only relevant to the application of the convention,²⁹⁸ and should, henceforth, not be understood as an obligation of a general nature applying to a situation falling outside the scope of the convention. Following the second sentence of Article 3 (5), for contracting states that derogate from Article 3 (4) by reinstating an absolute period, the period reinstated will not only be relevant to claims introduced by foreign claimants, but will also be applicable to claims in restitution brought in other contracting states for cultural objects displaced from an identified monument, an identified archaeological site or the public collection from the derogating state:

Article 3 UNIDROIT Convention (1995) – (5) [...] A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.

Whilst imprescriptibility is the rule (cf. Article 3 (4)), the domestic court seized with a claim for the recovery of a stolen cultural object is obliged to give recognition to the choice made under Article 3 (5) by the contracting state where the object was stolen.²⁹⁹ Put differently, any derogation to Article 3 (4) will apply to the claims brought before the courts of the derogating contracting state, but will also be applied to the claims of the derogating state introduced in other contracting states. This construction follows from the lack of reciprocity that would ensue without the present qualification: a state allowing a claim in restitution of a stolen cultural object not to be subjected to any absolute period – i.e. a contracting state not derogating from Article 3 (4) – would allow a derogating state to benefit from the said imprescriptibility, whilst a claim brought by the non-derogating state might be met with an absolute bar in the said derogating state when it had decided to constrain claims in restitution to a maximum period of seventy-five years or longer.³⁰⁰ Article 3 (5) *in fine* was thus adopted to ensure that a contracting state would not give preferential treatment to cultural objects originating from other contracting states when these states had posited a shorter absolute period for the said categories of objects.³⁰¹

3. LEGAL EFFECTS

The legal effects flowing from the expiration of the periods of limitations of Chapter II were not a point of contention during the drafting of the convention. On the contrary, the issue seems to have been left virtually unaddressed throughout the entire negotiations, with the exception of a brief intervention by the German delegation during the third session of the CGE: the German representative pointed to the lack of clarity as to the consequences resulting from the application of Article 3.³⁰² To remedy the uncertainties for followers in

²⁹⁶ Some states supported the idea that the inalienability of these particular objects could constitute a problem when they are considering ratifying the convention. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 39.

²⁹⁷ Droz, (1997), p. 252; Prott, *Commentary on the Unidroit Convention*, (1997), p. 39.

²⁹⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 39.

²⁹⁹ Calvo Caravaca, (2004), p. 97; Calvo Caravaca, A. L., Caamiña Domínguez, C. M., “El Convenio de Unidroit de 24 de Junio 1995” in: C. R. Fernández Liesa and J. Prieto de Pedro (dirs), *La Protección Jurídica Internacional del Patrimonio Cultural. Especial Referencia a España*, (Colex: Madrid, 2009), p. 173; this introduced the principle of reciprocity into the convention. This principle implies that the specific choice limiting the claim in restitution to a maximum period made by a state will be recognised and enforced abroad, even if the foreign period of restitution is less stringent than the one decided by the forum state. See UNIDROIT Secretariat, (2001), p. 510.

³⁰⁰ See the commentary of the delegation of Greece in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 269.

³⁰¹ See for example the commentary of the Spanish representative that took part in the DC in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 269.

³⁰² UNIDROIT, (1993), Study LXX – Doc. 39, p. 15.

possession, the delegation formulated the following proposal: “A claim for return [note author: read restitution]³⁰³ against the current possessor is excluded if a claim against the previous possessor is also excluded or would be excluded under the terms of the preceding provisions”³⁰⁴. Had this proposal been adopted, this would have entailed that the possessor, against whom the claim in restitution was not timely introduced, could either acquire ownership following the expiration of the period of limitation, or that the claimant’s right of action would expire, making it impossible for him to recover the stolen cultural object. Any subsequent transfer of the stolen cultural object to another possessor would then guarantee the ownership over the object to a follower in right. Nonetheless, the CGE – somehow inappositely – did not react to the German suggestion. Similarly, the DC did not pick up the discussion, ultimately leaving the subject matter unresolved. Nevertheless, as demonstrated in the comparative analysis carried out in Chapters 2 and 3 above, the legal effect flowing from the expiration of limitation periods constitutes an aspect of paramount importance to the application of limitation periods.³⁰⁵ In fact, the legal effect flowing from the expiration of a period of limitation has either been to divest the owner from his remedy, or to confer a right of ownership upon the property to the possessor. This difference is of utmost importance to the temporal limitations posited in Chapter II since it may be crucial to the recovery of a stolen cultural object, as will be explained below.

(1) Relative period

Technically, if the relative period parallels statutes of limitations as applied in California and New Jersey, the expiration of the relative period ought to be embedded with similar traits. Nevertheless, this assimilation is nettlesome considering that the two jurisdictions have approached this technicality differently: as explained in Chapter 3 above, on the one hand, the New Jersey Supreme Court held in *O’Keeffe v. Snyder* that the expiration of the statute of limitations that is applicable to an action in replevin resulted in creating a prescriptive right in favour of the possessor.³⁰⁶ This prescriptive right entails that the possessor becomes the owner of the stolen property and can dispose of it as he wishes. Consequently, the victim of the theft can no longer recover the property, not even from a subsequent possessor to the one acquiring the prescriptive right. On the other hand, California courts have explicitly rejected the approach that was adopted in *O’Keeffe*, considering each new possession as a new act of conversion for which a new period of limitation applies. In addition, the United States District Court for the Central District of California clarified in 2015 that a new period of limitation would apply for any subsequent conversion, even though a previous period of limitations had already run and expired for a prior conversion. The implications of the Californian dicta are far reaching, as it means that stolen personal property remains stolen – irrespective of how many years have transpired since the theft – and that a dispossessed owner can sue any new possessor of a stolen property in replevy. Contrasting both approaches, the expiration of the statute of limitations in New Jersey operates upon the right, whilst the expiration of the same period of limitation operates upon the remedy in California. The difference between the two jurisdictions is not only archetypal of the importance of knowing, with exactitude, the legal effect flowing from the expiration of limitation periods, but it highlights the pertinence of the aforementioned German proposal. Extrapolating the New Jersey and California approaches to the relative period, this would mean that the expiration of the period would either operate on the right or on the remedy. Without clarification as to this point by either the drafters of the convention or by UNIDROIT, any interpretation of the relative period contained in Article 3 in light of this distinction amounts to mere conjecture. Nevertheless, each subsequent transfer of the stolen object to a new possessor as of right should be assimilated to a new act of conversion for which a new relative period should run, i.e. in line with the regime applicable in California. This entails that the expiration of the relative period should operate upon the remedy against the possessor as of right, and not upon the right itself. As was warranted in Chapter 3 for California law, this construction would lead to the result – often qualified as absurd – of creating an unlimited right to sue for the claimant as against any new convertor when the rules omit to prescribe

³⁰³ Although the proposal speaks of return, the distinction between restitution and return for the purpose of the convention had not yet been settled when the proposal was formulated. Nevertheless, Article 3 (2) of the German proposal clarified that Article 3 is about cultural property theft, and not about illicit export. See UNIDROIT, (1992), Study LXX – Doc. 27, p. 1.

³⁰⁴ See UNIDROIT, (1993), Study LXX – Doc. 39, p. 15 and proposed Article 3 (8) in UNIDROIT, (1992), Study LXX – Doc. 27, p. 2; this proposed Article 3 (8) was to be read in conjunction with proposed Article 3 (2): “Any claim for the return [note author: read restitution] of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew the location of the object or the identity of the possessor or when he ought reasonably to have known that information, and in any case within a period of ten years from the time of the theft or acquisition of the cultural object, unless the possessor knew at the time of the acquisition or if it ought to have been obvious to any reasonable acquirer that the cultural object was stolen in which case the claim shall be brought within a period of thirty years from the time of acquisition”.

³⁰⁵ In this regard, see sections A. 4., B. 4 and C. 4. of ‘Chapter 2 – Cultural Property Theft – Understanding the Paradox (I) - Belgium, France and The Netherlands’, as well as section A. 4. of ‘Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) - New Jersey, California and New York’.

³⁰⁶ See Chapter 3, section A. 4. (2) above.

some sort of finality. Nevertheless, the regime of the convention prescribes finality in Article 3 (3) by imposing an absolute period of limitation of fifty years that runs from the day of the theft. Therefore, through this addition, it would be possible to allow a claimant to sue subsequent possessors as of right, even though the claimant failed to initiate legal proceedings within the first relative period.³⁰⁷ This interpretation sits well with the wording used in Article 3 (3) – which specifies that the claim is subject to the time limitations prescribed –, with the principle of restitution laid down in Article 3 (1) and is also in accordance with the object and purpose of Chapter II, which is to fight cultural property theft from the demand side of the art market by, *inter alia*, reinforcing the position of the owner (see below). This possibility to renew the relative period when the object passes in the hands of another possessor is further corroborated by the discussion amidst the Study Group in its third session: in discussing the problems inherent in purchases between subsequent possessors – either from a bad faith purchaser to a good faith purchaser or *vice versa* – the Preliminary draft Convention did not oblige to compute the diligence of the first possessor to the second possessor.³⁰⁸ As such, this interpretation would make it impossible to launder the tainted origins of a stolen cultural object during a fifty-year period, forcing possessors that want to dispose of the property during their lifetime to negotiate with the claimant in order to find a workable outcome that is satisfactory to both parties. The assimilation to the Californian regime is even more pronounced when one considers that the drafters had the *caveat emptor* principle in mind when they adopted the principle of automatic restitution (as explained below). The same principle was the fulcrum to the United States District Court for the Central District of California’s decision in the 2015 judgment of *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*³⁰⁹ Finally, it should be noted that Prott specified during the Committee of the Whole that the time limitation proposed in Article 3 (4) was about “limitation periods for certain claims”, and thus not about acquisitive prescription³¹⁰ or prescriptive rights. It appears, therefore, appropriate to construct the relative period in accordance with California law.

(2) Absolute period

Whilst it is clear that the absolute period bars the claimant from the possibility to enforce his right to the object, due to the lack of specificity in the language of the convention, the exact effect of a stale absolute period remains unknown. In accordance with the three European jurisdictions studied above, it could either constitute an acquisitive prescription (*usucapio*) that runs for fifty years starting from the moment that the object has been

³⁰⁷ The possibility that a claimant might sue belatedly might have been overseen by the drafters because they were probably of the opinion that the actual notice would ensure the filing of the claim within due time. Nevertheless, belatedness in initiating a claim of restitution on the basis of Chapter II may materialise due to three factors: a) the lack of specificity as to which possessor’s identity must be cognised for the purpose of the relative period (as explained below); b) the possibility for domestic courts to introduce a constructive notice in the relative period, in accordance with their domestic laws and c) the possibility for a mismatch between the actual cognition of the identity of the possessor and the whereabouts of the stolen cultural object and the return of the stolen cultural object within the sphere of influence of the convention in accordance with Article 10 (1).

³⁰⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 19. Although this commentary relates to the degree of cautiousness exercised by a purchaser in acquiring the cultural object, this rationale of assessing the diligence of subsequent purchasers separately is indicative of the possibility to treat subsequent possessions as different acts, or – to borrow the terminology use in *von Saher* – to consider the passing of the object to another possessor as a new ‘conversion’ justifying a new claim in restitution by the claimant.

³⁰⁹ See ‘Chapter 3 – Cultural Property Theft – Understanding the Paradox (II) - New Jersey, California and New York’, section A. 4. (3), and more particularly footnote 678, citing *Marei von Saher v. Norton Simon Museum of Art At Pasadena, et al.*, (2015), at 9: “In order to reach its conclusion, the Court considers the well-established rationale for treating each transfer of stolen property as a new act of conversion, as discussed in cases dating back to the 1800s. As the Supreme Court of Oregon aptly explained in *Velozian v. Lewis*, 15 Or. 539 (1888): At first blush, it may seem strange that one who takes possession of goods or chattels under a contract of purchase from one who had no right to sell should be treated as a wrong-doer, but the explanation of the principle lies in the common-law maxim *caveat emptor*, which applies to the transfer of personal property. It is the buyer’s own fault if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake. Nothing can be plainer than that no one can sell a right when he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, acts in derogation of the rights of the owner, and in hostility to his authority, and consequently can neither acquire themselves, nor confer on the purchaser any right or title of such owner. *Id.* At 541-42 (internal citations omitted). In other words, “a thief cannot convey valid title to an innocent purchaser of stolen property” and “[s]tolen property remains stolen property, no matter how many years have transpired from the date of the theft.” *Nafziger v. American Numismatic Soc’y*, 42 Cal. App. 4th 421, 432 (1996). As the California Supreme Court stated: “We are unable to perceive . . . that a person can ever be considered a *bona fide* purchaser of goods from one who has no right to sell, in a case where the rule of *caveat emptor* applies. The law imputes notice to him. Under that rule he is not only put on inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it.” *Harpending v. Meyer*, 55 Cal. 555, 560 (1880). Accordingly, the subsequent purchaser “has no lawful claim to this property as against the rightful owner.” *Strasberg v. Odyssey Group, Inc.*, 51 Cal. App. 4th 906, 921 (1996).”

³¹⁰ ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 14, 21 June 1995, p. 267.

stolen,³¹¹ or an extinctive prescription that extinguishes the claimant's right of action. On the other hand, in accordance with the three US jurisdictions scrutinised above, the period may be assimilated to a statute of repose, which affects the remedy. Irrespective of the legal qualification given, the possessor of the stolen cultural object becomes *de facto* the owner and the dispossessed owner loses his property.³¹² Similarly, a claimant with a legal interest in the object can no longer lodge a claim for its restitution. What is more, after this absolute period has lapsed, the distinction between good and bad faith becomes utterly irrelevant.³¹³ But for the apparent uncertainties surrounding the expiration of the absolute period, the drafters seemed to have a *usucapio* in mind when they were debating this aspect,³¹⁴ most notably because the preparatory work of the convention appears to accept embedding a fully-fledged right in the possessor over the object, after this period of fifty years has elapsed.

³¹¹ Droz, (1997), p. 251; Fraoua, (1997), p. 37; UNIDROIT Secretariat, (2001), p. 508.

³¹² Droz, (1994), p. 50.

³¹³ Droz, (1997), p. 252.

³¹⁴ See for example UNIDROIT, (1993), Study LXX – Doc. 39, pp. 15-16.

C. Restitution

Once it has been established that the claim in restitution is timely introduced, the merits of the case are dealt with in accordance with the residual provisions of Chapter II, notably Articles 3 (1) and 4 thereof. Whilst Article 3 (1) ensures the principle of mandatory restitution of stolen cultural objects, Article 4 entitles the possessor that is constrained by the claim in restitution to fair and reasonable compensation when he has exercised due diligence in acquiring the cultural object, and thus could not have known that the item was stolen. The principle of mandatory restitution posited by Article 3 (1) is addressed in the present section. Subsequently, sections D, E and F will elaborate upon the specificities of the payment of fair and reasonable compensation that is foreseen by Article 4.

1. PRINCIPLE OF MANDATORY RESTITUTION

Article 3 UNIDROIT Convention (1995) – (1) The possessor of a cultural object which has been stolen shall return it.

Article 3 (1) of the convention has a double function: first and foremost, it introduces a private right of action over stolen cultural objects.³¹⁵ In this first capacity, Article 3 (1) builds upon the premise laid down in Article 13 (c) of the 1970 UNESCO convention, which requires state parties to adopt in their domestic laws a mechanism enabling rightful owners to introduce actions for the recovery of their stolen property.

Article 13 UNESCO Convention (1970) – The States Parties to this Convention also undertake, consistent with the laws of each State: [...] (c) to **admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;**

Through the means of Article 3 (1), state parties to the 1995 convention are unconditionally obliged to allow claimants to bring actions in restitution when the said claim in restitution falls within the ambit of the convention. Importantly, it should be reiterated that Article 3 (1) introduces and recognises a right of restitution for claimants, including natural and legal persons,³¹⁶ and states.³¹⁷ In other words, Article 3 (1) does not distinguish between privately or publicly owned objects³¹⁸ and allows any victim of theft to rely upon it. Secondly, this article lucidly posits the principle of restitution of stolen cultural objects³¹⁹ by which the possessor of a stolen cultural object is obliged to return it.³²⁰ In order to better understand the choice operated by the

³¹⁵ Office Fédéral de la Culture (Suisse), (1998), p. 17.

³¹⁶ Office Fédéral de la Culture (Suisse), (1998), p. 17.

³¹⁷ In this respect, see section B. 2. (4) of ‘Chapter 1 – Presentation and Applicability of the Convention’ above.

³¹⁸ UNIDROIT Secretariat, (2001), p. 502.

³¹⁹ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94. This principle was kept simple in order to avoid a precise article with many complications. It was considered that further specificities about the article could be addressed by the explanatory report that accompanies the convention. See UNIDROIT, (1993), Study LXX – Doc. 42, p. 20.

³²⁰ The principle of mandatory restitution was not favoured in first instance: during the Study Group’s second session, Loewe averred that mandatory restitution would be detrimental to the acceptability of the future convention, irrespective of whether the compensation is paid to the purchaser or not (see UNIDROIT, (1989), Study LXX – Doc. 14, p. 8). In accordance with Loewe’s view, the SG unanimously agreed not to opt for automatic restitution (*idem*). All the more against mandatory restitution, the SG considered the possibility for a purchaser in good faith that had exercised due diligence during the acquisition to keep the object (UNIDROIT, (1989), Study LXX – Doc. 14, p. 11). Alternatively, it was proposed to prescribe the automatic restitution of stolen objects in all instances, coupled with an optional compensation when the possessor could prove that he was entitled to it (*ibid*, p. 8). In support of the latter position, it was recalled that the 1970 convention already codified mandatory restitution and, therefore, not following the same approach in the future instrument would have the effect of weakening the protection afforded by the 1970 predecessor (UNIDROIT, (1989), Study LXX – Doc. 14, p. 8). The principle of automatic restitution gathered momentum after the second session of the Study Group when Fraoua argued in favour of this solution, advancing that it would make the principle of restitution of stolen cultural objects sacrosanct without having to consider the intricacies inherent in establishing the good or bad faith of the possessor (see UNIDROIT, (1989), Study LXX – Doc. 16, p. 9). Instead, Fraoua believed that the protection of the owner must be given priority (UNIDROIT, (1989), Study LXX – Doc. 16, p. 10) and that the determination of the cognition of the illicit origin of the object by the purchaser would only be relevant to the question of compensation (UNIDROIT, (1989), Study LXX – Doc. 16, p. 9). In other words, the proposed mechanism would afford a strong protection to owners, whilst at the same time it would require purchasers to be particularly cautious in acquiring cultural objects (*ibid*, p. 10). What is more, it was added that this solution would have the advantage of being particularly simple (UNIDROIT, (1989), Study LXX – Doc. 16, p. 10). Fraoua’s arguments were also supported by Frigo (see UNIDROIT, The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects, Study LXX – Doc. 16 Add. 1, Rome, December 1989, p. 1). Consequently, the principle of mandatory restitution found its first expression after the second meeting of the SG (see alternative II of Article 2 (1) of the *Preliminary draft Convention on the restitution and return of cultural objects* (after a first revision). This preliminary draft can be found at UNIDROIT, The International Protection of Cultural Property – Preliminary draft Convention on the restitution and return of cultural objects (prepared by the Unidroit Secretariat in the light of the discussions of the study group on the international protection of cultural property at its second session held in Rome from 13 to 17 April 1989), Study LXX – Doc. 15, Rome, July 1989). In the following session of the SG, automatic restitution gained momentum: the Study Group approved, in block, this alternative (see UNIDROIT, (1990), Study LXX – Doc. 18, pp. 11-12; Crewdson, (1992), p. 46 and Prot, *Commentary on the Unidroit*

drafters of the convention, it is important to ferret out the main reasons that have led them to favour the automatic restitution of stolen cultural objects. Three main considerations have played a prominent role in reaching this result: (1) the need to deprecate and reprimand theft, (2) the need to respond appropriately to the illicit traffic in stolen cultural objects and (3) the need to adopt tailor made rules for cultural objects.

(1) Reprimanding theft

Throughout the creation of the convention, there was consensus amongst the drafters that theft ought to be punished and that stolen cultural property must be returned to its legal owner.³²¹ As Merryman expressed: “No respected voice advocates the free movement of stolen cultural property”.³²² The consensus was mainly grounded in the idea that the taking of cultural object through unlawful means could not be tolerated and that states have to cooperate in good faith in determining the ownership of these objects post-theft.³²³ Therefore, deprecating theft by requiring all stolen cultural objects to be given back to the dispossessed person seemed to be axiomatic in the elaboration of Chapter II.³²⁴ This idea was accepted by all the parties involved,³²⁵ and was considered to be a realistic means of tackling cultural property theft.³²⁶

(2) Appropriate response to the illicit traffic in stolen cultural objects

Following the views of Prott, for many years experts in the field of cultural heritage law had advocated the restitution of the object to its holder as the only way to impede the illicit traffic in cultural property.³²⁷ As explained in the introductory chapter above, the protection of *bona fide* acquirers through means of third-party protection was considered as a means of facilitating the laundering of stolen cultural property.³²⁸ Therefore, the drafters of the convention believed that the obligation of restitution of Article 3 (1), combined with the broad definition of cultural objects given in Article 2, constituted a lethal combination against the targeted traffic.³²⁹ Mandating the automatic restitution of a stolen object puts the emphasis on the *nemo dat quod non habet* principle³³⁰ and constitutes a codification of a global protection of ownership.³³¹ The *rationale* for protecting property rights in order to tackle appropriately cultural property theft is twofold: 1) outside the regime of the convention, the owner would often be disbarred from recovering his property in a foreign jurisdiction, often due to third-party protection regimes. Subsequently, it would be particularly difficult for the victim of the theft to negotiate the restitution of the object in jurisdictions where possessors benefit from the said protection.³³² He would, thereon, have to persuade the possessor that the latter had a moral obligation to hand the property back,

Convention, (1997), p. 29; Interestingly, Chatelain had incorrectly predicted that the principle protecting the interests of the dispossessed owner would not be accepted as a main principle by countries favouring commercial transactions through means of third-party protection (see UNIDROIT, (1989), Study LXX – Doc. 16, p. 3). On the other hand, Raidl submitted that this choice was complementary to Article 7 of the 1970 UNESCO convention, making it particularly interesting in seeking compatibility with the later instrument (UNIDROIT, (1989), Study LXX – Doc. 16, p. 22) and one member pointed at the fact that this solution ‘was the only realistic solution which could combat commerce in stolen works of art’ (UNIDROIT, (1990), Study LXX – Doc. 18, p. 11). The principle of unconditional restitution was thereon supported without ambiguity (Prott, (1998), p. 209). Moreover, it ought to be noted that this principle was adopted by unanimity during the third session of the CGE, where forty-four delegations voted in favour, none against and without any abstentions (see UNIDROIT, (1993), Study LXX – Doc. 39, p. 17). The consensus was reiterated during the fourth session of the CGE (UNIDROIT, (1994), Study LXX – Doc. 48, p. 13) and it finally found its place in Article 3 (1).

³²¹ Sánchez Cordero, J., ‘The Unidroit cultural Convention. The unfulfilled tasks’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

³²² Gerstenblith, P., *Art, Cultural Heritage, and the Law: Cases and Materials*, (Carolina Academic Press: Durnham, Fourth Edition, 2008), p. 596, citing Merryman, J. H., ‘The Free International Movement of Cultural Property’, 31 (1) *New York University Journal of International Law & Policy*, (1998), pp. 4-14.

³²³ Yasaitis, K. E., ‘Case Note – National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in *United States v. Schultz*’, 12 *International Journal of Cultural Property*, (2005), p. 107.

³²⁴ Droz, (1997), p. 251.

³²⁵ Droz, (1997), p. 251.

³²⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 29.

³²⁷ See UNIDROIT, (1993), Study LXX – Doc. 42, p. 19, citing Chatelain, Rodotà, O’Keefe and Prott, Reichelt and Fraoua. See also ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 93 also cited in the introduction above.

³²⁸ See the introductory chapter to the present research, and more particularly section B. 1. thereof.

³²⁹ See UNIDROIT Secretariat, (2001), p. 498; see also UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit Preliminary draft Convention on stolen or illegally exported cultural objects as revised June 1992 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 36, Rome, February 1993, p. 11. See also Presidenza del Consiglio dei Ministri, (1996), pp. 24 and 91.

³³⁰ O’Keefe, P. J., ‘Developments in Cultural Heritage Law: What is Australia’s Role?’, 1996 *Australian International Law Journal*, (1996), p. 41.

³³¹ Klein, (1999), p. 279, footnote 35; Office Fédéral de la Culture (Suisse), (1998), p. 66.

³³² Prott, *Commentary on the Unidroit Convention*, (1997), p. 28.

after which a *quid pro quo* to restitution would have to be negotiated.³³³ This would place the owner in a weak bargaining position. Therefore, reinforcing his position seemed to be “the only realistic solution which would also have a deterrent effect on illegal traffic (*sic*) in cultural objects”.³³⁴ Consequently, the convention consolidates the owner’s position by providing for the automatic restitution of the object, putting him in a stronger position as against the possessor; 2) concurrently, the general obligation of automatic restitution supports the *caveat emptor* principle by requiring the acquirer to undertake inquiries into the cultural object that he wishes to acquire’s provenance.³³⁵ There exists a direct correlation between the notion of *caveat emptor* and the *nemo dat quod non habet* principle: acquirers that are aware that they cannot obtain a right from a thief must be cautious in vetting whether the transferor conveys a right to the object in conformity with the *nemo dat* rule.³³⁶ Often, acquirers of cultural objects shy away from inquiring into the provenance of the item,³³⁷ relying instead on the guarantees given by the seller as legal defence to the acquisition of stolen cultural objects.³³⁸ This ‘no questions asked’ attitude was an important contributory factor to the opacity of the art market, which has the effect of differentiating this market from any other market, in which purchasers are usually more prone to undertake research and ask questions.³³⁹ In bringing the *caveat emptor* principle to the forefront, an acquirer will be much more prudent during the acquisition of a work of art.³⁴⁰ What is more, by penalising the possessor of a stolen cultural object for not having inquired properly into the provenance of the object through restitution, it is assumed that the secrecy of the art market or the connivance of market stakeholders will wane,³⁴¹ thereby indirectly deterring the theft of cultural property.³⁴² Consequently, mandating the restitution of all stolen cultural objects and the payment of compensation to diligent possessors was considered as the most appropriate mechanism to hinder the illicit traffic in stolen cultural objects.³⁴³ Automatic restitution forces acquirers to be extremely cautious and deters them from acquiring objects that may have a dubious origin.³⁴⁴ It is, therefore, expected that the acquirers of cultural property would then refuse to obtain a cultural object when they are uncertain of its origins.³⁴⁵ The solution posited by Chapter II is, thenceforth, designed to be pragmatic in nature.³⁴⁶

(3) Tailor-made solution for cultural objects

Finally, it is clear that, because of the peculiar and unique character of cultural objects, a dispossessed person will favour the restitution of the property over any other remedy.³⁴⁷ Due to the peculiar nature of these materials, the reimbursement of their value to the owner seemed inappropriate.³⁴⁸ Therefore, the obligation to return a stolen cultural object constitutes an appropriate remedy, given their nature.

2. OPERATIONALIZATION

Whilst Article 3 (1) imposes an obligation of restitution of a stolen cultural object on its possessor, the convention does not elaborate on the specifics of this procedure. Therefore, in order to understand the exact implications of the provision, the notions of ‘possessor’ and of ‘return’ require further explanation. Additionally, Article 3 (1) does not specify to whom restitution ought to be made. Consequently, the present section addresses this aspect *in fine*.

³³³ Prot, *Commentary on the Unidroit Convention*, (1997), p. 28.

³³⁴ UNIDROIT Secretariat, (2001), p. 502.

³³⁵ Prot, ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Ten years On’, (2009), p. 218; see also the ICPO – Interpol’s commentary in UNIDROIT, (1992), Study LXX – Doc. 25, p. 12.

³³⁶ Forrest, (2010), p. 201, footnote 261.

³³⁷ Prot, ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Ten years On’, (2009), p. 229.

³³⁸ Gerstenblith, (2008), p. 612.

³³⁹ Prot, ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Ten years On’, (2009), p. 227.

³⁴⁰ O’Keefe, (1999), p. 29.

³⁴¹ See the commentary by Prot in UNIDROIT, (1993), Study LXX – Doc. 36, p. 15.

³⁴² As was established by some members of the CGE after its first session. See UNIDROIT, (1992), Study LXX – Doc. 29, p. 8; Carey Miller, Meyers and Cowe, (2001), p. 9; UNIDROIT Secretariat, (2001), p. 502; Prot, *Commentary on the Unidroit Convention*, (1997), p. 29.

³⁴³ See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

³⁴⁴ Prot, (1998), p. 213.

³⁴⁵ UNIDROIT, (1993), Study LXX – Doc. 36, p. 15.

³⁴⁶ Delepierre, S., Schneider, M., ‘Ratification and Implementation of International Conventions to Fight Illicit Trafficking in Cultural Property’, in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protecting the World’s Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Good: Paris, 2015), p. 133.

³⁴⁷ Prot, *Commentary on the Unidroit Convention*, (1997), p. 29; Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials*, (2004), pp. 385-386.

³⁴⁸ Prot, *Commentary on the Unidroit Convention*, (1997), p. 29.

(1) Possessor

Following the text of Article 3 (1), the ‘possessor’ of a stolen cultural object must return it. Despite several proposals formulated throughout its creation,³⁴⁹ the convention does not define the term ‘possessor’, or even the term ‘possession’. As the idea of possession is intrinsically linked to national property law regimes,³⁵⁰ it was deemed appropriate not to try establishing a harmonised definition by simply referring to the standard term ‘possessor’³⁵¹ – irrespective of the fact that this term might be understood differently in national laws.³⁵² Preference was thus given to a broad formulation of the notion in order to accommodate the differences between the various domestic laws of contracting states for the purpose of facilitating the recovery of cultural objects.³⁵³ By merely referring to possession, it was understood that states that would then implement the convention in their national legal order could explain what this concept entails in their own domestic legal jargon³⁵⁴ through the implementing legislation³⁵⁵ or by way of a declaration formulated at the moment of adhering to the convention. The use of alternative concepts, such as ‘holder’,³⁵⁶ ‘acquirer’, ‘physical possessor’, or ‘owner’³⁵⁷ would have rendered the negotiations much more difficult.³⁵⁸ Nevertheless, there was a general feeling within the CGE that – irrespective of the domestic specificities – the notion of ‘possessor’ needed to be broadly interpreted so as to facilitate the restitution of cultural objects, irrespective of whether this terminology would precisely match the concept as defined in national laws.³⁵⁹ Because of this broad construction, the term

³⁴⁹ A proposal to define the notion of possession was made by the German delegation after the CGE’s first session. The delegation put forward the following definition of ‘possessor’: “[...] anyone who has the cultural object under his actual control and who, as a result thereof, is able to hand over the object of the claimant” (see UNIDROIT, (1992), Study LXX – Doc. 27, p. 1). Alongside this proposal, the United States’ delegation participating in the CGE also drafted a definition: “‘Possessor’ means a person or entity which physically, on its own account, holds the cultural object, or which exercises control or dominion over the cultural object, or has a present unqualified right to do so” (see UNIDROIT, (1993), Study LXX – Doc. 47, (Misc. 34), p. 39). Furthermore, the Dutch delegation that took part in the DC established the following definition: “‘Possessor’ shall mean the person physically holding the cultural objects on his own account”. See ‘Working Papers Submitted to the Committee of the Whole’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 2, p. 115. See also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. And 79; CONF. 8/D.C./Doc. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 286.

³⁵⁰ In this regard, see the definitions of possession that are found in Belgian, French and Dutch private law that were given in Chapter 2 above (respectively to be found in sections A. 1. (1), B. 1. (1) and C. 1 (1)). Although not discussed for New Jersey, California and New York in Chapter 3, possession in these jurisdictions can be defined as: “1. The fact of having or holding property in one’s power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. [...]”. Garner, B. A., *Black’s Law Dictionary*, (West, 10th edition, 2014), keyword: Possession.

³⁵¹ Klein, (1999), p. 271; the situation of possession is a factual situation which is intelligible in most legal systems. Hence, the term possession was preferred because it involves a situation that can be schematised and is easily understood by almost anyone. See Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 37.

³⁵² ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 185; Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 33; it had, nonetheless, been proposed during the CGE’s first session to either take it out or define this notion more specifically. This was notably because the concept was further nuanced in certain national legal systems (distinguishing, for example, between possession for oneself and possession for another). See UNIDROIT, (1991), Study LXX – Doc. 23, p. 12.

³⁵³ ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/ W.P. 2)’, Presidenza del Consiglio dei Ministri, (1996), p. 167.

³⁵⁴ Klein, (1999), p. 271; Prott, *Commentary on the Unidroit Convention*, (1997), p. 31.

³⁵⁵ Prott, *Commentary on the Unidroit Convention*, (1997), p. 31.

³⁵⁶ During the second session of the CGE, certain delegations believed that the notion of ‘possessor’ should be replaced by the notion of ‘holder’. This proposal was dismissed because the proposed notion had a specific technical meaning in English law that would pose problems when used in the convention. Instead, the notion of ‘physical possessor’ was then deemed a better alternative (see UNIDROIT, (1992), Study LXX – Doc. 30, p. 10), although it was ultimately not retained. See also the proposition submitted by the delegation of China in ‘Comments by Governments on the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects: People’s Republic of China, Japan and New Zealand’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, p. 68 submitting that the term ‘holder’ is a more neutral term than that of ‘possessor’. It also proposed to define the proposed notion; see furthermore the definition of ‘holder’ that was propounded by the Dutch delegation in ‘Working papers submitted to the Committee of the Whole’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 1, p. 115, and also the contribution of the Czech Republic in ‘Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 4, p. 117 (where the term ‘holder’ was proposed instead of ‘possessor’).

³⁵⁷ As was correctly noted by the delegation of Venezuela, possession refers to a factual relationship, whilst the use of the term ownership would necessitate a discussion on the legality or illegality of the ownership concerned. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of Governmental delegations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Finland, Netherlands, Sweden, Turkey and Venezuela), Study LXX – Doc. 32, Rome, November 1992, p. 19.

³⁵⁸ Renold, (1997), p. 25; Prott, *Commentary on the Unidroit Convention*, (1997), p. 31.

³⁵⁹ UNIDROIT, (1993), Study LXX – Doc. 39, p. 12; as was noted by the explanatory report to the Draft Unidroit Convention submitted to the DC, views were divided as to the notion of possession: whilst some delegations that took part in the CGE wanted the notion of possessor to be either replaced by the term ‘holder’, or to be defined precisely, the majority view was that the text of the future

‘possessor’ may refer to any person having physical control over the object – including transporters, borrowers (museums), art galleries, restorators, etc.³⁶⁰ – and thus include custodians / detentors.³⁶¹ Furthermore, any bailee – such as a bank, an insurance company or a borrowing museum that is exhibiting the object – could be obliged as ‘possessor’ to return the stolen cultural object on the basis of Article 3 (1).³⁶² This broad appreciation of the notion of possession will have the incidental result of making it more difficult for collectors to lend their pieces for exhibitions or scientific research,³⁶³ as the legal or natural person that is temporarily entrusted with the object might be required to give it back when compelled to do so. Furthermore, because the term possessor could refer to a borrowing museum, it was submitted during the DC that the consequences of the restitution of the stolen cultural object would constitute a serious financial risk for such *musea*, which would, therefore, refrain from borrowing works of art in the future.³⁶⁴

(2) Return

Article 3 (1) posits that the possessor of a stolen cultural object must return it. Although Article 3 (1) explicitly refers to the concept of ‘return’, this notion must not be assimilated to the return mechanism laid down in Article 1 (b) and Chapter III of the convention. In fact, the term ‘return’, as used in Article 3 (1), is to be given a plain meaning,³⁶⁵ and not the qualified meaning that it is embedded with in the context of Chapter III.³⁶⁶ Furthermore, the obligation to return the stolen property is unconditional, as restitution is always prescribed and good faith cannot bar it from taking place.³⁶⁷ Because good faith cannot oppose the restitution of the object under the regime of Chapter II, it is impossible to acquire a stolen object through means of *usucapio* and, thereby, to launder the illegal origins of the stolen property.³⁶⁸ This also means that Article 3 (1) makes it impossible for the possessor of a stolen cultural item to rely on a market overt exception,³⁶⁹ unlike Articles 2280 BCC, 2277 FCC and 3:86 (3) (a) DCC. Article 3 (1) thus constitutes a blanket rule mandating the automatic restitution of stolen cultural objects.³⁷⁰ Furthermore, the convention does not impose any formal obligation for the

convention ought to be as neutral as possible and be given a wide meaning (see ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’ in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/3, p. 27). Therefore, the term ‘possessor’ – although it might not be in line with the domestic laws of the contracting states –, should be construed in accordance with the objective of the convention, which is to promote the return of cultural objects (*idem*).

³⁶⁰ Jolles, (1997), p. 58.

³⁶¹ This could entail that a mere detentor might also be obliged to give the stolen object back on the basis of Article 3 (1). Detention of goods was discussed in Chapter 2 above as a concept that is inherent to Belgian, French and Dutch private law (see sections A. 1. (1), B. 1. (1) and C. 1. (1) of Chapter 2 above for more details about the notion of detention).

³⁶² UNIDROIT, (1994), Study LXX – Doc. 48, p. 14.

³⁶³ Jolles, (1997), p. 58.

³⁶⁴ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects’ (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2), in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 169; this would in turn jeopardise exchanges, a reason why it was submitted that the terminology ‘owner’ would be more appropriate (see ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects’ (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2), in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 169). Nonetheless, as was submitted by the Chairman of the Committee of the Whole, this would have created a vicious circle (see ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects’ (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2), in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/S.R. 2, 8 June 1995, p. 169).

³⁶⁵ Therefore, another terminological choice, such as ‘give back’ or ‘hand over’ would have been more appropriate.

³⁶⁶ See ‘Chapter 1 – Presentation and Applicability of the Convention’, section B. 2.; this remark applies *mutatis mutandis* to Article 4 (1) that will be discussed in more detail below.

³⁶⁷ Office Fédéral de la Culture (Suisse), (1998), p. 18.

³⁶⁸ Droz, (1997), p. 248; in fact, third-party protection by means of acquisition in good faith was considered as a means of allowing a tainted object to enter licitly the art-market. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 30. See also section B. 1. (1) of the introductory chapter to the present research.

³⁶⁹ Nonetheless, the German delegation made a proposal after the first session of the CGE to include a provision about market overt acquisitions: “A claim for return [note author: read restitution] of the cultural object is excluded if the object was acquired as a result of the enforcement of a judgment. Such a claim is also excluded if the object was acquired at a public auction unless the possessor knew at the time of acquisition or if it ought to have been obvious to any reasonable acquirer that the cultural object was stolen. A public auction is merely an auction held publicly by a court officer appointed for the place of auction, or by some other official authorised to conduct auctions”. See UNIDROIT, (1992), Study LXX – Doc. 27, p. 2.

³⁷⁰ Grover, (1991-1992), p. 1455; although at the time of drafting the UNIDROIT convention Article 11 LUAB seemed to be an inadequate blueprint (see UNIDROIT, Study LXX – Doc. 1, (1986), p. 30), Article 3 (1) builds upon this article by affording enhanced protection to owners. Similar to Article 3 (1) of the convention, Article 11 LUAB would prevent the purchaser of a stolen object from invoking his good faith (see UNIDROIT, Study LXX – Doc. 1, (1986), p. 30 and UNIDROIT, *The International Protection of Cultural Property – Unidroit draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables* (LUAB, 1974), Study LXX – Doc. 9, Rome, January 1989, p. 8) for three reasons: firstly, dispossessed owners enjoy protection under most legal systems; secondly, it is often easier for the purchaser to obtain damages from the seller than it is for the owner to find the thief and thirdly, an increase in theft of – *inter alia* – cultural materials in the 1970s called for an enhanced regime to protect owners (UNIDROIT, Study LXX – Doc. 1, (1986), p. 30). This means that the general obligation to hand back stolen objects to a dispossessed owner was already supported at the end of the 1960s

dispossessed person to report the theft to the authorities. This is notably because requiring to report the misappropriation to the police would have been problematic with regard to archaeological theft, where it is impossible to report the crime since the excavated object is often unknown to the source state in the first place.³⁷¹

It has been argued that the choice for automatic restitution – even in cases of acquisition in good faith –, is a novelty for states that adhere to the civil law tradition³⁷² because third-party protection by means of acquisitive prescription or market overt is discarded under the convention's regime. Instead, this choice for automatic restitution reflects the common law approach³⁷³ – which predominantly protects owners – and has been particularly criticised; it has been judged by some commentators as 'dramatic' for states that follow the civil law tradition.³⁷⁴ What is more, Siehr has qualified the convention as depriving the international art trade from the concept of *bona fide* acquisition because of the unfettered obligation of restitution.³⁷⁵ As such, it is averred by some commentators that the principle of legal certainty has not been taken into consideration by the convention.³⁷⁶ Nevertheless, these commentators fail to observe that, in fact, common and civil law jurisdictions recognise that stolen property must be returned to its original owner,³⁷⁷ (as mirrored in their adherence to the *nemo dat quod non habet* principle³⁷⁸), although civil law jurisdictions tend to afford third-party protection to good faith acquirers in order to secure the certainty of commercial transactions.³⁷⁹ The mandatory restitution of a stolen cultural object posited by Article 3 (1) is, therefore, not completely at odds with the civil law approach, as it operates on the same premise. Furthermore, the obligation of restitution laid down in Article 3 (1) is outweighed by the relative period of three years³⁸⁰ of Article 3 (3) – which gives the claimant a relatively short period of time to initiate proceedings against the possessor – and by the payment of the fair and reasonable compensation to a duly diligent possessor imposed by Article 4 (1).

(3) Person to whom the stolen cultural object is returned

Despite various proposals to clarify this point in the article itself,³⁸¹ Article 3 (1) does not specify to whom the restitution needs to be made.³⁸² The Study Group considered that the item should be given back to the

in the creation of the LUAB. Consequently, Article 3 (1) follows the same line of reasoning as Article 11 LUAB and can, therefore, not be considered as a groundbreaking provision. The codification of the principle of automatic restitution merely confirms a rule that has been informally recognised since the 1960s, and which seems to be generally accepted nowadays (Vicien-Milburn, M., 'International claims for restitution outside the framework of the 1970 and 1995 instruments - genesis of the 1995 Convention', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming).

³⁷¹ See the response by Prott on a proposal made by the Dutch delegation that took part in the DC, in 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188. ³⁷² Renold, (1997), p. 25; although the obligation laid down in Article 3 (1) is already familiar to several states (see Grosse, L., Jouanny, J. P., 'La Protection du Patrimoine Culturel en Vertu des Instruments de l'UNESCO (1970) et d'UNIDROIT' (1995): La Position d'Interpol', 1/2 *Uniform Law Review*, (2003), p. 578; Forbes, (1996), p. 249); some authors have even argued that the concept of *bona fide* purchase would disappear in the context of the international art trade because of provisions such as Article 3 (1). See for example Siehr, K., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (Débats)', in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 64; Prott, *Commentary on the Unidroit Convention*, (1997), p. 28; UNIDROIT Secretariat, (2001), p. 502.

³⁷³ Renold, (1997), p. 25; Valgaeren, J. H., 'Geroofde kunstvoorwerpen tijdens WO II – Een juridisch en historisch overzicht', 42 (4) *Juris Falconis Jg.*, (2005-2006), p. 618; Sidorsky, (1996), p. 26; Burke explains why following the common law approach is the right solution for tackling the illicit traffic in cultural objects. It is notably due to the pernicious effect of the protective laws prescribing third-party protection in civil law jurisdictions that the illicit traffic is fuelled. To avoid further developments in the said traffic, the common law approach must be favoured. See Burke, (1990-1991), p. 464.

³⁷⁴ See for example Crewdson, R., 'Putting Life into a Cultural Property Convention: UNIDROIT; Still Some Way to Go.', 17 *International Legal Practitioner* (1992), p. 46 and Sidorsky, (1996), p. 26.

³⁷⁵ Siehr, K., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)' in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 64.

³⁷⁶ Jolles, (1997), p. 55.

³⁷⁷ Siehr, K., 'The 1993 European Directive and the Unidroit Convention', in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), pp. 77-78; this conclusion was also reached in the compromise that was adopted in the Convention.

³⁷⁸ See notably Chapter 2, sections A. 2. (2), B. 2. (2) and C. 2. (2) and Chapter 3, section A. 2. (1).

³⁷⁹ As a matter of illustration, see sections A. 3. and 4., B. 3. and C. 3. and 4. Of Chapter 2 above.

³⁸⁰ Love Levine, (2010-2011), p. 777.

³⁸¹ See for example UNIDROIT, (1992), Study LXX – Doc. 30, p. 10; see also the proposals made during the third session of the CGE to replace the addition 'to its owner' with the qualifications 'to the requesting state' and 'to the claimant' in UNIDROIT, (1993), Study LXX – Doc. 39, pp. 13 and 17. The qualification 'to its owner' was present in a previous draft of the article but was deleted by the drafting committee at the third session of the CGE because this qualification could have given rise to unnecessary complications. See UNIDROIT,

dispossessed person,³⁸³ who could be someone else than the owner. This would, for example, be the case when the object was on loan at the time of the theft or when it was wrongfully taken from any other person that was legally entitled to the possession of the property at the time of the theft.³⁸⁴ Furthermore, the SG believed that the person to whom restitution needs to be effectuated must prove the necessary facts that demonstrate his entitlement to possession of the object,³⁸⁵ irrespective of whether the claimant is a bank that has a pledge on it, or a museum that had borrowed the item.³⁸⁶ This aspect was further discussed during the CGE, where it was considered – in line with the rationale relied upon by the SG – that there were too many persons that could benefit from the restitution, making it preferable to leave this issue to the judge seized with the matter:³⁸⁷ as was noted by a representative present during the third meeting of the CGE, it was unclear on the basis of Article 3 (1) to whom the object should be returned, as this might imply the dispossessed person, but it could also mean the transferor from which the possessor had acquired the stolen property.³⁸⁸ The CGE clarified that because the claimant might not be the owner of the stolen cultural object, it was preferable not to specify to whom it should be returned in the convention.³⁸⁹ Although it was accepted that the object might often be stolen from its owner, it was still foreseeable that the property may be subject to competing claims when used as pledge or loaned, and it was therefore ultimately decided to leave this question to the court seized to answer,³⁹⁰ in accordance with the applicable law.³⁹¹ More conspicuously, the committee believed that it was for the claimant to decide to whom the object should be returned when this would not be prohibited by the public law of the forum state.³⁹² What is salient, however, is that the stolen property must not be returned to the person that transferred it to the possessor post-theft. Instead, it will have to be returned to either the owner, or any other party that held the cultural object before the theft took place.

(1993), Study LXX – Doc. 39, p. 16; Japan also introduced a proposal to adopt a conflict rule which would establish the applicable law by which it would be possible to determine who is entitled to have the object returned to, because it believed that not all rights and interests of the claimants would be recognised by the domestic court seized. For more information in relation to this commentary, see ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5, April 1995, pp. 72-73. See also ‘Working Papers Submitted to the Committee of the Whole’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 6, 7 June 1995, p. 118 and ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2)’ addressed during the second meeting of the Committee of the Whole, in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 13 June 1995, p. 167.

³⁸² ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 27; see also Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995), (1997), p. 33; Calvo Caravaca, (2004), p. 95; Forrest, (2010), p. 203.

³⁸³ The Study Group favoured the restitution to the dispossessed person, leaving the questions of ownership and other legal interests to be solved by the court seized with the contention. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 12 and UNIDROIT, (1993), Study LXX – Doc. 39, p. 13.

³⁸⁴ Protz, *Commentary on the Unidroit Convention*, (1997), p. 32; See also UNIDROIT, (1990), Study LXX – Doc. 19, pp. 20-21.

³⁸⁵ UNIDROIT, (1990), Study LXX – Doc. 19, p. 21; Calvo Caravaca and Caamiña Domínguez, (2009), p. 170.

³⁸⁶ See UNIDROIT, (1990), Study LXX – Doc. 19, p. 21.

³⁸⁷ UNIDROIT, (1991), Study LXX – Doc. 23, p. 12.

³⁸⁸ UNIDROIT, (1993), Study LXX – Doc. 39, p. 17.

³⁸⁹ See UNIDROIT, (1994), Study LXX – Doc. 48, p. 19.

³⁹⁰ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, p. 27; Calvo Caravaca and Caamiña Domínguez, (2009), p. 170; UNIDROIT Secretariat, (2001), p. 502.

³⁹¹ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995), (1997), p. 33; UNIDROIT Secretariat, (2001), p. 502.

³⁹² UNIDROIT, (1994), Study LXX – Doc. 48, p. 19.

D. Entitlement to compensation

Once it has been established on the basis of Article 3 (1) that the object must be returned, Article 4 (1) entitles the possessor of a stolen cultural object to receive fair and reasonable compensation, subject to certain conditions.

Article 4 UNIDROIT Convention (1995) – (1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

The right to compensation was controversial in the creation of the convention.³⁹³ While many domestic legal systems concede to the principle of compensation of an innocent acquirer,³⁹⁴ the necessity of compensating the possessor was seen by some states' representatives as unjust.³⁹⁵ It was argued that it was particularly unfair to owners or states often victim of theft of their cultural materials to pay compensation.³⁹⁶ Nonetheless, it was responded that since it would often be very unlikely that the acquirer would comply with all the requirements of due diligence (see below), the owner would often not have to pay compensation.³⁹⁷ Others considered the right to compensation to be an important means of enhancing restitution and ratification of the convention.³⁹⁸ This right was ultimately retained and codified in Article 4 (1). This provision constitutes the *quid pro quo* to the mandatory restitution of Article 3 (1), as it prescribes for the conditional payment of fair and reasonable compensation at the time of the restitution of the object. Nonetheless, compensation is not automatic³⁹⁹ but only needs to be paid in cases where the possessor did not know, nor ought reasonably to have known, that the object was stolen and when he can prove that he acted with due diligence throughout the acquisition.⁴⁰⁰ These two conditions are cumulative and taken together they impose an advanced standard of cautiousness upon the possessor.⁴⁰¹ To determine the conditions within which he will be entitled to compensation, the following section explains how the *quid pro quo* of Article 4 (1) is operationalised throughout Article 4 of the convention. Therefore, section 1 explains who is entitled to indemnification and why; section 2 discusses the burden of proving good faith and, more particularly, the rejection of the presumption of good faith; section 3 elaborates on the means of assessing the good faith of the possessor – notably through the determination of due diligence –, because only innocent acquisitions are protected by the convention.

1. INDEMNIFIED PARTY

(1) Good faith possessor

Subject to certain conditions, Article 4 (1) entitles the possessor of a stolen cultural object that is forced to return it to fair and reasonable compensation. It is important to note that, despite the confusing wording of Article 4 (1), the possessor that is obliged to return the stolen cultural object on the basis of Article 3 (1) could be a different person than the one that is entitled to fair and reasonable compensation on the basis of Article 4 (1). In fact, it has been advanced that this is notably because the term 'possessor' needs to be interpreted broadly when reading Article 3,⁴⁰² but it has a restrictive meaning when understood in the provision relating to compensation (i.e. Article 4).⁴⁰³ But for this interpretation, it seems more appropriate to construct the regime of Chapter II in light of the common law rule of relativity of title, by which different possessors vie to have their possession

³⁹³ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 35; Klein, (1999), p. 277; Prott, *Commentary on the Unidroit Convention*, (1997), p. 41.

³⁹⁴ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 36.

³⁹⁵ For example, source states would then be obliged to buy their cultural heritage back, financial burden which most of these states cannot bear. See Mackenzie, S., 'Illicit Antiquities, Criminological Theory, and the Deterrent Power of Criminal Sanctions for Targeted Populations', 7 (2) *Art. Antiquity and Law*, (2002), p. 133. To remedy to this shortcoming, propositions were made to instate a special Fund for the payment of the fair and reasonable compensation. This idea needed to be supported during the negotiations to convince developing states to accept the obligation to pay fair and reasonable compensation to a diligent buyer. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 43.

³⁹⁶ See UNIDROIT, (1994), Study LXX – Doc. 48, p. 21.

³⁹⁷ UNIDROIT, (1994), Study LXX – Doc. 48, p. 21.

³⁹⁸ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 37.

³⁹⁹ Carducci, (2006), p. 100.

⁴⁰⁰ Droz, (1997), p. 254; Carducci, (2006), p. 100.

⁴⁰¹ Lalive D'Épinay, (1996), p. 52, referring to the field of health and safety citing the *Art Newspaper*, n. 51, September 1995, p. 26.

⁴⁰² Calvo Caravaca and Caamiña Domínguez, (2009), p. 169; Fach Gómez, K., 'Algunas Consideraciones en Torno al Convenio de Unidroit sobre Bienes Culturales Robados o Exportados Ilegalmente', *Anuario de Derecho Internacional Privado*, (2004), p. 15; UNIDROIT Secretariat, (2001), p. 502.

⁴⁰³ Calvo Caravaca and Caamiña Domínguez, (2009), p. 170.

considered as superior.⁴⁰⁴ As such, the term ‘possessor’ as used in Chapter II may refer to different possessors with relative rights of possession. Nevertheless, unlike Article 3 (1), the provisions on compensation of Article 4 are not directed at a person holding the object for another, but at an innocent acquirer that has obtained the stolen cultural object in the belief that he has become the owner (cf. Article 4 (1) *in fine* and Article 4 (4)). In fact, Article 4 should have more specifically referred to the notion of ‘possessor as of right’ so as to avoid any confusion. Instead, the term ‘possessor’ is used without further qualification. Furthermore, although the drafters of the convention did not lose sight of the distinction,⁴⁰⁵ Chapter II is silent as to the notions of good faith, a lack of good faith or bad faith.⁴⁰⁶ During the third meeting of the Committee of the Whole, Protton noted that only in rare cases the object will actually be found in the hands of a thief.⁴⁰⁷ Instead, it is more likely for the object to have been transferred to an innocent possessor that has acquired possession in *bona fide*.⁴⁰⁸ It was, therefore, the drafters’ intention to come up with an instrument that would constitute “an appropriate arrangement for the restitution of the objects by a good faith possessor”.⁴⁰⁹ Therefore, alongside ensuring the principle of mandatory restitution through Article 3 (1), the convention regulates acquisitions of stolen cultural objects by innocent possessors.⁴¹⁰ In fact, Article 4 (1) builds on the premises laid down in Article 7 (b) (ii) of the 1970 UNESCO convention to pay just compensation to an innocent purchaser or to a person who has valid title.⁴¹¹

Article 7 UNESCO Convention (1970) – (b) The States Parties to this Convention undertake: [...]

(ii) at the request of the State Party of origin, to **take appropriate steps to recover and return** any such cultural property imported after the entry into force of this Convention in both States concerned, **provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.** [...]

Nonetheless, Chapter II is not limited to the dispossessed owner versus *bona fide* possessor dilemma, but instead it regulates acquisition *a non domino* of cultural objects following an involuntary loss of possession by means of theft. Henceforth, it ought to oblige possessors that were aware that the object was stolen at the time of the acquisition too. This is the reason why Article 3 (1) mandates the automatic restitution of the object irrespective of whether the possessor acted in good or bad faith at the time of the acquisition.⁴¹² Nevertheless, it will only be

⁴⁰⁴ In this regard, it should be emphasised that the Drafting Committee operating within the DC had decided to refrain from defining the notion of possession in the text of the convention, but believed instead that the term possession was to be “liberally interpreted in accordance with the facts of the situation”. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc. 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 286.

⁴⁰⁵ As was noted by Reichelt at the outset of the development of the convention, acquisitions in bad faith should not be worthy of protection in the future instrument (see UNIDROIT, (1986), Study LXX – Doc. 1, p. 26). What is more, a distinction between good faith and bad faith acquisitions was discussed at the second session of the SG: proposals were made to categorise acquirers on the good / bad faith distinction depending on the degree of cautiousness exercised during the acquisition (see for example the discussion UNIDROIT, (1989), Study LXX – Doc. 14, pp. 8 and 9). Nonetheless, such a classification was considered undesirable as it was advanced that differentiating between categories of purchasers would create levels of purchasers (UNIDROIT, (1989), Study LXX – Doc. 14, p. 9). Subsequently, a proposed variant introduced after the second session of the SG foresaw three different possibilities: 1) when the purchaser acquired in bad faith, the return of the object would be mandatory; 2) when the purchaser acquired in good faith, he would be entitled to keep the object, whilst, 3) when the purchaser’s good faith was dubious, he would have to return the object, but would be entitled to the payment of compensation (see Chatelain, in UNIDROIT, (1989), Study LXX – Doc. 16, p. 4). As was noted by Fraoua, this solution was deemed inappropriate because the appreciation of either good faith or bad faith would constitute a particularly difficult exercise (see UNIDROIT, (1989), Study LXX – Doc. 16, p. 10). Furthermore, this system would afford less protection to countries suffering from the illicit traffic than the system enacted under the 1970 UNESCO convention (*idem*). Additionally, the Study Group was not planning on introducing the pernicious concept of ‘innocent amateur’ (UNIDROIT, (1989), Study LXX – Doc. 14, p. 9). Instead, it was preferred to take the character of the transacting parties into account in assessing the standard of care exercised by the purchaser during the acquisition (*idem*). This preference was also reflected in domestic case law (*idem*), where the character of the parties to a transaction involving a stolen cultural object weighed in the determination of the standard of care that was to be expected.

⁴⁰⁶ This distinction has, nonetheless, proved salient to the rules on third-party protection or limitation of the right of action of the majority of jurisdictions that were analysed in Chapters 2 and 3 above.

⁴⁰⁷ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’ addressed during the third meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 14 June 1995, p. 176.

⁴⁰⁸ *Idem*.

⁴⁰⁹ See the commentary of the representative of Switzerland in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 3, 8 June 1995, p. 179.

⁴¹⁰ Jolles, (1997), pp. 60-61.

⁴¹¹ See also ‘Chapter 7 – Unidroit and the World’ below for more details about the 1970 convention.

⁴¹² ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’, Presidenza del Consiglio dei Ministri, (1996), p. 26; UNIDROIT Secretariat, (2001), p. 502; see UNIDROIT, (1990), Study LXX – Doc. 19, p. 19; see also Lagarde, P., ‘La restitution internationale des biens culturels en dehors de la Convention de l’UNESCO de 1970 et de la Convention d’UNIDROIT de 1995’, 11 *Uniform Law Review / Revue de droit uniforme*, (2006), p. 84; therefore, tackling acquisitions in bad faith of illegally acquired cultural objects is one of the objectives of the UNIDROIT convention (Fox, (1993), p. 259). It is also important to note that when the possessor is the thief himself, other conventions adopted in the field of

possible for the possessor who has acted in good faith to obtain fair and reasonable compensation on the basis of Article 4.

(2) For value and gratuitous acquisitions

Although the regime of Article 4 is primarily addressed at good faith acquisitions for value, Article 4 (5) covers gratuitous acquisitions through gifts or by means of inheritance.

Article 4 UNIDROIT Convention (1995) – (5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

Article 4 (5) makes it impossible to launder the illicit origin of a cultural object through means of donation or bequeathal.⁴¹³ The idea underlying this rule is to avoid any possible laundering of cultural assets through means of transfer to innocent third parties.⁴¹⁴ This process of laundering was commonly used in instances where objects were donated to museums:⁴¹⁵ as was noted by UNESCO, museums – bound by codes of ethics that prohibit the acquisition of stolen or illegally exported cultural objects – have sometimes encouraged private parties, that are not subjected to these rules, to acquire cultural objects with dubious origins, with the hope of receiving it afterwards by means of gift.⁴¹⁶ Furthermore, tax donations or other types of gratuitous transactions have historically been used as sophisticated means of laundering the title to cultural objects.⁴¹⁷ With the present article, it becomes impossible for museums to use these derogatory practices, as the beneficiary of the gift or of the bequeathal is treated similarly to the donor or bequeather.⁴¹⁸ Article 4 (5) thus constitutes an appropriate response to the targeted laundering problems. Furthermore, it should be noted that the members of the SG did not contemplate the situation of agency whilst drafting this article.⁴¹⁹

Imputing the knowledge of the predecessor in title to the possessor in cases of donation or bequeathal was already addressed in the first stage of the convention's development. Article 2 (2) of the *Loewe Preliminary draft Convention* provided that: "The conduct of a predecessor in possession from whom the possessor has acquired the property by inheritance or otherwise gratuitously shall be imputed to the possessor".⁴²⁰ This imputability of conduct was further discussed at the third session of the SG, where two scenarios were discussed: firstly it was advanced that a subsequent acquirer in good faith would be deemed to have acted in bad faith if the predecessor acted in bad faith; whilst, secondly, an acquirer who acted in bad faith should be able to enjoy the protection given to the predecessor who acted in good faith – in conformity with the adage *mala fides superveniens non nocet* – with the exception of the thief himself.⁴²¹ Loewe repudiated this latter scenario, since he had not initially considered that a laundered cultural object would always retain its laundered status.⁴²² Instead, he had been of the opinion that the conduct of subsequent possessors should be individually assessed for the purpose of determining whether compensation should be paid.⁴²³ Nonetheless, his view was not mirrored in the Urtext,⁴²⁴ which – in words similar to Article 2 (2) of the Loewe draft – prescribed that:

Article 4 Preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1990) – (3) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

As the Canadian delegation that took part in the work of CGE noted with regard to the PDC,⁴²⁵ it might be particularly difficult for the heir to prove that the testator had exercised the diligence required, which would put

mutual assistance in criminal matters will prevail and the stolen object(s) can be reclaimed on the basis of this *lex specialis* because of the object's classification as *objectum sceleris* (see Siehr, 'The Protection of Cultural Heritage and International Commerce', 7 *International Journal of Cultural Property*, (1997), p. 309).

⁴¹³ Forrest, (2010), p. 203.

⁴¹⁴ Lenzner, (1994-1995), p. 497; Droz, (1997), p. 256.

⁴¹⁵ Forrest, (2010), p. 203.

⁴¹⁶ 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 98.

⁴¹⁷ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 216.

⁴¹⁸ 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 98.

⁴¹⁹ UNIDROIT, (1990), Study LXX – Doc. 19, p. 25.

⁴²⁰ UNIDROIT, Preliminary draft Convention on the restitution of cultural property (drawn up by Mr Roland Loewe in the light of the two studies prepared by Mme G. Reichelt), Study LXX – Doc. 3, Rome, June 1988, p. 2.

⁴²¹ UNIDROIT, (1990), Study LXX – Doc. 18, pp. 18-19.

⁴²² UNIDROIT, (1990), Study LXX – Doc. 18, p. 19.

⁴²³ UNIDROIT, (1990), Study LXX – Doc. 18, p. 19.

⁴²⁴ Preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (approved by the Unidroit study group on the international protection of cultural property at its third session on 26 January 1990), Published in UNIDROIT, (1990), Study LXX – Doc. 18, Appendix III.

⁴²⁵ The text of the draft can be found in UNIDROIT, (1990), Study LXX – Doc. 19, pp. 1-6.

the heir in a weaker position in comparison to other possessors.⁴²⁶ This point was further discussed during the second session of the CGE where some representatives – echoing the concerns formulated by Canada – believed that this provision would work an injustice on the good faith possessors that had acquired from a bad faith possessor by means of inheritance or gift.⁴²⁷ This injustice followed from the obligation to give back the object whilst not being in possession of the information that the donor or testator had about the object, and thus being unable to prove that diligence was exercised by the predecessor during the acquisition of the object.⁴²⁸ As a result, the heir or donee would be deprived of any entitlement to fair and reasonable compensation.⁴²⁹ This provision would, therefore, put the possessor of an inherited or donated object in a worse position as compared with possessors who have acquired for value.⁴³⁰ In order to remedy this problem, it was proposed during the same session to apply a shorter period of limitation to the possession of inherited or donated cultural objects.⁴³¹ Nonetheless, this proposal was not retained. Instead, in replying to the concerns raised, a member of the SG that was present during the session advanced that the choice operated in Article 4 (3) PDC was to equate the positions of acquirers for value and the position of acquirers by gratuitous means: if a possessor for value was to hand back the object, then a similar fate should be prescribed for a possessor that acquired the object gratuitously.⁴³² Not holding the recipient to the same standard as the bequeather / donor would entitle museums to acquire objects of dubious origin indirectly by having private parties purchase it without exercising the required diligence and then donating the object by gift or through testament to the museum in order to launder the object's origins.⁴³³ What is more, the same member of the SG noted that the injustice discussed would not be operated on the possessor, because it is his diligence in the acquisition from the testator or the donor that would be assessed for the purpose of determining the compensation,⁴³⁴ therefore bringing the provision in line with Loewe's view. In fact, the SG had the principle by which a gift or bequeathal could not be used to launder the origin of the object in mind.⁴³⁵ Consequently, the recipient would have to question the origin of the object and undertake a diligent search as to the property received if he wants to be entitled to compensation in case of restitution.⁴³⁶ This obligation is all the more so justified by the fact that bequeathals do not provide any warranty of right over the item.⁴³⁷ Subsequently, the imputability of conduct was bartered for the formulation of “no more favourable position” that can now be found in Article 4 (5).⁴³⁸ This formulation – prescribing that the actual possessor would not be in a more favourable position than the transferor – had also gained popularity on the international plane: the impossibility of laundering title to a stolen cultural object through donations was also addressed in the 1991 Resolution of the International Law Commission (ILC) entitled “The international sale of works of art from the angle of the protection of the cultural heritage”. In its authoritative (French) version, Article 4 (3), *in fine*, of the Resolution specifically established that “[...] En cas de donation ou de succession, le possesseur ne peut bénéficier d'un statut plus favorable que celui de son ayant cause”.⁴³⁹

Article 4 (5) will have important consequences for charities and museums, to which many cultural objects are bequeathed.⁴⁴⁰ These institutions will have to be particularly cautious and will need to retrace the provenance of the property bequeathed in exercising due diligence.⁴⁴¹

⁴²⁶ UNIDROIT, (1991), Study LXX – Doc. 20, p. 1; subsequently, the Secretariat of UNIDROIT proposed the deletion of the provision because it considered it unnecessary and too harsh to both heirs and donees. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the first session of the committee (Rome, 6 to 10 May 1991), Study LXX – Doc. 22, Rome, July 1991, p. 8.

⁴²⁷ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴²⁸ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴²⁹ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴³⁰ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴³¹ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴³² UNIDROIT, (1991), Study LXX – Doc. 23, p. 22; see also UNIDROIT, (1990), Study LXX – Doc. 19, p. 25.

⁴³³ UNIDROIT, (1991), Study LXX – Doc. 23, pp. 23-24.

⁴³⁴ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴³⁵ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴³⁶ UNIDROIT, (1991), Study LXX – Doc. 23, p. 22.

⁴³⁷ UNIDROIT, (1991), Study LXX – Doc. 23, pp. 22-23.

⁴³⁸ The change took place after the third session of the CGE. See Article 4 (3) of the Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects, in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (revised text prepared by the Unidroit Secretariat following the third session of the committee), Study LXX – Doc. 40, Rome, June 1993, p. 4.

⁴³⁹ Which translates into “In case of donation or succession, the holder may not enjoy a status more favourable than that of the previous holder”. The non-authoritative (English) version of the Resolution is available at http://www.idi-ii.org/app/uploads/2017/06/1991_bal_04_en.pdf, last retrieved on 01.03.2018.

⁴⁴⁰ Lehman, J. N., “The Continued Struggle With Stolen Cultural Property: the Hague Convention, the Unesco Convention, and the Unidroit Draft Convention”, 14 *Arizona Journal of International and Comparative Law*, (1997), p. 548.

⁴⁴¹ Lehman, (1997), p. 548.

(3) Protecting innocent acquisitions

The right to compensation is exclusively made available for *bona fide* acquirers, and it will, therefore, only be applicable in limited instances. In fact, the *raison d'être* of Article 4 is to punish acquirers of cultural objects that do not properly vet the provenance of the cultural object during the acquisition.⁴⁴² By mandating the automatic restitution of the stolen object and, thus, subjecting acquirers to the risk of losing both the good and the right to compensation when they have not researched the provenance, this would have the effect of changing acquirers' general practice of not inquiring since they would no longer want objects of a dubious origin.⁴⁴³ In other words, prescribing conditional compensation serves the purpose of keeping acquirers alert at the time of the acquisition, because they are aware that no compensation will be paid if they fail to act cautiously during the acquisition.⁴⁴⁴ By creating incentives for acquirers to warrant cautiousness, Article 4 (1) has the effect of diminishing the demand for stolen objects:⁴⁴⁵ the prospect of being entitled to compensation would entice acquirers to vet the provenance of the object meticulously.⁴⁴⁶ This would, *a priori*, lead to a reduction in theft,⁴⁴⁷ as stolen cultural objects would become unmarketable. Additionally, this would also change the practice of connivance of sellers and purchasers⁴⁴⁸ and would, in turn, ameliorate the overall situation at the international level.⁴⁴⁹ Therefore, Article 4 (1) – together with Article 3 (1) – is considered crucial to the fight against the illicit trafficking of stolen cultural goods.⁴⁵⁰ What is more, although prescribing for the payment of compensation has a deterrent effect on recovery⁴⁵¹ – and has been qualified as an ancillary guarantee⁴⁵² –, the obligation to pay fair and reasonable compensation constitutes an intermediary position between affording no protection to third parties whatsoever and third-party protection.⁴⁵³ In fact, compensation seemed desirable because throughout the elaboration of Article 3 (1), countries belonging to the civil law tradition already gave up the possibility for the acquirer who acted in good faith to keep the item:⁴⁵⁴ the weakening of the protection of the *bona fide* purchaser adopted by the convention was considered Rubicon for states that do provide protection to good faith acquirers.⁴⁵⁵ To mitigate the changes wrought, the payment of compensation was introduced to the regime of the convention.⁴⁵⁶ Doing away with any type of compensation would have been a too drastic change for those countries that have rules on third-party protection.⁴⁵⁷ Thenceforth, the right to payment of compensation was considered as the middle way

⁴⁴² UNIDROIT, (1993), Study LXX – Doc. 42, p. 23. See also UNIDROIT, (1994), Study LXX – Doc. 48, p. 21 and 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31.

⁴⁴³ *Idem*. See also 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 96.

⁴⁴⁴ See the commentary of the American delegation in UNIDROIT, (1992), Study LXX – Doc. 29, p. 21. See also the commentary of Prott in UNIDROIT, (1993), Study LXX – Doc. 36, p. 49.

⁴⁴⁵ Das, (2004), p. 212.

⁴⁴⁶ UNIDROIT, (1992), Study LXX – Doc. 30, p. 14.

⁴⁴⁷ UNIDROIT, (1994), Study LXX – Doc. 48, p. 21 and 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31.

⁴⁴⁸ UNIDROIT, (1994), Study LXX – Doc. 48, p. 21 and 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31. See also 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 96.

⁴⁴⁹ UNIDROIT, (1992), Study LXX – Doc. 30, p. 14.

⁴⁵⁰ See the commentary of Prott in UNIDROIT, (1993), Study LXX – Doc. 36, p. 49: "The threat of return of the object, without compensation where diligence has not been used, would have the salutary effect of requiring traders and collectors to make proper enquiry. This would have an important effect generally in deterring illicit trade in cultural objects and is one of the fundamental principles of the draft which should not be put aside". See also Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 37.

⁴⁵¹ Olivier, M., 'The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property', 26 *Golden Gate University Law Review*, (1996), p. 658.

⁴⁵² See Chatelain, in UNIDROIT, (1989), Study LXX – Doc. 16, p. 3.

⁴⁵³ 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30; Love Levine, (2010-2011), p. 778.

⁴⁵⁴ UNIDROIT, (1993), Study LXX – Doc. 36, p. 15; Prott, *Commentary on the Unidroit Convention*, (1997), p. 41.

⁴⁵⁵ UNIDROIT, (1994), Study LXX – Doc. 48, p. 21. See also 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30.

⁴⁵⁶ UNIDROIT, (1994), Study LXX – Doc. 48, p. 21. See also 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30.

⁴⁵⁷ UNIDROIT, (1993), Study LXX – Doc. 42, p. 53.

between the unconditional protection of an acquirer in good faith and no protection at all.⁴⁵⁸ This demonstrates that the compromise reached between the parties at the Diplomatic Conference found a middle way in securing the interests of both common law and civil law jurisdictions.⁴⁵⁹ Additionally, the purpose of fair and reasonable compensation serves as a balancing of losses between the two innocent parties:⁴⁶⁰ as was noted by Paolucci during the DC – “one cannot right an injustice by committing another”.⁴⁶¹ Therefore, it was judged fair to prescribe the payment of compensation to a purchaser in good faith that cannot resort to contractual liability against the seller.⁴⁶² What is more, considering that in certain states constitutional guarantees of ownership could not be disturbed,⁴⁶³ provisions securing the payment of compensation to innocent acquirers that ought to have gained ownership on the basis of domestic private law – i.e. by means of third-party protection – were particularly welcomed.⁴⁶⁴ Moreover, prescribing for the payment of fair and reasonable compensation functions as a counterweight to restitution in order to attract market states.⁴⁶⁵ Thus, prescribing compensation was deemed necessary to ensure a wide acceptance of the convention from a political and philosophical point of view.⁴⁶⁶ Finally, the Secretariat General of the I.C.P.O. – Interpol correctly submitted that discarding the obligation to compensate an acquirer for his good faith in the 1995 UNIDROIT convention would constitute a step backwards

⁴⁵⁸ UNIDROIT, (1988), Study LXX – Doc. 4, p. 23. See also ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30; see for example the commentary of the CGE made during its second session: “The group had been conscious of the fact that from the angle of comparative law this principle [of automatic restitution] might constitute a kind of revolution for those countries whose law traditionally protected the good faith purchaser for value, but it had to be noted that Article 4 also constitute a revolution for those States which did not make provision for the payment of compensation and in consequence Chapter II was both balanced and fair”. See UNIDROIT, (1992), Study LXX – Doc. 30, p. 9; see also ‘Draft final provisions capable of embodiment in the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Notes Drawn up by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 26; Nafziger, J. A. R., Scovazzi, T., “La Restitution des Biens Culturels Volés ou Illicitement Exportés en Temps de Paix”, in: J. A. R. Nafziger and T. Scovazzi, *Le Patrimoine Culturel de l’Humanité – The Cultural Heritage of Mankind*, (Martinus Nijhoff Publishers: Leiden / London, 2008), p. 69.

⁴⁵⁹ This was already conceded during the third meeting of the CGE. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 19.

⁴⁶⁰ Forrest, (2010), p. 207.

⁴⁶¹ See ‘Summary Records of the Meetings of the Conference (Plenum)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/S.R. 1, 10 June 1995, p. 348.

⁴⁶² This commentary was made by the American delegation before the second session of the CGE. See UNIDROIT, (1992), Study LXX – Doc. 29, p. 23.

⁴⁶³ As was noted by UNESCO: “For some States which have a constitutional guarantee of rights of private property, it is only constitutionally possible to deprive the *bona fide* acquirer of property in the public interest and with an indemnity”. See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 97. See also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 2; CONF. 8/6; CONF. 8/C.1/W.P. 7, 28, 38, 55 and 56), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 10, 15 June 1995, p. 234.

⁴⁶⁴ Protz, (1998), p. 212; as was noted by the French delegation that took part in the DC, prescribing for the payment of fair and reasonable compensation would create inconsistencies with constitutional principles. See ‘Comments by Governments on the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects: France and United States of America’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 3, p. 81; in a preliminary draft of the convention, states were given the possibility to apply their national laws “when this would disallow the possessor’s right to compensation even when the possessor has exercised the necessary due diligence contemplated by article 4(1)” (see former Article 11 (a) (iii) of the Preliminary draft Convention (to be found in UNIDROIT, (1990), Study LXX – Doc. 19, p. 6). See Crewdson, (1992), p. 47 and footnote 7). It was because of the fear expressed by certain states of seeing their citizens as not being able to pay the compensation that this possibility of setting aside the obligation to pay compensation was advanced (Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 35; Schneider, (1996), p. 146). Non-compensation was not an option for other states because the expropriation of an owner’s property without due compensation was contrary to their constitutional system when the possessor had acquired ownership by means of third-party protection (see Crewdson, (1992), p. 47 and Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 35); it should also be noted that the impossibility for the original owner to pay the compensation is likely to discourage claims in restitution of stolen property. See Olivier, (1996), p. 658). Nevertheless, a specific formulation that gives discretion to contracting states to provide for the payment of compensation was omitted from the final document. It is, nonetheless, possible for states to apply their domestic laws under Article 9 (1), if these laws set aside the obligation to compensate the purchaser in good faith (see Protz, *Commentary on the Unidroit Convention*, (1997), p. 41). This is only possible if the domestic law is more favourable to the restitution of stolen cultural property. More about Article 9 (1) can be found in ‘Chapter 6 – Application of the Convention’ below.

⁴⁶⁵ Hoffman, (10 March 1995), p. 3.

⁴⁶⁶ UNIDROIT, (1993), Study LXX – Doc. 42, pp. 23 and 53. See also ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30. See also ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 97.

when compared to Article 7 (b) (ii) of the 1970 convention.⁴⁶⁷ This would, additionally, have created compatibility problems, especially as it had been accepted from the outset that both conventions were to be complementary. Nevertheless, the introduction of a provision prescribing for the payment of compensation was not meant to force those states that have a regime more favourable to restitution and that do not prescribe for the payment of compensation to introduce a compensatory regime in their domestic laws.⁴⁶⁸

2. BURDEN OF PROOF

The implications of Article 4 (1) are far-reaching as they involve a reversal of the presumption of good faith applied in many civil law jurisdictions and the imputation of the obligation to demonstrate good faith during the acquisition upon the possessor. In accordance with the *bona fides praesumitur* adage,⁴⁶⁹ many civil law jurisdictions presume the existence of good faith during a third party's acquisition *a non domino*.⁴⁷⁰ This is notably the case for the three European jurisdictions that were scrutinised in Chapter 2 above.⁴⁷¹ Nevertheless, the drafters of the convention agreed to abandon this presumption in cases concerning stolen cultural objects.⁴⁷² In their opinion, good faith cannot be presumed when the acquirer obtained the cultural object without ascertaining its exact provenance.⁴⁷³ Instead, other legal systems that do not presume good faith presented an appropriate blueprint to the drafters. For example, Article 3 of the Swiss Civil Code does not presume good faith but, instead, renders the exercise of good faith context-dependent.⁴⁷⁴

Article 3 Swiss Civil Code – (1) Where the law makes a legal effect conditional on the good faith of a person, there shall be a presumption of good faith.

(2) No person may invoke the presumption of good faith if he or she has failed [corrigendum: to] exercise the diligence required by the circumstances.⁴⁷⁵

The solution instated by Article 3 of the Swiss Civil Code constituted a direct source of inspiration for the mechanism posited in Article 4 of the convention.⁴⁷⁶ Consequently, good faith is not presumed under the terms of the convention,⁴⁷⁷ and it is for the possessor to prove that he acted in good faith when he acquired the stolen cultural object, by demonstrating that he exercised due diligence at the time of the acquisition.⁴⁷⁸ This entails that the acquirer must demonstrate that he has undertaken all the steps necessary to ensure that the object acquired was not stolen.⁴⁷⁹ The obligation for the possessor to prove having taken all the necessary precautions during the

⁴⁶⁷ See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of International Organisations on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Interpol), Study LXX – Doc. 44, Rome, September 1993, p. 1.

⁴⁶⁸ UNIDROIT, (1993), Study LXX – Doc. 42, p. 23. See also ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 97, where UNESCO additionally specified that it had never been the intention to decrease the protection afforded to an owner of a cultural object that is given in some contracting states; for more details about this point, see Article 9 (1) that is discussed in ‘Chapter 6 – Application of the Convention’ below.

⁴⁶⁹ Klein, (1999), p. 279.

⁴⁷⁰ Renold, (1997), p. 28.

⁴⁷¹ Cf. Articles 2268 BCC, 2274 FCC and 3:118 (3) DCC.

⁴⁷² See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31; Renold, (2004), p. 262.

⁴⁷³ ‘Audience given by His Excellency Mr Oscar Luigi Scalfaro, President of the Italian Republic’, in Presidenza del Consiglio dei Ministri, (1996), p. xvii.

⁴⁷⁴ Klein, (1999), p. 279; Office Fédéral de la Culture (Suisse), (1998), p. 61; Lalive D’Epinay, ‘Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)’, (1997), pp. 78–79.

⁴⁷⁵ English translation provided by the Swiss government. Text available at <https://www.admin.ch/opc/en/classified-compilation/19070042/201701010000/210.pdf>, last retrieved on 01.03.2018.

⁴⁷⁶ Lalive D’Epinay, ‘Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)’, (1997), pp. 78 and 82.

⁴⁷⁷ Droz, (1997), p. 248; the abandonment of the presumption of good faith by the convention was qualified by Vernet as outrageous. In his opinion, abolishing the rule upon which good faith is presumed might jeopardise social relations in their entirety. See Vernet, (1997), p. 80; in some legal systems, the presumption of good faith ranks as a fundamental value of private law. This affirmation is, for example, true regarding Switzerland (see Département Fédéral de l’Intérieur (Suisse), *Convention d’Unidroit du 24 juin 1995 sur les biens culturels volés ou illicitement exportés – Texte et rapport explicatif*, (février 1996), p. 15).

⁴⁷⁸ Renold, (1997), p. 28; Jayme, E., ‘Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?’, 11 *Uniform Law Review*, (2006), p. 397.

⁴⁷⁹ Cornu, M., ‘Fighting Illicit Trafficking in Cultural Objects, Searching for Provenance and Exercising Due Diligence in the European Union’, Joint European Commission-UNESCO Project, ‘Engaging the European Art Market in the fight against the illicit trafficking of cultural property’, Study for the capacity-building conference, (20-21 March 2018), p. 11.

acquisition was first considered during the second session of the SG⁴⁸⁰ and found further consolidation during its third session.⁴⁸¹ In the first meeting of the CGE, it was noted that the shift of the burden of proof to the defendant was not a novelty because in certain legal orders the burden may shift to him when it would be too difficult for the claimant to provide proof of the situation.⁴⁸² This shift results in obliging the defendant to assist in bringing the necessary evidence, which sometimes could require from the defendant to prove the point himself.⁴⁸³ UNESCO also noted that the reversal of the burden of proof was welcome because an important portion of the cultural objects on the market had been acquired without considering their provenance, relying on the presumption of good faith enjoyed by possessors.⁴⁸⁴ In fact, in jurisdictions where good faith is presumed, it is particularly difficult for the claimant to prove that there were red flags during the possessor's acquisition, and the latter can thus rely upon the presumption of good faith in order to defeat the claim.⁴⁸⁵ A shift of the burden of proof to the possessor would thus constitute an appropriate solution to tackling this difficulty, but it could also be regarded as an important mechanism to change the practice of the art market.⁴⁸⁶ The shift is, therefore, considered to be a key measure in the fight against the illicit trade in cultural goods⁴⁸⁷ and notably in the fight against archaeological theft.⁴⁸⁸ Additionally, it can be difficult for a claimant to prove that the acquisition was not carried out in good faith if either the possessor or the thief has destroyed the evidence that could be of avail to the claimant.⁴⁸⁹ It is thus understandable that, considering the length of the absolute period, it might be more appropriate for the possessor to demonstrate that he adopted the required standard of care, thereby proving his good faith.⁴⁹⁰ What is more, the reason for shifting the burden of proof from the claimant to the defendant stems, *inter alia*, from the peculiar nature of the objects that are being traded: because the value of cultural objects often inflates with time and given that cultural objects have a long lifespan, their acquisition requires more caution than the acquisition of other goods.⁴⁹¹ Article 4 (1) *in fine* takes account of this shift in the burden of proof.

Article 4 UNIDROIT Convention (1995) – (1) [...] provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

Although the formulation “neither knew, nor ought reasonably to have known that the object was stolen” that was introduced by the drafting committee ensures neutrality with regard to the burden of proof,⁴⁹² there is a direct correlation between this formulation and the need to prove having exercised due diligence: due diligence will help to determine objectively whether the possessor knew or ought reasonably to have known that the cultural object was stolen.⁴⁹³ In fact, if Article 4 (1) only required the possessor to establish that he neither knew, nor reasonably ought to have known that the object was stolen, it would be sufficient for him to aver that he was not aware of the theft to comply with this requirement. This would then result in a shift of the burden of proof to the claimant, who would then have to demonstrate that the possessor had not acted in good faith at the time of the acquisition. This construction would be tantamount to a presumption of good faith to the benefit of the possessor. Therefore, the burden of proof is imputed upon the possessor since he must prove that he was duly diligent during the acquisition. Thus, the acquirer of a cultural object will not always be considered as having obtained the item in good faith – which is not to say that it was acquired in bad faith – on the basis of Chapter

⁴⁸⁰ UNIDROIT, (1989), Study LXX – Doc. 14, p. 13; the shift of the burden of proof was supported by one member of the Study Group who advanced that this shift might result in more assistance by the insurance companies when the burden of proof was imputed to the defendant (*idem*).

⁴⁸¹ UNIDROIT, (1990), Study LXX – Doc. 18, p. 16.

⁴⁸² UNIDROIT, (1991), Study LXX – Doc. 23, p. 20 and ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31.

⁴⁸³ *Idem*.

⁴⁸⁴ See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 97.

⁴⁸⁵ *Idem*.

⁴⁸⁶ *Idem*.

⁴⁸⁷ ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31; Van Gaalen, M.S., Verheij, A. J., ‘De Gevolgen van het Unidroit-Verdrag Inzake Gestolen of Onrechtmatig Uitgevoerde Cultuurobjecten voor Nederland’, 5 *Nederlandse Juristen Blad (NJB)*, (31 januari 1997), p. 198.

⁴⁸⁸ Gerstenblith, P., ‘Chapter 15 – Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage’, in: James A. R. Nafziger and A. M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, (Martinus Nijhoff Publishers, 2009), p. 316.

⁴⁸⁹ O’Keefe, (1999), p. 53.

⁴⁹⁰ Van Gaalen and Verheij, (1997), p. 198.

⁴⁹¹ Droz, (1994), p. 51; it requires a genuine investigation by the purchaser into the provenance and the title of the person that is disposing of the property. See Office Fédéral de la Culture (Suisse), (1998), p. 61.

⁴⁹² UNIDROIT, (1993), Study LXX – Doc. 39, p. 20.

⁴⁹³ Forrest, (2010), p. 207.

II, and will need to prove the contrary if he wants to be entitled to the payment of fair and reasonable compensation.⁴⁹⁴ This shifts the obligation to prove good faith to the possessor, instead of having the claimant disprove the possessor's presumed good faith. Although this shift is often used as an argument against the convention's regime, it has been averred that the said shift is not really innovative as it barely reflects the practice of some domestic courts.⁴⁹⁵

3. INNOCENT ACQUISITION

In order to counterbalance the obligation imposed upon the claimant to compensate the possessor that has acquired in good faith, the convention requires the possessor to prove that he has exercised due diligence in acquiring the stolen property.⁴⁹⁶ The rationale for imposing a requirement of due diligence upon the possessor can be explained as follows: from a cost-efficiency perspective, in cases of involuntary loss of possession resulting from theft, the dispossessed person is in a difficult position to resolve the situation. On the contrary, the acquirer is the only party with effective control since he can avoid becoming the recipient of a stolen object by undertaking the necessary inquiries into the provenance of the transacted materials. Hence, by investigating the right of the seller, he is in a better position and can avoid the quandary at lesser costs than the costs that a dispossessed person must make to retrieve the stolen object. Because the acquirer is the best cost avoider and because of the propensity in the legal field to provide for the cost-efficient allocation of resources, it is more appropriate to impute responsibility on acquirers, who will have the burden of making the necessary research in order to avoid becoming embroiled with dubious transactions.⁴⁹⁷ Furthermore, it is not unusual for purchasers to garner information about a potential acquisition. For example, acquirers often consult experts for the sake of verifying the authenticity of coveted works of art.⁴⁹⁸ Thus, a similar effort could be undertaken in researching the provenance of the work. What is more, imputing an obligation of due diligence upon the acquirer has the beneficial effect of tackling the secrecy of the art market by forcing sellers to disclose the provenance of the object and by obliging acquirers to question that information.⁴⁹⁹ Finally, making the payment of the compensation conditional upon the exercise of due diligence – instead of compulsory – is better suited to achieving a higher rate of restitution,⁵⁰⁰ which is instrumental to tackling the illicit trafficking of stolen cultural property. Put differently, requiring owners to pay compensation in all instances would impair restitution.⁵⁰¹ In fact, the due diligence requirement that is posited by the convention constitutes a test of good faith⁵⁰² that is specifically designed for the acquisition of cultural objects.

(1) Acquisition in good faith

As Lalive – Chairman of the CGE – noted, although the concept of good faith is not laid down in the convention, the system instated requires the possessor to act in good faith during the acquisition.⁵⁰³ In fact, the use of the terminology 'due diligence' was preferred to the use of 'good faith' or '*bona fides*' so as to avoid any assimilation of the regime of Article 4 (4) to the domestic conceptualisations of good faith.⁵⁰⁴ Therefore, preference was given to the unrelated and undefined 'due diligence' terminology⁵⁰⁵ in order to avoid problems

⁴⁹⁴ Jolles, (1997), p. 56; Calvo Caravaca, (2004), p. 97; Aubert, J.-F., 'Conclusions', in: C. Breiter, Q. Byrne-Sutton, F. Geisinger-Mariétoz, et M.-A. Renold (eds), *La Convention d'UNIDROIT du 24 juin 1995 sur les biens culturels volés ou illicitement exportés. Actes d'une table ronde organisée le 2 octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 94.

⁴⁹⁵ Klein, (1999), pp. 279-280; Office Fédéral de la Culture (Suisse), (1998), p. 62; following the *actori incumbit probatio* principle, each party has the duty to prove his claims and contentions. It is then also expected from the purchaser in good faith to be able to demonstrate due diligence, if he invokes his right to be compensated under the convention. For this particular reason, it is averred that the UNIDROIT convention does not depart from the traditional approach regarding the burden of proof. See Das, (2004), p. 212.

⁴⁹⁶ Droz, (1997), p. 254.

⁴⁹⁷ Burke, (1990-1991), p. 446; Roodt, (1994), p. 326.

⁴⁹⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 44.

⁴⁹⁹ Hoffman, (10 March 1995), p. 3.

⁵⁰⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 30; Doyal, S., 'Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy', 657 *Columbia Journal of Transnational Law*, (2000-2001), p. 669.

⁵⁰¹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 30.

⁵⁰² See 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31; Lehman, (1997), p. 548.

⁵⁰³ See Lalive D'Épinay, "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)", (1997), p. 78.

⁵⁰⁴ See the commentary by Prott in UNIDROIT, (1993), Study LXX – Doc. 36, p. 15; Forrest, (2010), pp. 206-207; Van Gaalen and Verheij, (1997), p. 197.

⁵⁰⁵ Prott, *Commentary on the Unidroit Convention*, (1997), p. 41; throughout the elaboration of the convention, several alternative formulations to 'due diligence' were put forward: 'precautions normally taken' (see UNIDROIT, (1989), Study LXX – Doc. 14, p. 8); 'a purchaser who "has taken all the necessary precautions"' (see UNIDROIT, (1989), Study LXX – Doc. 14, p. 9); 'necessary diligence' (see UNIDROIT, (1990), Study LXX – Doc. 18, p. 16. See also UNIDROIT, (1991), Study LXX – Doc. 23, p. 20 where a member of the SG explained to the CGE

linked to finding a common definition to the concept of good faith.⁵⁰⁶ As was noted by the Secretariat of UNIDROIT, due diligence constitutes an “indirect description of the notion of good faith so as to avoid the difficulties resulting from its different understanding in the various legal systems”.⁵⁰⁷ More particularly, due diligence relates to the behaviour of the acquirer during the acquisition, whilst good faith relates to his knowledge about the origin of the transacted property.⁵⁰⁸ Due diligence constitutes, therefore, an autonomous concept⁵⁰⁹ that must not be assimilated to domestic conceptualisations of good faith for the following reasons: firstly, unlike domestic laws, the obligation to demonstrate good faith through the exercise of due diligence does not trigger the rules on third-party protection, but it will be determinative in establishing whether the possessor is entitled to fair and reasonable compensation.⁵¹⁰ Secondly, due diligence is a tailor-made test of good faith that

that the choice of ‘necessary diligence’ was meant to further nuance the degree of diligence required for the acquisition of cultural objects, which could not be the same as the degree of diligence exercised in commercial practices. See also UNIDROIT, (1991), Study LXX – Doc. 23, p. 20 where it was advanced that ‘necessary diligence’ is unsuited to the situation because the possessor has purchased a stolen object and cannot, by definition, have exercised the necessary diligence. Additionally, see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of Governments on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Canada, China, France, Islamic Republic of Iran, Norway, Sweden and Turkey), Study LXX – Doc. 24, Rome, January 1992, p. 2 where Canada submitted that the possessor of a stolen cultural object might, by definition, never be able to exercise a necessary diligence. The use of the qualification ‘necessary diligence’ would have implied that if the object appears to have been stolen while the requirement of ‘necessary diligence’ had been complied with at the time of acquisition, this would adversely defeat the exercise of the said ‘necessary diligence’ and it would not be possible for the possessor to claim compensation (see Prot, *Commentary on the Unidroit Convention*, (1997), p. 46). Instead, the Canadian delegation advanced that the qualification ‘reasonable diligence’ was more appropriate because this would require the court seized to determine whether the possessor had acted appropriately during the acquisition of the object (see UNIDROIT, (1991), Study LXX – Doc. 23, p. 20 and UNIDROIT, (1992), Study LXX – Doc. 24, p. 2); ‘necessary vigilance’ (see UNIDROIT, (1989), Study LXX – Doc. 14, p. 8); ‘reasonable diligence’ as proposed by Canada in UNIDROIT, (1991), Study LXX – Doc. 20, p. 1, UNIDROIT, (1991), Study LXX – Doc. 23, p. 20, and UNIDROIT, (1992), Study LXX – Doc. 24, p. 2, and also supported by the UNIDROIT Secretariat in UNIDROIT, (1991), Study LXX – Doc. 22, p. 7. See also UNIDROIT, (1992), Study LXX – Doc. 30, p. 15 where one representative advanced that ‘reasonable diligence’ or ‘due diligence’ would force the court seized to determine whether the claimant had acted appropriately. At last, preference was given to ‘due diligence’ despite the existence of this notion in certain U.S. jurisdictions. Nonetheless, Prot submitted that using ‘required diligence’ instead of due diligence would have been a more suitable solution, as the convention lays down the specificities of what is required (see ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188 and Prot, *Commentary on the Unidroit Convention*, (1997), p. 46; reiterated in Forrester, (2010), p. 207). Nevertheless, the Chairman of the Drafting Committee operating within the DC explained that the members of the committee were unanimous as to the clarity of the terms ‘due diligence’ (see ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 289). Furthermore, this would have avoided confusion with the notion of due diligence that is required in certain U.S. jurisdictions. It is important to remark that this term must not be mistaken with the ‘due diligence’ known in these jurisdictions, as the two concepts are unrelated. In Chapter 3 above, it was demonstrated that due diligence was required to toll the running of the statute of limitations under the New Jersey discovery rule and that due diligence was also imposed in the application of the doctrine of equitable estoppel in New York law. Therefore, due diligence as applied in New Jersey and in New York are obligations incumbent upon the dispossessed owner in recovering his stolen property. Chapter II of the convention imposes no such obligation upon a claimant, as the relative period accrues upon the actual discovery of both the whereabouts of the cultural object and the identity of its possessor. Moreover, no constructive notice of these elements can be inferred on the basis of Chapter II of the convention. Instead, due diligence as posited in this chapter relates to the behaviour of the possessor and not of the claimant or of the owner of the stolen cultural object.

⁵⁰⁶ See for example the commentary of the explanatory report of the *Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects*: “One of the principal merits of the initial preliminary draft was that it avoided any definition of good faith or even reference to it, concentrating attention on the concept of possession rather than on that of ownership”, in ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30; Furthermore, Lalive has noted that the terminology ‘good faith’ had been intentionally left out of the convention because of the difficulties that had been encountered with this notion in drafting the LUAB. See Lalive, ‘La Convention D’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 35, footnote 68.

⁵⁰⁷ ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 32.

⁵⁰⁸ Cornu, (2018), p. 7, where the nexus between good faith and due diligence is addressed.

⁵⁰⁹ Prot proposed during the DC to use the terms ‘required diligence’ or ‘diligence required under this Convention’ to replace the terms ‘due diligence’ because: “This terminology would emphasize the fact that under the Convention its own standards were applicable rather than those of the national law of any Contracting State”. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188 and Prot, *Commentary on the Unidroit Convention*, (1997), p. 46; see also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 289.

⁵¹⁰ Renold, (2004), p. 260.

is specifically designed for the acquisition of cultural objects⁵¹¹ and it distinguishes itself from the notion of good faith because “[...] the normal degree of diligence expected in a normal commercial transaction was insufficient for the purchase of cultural objects”⁵¹²

Standard of good faith

For the purpose of the convention, acquiring the cultural object by means of due diligence entails that the possessor was not aware, nor ought reasonably to have been aware that the cultural object was stolen at the time of the acquisition (cf. Article 4 (1) of the convention). In a different manner, the Belgian, French and Dutch private law definitions of good faith relate to the lack of actual or constructive knowledge that one has not become the right-holder of the property (cf. respectively, Articles 550 BCC, 550 FCC and 3:118 (1) DCC), or put differently, that the transferor had no faculty to dispose of the property. The difference between the requirement laid down in Article 4 (1) of the convention and the Belgian, French and Dutch appreciations of good faith is justified by the fact that the convention is only directed at situations involving the involuntary loss of possession by means of theft, whilst the domestic definitions are addressed to a *non domino* good faith acquisitions following from a voluntary and involuntary loss of possession. Furthermore, the good faith of the possessor is assessed by means of actual or constructive notice, in a similar fashion to the notions of good faith that are applied in Belgian, French and Dutch private law.⁵¹³ During the first session of the CGE, it was submitted that a constructive notice should be added because it would be too easy for the possessor to invoke his alleged ignorance, even though sufficient publicity of the stolen object was made in his state of residence.⁵¹⁴ A majority of the representatives that took part in the work of the CGE during its fourth session expressed their support for a constructive notice because this would encourage acquirers to undertake further efforts in researching the provenance of the object and it would encourage them to be particularly cautious whilst acquiring objects with a dubious provenance.⁵¹⁵ Constructive notice thus has the effect of forcing a purchaser to undertake thorough investigations as to the provenance of the object.⁵¹⁶ This construction can be equally helpful when the object passes through the hands of subsequent possessors, making it impossible for a possessor who acted in bad faith to rely on the protection afforded by the diligence of a previous possessor.⁵¹⁷ Nonetheless, it has been asserted that constructive knowledge is difficult to prove in the context of artefacts issued from clandestine excavations, because of the lack of information due to the absence of documentation or of reports about objects whose existence is unknown.⁵¹⁸

Due diligence must be exercised at the time of the acquisition,⁵¹⁹ as clarified by Article 4 (1) *in fine*.

Article 4 UNIDROIT Convention (1995) – (1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it **exercised due diligence when acquiring the object**.

But for its lack of specificity,⁵²⁰ this approach is consistent with Belgian, French and Dutch private law (cf. notably Articles 2269 BCC and 2275 FCC), which require the acquirer to act in good faith when they obtain possession of the object.

⁵¹¹ Lalive D’Epinay, (1996), p. 50; this argument was also averred by one member of the CGE to explain the use of the term diligence – as was introduced in the Preliminary draft Convention – without mentioning the notion of good faith. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 20.

⁵¹² ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31.

⁵¹³ Cf. the explanations surrounding Articles 550 BCC, 550 FCC and 3:118 (1) *juncto* 3:11 DCC in Chapter 2 above. In both Articles 550 BCC and 550 FCC, the constructive notice was not explicit and was constructed by domestic courts in reading the two provisions. In Dutch private law, a constructive notice can be inferred from Article 3:11 DCC.

⁵¹⁴ UNIDROIT, (1991), Study LXX – Doc. 23, p. 16.

⁵¹⁵ See UNIDROIT, (1994), Study LXX – Doc. 48, Rome, February 1994, p. 21.

⁵¹⁶ ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31; Forrest, (2010), p. 205.

⁵¹⁷ For more information about the passing of the object between several possessors in good or bad faith, see UNIDROIT, (1990) Study LXX – Doc. 18, p. 19.

⁵¹⁸ UNIDROIT, (1991), Study LXX – Doc. 23, p. 16; this complication might be further exacerbated by the unavailability of specialised reviews in some parts of the world (*idem*).

⁵¹⁹ Forrest, (2010), p. 207.

⁵²⁰ In this respect, the LUAB was more precise than the 1995 convention as Article 8 of the draft LUAB specified that the moment of the handing over of the object would be determinative, unless the contract was formalised thereafter, which would make the conclusion of the contract the crucial moment at which good faith should be assessed (see UNIDROIT, (1989), Study LXX – Doc. 9, p. 8). Additionally, Article 9 LUAB requires good faith to be present during the negotiation and the conclusion of the contract. Despite their lack of

(2) Due diligence

The CGE seemed to be divided as to the need to adopt a clear definition of diligence, or whether they should merely prescribe guidelines as to the special degree of diligence that is to be required from acquirers:⁵²¹ whilst certain delegations stressed the need for the convention to lay down the clearest definition of diligence possible – ensuring that collectors would be aware of the standard of diligence required from them before acquiring cultural objects⁵²² –, other members believed that a general definition would reconcile the need to find common ground among all domestic legal orders and, at the same time, provide enough clarity to purchasers in understanding the standard to which their acquisitions are to be subjected to.⁵²³ Subsequently, disparities appeared as to the need for the definition to be all-encompassing, or merely illustrative and thus supplemented by more detail, as laid down in the explanatory report attached to the convention.⁵²⁴ During the DC, UNESCO remarked that, because the possessor would lose the object and eventually not be entitled to compensation, it might be particularly important to make the requirement of due diligence clear.⁵²⁵ Therefore, to determine the good faith of the possessor, Article 4 (4) provides a framework by which the court can establish the appropriateness of the steps undertaken by the possessor during the acquisition.⁵²⁶

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

This provision – which was inspired by Article 7 LUAB⁵²⁷ – is meant to provide guidelines to courts in assessing the good faith of the possessor.⁵²⁸ In fact, these courts will objectively weigh all the circumstances of the acquisition in order to determine whether the possessor neither knew, nor ought reasonably to have known, that the cultural object was stolen. This means that “*regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances*”. In other words, courts will vet all the steps that the acquirer has undertaken in ascertaining that the cultural object was not stolen, the presence of red flags during the acquisition and the response of the possessor in alleviating the concerns that were raised by these red flags. Thus, by weighing all the circumstances of the acquisition, domestic judges are

relevancy in cases concerning stolen objects (cf. Article 11 LUAB), these two provisions, suggest that good faith must be present throughout all the stages of the acquisition.

⁵²¹ UNIDROIT, (1991), Study LXX – Doc. 23, pp. 20-21.

⁵²² UNIDROIT, (1991), Study LXX – Doc. 23, p. 20.

⁵²³ UNIDROIT, (1991), Study LXX – Doc. 23, pp. 20-21.

⁵²⁴ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 98.

⁵²⁵ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 98.

⁵²⁶ Forrest, (2010), p. 207.

⁵²⁷ “Article 7 LUAB (1974) – (1) Good faith consists in the reasonable belief that the transferor has the right to dispose of the movables in conformity with the contract. (2) The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case. (3) In determining whether the transferee acted in good faith, account shall, *inter alia*, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor’s acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded”. Due to its general and flexible character, Article 7 of the LUAB served as a sturdy basis of reference in establishing the requirement of good faith of the convention (see UNIDROIT, (1986), Study LXX – Doc. 1, p. 8 and UNIDROIT, (1990), Study LXX – Doc. 19, p. 24). In fact, Article 4 (4) is primarily based upon paragraphs 2 and 3 of the LUAB (see ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 32): these paragraphs lay down subjective criteria for the assessment of the good faith of an acquirer, providing the judge seized with guidelines in his assessment (see UNIDROIT, (1986), Study LXX – Doc. 1, p. 29). What is more, similar to Article 4 (4), the list of criteria provided by Article 7 (3) of the LUAB was considered to be non-exhaustive (UNIDROIT, (1986), Study LXX – Doc. 1, p. 29). This is also mirrored in the use of the term ‘*inter alia*’ within the provision itself. In fact, Article 7 (3) LUAB would allow the judge to add criteria, including those that are prescribed in the *lex fori* (UNIDROIT, (1986), Study LXX – Doc. 1, p. 29). Consequently, although Article 7 LUAB served as the foundation for its development, Article 4 (4) was designed so as to refrain from speaking about good faith and was tailor-made for the acquisition of cultural objects (UNIDROIT, (1990), Study LXX – Doc. 19, p. 24). As was noted in the explanatory report of the *Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, the convention did not reproduce the complicated formula of the LUAB so as to ensure the simplicity of the provision and the application thereof. See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 32.

⁵²⁸ *Idem*.

given an important power of appreciation.⁵²⁹ Consequently, similar to notion of good faith that exist in domestic law, attempting to find a litmus test for due diligence would be elusive: the assessment of an acquirer's due diligence is fact-driven and left to the sovereign appreciation of the court seized with the claim in restitution.

As the list of variables constitutive of due diligence is introduced by the preposition 'including', it is important to remark that Article 4 (4) is merely illustrative and it cannot, therefore, be considered exhaustive.⁵³⁰ There was a disparity in opinion within the Study Group as to the need to lay down a comprehensive list of factors that would be indicative of the standard of cautiousness expected.⁵³¹ Originally, Article 4 (2) of the PDC produced by the SG after its third session would merely provide that the conditions laid down in assessing the diligence of the possessor at the time of the acquisition were "the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted any accessible register of stolen cultural objects which it could reasonably have consulted".⁵³² It was then accepted that these variables were to be supplemented by other elements found in paragraphs 2 and 3 of Article 7 LUAB, which were not transposed in the text of the PDC but were to be included in the explanatory report issued by the UNIDROIT Secretariat.⁵³³ Nonetheless, the provision was transitionally broadened, resulting in what is now Article 4 (4). Concerns had been expressed during the fourth meeting of the CGE that the list provided by Article 4 (4) was not strict enough and would render it too easy for possessors to obtain compensation from the claimant.⁵³⁴ In responding to these concerns, a delegation proposed adding more variables to the list.⁵³⁵ Other representatives emphasised, instead, the importance of the use of the preposition 'including' in the provision.⁵³⁶ This addition would make the list of Article 4 (4) non-exhaustive,⁵³⁷ allowing the court seized with the matter to take into account any other relevant factors.⁵³⁸ In fact, the members of the CGE found it unnecessary to overburden the article with additional conditions, since the non-exhaustive character of the provision was mirrored by the use of the preposition. As such, this addition gives a lot of flexibility to the court seized in assessing the due diligence on the basis of all the aspects that courts may deem to be of relevance to the determination of due diligence.⁵³⁹ It is, hence, possible for domestic courts to add to this list.⁵⁴⁰

Examples of elements that could be taken into account are notably: the nature of the cultural object, the terms of the contract, the circumstances surrounding its conclusion⁵⁴¹ – including the whereabouts of the parties at the time of the transaction,⁵⁴² the time of the day at which the said transaction took place,⁵⁴³ any haste to 'seal the deal'⁵⁴⁴ –, reasonable efforts to determine the provenance of an object,⁵⁴⁵ an incomplete provenance or the existence of information as to the legal export of an object,⁵⁴⁶ suspicious stains, marks, or any other indications present on the item or its container,⁵⁴⁷ or the fact that the cultural object originates from a country or region routinely subject to looting practices.⁵⁴⁸

⁵²⁹ Van Gaalen and Verheij, (1997), p. 197.

⁵³⁰ Bengs, (1996), p. 529; Prott, *Commentary on the Unidroit Convention*, (1997), p. 41; Calvo Caravaca and Caamiña Domínguez, (2009), p. 176.

⁵³¹ See for example UNIDROIT, (1990), Study LXX – Doc. 18, p. 16 where some members preferred not to complicate the regime of the convention with such a list, whilst other members considered oversimplification as less protective of the rights of the dispossessed owner.

⁵³² UNIDROIT, (1990), Study LXX – Doc. 19, p. 3 (Article 4 (2) of the PDC) and p. 24.

⁵³³ See for example 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 32.

⁵³⁴ UNIDROIT, (1994), Study LXX – Doc. 48, p. 22.

⁵³⁵ UNIDROIT, (1994), Study LXX – Doc. 48, p. 22.

⁵³⁶ UNIDROIT, (1994), Study LXX – Doc. 48, pp. 22-23.

⁵³⁷ UNIDROIT, (1994), Study LXX – Doc. 48, pp. 22-23.

⁵³⁸ UNIDROIT, (1993), Study LXX – Doc. 42, p. 23. See also 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 98.

⁵³⁹ See 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 32.

⁵⁴⁰ Bengs, (1996), p. 529.

⁵⁴¹ This was proposed by the delegations of Mexico and Turkey before the fourth session of the CGE. See (1993), Study LXX – Doc. 47, G.E./C.P. 4th session, Misc. 37, p. 42.

⁵⁴² Prott, *Commentary on the Unidroit Convention*, (1997), p. 47.

⁵⁴³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 47.

⁵⁴⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 47.

⁵⁴⁵ Doyal, (2000-2001), p. 669.

⁵⁴⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 41.

⁵⁴⁷ Prott, *Commentary on the Unidroit Convention*, (1997), p. 47.

⁵⁴⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 47.

E. Fair and reasonable compensation

Following Article 4 (1), the possessor that has demonstrated that he has acquired the cultural object in good faith is entitled to the payment of ‘fair and reasonable’ compensation upon returning the object.

Article 4 UNIDROIT Convention (1995) – (1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

The present section discusses the provisions pertaining to fair and reasonable compensation and the modalities of payment laid down in Article 4. In doing so, attention is devoted to the following aspects: 1. the object of the compensation, 2. the meaning to be given to ‘fair and reasonable’, 3. the modalities of payment and 4. alternatives to the payment of compensation.

1. COMPENSATION

During the third session of the CGE, a participant proposed prescribing ‘reimbursement’ instead of ‘compensation’.⁵⁴⁹ He averred that a diligent possessor should be entitled to reimbursement – including the reimbursement of restoration and conservation costs –, and not merely to compensation.⁵⁵⁰ Based on the regime of fair and reasonable compensation under discussion (see sub-section E. 2. below), another representative replied that it would not be impossible for a court to come to this conclusion during the proceedings, but that it would be inappropriate to establish a provision to this effect because this would entice the possessor to incur restoration costs, which may be undesirable for the object.⁵⁵¹ Instead, Article 4 (1) guarantees that compensation is paid to the possessor obliged to return the stolen object. The convention is thus concerned with ensuring compensation to the possessor for any loss that he has sustained. Nevertheless, it is inexplicit as to the nature of the said loss, which could either related to a loss of the *causa detentionis*, a loss of possession of the object, a loss of the purchase price or potentially a loss of all these elements combined. Although the drafters seem to have left this point to the appreciation of the domestic court seized by the claim in restitution, Siehr has submitted that this question is to be answered on the basis of the applicable domestic law.⁵⁵² Nevertheless, this submission is utterly problematic, as the distinction might be crucial when considering for value and gratuitous acquisitions: for example, the compensation of the loss of possession entitles the possessor to compensation, irrespective of whether the acquisition was gratuitous or not. This would have the undesirable effect of obliging the claimant to pay compensation for an object that was acquired gratuitously. On the other hand, the payment of compensation for the loss of the price paid has the effect of excluding gratuitous acquisitions from the compensatory regime posited by Article 4 of the convention. Nevertheless, this does not, *a priori*, sit well with Article 4 (5), which puts an heir or donee on an equal footing with an acquirer for value.⁵⁵³ In fact, it is unclear whether compensation needs to be paid to a person that acquired the object gratuitously.⁵⁵⁴ Consequently, some clarification with regard to the loss compensated could shed some light in this regard.

2. FAIR AND REASONABLE

The question of the amount of compensation was much disputed between the participants of the SG.⁵⁵⁵ In the *Loewe Preliminary draft Convention*, Article 3 (1) thereof provided for the payment of either the price paid by the possessor – or by the person from whom he received it by means of donation or inheritance –, or of the value of the object at its place of situation,⁵⁵⁶ unless the said possession was in cognition of the unlawful origin of the

⁵⁴⁹ UNIDROIT, (1993), Study LXX – Doc. 39, p. 19.

⁵⁵⁰ UNIDROIT, (1993), Study LXX – Doc. 39, pp. 19-20.

⁵⁵¹ UNIDROIT, (1993), Study LXX – Doc. 39, p. 20.

⁵⁵² Siehr, (1998), pp. 675-676.

⁵⁵³ For more details in this regard, see section D. 1. (2) above.

⁵⁵⁴ See Siehr, (1998), p. 676; as was pointed out by a member of the CGE during the second session, a problem with Article 4 (5) stems from the fact that the acquisition by the donee and heir was gratuitous and the payment of compensation for a gratuitous object seemed, therefore, to be misplaced. UNIDROIT, (1991), Study LXX – Doc. 23, p. 23; during the DC, the Turkish delegation argued that it would be possible for the court seized to discard the payment of compensation when the payment of such compensation would be deemed inappropriate. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P./ 2, 6, 21, 24, 70 Corr. 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, p. 289.

⁵⁵⁵ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 41-42.

⁵⁵⁶ UNIDROIT, Preliminary draft Convention on the restitution of cultural property (drawn up by Mr Roland Loewe in the light of the two studies prepared by Mme G. Reichelt), Study LXX – Doc. 3, Rome, June 1988, p. 2.

object (cf. see Article 3 (2) of the *Loewe Preliminary draft Convention*).⁵⁵⁷ In a similar fashion to the Loewe draft, Article 3 (1) of the *Preliminary draft Convention on the restitution and return of cultural objects*, which resulted from the first session of the SG, prescribed for the payment of compensation of either the purchase price paid by the innocent possessor or the market value at the place where the object is situated.⁵⁵⁸ These two points of reference were retained to make it impossible for the possessor to speculate on the value of the object when seeking compensation.⁵⁵⁹ An alternative was later on proposed to let the domestic judge decide on the payment of an ‘equitable compensation’,⁵⁶⁰ which would not exceed the value of the object or the price paid for it,⁵⁶¹ or the price paid for a similar object in the state where it is located.⁵⁶² This alternative was put forward to take into consideration the impossibility for a dispossessed owner to pay compensation.⁵⁶³ As such, the judge could take the financial situation of the claimant into account, including any money that has been paid by an insurance company.⁵⁶⁴ This new terminology was opposed by some members of the SG because of the too broad discretion given by these terms to the domestic judge,⁵⁶⁵ favouring the use of a more precise wording such as ‘purchase price’ or ‘actual value’, that had initially been retained and posed no interpretative problems.⁵⁶⁶ In fact, these members proposed to measure the compensation by establishing the ‘value’ of the object, taking into consideration the different dimensions that could be given to this term.⁵⁶⁷ Nevertheless, this last proposition was criticised on the basis that it would give unfettered discretion to the authority seized by the contention.⁵⁶⁸ Instead, the idea of leaving the determination of an equitable sum to the discretion of domestic judges obtained support from Fraoua, who reiterated that this scenario would entitle a judge to take the financial capacity of a dispossessed person into consideration in calculating the amount of compensation.⁵⁶⁹ If no account were given to this factor, this would result in the impossibility to recover the stolen cultural object when the claimant could not afford to pay the compensation,⁵⁷⁰ which would run contrary to the aims of the future instrument. Furthermore, Fraoua advanced that it would be misplaced to equate the results of sales through an auction house to the value of the compensation, notably because these results are often inflated and are not representative of the artistic or aesthetic value of the cultural object.⁵⁷¹ During the third session of the SG, this polarisation was resolved by abandoning the value criterion in favour of relying on the discretion of domestic courts. Nonetheless, in order to avoid confusion with concepts already known under domestic law – including the notion of ‘equitable’ –, the reference to an equitable amount was to be replaced by the terminology ‘fair and reasonable compensation’.⁵⁷² In fact, the members of the SG agreed to provide a diligent purchaser with fair and

⁵⁵⁷ UNIDROIT, Study LXX – Doc. 3, (1986), p. 3.

⁵⁵⁸ UNIDROIT, ‘Preliminary draft Convention on the restitution and return of cultural objects (prepared by the Unidroit Secretariat), Study LXX – Doc. 11, Rome, February 1989, p. 3; see also alternative II to Article 3 (2) in UNIDROIT, *The International Protection of Cultural Property – Preliminary draft Convention on the restitution and return of cultural objects* (prepared by the Unidroit Secretariat in the light of the discussions of the study group on the international protection of cultural property at its second session held in Rome from 13 to 17 April 1989), Study LXX – Doc. 15, Rome, July 1989, p. 5.

⁵⁵⁹ UNIDROIT, (1989), Study LXX – Doc. 14, p. 11; interestingly, the payment of this compensation was, at first, made optional and dependent on the willingness of the dispossessed owner entitled to restitution. See UNIDROIT, (1989), Study LXX – Doc. 11, p. 3. Article 3 (1) of the Preliminary draft prescribes: “Any dispossessed person who is entitled to restitution of a cultural object shall at the same time, **but at his own option** (emphasis added), compensate the possessor [...]”.

⁵⁶⁰ See UNIDROIT, (1989), Study LXX – Doc. 14, p. 12. The terminology ‘equitable compensation’ was also already well-known in many domestic legal orders and it would therefore not pose any problems of application. See the commentary by Fraoua in UNIDROIT, (1989) Study LXX – Doc. 16, p. 10.

⁵⁶¹ UNIDROIT, (1989), Study LXX – Doc. 14, p. 11.

⁵⁶² See Article 8 (1) of the Preliminary draft Convention on the restitution and return of cultural objects, in UNIDROIT, (1989), Study LXX – Doc. 11, p. 7; the reference to the price of the object in the country where the object is located was considered to be particularly problematic during the second session of the Study Group. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 24.

⁵⁶³ UNIDROIT, (1989), Study LXX – Doc. 14, p. 11.

⁵⁶⁴ UNIDROIT, (1989), Study LXX – Doc. 14, pp. 11-12.

⁵⁶⁵ UNIDROIT, (1989), Study LXX – Doc. 14, p. 12.

⁵⁶⁶ UNIDROIT, (1989), Study LXX – Doc. 14, p. 12.

⁵⁶⁷ UNIDROIT, (1989), Study LXX – Doc. 14, p. 24.

⁵⁶⁸ UNIDROIT, (1989), Study LXX – Doc. 14, p. 24.

⁵⁶⁹ UNIDROIT, (1989), Study LXX – Doc. 16, p. 13.

⁵⁷⁰ UNIDROIT, (1989), Study LXX – Doc. 16, p. 13.

⁵⁷¹ UNIDROIT, (1989), Study LXX – Doc. 16, p. 13; in support of this submission, it should be recalled that the obligation to pay just compensation to the innocent purchaser under the regime of the 1970 convention was already seen as particularly problematic because of the increase in the value of the object to the final purchaser. See UNIDROIT, Study LXX – Doc. 1, (1986), p. 41; furthermore, the Indian delegation that took part in the DC noted that the payment of compensation that matches the purchase price would only have the result of encouraging the sale of stolen cultural objects because the price increases with each transaction. See ‘Working papers submitted to the Committee of the Whole’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/W.P. 42, 12 June 1995, p. 132.

⁵⁷² See UNIDROIT, (1990), Study LXX – Doc. 18, p. 16; Prott, *Commentary on the Unidroit Convention*, (1997), p. 42; see also UNIDROIT, (1990), Study LXX – Doc. 19, pp. 22-23; the use of the characterisation ‘fair and reasonable’ was a compromise between those states that advocated no compensation and states that supported the payment of full compensation to a duly diligent purchaser (see UNIDROIT, (1990), Study LXX – Doc. 19, p. 22; Office Fédéral de la Culture (Suisse), (1998), p. 65). Furthermore, the qualification ‘fair and reasonable’ was already familiar to other international instruments (UNIDROIT, (1989), Study LXX – Doc. 14, p. 12; Prott, *Commentary on*

reasonable compensation and that the market value / price paid considerations would fall within the assessment of this criterion.⁵⁷³ It would, therefore, be adequate to leave this appreciation to the judge seized with the matter, who might take these two variables into consideration when computing the amount of compensation that is to be paid.⁵⁷⁴ During the first session of the CGE, it was proposed to establish the fairness and reasonableness of the compensation on the basis of what would be fair and reasonable in all the circumstances.⁵⁷⁵ Other representatives pointed out the contrast between this proposition and the requirement to pay ‘just’ compensation prescribed by the 1970 convention.⁵⁷⁶ Ultimately, it was preferred to leave these considerations to an explanatory report.⁵⁷⁷

Consequently, the language of the convention was intentionally left unclear and undefined.⁵⁷⁸ This nebulousness was deliberate so as to enable domestic courts to determine what is fair and reasonable,⁵⁷⁹ thereby giving leeway to courts in deciding about the amount of compensation to be paid.⁵⁸⁰ What is more, by not referring to the purchase price or the market value, the provision is not tying the judges to these numbers.⁵⁸¹ Furthermore, this ambiguity made it possible to take the financial resources of the claimants into consideration.⁵⁸² In other words, account is taken of what the claimant can afford to pay as compensation, and what the possessor is willing to accept.⁵⁸³ As such, the qualification ‘fair and reasonable compensation’ entitles domestic judges to take the financial means of developing countries into consideration in the calculus of the amount to pay.⁵⁸⁴ The use of the terms ‘fair and reasonable’ was, therefore, deemed appropriate. Furthermore,

the Unidroit Convention, (1997), p. 42) and was applied, for example, in situations concerning compensation following from nationalisation in public international law (see UNIDROIT, (1990), Study LXX – Doc. 18, p. 18). Therefore, it had the advantage of being a universal concept (see UNIDROIT, (1990), Study LXX – Doc. 18, p. 18). One member of the Study Group pointed out the fact that in dealing with these specific issues, courts have generally prescribed the payment of compensation of lesser value – and even sometimes importantly of lesser value – than the commercial value of the misappropriated object (UNIDROIT, (1990), Study LXX – Doc. 18, p. 18 and Prot, *Commentary on the Unidroit Convention*, (1997), p. 42); during the DC, the German delegation noted that the compensation should be limited to a ‘fair’ compensation – thus in accordance with the compensatory regime of Directive 93/7/EEC – and not to ‘fair and reasonable’ compensation (see ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Germany)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 2, April 1995, p. 78. See also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 183). The same delegation believed that the payment of ‘fair and reasonable’ compensation gave “excessive room for interpretation” and was less clear than the payment of ‘fair’ compensation. (See ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (People’s Republic of China, Japan and New Zealand)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 79).

⁵⁷³ UNIDROIT, (1990), Study LXX – Doc. 18, p. 17.

⁵⁷⁴ UNIDROIT, (1990), Study LXX – Doc. 18, p. 17.

⁵⁷⁵ See UNIDROIT, (1991), Study LXX – Doc. 23, p. 18. This was further supported by the Canadian delegation, which had used a similar terminology in deciding about the compensation in its law implementing the 1970 UNESCO convention (*idem*).

⁵⁷⁶ UNIDROIT, (1991), Study LXX – Doc. 23, p. 18.

⁵⁷⁷ UNIDROIT, (1991), Study LXX – Doc. 23, p. 18.

⁵⁷⁸ Fox, (1993), p. 262; Siehr, (1997), p. 309.

⁵⁷⁹ Fox, (1993), p. 262; during the DC, the Portuguese delegation noted that leaving the determination of what is fair and reasonable compensation constitutes an application of the principle of equity, a principle that is ‘a feature of all legal systems’. Therefore, it should not be difficult for judges to determine the amount of fair and reasonable compensation. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S. R. 4, 14 June 1995, p. 183.

⁵⁸⁰ Office Fédéral de la Culture (Suisse), (1998), p. 65.

⁵⁸¹ UNIDROIT, (1990), Study LXX – Doc. 19, p. 23.

⁵⁸² ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30.

⁵⁸³ Therefore, the Study Group modified the terms ‘equitable compensation’ to ‘equitable compensation having regard to the situation of the two parties’ in earlier drafts. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 12; Office Fédéral de la Culture (Suisse), (1998), p. 65.

⁵⁸⁴ It is important to note in this respect that concerns were raised by the Thai delegation after the first session of the CGE that what constitutes fair and reasonable compensation to developed states might not be fair and reasonable to developing states, notably because of the limited budget that the latter states have (see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of Governments on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Thailand), Study LXX – Doc. 28, Rome, January 1992, p. 1). The concerns of source states were already raised earlier in the drafting process of the convention: the paying of compensation prescribed by Article 7 (b) (ii) of the 1970 convention was already particularly difficult to cope with by source states, which often lacked the financial means to pay the said compensation (UNIDROIT, (1989), Study LXX – Doc. 10, p. 10). This meant, to some participants, that the payment of compensation should be made conditional upon the fulfilment of stringent requirements, such as the reversal of the burden of proof, a heavy burden in standard of precautions expected from the purchaser or a considerate method of calculus of the compensation (UNIDROIT, (1989), Study LXX – Doc. 10, p. 10). At last, the chosen formulation served to alleviate the concerns that were formulated by developing states about the impossibility to afford paying the compensation because of the lack of financial resources. See for example the concerns raised by the Asian-African legal consultative committee in UNIDROIT, (1991), Study LXX – Doc. 21, p. 1. See also the commentary of the Iranian delegation in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 187; some delegations did not accept that the claiming state’s capacity to pay would be accepted as a valid

this terminology would also provide sufficient flexibility to domestic judges in determining whether the acquirer could also reclaim money from the seller,⁵⁸⁵ as is possible in some legal systems.⁵⁸⁶ If the acquirer in good faith can then reclaim from the seller, the compensation that has to be paid by the claimant need not be the full purchase price and can, therefore, be much less.⁵⁸⁷

3. METHOD OF COMPUTATION

The terms ‘fair and reasonable’ are not defined by the convention, and the document does not provide any material criteria that can be used in order to establish the amount of compensation.⁵⁸⁸ It, additionally, remains unclear which law – if any – should be applied in order to determine the amount of the compensation.⁵⁸⁹ Furthermore, no particular standard of fairness and reasonableness was envisaged by the drafters of the convention and it fails to provide a means of assessing the value of ritual and ethnographic materials.⁵⁹⁰ This lack of concreteness has led commentators to speculate about the advantages that this vagueness entails for the concept’s interpretation⁵⁹¹ and about the exact amount of compensation that must be paid:⁵⁹² Klein submits that the notions of ‘fair and reasonable’ need to be understood in light of their ordinary meaning.⁵⁹³ Thus, since the UNIDROIT convention has two authentic versions – i.e. French and English –, the meaning of these two terms is the one given to these terms in these two respective languages.⁵⁹⁴ In this regard, attention should be given to the discrepancy that exists between the French version requiring the payment of ‘une indemnité équitable’ – which matches the former notion of ‘equitable compensation’ that was put forward at the SG – and the English version that requires the payment of ‘fair and reasonable compensation’. Alternatively, Hoffman has submitted that such compensation could be assessed by taking into account either the intrinsic value of the object in the country of origin, or its commercial value in its domestic or international market.⁵⁹⁵ Nonetheless, a reference to the value of the object in the country of origin was discussed during the second session of the SG. Its members concluded that it would not be desirable to make such a reference because of the complications that would ensue in determining this value and they submitted that a reference to a foreign value might also prove detrimental to the dispossessed person.⁵⁹⁶ Instead, leaving the issue of the determination of the value of the object to the domestic judge seized with the matter seemed more appropriate to them.⁵⁹⁷ Following the UNIDROIT Secretariat – and contrary to what was submitted by some commentators⁵⁹⁸ – the compensation does not specifically match the

criterion in the determination of the amount of compensation. This was, for example, the position of Germany. See ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Germany)’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/5 Add. 2, April 1995, p. 79 and ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 183.

⁵⁸⁵ Protz, *Commentary on the Unidroit Convention*, (1997), p. 42.

⁵⁸⁶ Protz, *Commentary on the Unidroit Convention*, (1997), p. 42.

⁵⁸⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 42.

⁵⁸⁸ Calvo Caravaca, (2004), p. 98; “The UNIDROIT Convention does not specify a standard, such as the price paid or the commercial value of the object as a method for resolving the issue of what constitutes “fair and reasonable compensation.” It also does not provide a more subjective standard which might be an appropriate measure for valuing ritual or ethnographic objects”. See Sidorsky, (1996), p. 28; a proposal made by the delegation of The Netherlands for the Committee of the Whole put forward the idea of creating an article laying down elements of the fair and reasonable compensation, similar to Article 4 (4) for due diligence (see ‘Working Papers submitted to the Committee of the Whole’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/C.1/W.P. 2, 7 June 1995, p. 116). Nonetheless, this proposal was not retained in the final version of the convention.

⁵⁸⁹ Calvo Caravaca, (2004), p. 98, where Calvo Caravaca questioned whether the domestic court that has been seized is to apply its own substantive law on compensation and suggests that this option is the only viable option.

⁵⁹⁰ Sidorsky, (1996), p. 28.

⁵⁹¹ Klein, (1999), pp. 275-276.

⁵⁹² See Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 36.

⁵⁹³ Klein, (1999), p. 277.

⁵⁹⁴ Klein, (1999), p. 277.

⁵⁹⁵ Hoffman, (10 March 1995), p. 3.

⁵⁹⁶ See UNIDROIT, (1989), Study LXX – Doc. 14, pp. 12-13.

⁵⁹⁷ UNIDROIT, (1989), Study LXX – Doc. 14, p. 13.

⁵⁹⁸ Van Gaalen and Verheij infer from the Explanatory report of the Draft convention (CONF. 8/3) that the compensation will at least comprise the price paid for the object. Their submission is based on paragraph 60 thereof: “It was observed that a specific reference to the price paid or to the object’s commercial value would encourage the judge to give too much weight to those factors in determining what is fair and reasonable and the committee therefore preferred to leave it to the discretion of the judge to reach the same result”. However, this commentary was followed by the statement: “It may likewise be recalled that in public international law in connection with compensation for nationalisation, judges have for many years applied this notion on the understanding that it may correspond to a sum lower, and sometimes very much lower, than the real commercial value of the object or the price actually paid for it”. Hence, the inference made by Van Gaalen and Verheij is incorrect. See Van Gaalen and Verheij, (1997), p. 197 and compare with ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/3, December 1994, p. 30.

market value,⁵⁹⁹ and in fact, it can be considerably below the market level or below the purchase price.⁶⁰⁰ The Secretariat – recognising that an important margin of appreciation is given to the court seized⁶⁰¹ – proposed that courts should take a whole panoply of elements into account in their determination.⁶⁰² Some of the **main elements** to take into consideration are:

- the market value;⁶⁰³
- the price paid;⁶⁰⁴
- the amount that the possessor is willing to accept as compensation;⁶⁰⁵
- the solvability of the claimant;⁶⁰⁶
- the possibility for the purchaser to recover money from the seller, thus avoiding the payment of double compensation⁶⁰⁷ (in this regard, see the discussion about Articles 4 (2) and (3) below);
- the possibility for third parties, such as cultural foundations – as well as their financial contributors – to help developing countries pay the indemnity due;⁶⁰⁸
- the funding of the cultural foundations helping developing countries;⁶⁰⁹
- the fees for the legal proceedings incurred by the claimant;⁶¹⁰
- the costs of restoration or maintenance of the object.⁶¹¹

Elements that cannot be computed in the calculation include:

- punitive damages;⁶¹²
- legal interests running from the day of the acquisition;⁶¹³
- for artefacts, the costs of excavation or of removal.⁶¹⁴

Despite the many uncertainties surrounding the determination of fairness and reasonableness, the following submissions are ascertainable:

⁵⁹⁹ Protz, *Commentary on the Unidroit Convention*, (1997), p. 42; if the compensation were to match the market value, the payment of the said compensation might prove too difficult for source states to pay, since this would be particularly burdensome in light of their limited budgets. Hoffman, (10 March 1995), p. 3.

⁶⁰⁰ Jolles, (1997), p. 55; Jayme, (2006), pp. 397-398; it should also be noted that if the claimant is required to repay the purchase price for the object, this will quite often make it impossible for him to recover if the purchase price was extremely high. Hence, the requirement to repay the purchase price would constitute a protectionist measure for the purchaser in good faith and any other person in the chain of possession prior to him. See Protz, *Commentary on the Unidroit Convention*, (1997), p. 30.

⁶⁰¹ Renold, (1997), p. 29; Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou exportés (du 24 juin 1995)', (1997), p. 36; "Domestic judges apparently are being asked to use their discretion in a purely equitable capacity". See Bengs, (1996), p. 529; Calvo Caravaca and Caamiña Domínguez, (2009), p. 177.

⁶⁰² Renold, (1997), p. 29.

⁶⁰³ Van Gaalen and Verheij, (1997), p. 197.

⁶⁰⁴ Van Gaalen and Verheij, (1997), p. 197.

⁶⁰⁵ Office Fédéral de la Culture (Suisse), (1998), p. 65.

⁶⁰⁶ Renold, (1997), p. 29; the solvability of the claimant was heavily criticised as a criterion that is to be used in determining the amount of compensation to be paid (see Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou exportés illicitement (du 24 juin 1995)', (1997), p. 36) but it appears to be of particular importance as witnessed by the *travaux préparatoires* discussed above (see Klein, (1999), p. 276; Office Fédéral de la Culture (Suisse), (1998), p. 65; Van Gaalen and Verheij, (1997), p. 197). This element of solvability accounts for the differences between rich countries and third world countries (see Van Gaalen and Verheij, (1997), p. 197) and is taken into consideration so as to ensure that financial considerations will not deter the owner from reclaiming his property (*idem*).

⁶⁰⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 42; Klein, (1999), p. 277.

⁶⁰⁸ Klein, (1999), p. 277.

⁶⁰⁹ Van Gaalen and Verheij, (1997), p. 197.

⁶¹⁰ Forrest, (2010), p. 207.

⁶¹¹ See for example the proposal by the German delegation to have the expenditure necessary for the restoration, maintenance and improvement of the object repaid when the fair and reasonable compensation would be lower than the value of the object itself (excluding expenditures made for normal maintenance) in UNIDROIT, (1992), Study LXX – Doc. 27, p. 2.

⁶¹² See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 292.

⁶¹³ As was submitted by Fraoua after the second session of the Study Group, legal interests running from the moment of the purchase cannot be computed in the calculation of fair and reasonable compensation because this would have the effect of supporting speculation in cultural objects. See UNIDROIT, (1989), Study LXX – Doc. 16, p. 10.

⁶¹⁴ Although the Asian-African legal consultative committee reacting upon the PDC advanced that only the costs of extraction and of transport could be computed in the calculus of the amount of compensation and that the compensation for these objects should not be based on a market-referencing price (see UNIDROIT, (1991), Study LXX – Doc. 21, p. 1), UNESCO noted that taking the costs of excavation and of removal (e.g. transport) of the artefact in the computation of the fair and reasonable compensation would not be reasonable. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations on international organisations on the Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Unesco, Interpol), Study LXX – Doc. 25, Rome, January 1992, p. 9.

- the court seized must set the amount of compensation, which will depend upon the circumstances of the case;⁶¹⁵
- the convention explicitly rejects the payment of full compensation;⁶¹⁶
- the amount of compensation does not equate the price paid;⁶¹⁷
- the compensation may be inferior to the commercial value of the property;⁶¹⁸
- it cannot be limited to a ‘symbolic’ amount;⁶¹⁹
- the notion of fair and reasonable compensation imposes strict limits upon the amount to be paid⁶²⁰ and, as such, the provision gives extensive discretion to domestic judges.⁶²¹

It is important to note that the nebulousness of the concept of fair and reasonable compensation makes it possible to provide a higher compensation to a possessor that is left without a remedy against the transferor, which is realistic when the cultural object is returned after the action against the transferor has expired. Furthermore, the nebulousness of the notion of ‘fair and reasonable compensation’ makes the convention more accessible.⁶²² Nonetheless, in a similar fashion to the 1970 UNESCO instrument, it sacrifices the uniformity and certainty of commercial transactions in favour of accessibility.⁶²³

To many states, the biggest danger in the determination of the amount of restitution is that of expropriation without just compensation.⁶²⁴ Nowadays, the prohibition to expropriate someone from his property without just compensation is a principle that is present in many states’ legal systems⁶²⁵ and ranks, quite often, as a constitutional guarantee. As such, in cases where the good faith possessor is required to restore the stolen chattel, the possessor must be compensated for the loss.⁶²⁶ If the amount he receives is lower than the price paid, then there will be a situation of unfairness towards the *bona fide* purchaser. To correct this negative outcome, it has been advanced that states guaranteeing expropriation with just compensation should pay the difference.⁶²⁷ Although the practicality of this proposal is tainted by scepticism, another solution would be to interpret the provision of the convention as providing for full compensation.⁶²⁸ This aspect will have to be dealt with, in practice, by the domestic courts in order to see how it could be remedied, but several states have already criticised the fact that the compensation is not equal to the purchase price.⁶²⁹

Ancillary costs, such as the costs of transportation, insurance, storage, the costs incurred in the exercise of due diligence, the various legal costs undertaken during the proceedings and any money spent on the restoration of the cultural object,⁶³⁰ are not covered by the convention.⁶³¹ Because of the lack of specificity of the

⁶¹⁵ Doyal, (2000-2001), p. 670.

⁶¹⁶ See Schneider, (1996), p. 146.

⁶¹⁷ Fraoua, R., ‘Arab States and the 1995 UNIDROIT Convention’, in: UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming; this submission can be contrasted with the following: in case of illegal export, the Japanese delegation that took part in the DC believed that the compensation could equate the price paid since the possessor acquired the illegally exported cultural object *a domino*: “[...] if the request will have the effect of depriving the possessor of ownership, fair and reasonable compensation should be the purchase price paid by the possessor in cases where he obtained the object by purchase. We consider that the property interests of the possessor of an illegally exported cultural object deserve greater protection than do those of the possessor of a stolen cultural object, because the possessor of an illegally exported cultural object has acquired the object from its legal owner by an otherwise perfectly legal transaction but is, nonetheless, required to return it by virtue of this Convention because the export regulations of a foreign State have been violated”. See ‘Comments by Governments on the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects: People’s Republic of China, Japan and New Zealand’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, p. 75.

⁶¹⁸ Klein, (1999), p. 276; as was noted by the Portuguese delegation during the DC: “[...] the compensation awarded should not reflect the market value of the object as the acquirer’s good faith would never remedy the illegal origin of a stolen object”. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188.

⁶¹⁹ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou exportés illicitement (du 24 juin 1995)’, (1997), p. 36; Calvo Caravaca and Caamiña Domínguez, (2009), pp. 177-178.

⁶²⁰ ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 30.

⁶²¹ Doyal, (2000-2001), p. 670.

⁶²² Hoffman, (10 March 1995), p. 3.

⁶²³ Hoffman, (10 March 1995), p. 3.

⁶²⁴ Aubert, (1997), p. 93.

⁶²⁵ Jolles, (1997), p. 55.

⁶²⁶ Klein, (1999), p. 278; Calvo Caravaca and Caamiña Domínguez, (2009), p. 177.

⁶²⁷ Aubert, (1997), p. 95.

⁶²⁸ Aubert, (1997), p. 95.

⁶²⁹ This is notably the case in Germany and Sweden, see Office Fédéral de la Culture (Suisse), (1998), p. 47.

⁶³⁰ Provided, of course, that the damage to the object has occurred because of or after the theft has taken place; Prott, *Commentary on the Unidroit Convention*, (1997), p. 43.

nature of the compensation, it is unclear whether these costs ought to be computed into the amount of fair and reasonable compensation that was discussed above.

Conservation, restoration and maintenance of the stolen cultural object

The convention is silent as to the reimbursement of these costs.⁶³² Nonetheless, during the first session of the CGE, it was advanced that certain provisions had to be made in order to cover the expenses necessary to ensure the conservation of the cultural object.⁶³³ The representative addressing this issue advanced that by not entitling the possessor – irrespective of his good or bad faith – to reclaim these costs would result in disincentivising him from undertaking efforts to conserve the object.⁶³⁴ UNESCO warned the participants in the committee of the possibility for the possessor, even when he acted in bad faith, to recover conservation costs when handing back the cultural object: because the professions of restorer or conservator are not regulated, these titles can be used without proving any professional qualification.⁶³⁵ Consequently, the possessor could abuse the situation by increasing the costs of conservation so as to ensure that the claimant might not be able to afford to pay the compensation.⁶³⁶ The destruction of the integrity of the object through ‘restoration work’ might also result in the claimant no longer being interested in reclaiming the object.⁶³⁷ Although some adamant members of the CGE believed that the costs of restoration, maintenance and conservation should be borne by the claimant,⁶³⁸ the committee – during its second session – rejected the idea that the possessor should be entitled to have these costs reimbursed.⁶³⁹ As was noted by Prott – reiterating UNESCO’s view on the matter –, it was deemed unwise to prescribe the reimbursement of restoration costs since a) this would encourage possessors to either undertake restorations to have the claimant desist itself from a claim in restitution because the restoration has affected the object to the extent that it has lost value to the claimant and b) this would increase the amount to be reimbursed.⁶⁴⁰ Consequently, in these circumstances it would be unlikely that the restorations would be of the standard that is required.⁶⁴¹

During the DC, the Japanese Delegation was particularly fond of the idea that these costs should be reimbursed – irrespective of the good or bad faith of the possessor⁶⁴² – and in order to support its proposals, it put forward Japanese law as a possible model that could be followed in applying the convention.⁶⁴³ In response, it was reiterated that allowing the diligent purchaser to recover all the costs might lead to the result that some of these purchasers will undertake unnecessary restoration to the detriment of the object, in order to fetch a better price for it, and thus increase its merchantable value.⁶⁴⁴ Consequently, this includes the danger that the diligent purchaser would purposefully undertake restoration work so as to receive more compensation.⁶⁴⁵ Furthermore, the restoration service could be of poor quality, which means that money has been paid for a service that

⁶³¹ Calvo Caravaca, (2004), p. 98.

⁶³² Prott, *Commentary on the Unidroit Convention*, (1997), p. 43. Nevertheless, it should be remarked that Prott specifically refers to restoration costs, and not to the other adjacent costs.

⁶³³ UNIDROIT, (1991), Study LXX – Doc. 23, p. 17.

⁶³⁴ UNIDROIT, (1991), Study LXX – Doc. 23, p. 17; see also the Japanese submission that the reimbursement would give incentives to the possessor to preserve and repair the object during his possession of the object, in ‘Working Papers submitted to the Committee of the Whole’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 6, 7 June 1995, p. 119.

⁶³⁵ See UNIDROIT, (1992), Study LXX – Doc. 25, p. 8.

⁶³⁶ UNIDROIT, (1992), Study LXX – Doc. 25, p. 8.

⁶³⁷ UNIDROIT, (1992), Study LXX – Doc. 25, pp. 8-9.

⁶³⁸ UNIDROIT, (1992), Study LXX – Doc. 30, p. 17.

⁶³⁹ UNIDROIT, (1992), Study LXX – Doc. 30, p. 17.

⁶⁴⁰ See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects as Revised June 1992 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 36, Rome, February 1993, p. 19.

⁶⁴¹ UNIDROIT, (1993), Study LXX – Doc. 36, p. 19.

⁶⁴² See for example ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (People’s Republic of China, Japan and New Zealand)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 74. See also ‘Working Papers submitted to the Committee of the Whole’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 6, 7 June 1995, p. 118. Japan also wanted to include this right to reimbursement as a condition of restitution (see *ibidem*, p. 119).

⁶⁴³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 43; the Japanese delegation that took part in the DC noted that “Under Japanese law the possessor of an object belonging to another person was – if he had to return it – entitled to compensation for the amount of the costs of maintenance and conservation of the object, irrespective of whether or not he knew or ought to have known that the object was stolen, and was entitled to retain the object until such payment had been effected”. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 187.

⁶⁴⁴ See for example the case of the Northern Kwakiutl Thunderbird headdress that is given by Prott. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 43.

⁶⁴⁵ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 43-44.

negatively affects the value of the object, or that will require rectifications or even further restorations.⁶⁴⁶ Henceforth, the DC preferred to leave this aspect unsettled in the final version of the treaty.⁶⁴⁷ While there will be instances where these costs are justified and required,⁶⁴⁸ the repayment of costs will, ultimately, have to be decided upon the basis of the *lex fori*.⁶⁴⁹

Quid of the damage done to the object because of poor restorations? In the *Autocephalous* case discussed in Chapter 3 above, Goldberg had the curved mosaics – the concavity of which was a result of its placement in the apse of the Orthodox Church, from where it had been extracted – flattened.⁶⁵⁰ This process had irreversible consequences for these ensembles, which could not, afterwards, be brought back to their original shape and were, consequently, deprived from their depth and perspective.⁶⁵¹ Moreover, because Goldberg had to file for bankruptcy, it was impossible for the government of Cyprus to claim additional damages for the morphological changes.⁶⁵² In this regard, the CGE noted that the payment of compensation would not make it impossible to recover further compensation from the possessor for the damage suffered by the object as a result of poor conservation efforts.⁶⁵³

Costs of restitution

With regard to the costs restitution, – and contrary to Article 6 (4) that is concerned with the costs of returning illegally exported cultural property⁶⁵⁴ – there are no set provisions in the convention that deal with the reimbursement of said costs.⁶⁵⁵ Despite a proposal made by the delegation of the Republic of Korea to have Article 4 address the question of payment of the costs of restitution in a similar fashion to what Article 6 (4) prescribes in case of return,⁶⁵⁶ no such provision was retained in the final version of the convention. The drafters of the convention decided to leave the question of the recovery of these costs to the discretion of the judges seized with the contention.⁶⁵⁷

⁶⁴⁶ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 43-44; see also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188. See also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 292.

⁶⁴⁷ Prott, *Commentary on the Unidroit Convention*, (1997), p. 44.

⁶⁴⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 44.

⁶⁴⁹ Calvo Caravaca and Caamiña Domínguez, (2009), p. 177.

⁶⁵⁰ Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 453.

⁶⁵¹ Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 453.

⁶⁵² Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 453.

⁶⁵³ UNIDROIT, (1991), Study LXX – Doc. 23, p. 17; see also the commentary by the Turkish delegation that took part in the DC in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 187.

⁶⁵⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 67.

⁶⁵⁵ Prott, *Commentary on the Unidroit Convention*, (1997), p. 43.

⁶⁵⁶ See ‘Working Papers submitted to the Committee of the Whole’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 8, 8 June 1995, p. 121.

⁶⁵⁷ Prott, *Commentary on the Unidroit Convention*, (1997), pp. 43, 67.

F. Modalities of payment

Alongside the determination of what amounts to fair and reasonable compensation, attention will now be devoted to the modalities of payment of the compensation to the possessor. In discussing these, the following questions will be tackled: 1. who must pay the compensation?; 2. when must the compensation be paid? and 3. what are the legal implications resulting from the non-payment of the compensation?

1. WHO?

Although Article 4 (1) requires that fair and reasonable compensation must be paid to the possessor that is returning the cultural object, Article 4 does not precisely explain who has to pay.⁶⁵⁸ There was agreement between the drafters that the payment of the fair and reasonable compensation should not be imputed exclusively upon the owner if alternatives – such as sponsorship – are available.⁶⁵⁹ Thus, Article 4 was purposely left unspecific because it is possible to claim the payment of the compensation from different persons.

(1) Claimant

Originally, it was intended to require the claimant to pay the compensation.⁶⁶⁰ Nevertheless, one representative that took part in the second session of the CGE noted that requiring this from the claimant was similar to prescribing the payment of a ransom and that it would be tantamount to ensuring that the thief or a bad faith seller would be financially advantaged.⁶⁶¹ Since the thief would be the only one that benefits from the situation,⁶⁶² it would then be unfair to require payment from the claimant.⁶⁶³ In response to the ransom argument, another representative averred that it was often impossible to find the thief at the time the claim in restitution was brought before the court,⁶⁶⁴ leaving the payment of compensation to the claimant in order to secure the prompt recovery of the stolen object. Nonetheless, the members of the CGE unanimously concluded that the convention did not oblige the claimant to pay the compensation and that it was not to discard alternative possibilities, such as sponsorship or other methods of paying compensation.⁶⁶⁵ Thenceforth, two mechanisms were designed to alleviate the burden incumbent upon the claimant: subsidiarity and the claimant's right to recover the compensation from any other person, to be found in Articles 4 (2) and (3) respectively.⁶⁶⁶

(2) Subsidiarity

As an alternative to having the claimant pay the compensation, a mechanism of subsidiarity appeared after the introduction of the PDC: in anticipation of the first session of the CGE, the Greek government proposed to add a provision to the effect of having the *mala fide* vendor pay the compensation whenever this would be possible.⁶⁶⁷ This idea was further discussed during the first session of the CGE, where it was advanced that a possibility should be available for the compensation to be paid by a bad faith seller.⁶⁶⁸ Although reaching an agreement as to the introduction of a specific provision to this effect would have been particularly difficult, it was advanced during the CGE that the convention should at least make this situation possible.⁶⁶⁹ In opposing this proposal, some participants to the CGE submitted that this mechanism was inappropriate since it would run counter the purpose of the convention – which is to mandate the automatic restitution of stolen cultural objects – as it would delay the resolution of contentions.⁶⁷⁰ Therefore, the CGE decided that the claimant should pay the

⁶⁵⁸ Forrest, (2010), p. 213; Calvo Caravaca, (2004), p. 98; the Portuguese delegation that took part in the DC noted that the convention ought to specify who has to pay the compensation, or else the prospects of its ratification would be severely impaired. See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188.

⁶⁵⁹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 45.

⁶⁶⁰ See for example Article 4 (1) of the *Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, in UNIDROIT, (1990), Study LXX – Doc. 19, p. 2; Forbes, (1996), p. 250.

⁶⁶¹ UNIDROIT, (1992), Study LXX – Doc. 30, p. 14.

⁶⁶² Calvo Caravaca, (2004), p. 98.

⁶⁶³ See 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 97.

⁶⁶⁴ UNIDROIT, (1992), Study LXX – Doc. 30, p. 14; UNESCO already noted earlier that it is often difficult, if not impossible, to find the person who acted in bad faith and who transferred the cultural object to the possessor. See UNIDROIT, (1992), Study LXX – Doc. 25, p. 9.

⁶⁶⁵ UNIDROIT, (1993), Study LXX – Doc. 39, p. 22.

⁶⁶⁶ Carducci, (2006), p. 100.

⁶⁶⁷ UNIDROIT, (1991), Study LXX – Doc. 22, p. 21: "Such compensation shall, where possible, be paid by the *mala fide* vendor of the object to the possessor".

⁶⁶⁸ UNIDROIT, (1991), Study LXX – Doc. 23, pp. 18-19.

⁶⁶⁹ UNIDROIT, (1991), Study LXX – Doc. 23, p. 19.

⁶⁷⁰ UNIDROIT, (1994), Study LXX – Doc. 48, p. 22.

compensation and judged it more appropriate to leave the possibility for the claimant to obtain reimbursement of it to domestic law.⁶⁷¹ What is more, during the fourth meeting of CGE, one participant proposed to make the payment of fair and reasonable compensation conditional upon the exhaustion of all the potential remedies that would be available to the possessor.⁶⁷² The idea was that the claimant would not be obliged to pay the fair and reasonable compensation to the possessor, provided the possessor had a remedy against a transferor from whom he acquired stolen property.⁶⁷³ Although the CGE seemed to have discarded the idea of subsidiarity, it was embodied in Article 4 (2) by the informal Working Group at the end of the Diplomatic Conference.⁶⁷⁴ This embodiment was carried out so as to take the interests of exporting states into consideration, ensuring that ‘all reasonable efforts’ would be undertaken to have those responsible for the removal of the object refund the compensation paid to the diligent possessor.⁶⁷⁵

Article 4 UNIDROIT Convention (1995) – (2) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, **reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.**

This provision specifies that reasonable efforts must be undertaken to have the person – or any predecessor in possession – pay the compensation instead of the claimant, in accordance with the *lex fori*. Subsidiarity thus entails that the claimant does not have to pay the compensation to the possessor if it could reasonably be obtained from another person who transferred the cultural object to the possessor – e.g. the seller, thief, etc. – and who is thus responsible for the contention.⁶⁷⁶ Furthermore, the qualification ‘any prior transferor’ makes it possible to expand and apply the concept of subsidiarity to other persons who did not directly transfer the stolen object to the possessor, e.g. looters, smugglers, middlemen or art dealers.⁶⁷⁷ As such, the burden of paying the fair and reasonable compensation is first imputed upon the wrongdoer.⁶⁷⁸ Nevertheless, subsidiarity is made dependent on any remedies that exist in the *lex fori*. Article 4 (2) specifically refers to domestic law since the formal introduction of an independent mechanism on subsidiarity was discarded, as this would have unfavourably complicated the regime of the convention.⁶⁷⁹ Furthermore, considering that Article 3 already prescribes long time limitations, it would have frustrated the balance created by Article 4.⁶⁸⁰

⁶⁷¹ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 31.

⁶⁷² See UNIDROIT, (1994), Study LXX – Doc. 48, p. 22 and Prott, *Commentary on the Unidroit Convention*, (1997), pp. 45 and 46.

⁶⁷³ UNIDROIT, (1994), Study LXX – Doc. 48, p. 22.

⁶⁷⁴ Article 4 (2) seems to be a remnant of discussions about this subject that were undertaken at the Committee of the Whole. See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’ addressed during the fourth meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 183; see also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 290.

⁶⁷⁵ Delepierre and Schneider, (2015), p. 134.

⁶⁷⁶ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’ addressed during the fourth meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 183; in fact, it was deemed easier for the purchaser in good faith to recover the purchase price from the seller than requiring the dispossessed owner to find the thief or subsequent transferees (see Grover, (1991-1992), p. 1454). As was noted by Vrellis during the Diplomatic Conference: “The good faith possessor could be paid compensation by his transferor who could then claim from his transferor and so on until the original offender was reached. Such a chain of claims was not impossible as each transferee would know his transferor, and all domestic legal systems had some means of procedure which permitted the joining of third parties in an action”, (see ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 291. Moreover, the possibility for the purchaser to be awarded damages on the basis of the contractual default of the transferor is in harmony with assuring the restitution of the stolen cultural object (see UNIDROIT, (1986), Study LXX – Doc. 1, p. 41). Additionally, the possibility to initiate legal proceedings only against the seller will ensure cautiousness from purchasers when they are acquiring these cultural materials (see UNIDROIT, (1986), Study LXX – Doc. 1, p. 41). Burke has submitted that requiring payment from the vendor would give more incentives for the purchaser in good faith to investigate the title of the former. See Burke, (1990-1991), p. 465).

⁶⁷⁷ Kurjatko, A., ‘Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art’, 5 (1) *U. C. Davis Journal of International Law and Policy*, (1999), p. 79, footnote 142.

⁶⁷⁸ Droz, (1997), p. 255; Calvo Caravaca, (2004), p. 98; Kurjatko, (1999), p. 79, footnote 142.

⁶⁷⁹ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’ addressed during the fourth meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 183.

⁶⁸⁰ As was explained by Fraoua in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)’ addressed during the fourth meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 4, 14 June 1995, p. 184.

(3) Claimant's right to recover the compensation

If it proves impossible or too difficult to have the person who transferred the stolen cultural object to the possessor or any prior transferor pay the compensation, then the claimant will have to pay. To remedy to the unfairness towards him – who was the victim of the theft in the first place – Article 4 (3) was adopted, allowing him to recover the fair and reasonable compensation from a party responsible for the transfer to the possessor.⁶⁸¹

Article 4 UNIDROIT Convention (1995) – (3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.

Article 4 (3) provides a means to seek the payment of the compensation from a person that is partly responsible for the fraudulent transaction.⁶⁸² A 'return path' helps the claimant that has had to compensate the possessor to recover such compensation from any other person that is found to be responsible in the fraudulent chain of transactions.⁶⁸³ Furthermore, Article 4 (3) also makes it possible to recover the compensation from a third party that has played no part in the theft or subsequent transfer to the possessor. It, thus, enables an insurance company, the non-owning state where the object has been stolen (or any other state having an interest in the matter), an investor, a sponsor, a museum, etc. (i.e. parties that have the capacity), to reimburse the compensation.⁶⁸⁴

Prott has qualified the present article as unnecessary.⁶⁸⁵ To her, the payment of compensation does not affect the possibility for the claimant to recover the money from someone else, as is provided for in the applicable law.⁶⁸⁶ Therefore, making a provision to this effect is, indeed, somewhat idle.

2. WHEN?

As is reflected in the wording of Article 4 (1), compensation needs to be paid at the time of the restitution.⁶⁸⁷ If the court does not set the modalities of the payment, it is possible for the parties to negotiate these between them.⁶⁸⁸ This means that it is possible for the parties to postpone the restitution,⁶⁸⁹ which can be useful if the claimant is not yet in a position to pay the necessary amount of compensation.⁶⁹⁰ If the restitution is postponed, it may be possible to deduct a certain amount from the compensation since the possessor is allowed to enjoy the object for a longer period.⁶⁹¹

3. LEGAL IMPLICATIONS OF NON-PAYMENT

After the second session of the SG, Reichelt proposed that compensation should be paid within a period of five years running from the adjudication of the claim in restitution.⁶⁹² Although this proposal was not further addressed in the sessions of the SG, a member of the CGE noted that the PDC was unspecific as to the legal implications of the non-payment of compensation.⁶⁹³ Nonetheless, adopting specific provisions as to the said implications would constitute the link between the obligation to give back the object laid down in Article 3 (1) and the right to compensation posited in Article 4 (1).⁶⁹⁴ During the Diplomatic Conference, some delegations supported the introduction of a right of retention to the benefit of the possessor.⁶⁹⁵ But for this, the drafting

⁶⁸¹ UNESCO, (2005), p. 5; this mechanism was proposed by the Portuguese delegation that took part in the DC. See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W. P. 2, 4, 6, 7, 18, 21 and 22), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 188.

⁶⁸² Droz, (1997), p. 256.

⁶⁸³ E.g. a dealer that has knowingly concealed the object for several years. See Calvo Caravaca, (2004), p. 98.

⁶⁸⁴ Calvo Caravaca, (2004), p. 98; Prott, *Commentary on the Unidroit Convention*, (1997), p. 45.

⁶⁸⁵ Prott, *Commentary on the Unidroit Convention*, (1997), p. 46.

⁶⁸⁶ Prott, *Commentary on the Unidroit Convention*, (1997), p. 46.

⁶⁸⁷ Calvo Caravaca, (2004), p. 98; Office Fédéral de la Culture (Suisse), (1998), p. 65; the payment needs to take place at the same time as the restitution. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 44 and Calvo Caravaca and Caamiña Domínguez, (2009), p. 177.

⁶⁸⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 44.

⁶⁸⁹ Calvo Caravaca and Caamiña Domínguez, (2009), p. 177.

⁶⁹⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 44.

⁶⁹¹ Calvo Caravaca and Caamiña Domínguez, (2009), p. 177.

⁶⁹² UNIDROIT, (1989), Study LXX – Doc. 16 Add. 2, p. 2.

⁶⁹³ UNIDROIT, (1991), Study LXX – Doc. 23, p. 17.

⁶⁹⁴ UNIDROIT, (1991), Study LXX – Doc. 23, p. 17.

⁶⁹⁵ For example, the Japanese delegation supported a right of retention for the possessor up until payment of the compensation. The rationale behind this was that, considering the international character of the situation, it would be particularly difficult for the possessor to initiate legal proceedings in a foreign jurisdiction in order to obtain the payment of the compensation after having given the object back. See 'Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (People's Republic of China, Japan and New Zealand)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 74.

committee operating during the DC noted that it did not want to introduce too many details into the regime of the convention and conceded that this aspect should be left for the domestic courts to decide.⁶⁹⁶ This approach was also approved by the chairman of the DC, ultimately leaving the matter to domestic courts to decide.⁶⁹⁷

⁶⁹⁶ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. And 75; CONF. 8/D.C./ Docs. 1 and 2), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 17, 23 June 1995, p. 292.

⁶⁹⁷ *Idem*.

Summary

Claimant – Chapter II of the convention entitles a claimant to bring a claim in restitution for a stolen cultural object. The notion ‘claimant’ is not, however, defined in the convention. This term was purposely left undefined so as to accommodate a multitude of claimants, such as the owner, a temporary holder, an intermediary person, or even the holder of a security right vested in the cultural object stolen. Therefore, the concept ‘claimant’ was preferred over alternative terminology, such as ‘dispossessed person’. Domestic courts are entrusted with deciding who can rely on Chapter II of the convention. In doing so, special attention needs to be paid to claims in restitution brought by indigenous and tribal communities, as difficulties in legal standing might materialise when these communities register inanimate objects as claimant or where they decide to sue collectively. Domestic courts should not merely rely upon the procedural *lex fori* in order to determine the legal personality and *locus standi* of these parties, but they should instead stretch the concept of claimant so as to accommodate the needs of indigenous and tribal communities, notably considering the wording of Article 3 (8) of the convention.⁶⁹⁸

Superior right of possession – For the purpose of the claim in restitution, the claimant must prove that he has a superior right of possession over the object. Henceforth, he will have to prove that he had a valid *causa possessionis* and that there was dispossession by means of theft. A claimant with a right of possession over the stolen cultural object will always prevail against the possessor of the stolen cultural object, as the convention does not confer any right of possession to the possessor⁶⁹⁹, much like in the three American jurisdictions that were scrutinised in Chapter 3. Therefore, the convention adheres to the concept of relativity of title, whereby the parties to a contention vie for the possession of the object. Furthermore, because the claimant must demonstrate a superior right of possession, the claim in restitution needs to be constructed similar to an action in replevin. This is particularly important for contracting states that are not familiar with either the action in replevin and the concept of relativity of title, as these states will need to weigh the relative possessory rights of the parties. For claims brought by indigenous or tribal communities, it is sufficient to demonstrate that the object belonged to and was used by a tribal or indigenous community in a contracting state as part of that community's traditional or ritual use⁷⁰⁰ in order to demonstrate that they have a superior right of possession over the object.⁷⁰¹

Identification of the stolen cultural object – What is more, the object must still physically exist at the time the claim in restitution is introduced and it must be the same cultural object as the one that was stolen.⁷⁰²

Time limitations (general rule) – Similar to the rules applicable in the six jurisdictions that were scrutinised in Chapters 2 and 3 of the present research, the convention also subjects a claim for the restitution of a stolen cultural object to certain time restrictions. Therefore, Article 3 (3) of the convention requires a claim in restitution to be brought in accordance with a relative and an absolute period. The relative period – prescribed in Article 3 (3) *ab initio* – is construed in a similar fashion to statutes of limitations and it primordially mirrors the strict discovery rule as laid down in California law. This means that the relative period of three years accrues at the time when the claimant actually discovers both the identity of the possessor and the whereabouts of the stolen cultural object. These two elements reflect the ones laid down in the New Jersey discovery rule, meaning that the relative period is an amalgamation of both the California and the New Jersey discovery rules. Although no constructive notice of these two elements is posited by Article 3 (3), the drafters of the convention did not discard the possibility for the court seized with the contention to apply a constructive notice, if this is part of the domestic rules on dilatoriness. Furthermore, it is important to note that the actual cognition of the whereabouts of the object and of the identity of the possessor by the claimant can be imputed to any successor in right.⁷⁰³ For the claim to be timely introduced, it must not only comply with the relative period, but the claim needs also to be introduced within the absolute period of fifty years from the date of the theft.⁷⁰⁴⁻⁷⁰⁵ It remains unclear whether this period is assimilated to a statute of repose, to a prefix period or to a period of acquisitive or of extinctive prescription. The distinction is particularly important with regard to interruption / suspension of the absolute period and to the legal effects flowing from the expiration of the absolute period. Furthermore, it is not clear

⁶⁹⁸ Cf. section A. 1. above.

⁶⁹⁹ Cf. Article 3 (1) of the convention.

⁷⁰⁰ Cf. Article 3 (8) of the convention.

⁷⁰¹ Cf. section A. 2. above.

⁷⁰² Cf. section A. 3. above.

⁷⁰³ Cf. section B. 1. (1) above.

⁷⁰⁴ Cf. Article 3 (3) *in fine* of the convention.

⁷⁰⁵ Cf. section B. 1. (2) above.

whether the period of fifty years is to be calculated by full days or whether it starts running from the day of the theft.⁷⁰⁶

Time limitations (exceptions) – Next to the regime of Article 3 (3), Article 3 (4) and (5) provide two exceptions to the general rule laid down in Article 3 (3). These exceptions – inspired by the second paragraph of Article 7 (1) of Directive 93/7/EEC – apply to cultural objects that are of importance to the cultural heritage of contracting states and include cultural objects forming an integral part of an identified monument, of an identified archaeological site or stemming from a public collection, as described in Article 3 (4)-(8). Although identified monuments and identified archaeological sites – both categories having been introduced in order to secure the physical integrity of these two settings and to assimilate removed fixtures to movable cultural objects that deserve special protection for the purpose of Chapter II – are left undefined by the convention, the notion of a public collection is defined in Article 3 (7). This definition of ‘public collection’ – inspired by the definition of public collections that is laid down in Article 1 (1) of Directive 93/7/EEC – specifies that a public collection is composed of a group of inventoried or otherwise identified cultural objects owned by either a contracting state, a regional or local authority of the said contracting state, a religious institution in the said contracting state or an institution that is established for an essentially cultural, educational or scientific purpose in a contracting state and is recognised in that state as serving the public interest. The requirement that the cultural objects belonging to the public collection be inventoried or otherwise identified was specifically adopted to ensure that public collections are inventoried, but also to make the identification of the stolen object easier in case of theft. Nevertheless, because it would be difficult for some states to inventory the objects belonging to their public collection – notably when the object is unknown to a source state because it is the product of archaeological theft –, the requirement of inventorisation was deemed problematic. To remedy to the limitations of this notion, it was agreed to add the qualification ‘or otherwise identified’, which allows the subsumation of special cultural objects under the category of public collection after the theft took place. Furthermore, only objects that are owned by one of the four entities listed in Article 3 (7) will be considered as belonging to a public collection. This requirement that the cultural object be owned is particularly important with regard to cultural objects stemming from archaeological theft.⁷⁰⁷

Regarding the institutions that are listed in Article 3 (7), it is noticeable that these institutions must be recognised by the contracting state concerned. This condition is particularly important to religious institutions – i.e. category (c) – and institutions established for an essential cultural, educational or scientific purpose in a contracting state that is also recognised in that state as serving the public interest (i.e. category (d)). The religious institutions addressed by the provision are the ones recognised by the domestic law of the contracting state concerned. With regard to the category (d) institutions, it should be noted that this category was added to include cultural objects of private collections owned by non-profit organisations that are not owned by the state, financed or not financed through public funds and open to the public. Consequently, cultural objects belonging to collections of institutions offering marginal public access and of commercial entities are not subsumed under the category of cultural objects belonging to public collections.⁷⁰⁸

Sacred or communally important cultural objects belonging to and used by a tribal or indigenous communities in a contracting state as part of that community’s traditional or ritual use are subjected to the same rules as the ones applicable to public collections.⁷⁰⁹ These objects were not included in the definition of public collection given in Article 3 (7) because they often are not publicly accessible. Hence, unlike public collections, Article 3 (8) does not require that the object be inventoried or otherwise identified. Article 3 (8) is directed at the protection of communal objects, but it also includes items used by only one member of the community, as long as it is of communal importance. By referring to sacred or secret objects, the scope of Article 3 (8) is limited to cultural materials that form the core of the community concerned. Difficulties arise in regard of Article 3 (8) because of the lack of definition of some of its key concepts, such as the notions of ‘sacred’, ‘communally important’ and ‘traditional or ritual use’.⁷¹⁰

Article 3 (4) instates an exception to the regime of Article 3 (1) for cultural objects forming an integral part of an identified monument or archaeological site, or belonging to a public collection. Because of the importance of these cultural objects to a claiming state, the said state should not lose the possibility to claim these goods back. Therefore, Article 3 (4) foresees no absolute period, and the claim in restitution for these types of objects will only be subjected to the relative period. As such, Article 3 (4) creates a partial imprescriptibility for

⁷⁰⁶ Cf. section B. 1. (3) above.

⁷⁰⁷ Cf. section B. 2. (1) above.

⁷⁰⁸ Cf. section B. 2. (1) above.

⁷⁰⁹ Cf. Article 3 (8) of the convention.

⁷¹⁰ Cf. section B. 2. (1) above.

these special cultural objects.⁷¹¹ Nevertheless, because certain states wanted to instate an absolute period for these categories of materials in order to ensure legal certainty, Article 3 (5) establishes an exception to the exception laid down in Article 3 (4). Inspired by Article 7 of Directive 93/7/EEC, a maximum period of seventy-five years was deemed more appropriate to these representatives. Article 3 (5) thus allows contracting states to reinstate an absolute period of seventy-five years, or any other longer period provided in its domestic law. Nevertheless, this contracting state will have to express its choice through means of declaration at the time of signature, ratification, acceptance, approval or accession, whichever is relevant thereto.⁷¹² The choice operated is only relevant to the application of the convention. Furthermore, the second sentence of Article 3 (5) specifies that if a contracting state adheres to the exception to the exception for foreign claims brought before its domestic courts, the exception to the exception will also apply to claims for the restitution of cultural objects displaced from a monument, archaeological site or public collection brought by the derogating state in another contracting state. As such, this second sentence introduces a principle of mutual recognition of the regime of Chapter II applicable to special cultural objects between contracting states.⁷¹³

Legal effect expiration time limitations – One aspect that has been left virtually unaddressed is the legal effect flowing from the expiration of both the relative and absolute periods. As the relative period was inspired by the New Jersey and California statutes of limitations, the expiration of the relative period ought to be embedded with similar traits. Nonetheless, New Jersey courts have created a prescriptive right for the possessor of the stolen property following the expiration of the statute of limitations, whilst California courts have rejected such a conclusion. Instead, these courts have held that every new interference with the rights of the owner by a possessor amounts to a new conversion, concomitantly triggering a new statute of limitations, even though a previous SOL for a prior conversion had ran and expired. The rationale underlying the California decision is that a stolen object remains stolen, irrespective of how many years have transpired since the theft and, therefore, that the dispossessed owner can sue for each new conversion of stolen personal property. As such, the expiration of the statute of limitations in New Jersey operates upon the right and the Californian approach affects the remedy. In extrapolating these two solutions to the regime of Chapter II, it remains unclear whether the expiration of the relative period operates on the right or upon the remedy. It is proposed to assume that the expiration of the relative period works similar to California law and operates on the remedy as against the current possessor as of right. Therefore, the transfer of the stolen cultural object to another possessor as of right would constitute a new conversion for which a new period of limitation would start to run, even though the right of action against a prior possessor both ran and expired. Albeit, unlike case law in California, which seems to have accepted that the replevin of stolen personal property can be brought unrestrictedly, the absolute period creates finality and will only allow the recovery of a stolen cultural object for a maximum period of fifty years (with the exception of special categories of cultural objects described in Article 3 (4)-(8)).⁷¹⁴

With regard to the absolute period, although it is clear that its expiration will mean that the stolen object can no longer be recovered, it is unclear whether this period is to be assimilated to a period of prescription or to a statute of repose. Irrespective of this nuance, it is unquestionable that the owner loses his right of ownership and that the possessor becomes the owner of the stolen property. Furthermore, the distinction between good and bad faith becomes irrelevant. In fact, the drafters seem to have had the concept of *usucapio* in mind when they debated the absolute period.⁷¹⁵

Principle of mandatory restitution – Once it has been established that the claim was timely introduced, the merits of the case are dealt with by Articles 3 (1) and 4 of the convention. Article 3 (1) obliges the possessor of a stolen cultural object to return it and it is embedded with a double function: firstly, it builds upon Article 13 of the 1970 UNESCO convention by requiring the contracting state to admit actions for the recovery of stolen cultural objects brought by or on behalf of the rightful owner(s). In doing so, Article 3 (1) does not make a distinction between cultural objects publicly or privately owned and allows natural and legal persons, but also states, – put differently, any victim of theft – to initiate a claim in restitution. Secondly, Article 3 (1) prescribes the unconditional return of a stolen cultural object. The choice for automatic restitution was driven by three considerations: the need to reprimand theft; the need to adopt an appropriate response to the illicit traffic in stolen cultural objects and the need to adopt tailor-made solutions for cultural objects. With regard to the fight against cultural property theft, the drafters of the convention reinforced the position of the owner by ensuring the automatic return of a stolen cultural object, as “the only realistic solution which would have a deterrent effect

⁷¹¹ Cf. section B. 2. (2) above.

⁷¹² Cf. Article 3 (6) of the convention.

⁷¹³ Cf. section B. 2. (3) above.

⁷¹⁴ Cf. section B. 3. (1) above.

⁷¹⁵ Cf. section B. 3. (2) above.

on illegal traffic in cultural objects”. Furthermore, this obligation of restitution supports the idea of *caveat emptor* insofar it requires the acquirer to undertake inquiries about the cultural object that he covets. By obliging the possessor of a stolen cultural object to return it and lose the right to fair and reasonable compensation when he was not sufficiently diligent during the acquisition, it is assumed that this will give the acquirer sufficient incentive to be cautious throughout the acquisition. Subsequently, this will lead to a diminution of transactions involving cultural objects with a dubious origin, tackling the secrecy and connivance of the art market and deterring cultural property theft in the long run.⁷¹⁶

Possessor – Article 3 (1) obliges the possessor of a stolen cultural object to return it. Nevertheless, the notion of possessor is left undefined due to the disparities that exist in national definitions of this concept. Instead, the term ‘possessor’ must be stretched for the purpose of Article 3 (1) to facilitate the restitution of a stolen cultural object. Thus, a possessor may refer to any person having physical control over the cultural object. Consequently, this obligation will make it more difficult for collectors to lend their pieces for exhibition or scientific research. Furthermore, this obligation would put lenders in default in complying with their contractual obligations, if they have to return the cultural object after the agreed loan period. This, therefore, constitutes a serious financial risk for them.⁷¹⁷

Return – Although Article 3 (1) mandates the return of the stolen cultural object, the term return should be given a plain meaning and should, therefore, not be assimilated to the qualified terminology used in Article 1 (b) and in Chapter III of the convention. Because Article 3 (1) secures the automatic return of the stolen cultural object irrespective of the good faith of the possessor, it is impossible to launder the illicit origin of the object through *usucapio* or through means of market overt. Article 3 (1) thus constitutes a blanket rule that mandates the automatic restitution of a stolen cultural object.⁷¹⁸

Person to whom the stolen cultural object is returned – Article 3 (1) does not specify to whom the stolen cultural object must be returned. This point is to be determined by the judge seized with the contention.⁷¹⁹

Entitlement to compensation – Once it has been established that the stolen cultural object must be returned, Article 4 (1) of the convention entitles the possessor to fair and reasonable compensation, subject to specific conditions. As such, Article 4 (1) is the *quid pro quo* of the mandatory restitution of a stolen cultural object. Compensation is not automatic, but will only have to be paid when the possessor did not know, nor ought to have known, during the acquisition that the cultural object was stolen, and can prove that he exercised due diligence at the time of the acquisition.⁷²⁰

Good faith possessor – The possessor that is entitled to fair and reasonable compensation on the basis of Article 4 (1) may not be the same person as the possessor who is obliged to return the stolen cultural object on the basis of Article 3 (1). Instead, the convention seems to recognise more than one possessor and thus to embrace the idea of relativity of title, by which different possessors vie to have their possession considered superior. Article 4 (1) is directed specifically at the indemnification of an innocent acquirer – and thus at a possessor as of right⁷²¹ – because the stolen object will rarely be found in the hands of a thief and because the drafters of the convention intended to come up with an instrument that would constitute “an appropriate arrangement for the restitution of the objects by a good faith possessor”. As such, Article 4 (1) builds on the premises laid down in Article 7 (b) (ii) of the 1970 UNESCO convention. Nevertheless, Chapter II regulates acquisitions *a non domino* of cultural objects following an involuntary loss of possession resulting from theft. It obliges any good or bad faith possessor to return the stolen cultural property, but it only entitles a good faith possessor to fair and reasonable compensation.⁷²²

For value and gratuitous acquisitions – Although Article 4 primarily targets acquisitions for value, Article 4 (5) incorporates gratuitous acquisitions within the regime of Chapter II. This provision was included to ensure that the illicit origin of a stolen cultural object could not be laundered through means of donation or bequeathals. Thenceforth, the beneficiary of the gratuitous transfer shall not be put in a better position than the person from whom he acquired the cultural object. Article 4 (5) will thus have important consequences for

⁷¹⁶ Cf. sections C. 1. (1), (2) and (3) above.

⁷¹⁷ Cf. section C. 2. (1) above.

⁷¹⁸ Cf. section C. 2. (2) above.

⁷¹⁹ Cf. section C. 2. (3) above.

⁷²⁰ Cf. section D of the present chapter.

⁷²¹ Cf. Articles 4 (1) *in fine* and 4 (4) of the convention.

⁷²² Cf. section D. 1. (1) above.

charities and museums, to which many cultural objects are bequeathed. These institutions will thus need to prove having exercised due diligence at the time of the acquisition, if they want to be entitled to fair and reasonable compensation.⁷²³

Protecting innocent acquisitions – The *raison d'être* of Article 4 is to punish acquirers of stolen cultural objects that do not properly investigate the provenance of the item during the acquisition. By subjecting possessors to the risk of losing both the good and the compensation if they were not sufficiently diligent in their investigation, the convention is expected to change the practice of acquirers to ensure that they will no longer acquire cultural objects with a dubious origin. Consequently, it ensures that stolen cultural objects become unmarketable. Therefore, both Articles 3 (1) and 4 (1) are key to the fight against the illicit traffic in stolen cultural property. Furthermore, the payment of fair and reasonable compensation constitutes an intermediary position between no third-party protection and third-party protection. Moreover, the fair and reasonable compensation serves to attract market states. Not prescribing compensation in the regime of the convention would create compatibility problems with Article 7 (b) (ii) of the 1970 UNESCO convention. At last, the introduction of fair and reasonable compensation does not mean that states that have no rules on compensation – and therefore a regime more favourable to restitution – should adopt these rules.⁷²⁴

Burden of proof – In determining whether the possessor acted in good faith at the time of the acquisition for the purpose of the fair and reasonable compensation, Article 4 (1) does not instate a presumption of good faith in favour of the possessor. The drafters of the 1995 convention agreed to abandon this presumption that exists in many domestic laws to the benefit of an acquirer. In fact, the drafters opined that no good faith could be invoked when the acquirer obtained the cultural object without inquiring into its provenance. Thus, they found inspiration from those jurisdictions that had not adopted a presumption of good faith to the benefit of the possessor. In fact, the drafters were particularly influenced by Article 3 of the Swiss Civil Code. The shift in the burden of proof to the defendant is not a novelty as domestic courts already operated a shift when it would be too difficult for the claimant to provide the necessary proof. Furthermore, UNESCO welcomed this because an important portion of what was on the art market had been acquired without inquiring into the provenance of the property and, thus, many transactions had been carried out by relying on the presumption of good faith. Furthermore, in jurisdictions where good faith is presumed, it was particularly difficult for the claimant to prove that there were red flags during the acquisition by the defendant. Shifting the burden of proof to the possessor was thus an appropriate means to alleviate this difficulty and to change the practices of art market stakeholders. Alongside Articles 3 (1) and 4 (1), the shift of the burden of proof to the acquirer is key in the fight against the illicit trade in stolen cultural objects and, notably, in the fight against archaeological theft. Furthermore, it is easier for the acquirer to keep proof of his good faith than for the claimant to disprove the good faith after several decades have lapsed. Finally, the shift of the burden of proof is welcomed for cultural objects, since these items inflate over time and especially since they have a long lifespan, making them particularly coveted by thieves. Consequently, good faith is not presumed under Chapter II, and Article 4 (1) *in fine* shifts the burden of proof to the possessor by requiring him to demonstrate that he did not know, nor ought to have known, that the cultural object was stolen through the exercise of due diligence. Therefore, the possessor mentioned in Article 4 will always be deemed to have acquired the cultural object not in good faith and will need to demonstrate his good faith if he wants to be entitled to the fair and reasonable compensation. As such, the possessor must prove his good faith, instead of having the claimant disprove the possessor's presumed good faith.⁷²⁵

Innocent acquisitions – To balance against the claimant's obligation to pay the fair and reasonable compensation to a possessor in good faith, the convention requires that the possessor proves having exercised due diligence during the acquisition. This is tantamount to requiring the possessor to demonstrate that he has acquired the object in good faith. Imputing due diligence upon the possessor for the purpose of being entitled to the payment of fair and reasonable compensation forces the possessor to inquire about the provenance of the cultural object, it obliges dealers to disclose the provenance and acquirers to question the information that has been provided. As such, it adequately tackles the secrecy of the art market. Furthermore, it is particularly astute to make the payment of compensation conditional upon the exercise of good faith, as the non-entitlement to compensation is conducive to achieving more restitutions, which is instrumental in tackling the illicit trafficking of stolen cultural property.⁷²⁶

⁷²³ Cf. section D. 1. (2) above.

⁷²⁴ Cf. section D. 1. (3) above.

⁷²⁵ Cf. section D. 2. above.

⁷²⁶ Cf. section D. 3. above.

Acquisitions in good faith – Due diligence constitutes a test of good faith designed for the acquisition of cultural objects. The drafters eschewed the use of the terms ‘good faith’ or ‘bona fides’ because it would have proven difficult to harmonise domestic definitions on good faith and because they did not want the requirement laid down in the convention to be confused with the domestic interpretations of good faith. Thus, preference was given to the unrelated and undefined notion of ‘due diligence’, which existed in American law but not as a requirement imputed upon the acquirer. Thus, due diligence, as posited in the convention, must be clearly distinguished from the notion of ‘due diligence’ found in American law. For the purpose of the convention, due diligence means that the possessor was not aware, nor ought reasonably to have known that the cultural object was stolen at the time of the acquisition. What is more, similar to Belgian, French and Dutch law, Article 4 (1) specifies that the cognition of the possessor can be actual or constructive. The constructive notice can be helpful when a bad faith possessor wants to rely on the diligence exercised by a previous possessor. Nevertheless, it will be difficult to prove actual or constructive notice regarding cultural objects stemming from archaeological theft because of the lack of information relating to the existence of these objects. Finally, due diligence must have been exercised at the time of the acquisition, as clarified by Article 4 (1) *in fine*.⁷²⁷

Due diligence – The constitutive elements of due diligence are laid down in Article 4 (4) of the convention. This provision – inspired by Article 7 LUAB – serves as a guideline for courts in order to assess the good faith of the possessor for the purpose of deciding upon the entitlement to fair and reasonable compensation. Following Article 4 (4), to determine whether the possessor knew or ought to have known that the cultural object was stolen, “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”. This means that the court seized with the contention will scrutinise the presence of red flags during the acquisition and the possessor’s response in alleviating concerns raised by these red flags. Hence, attempting to formulate a test of due diligence is tantamount to squaring the circle as the determination of due diligence is fact-driven and left to the sovereign appreciation of the domestic courts seized by the claim in restitution, much like the determination of good faith in domestic law.

The use of the preposition ‘including’ given in Article 4 (4) was introduced to ensure the non-exhaustiveness of the provision. This preposition makes it possible for the domestic courts seized with a claim in restitution to assess due diligence on the basis of all the aspects that the courts deem relevant to the determination of due diligence. It is, therefore, possible to take additional aspects into consideration, such as the nature of the cultural object, the terms of the contract, the circumstances surrounding its conclusion, etc.⁷²⁸

Compensation – The possessor that has successfully demonstrated having acquired the cultural object in good faith, is thereby entitled to fair and reasonable compensation.⁷²⁹ Because the convention prescribes the payment of compensation, it is directed at compensating a loss suffered by the possessor. It remains unclear whether the loss relates to a loss of *causa detentionis*, a loss of possession, a loss of the purchase price or a loss of all these elements combined. Domestic courts are left with the task of determining the nature of the loss. This aspect crucial to the distinction between gratuitous and for value acquisitions, as it is unclear whether an acquirer will technically suffer a loss if the acquisition was gratuitous.⁷³⁰

Fair and reasonable – The notion of fair and reasonable compensation is left undefined in the convention. Domestic judges are given discretion in determining what is to be regarded as fair and reasonable. Nonetheless, the judge may take a panoply of elements into consideration in assessing the fairness and reasonableness. As such, it is also possible to take the financial resources of the claimant into consideration, which is particularly helpful in relation to source states. Thus, it is possible to weigh what the claimant can pay and what the possessor is willing to accept in the assessment of fair and reasonable compensation. Furthermore, the court could also take into consideration the fact that the possessor might be able to reclaim money from the transferor in his assessment. Following the views of the Secretariat of UNIDROIT, some of the main elements to take into consideration are: the market value, the price paid, the amount that the possessor is willing to accept as compensation, the solvability of the claimant, the possibility for the purchaser to recover money from the seller (thus avoiding the payment of double compensation), the possibility for third parties to help developing countries pay the compensation, the legal fees incurred by the claimant in bringing the claim in restitution, the

⁷²⁷ Cf. section D. 3. (1) above.

⁷²⁸ Cf. section D. 3. (2) above.

⁷²⁹ Cf. Article 4 (1) of the convention.

⁷³⁰ Cf. section E. 1. above.

costs of restoration and maintenance of the object. The elements that can never be computed in the fair and reasonable compensation are: punitive damages, legal interests running from the day of the acquisition and the costs of excavation or of removal of artifacts.⁷³¹

Method of computation – But for the unclarity of what fair and reasonable compensation entails, it is possible to ascertain that: the court seized must set the amount of compensation, which will depend upon the circumstances of the case, full compensation is explicitly rejected, the amount of compensation cannot equate the price paid and may be inferior to the commercial value of the object, the amount cannot be limited to a symbolic amount and judges are given extensive discretion in deciding on the amount of compensation that is to be paid. Because of its nebulosity, the concept of fair and reasonable compensation makes it possible for the court to provide a higher amount of compensation for a possessor that is deprived of any remedy against the seller because it has expired on the basis of domestic law. Additionally, the lack of specificity makes the convention more accessible, although uniformity and certainty are sacrificed in favour of accessibility. Any ancillary costs relating to transportation, insurance, storage, costs incurred in the exercise of due diligence, the various legal costs undertaken during the proceedings and money spent on the restoration of the cultural object are not covered by the convention. It is unclear whether these costs can be computed in the calculus of the fair and reasonable compensation. Regarding the costs associated with restoration, conservation or maintenance of the item, concerns were expressed as to the danger of prescribing the reimbursement of these costs as a rule since the possessor could undertake these to make restitution more difficult or to affect the nature of the cultural object to such an extent that the claimant is no longer interested in recovering the property. Furthermore, because the professions of restorer and conservator are not regulated, these titles could be abused by persons that have not demonstrated or exhibited any professional qualifications. It was then decided to leave the power of appreciation to the domestic court – and depending on the *lex fori* –, which can compute these costs in the amount of fair and reasonable compensation that is to be paid, providing that the costs are justified and necessary. Finally, it is possible for the claimant to obtain compensation from the possessor for any damage caused to the object as result of poor restoration work. Unlike Article 6 (4), it is unclear who will have to bear the costs of restitution. The domestic courts have been given the power to decide on this issue.⁷³²

Who must pay the compensation – Article 4 (1) is silent as to whom must pay compensation to the possessor. It is possible for the compensation to be paid by different persons, a reason why the convention does not elaborate upon this point. The rule is, nonetheless, that a claimant must pay the fair and reasonable compensation.⁷³³

Subsidiarity – To alleviate this burden imputed upon the claimant, two mechanisms were adopted: subsidiarity and the right to recover from any other person, both of which can be found in Article 4 (2) and (3) of the convention respectively. Article 4 (2) specifies that any reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where doing so would be consistent with the law of the state in which the claim is brought. This provision was introduced in order to ensure that “all reasonable efforts” will be undertaken to have those responsible for the removal of the cultural object pay the compensation to the possessor. Subsidiarity means that the claimant will only have to pay the fair and reasonable compensation when it cannot be reasonably obtained from a party responsible for the quandary. The qualification ‘any prior transferor’ also makes it possible to expand subsidiarity to any person that is directly or indirectly responsible for the transfer of the cultural object to the possessor. As such, the wrongdoer is the first person that has to pay the compensation, although this is dependent upon the remedies available in the *lex fori*. If it proves too difficult or impossible to have a prior transferor pay the compensation to the possessor, then the claimant must pay the compensation.⁷³⁴

Right to recover the paid compensation – Nevertheless, he can obtain reimbursement from any other person that was responsible for the transfer to the possessor. It is also possible to have a third party reimburse the compensation, such as a third state, an insurance company, an investor, a sponsor, a museum, etc.⁷³⁵

When must compensation be paid – Compensation must be paid at the time of the restitution. If no modalities of payment are prescribed by the court, the parties can negotiate these modalities between them. As

⁷³¹ Cf. section E. 2. above.

⁷³² Cf. section E. 3. above.

⁷³³ Cf. section F. 1. (1) above.

⁷³⁴ Cf. section F. 1. (2) above.

⁷³⁵ Cf. section F. 1. (3) above.

such, they can agree on a postponed restitution and the extra enjoyment of the cultural object could help decrease the amount of compensation that is to be paid.⁷³⁶

Implications of the non-payment – The implications of the non-payment of the compensation are unsettled. It is unclear whether the possessor obtains a right of retention until the payment of the compensation. The drafters preferred to keep the convention simple and to leave such details for domestic courts to determine.⁷³⁷

⁷³⁶ Cf. section F. 2. above.

⁷³⁷ Cf. section F. 3. above.

PART III
ARCHAEOLOGICAL THEFT

CHAPTER 5 |
ARCHAEOLOGICAL THEFT

CHAPTER 5 | ARCHAEOLOGICAL THEFT

INTRODUCTION	379
A. ARCHAEOLOGICAL THEFT – CAUSES AND EFFECTS.....	380
1. The economics of clandestine excavations.....	380
(1) Demand and supply.....	380
(2) Protecting artefacts <i>in situ</i> and <i>ex situ</i>	386
2. The externalities of clandestine excavations.....	390
(1) Destruction of information.....	391
(2) Societal externalities.....	394
B. THE RESPONSE OF SOURCE STATES.....	396
1. Controlling the demand – patrimonial claims.....	396
2. Patrimonial laws – pitfalls.....	398
(1) Ownership versus possession	400
(2) Sufficiently clear, unambiguous and intelligible declaration.....	400
(3) Conditionality of ownership.....	402
(4) Language hurdles	403
(5) Declaration of ownership precedes the removal of the object.....	404
(6) Exercised right.....	405
(7) Exclusive right.....	406
3. Patrimonial laws – guidelines.....	408
C. THE UNIDROIT SOLUTION	410
1. Assimilation to Theft (Chapter II).....	412
(1) Cultural objects.....	413
(2) Illegality of the act of appropriation	414
(3) Assimilation to stolen cultural objects.....	421
2. Assimilation to Illegal Export (Chapter III).....	422
(1) Article 5 (3) (a) – physical preservation of the object or of its context.....	423
(2) Article 5 (3) (b) – integrity of a complex object.....	423
(3) Article 5 (3) (c) – preservation of information of, for example, a scientific or historical character.....	423
3. Interactions between Chapter II and Chapter III	423
SUMMARY	426

Introduction

Next to cultural property theft, archaeological theft constitutes a distinguishable – although not less important – segment of the illicit traffic in cultural property.¹ Whilst the pillaging of tombs and sites has a long historical record – probably making it one of the oldest professions in the world² –, the looting of archaeological sites remains a scourge, the effects of which can be witnessed worldwide.³ Thenceforth, it is believed that the world's archaeological heritage is rapidly dissipating.⁴ This is all the more so because many source states have been particularly powerless in tackling the problem adequately. In fact, the pillaging of antiquities raises issues that are so peculiar that archaeological theft is deemed to be a problem *sui generis*. Therefore, in order to understand the complexities inherent in countering this activity, attention must be given to the difficulties that source states are faced with in protecting their archaeological materials. This explanation will allow to better comprehend how the drafters of the UNIDROIT convention have responded to the problem. Hence, the present chapter addresses, at first, the causes and effects of archaeological theft and the adjacent difficulties that are encountered by source states in protecting their archaeological objects from theft (section A), the response of source states to the problem (section B) secondly, and, finally, the solutions propounded by the UNIDROIT convention in relation thereto (section C).

¹ Love Levine, A., 'The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention', 36 (2) *Brooklyn Journal of International Law*, (2010-2011), p. 755.

² See for example Burnett, J., 'Cooling U.S. Market Sends Tomb Raiders Abroad', *NPR*, 29 May 2007, available at <http://www.npr.org/templates/story.php?storyId=10457558>, last retrieved on 01.03.2018.

³ Desmarais, F., 'An International Observatory on Illicit Traffic in Cultural Goods', in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protection the World's Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Good: Paris, 2015), p. vii; Lunden, S., 'The Illicit Antiquities Trade. Raising Public Awareness, Governments, non governmental institutions and civil society – an indispensable partnership', in UNIDROIT, *Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, (UNESCO Headquarters, Paris, 19 June 2012), forthcoming; for an advanced analysis of archaeological theft, see Hardy, S. A., 'Illicit Trafficking, Provenance Research and Due Diligence: the State of the Art', *Research study*, 30 March 2016, text available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Hardy_2016_UNESCO_antiquities_trafficking_review_materia.pdf, last retrieved on 01.03.2018; see also Mueller, T., 'How Tomb Raiders are Stealing our History', *National Geographic*, June 2016, available at <http://www.nationalgeographic.com/magazine/2016/06/looting-ancient-blood-antiquities/>, last retrieved on 01.03.2018. A few recent examples of successful law enforcement raids demonstrate that archaeological theft is still very contemporary and widespread: Operation Pandora – a November 2016 led operation and joint action between UNESCO, Interpol, Europol, the WCO and 18 countries – resulted in the recovery of, *inter alia*, 3561 works of art, half of which were archaeological items (see Europol, '3561 Artefacts Seized in Operation Pandora', *Press release*, 23 January 2017, available at <https://www.europol.europa.eu/newsroom/news/3561-artefacts-seized-in-operation-pandora>, last retrieved on 01.03.2018). This Operation was followed by operations Pandora II and Athena, in which 41 000 cultural objects were seized in the period October to December 2017 (see Europol, 'Over 41 000 Artefacts Seized in Global Operation Targeting the Illicit Trafficking of Cultural Goods', *Press release*, 21 February 2018, available at <https://www.europol.europa.eu/newsroom/news/over-41-000-artefacts-seized-in-global-operation-targeting-illicit-trafficking-of-cultural-goods>, last retrieved on 01.03.2018).

On 21 January 2015, the Italian *Carabinieri* discovered a smuggling network of archaeological objects taken in Italy and transported to Switzerland, followed by their disposal on the art market through the use of forged certificates of authenticity. 5.361 artefacts, valued at more than 45 million euros, were confiscated during the investigation (see Monteforte, F., 'Italy seizes more than 5,000 looted antiquities in record haul', *Business Insider*, 21 January 2015, text available at http://www.businessinsider.com/afp-italy-seizes-more-than-5000-looted-antiquities-in-record-haul-2015-1?utm_source=feedburner&utm_medium=feedburner&utm_campaign=feedburner, last retrieved on 01.03.2018). Another example is provided by a major discovery of stolen Native American artefacts in Utah in 2009. More than forty-thousand artefacts were recovered during the operation that was led by the U.S. Federal law enforcement authorities (see Sharp, K. 'An Exclusive Look at the Greatest Haul of Native American Artefacts, Ever', *Smithsonian Magazine*, November 2015, available at: http://www.smithsonianmag.com/history/exclusive-greatest-haul-native-american-artefacts-looted-180956959/?utm_source=twitter.com&utm_medium=social&utm_campaign=no-ist, last retrieved on 01.03.2018). See also the extent of the problem in China that is reported by Qin, A., 'Tomb Robbing, Perilous but Alluring, Makes Comeback in China', *The New York Times*, 15 July 2017, available at <https://mobile.nytimes.com/2017/07/15/world/asia/china-tomb-robbing-qin-dynasty.html?referer=https://t.co/VOQaCVOmxe>, last retrieved on 01.03.2018 and Ramzy, A., 'Chinese Tomb Robbers Used Feng Shui to Steal Antiquities', *The New York Times*, 27 May 2015, available at <https://sinosphere.blogs.nytimes.com/2015/05/27/chinese-tomb-robbers-used-fengshui-high-tech-probes-to-steal-antiquities/>, last retrieved on 01.03.2018 for an account of the biggest sting on the traffic of Chinese antiquities since 1949.

⁴ Brodie, N., Renfrew, C., 'Looting and the World's Archaeological Heritage: The Inadequate Response', 34 *Annual Review of Anthropology*, (2005), p. 343.

A. Archaeological Theft – Causes and Effects

For the sake of clarification, it should be emphasised that archaeological theft either takes the form of clandestine excavations (i.e. unauthorised excavations and adjoining unauthorised retention) or of misappropriation following authorised excavations (precluding a lawful retention).⁵ In practice, these two forms can be subdivided in three specific scenarios: 1) the object has either been extracted from a site that is not known to anyone except to the thieves or the finder; or, 2) it has been excavated on a known site by unauthorised persons; or, 3) it has been excavated on a known site by authorised staff members, but it is subsequently retained in violation of excavation regulations⁶ and rules on ownership of artefacts. To comprehend the prevalence of archaeological theft, it is important to examine the reasons that make the looting of antiquities such a thriving enterprise. In this analysis, attention must therefore be given to the causes that underlie the pilfering. Henceforward, the present section briefly addresses the economics of clandestine excavations by providing a synopsis of the manufacturing of tainted artefacts, ranging from the main actors operating in the traffic and their motivations, to the process of looting from the find site and of retailing on the antiquity market. Secondly, this section also highlights the complexities that are peculiar to the protection of archaeological sites and of artefacts that make prevention from plundering – and, therefore, control of the supply of looted artefacts – a difficult task for source states. Thirdly, the externalities generated by the illegal activity are addressed. In fact, the set of peculiar circumstances surrounding archaeological theft are of paramount importance in understanding why it is a distinguishable facet of the illicit traffic in cultural property.

1. THE ECONOMICS OF CLANDESTINE EXCAVATIONS

(1) Demand and supply

Similar to most illegal activities, archaeological theft is first and foremost the result of a demand.⁷ As such, it constitutes a by-product of the licit market in artefacts, and the responsibility of its existence lies primarily with consumers of artefacts, which range from collectors⁸ and museums,⁹ to mere dilettantes.¹⁰ For the sake of responding to the insatiable demand of this market, looters direct their attention to the exploitation of cultural holdovers from past civilizations.¹¹ Unlike what is commonly believed, archaeological theft is not limited to marauders or tomb raiders. More conspicuously, a multitude of suppliers of stolen artefact can be identified, which ought to be classified on the basis of the frequency of their involvement in the said unlawful activities:

⁵ Lalive D'Épinay, P., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)' in: C. Breitter, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 33.

⁶ O'Keefe, P. J., 'Faisabilité d'un Code International de Déontologie pour les Négociants en Biens Culturels Afin de Lutter Plus Efficacement Contre le Trafic Illicite de Biens Culturels, Rapport établi pour l'UNESCO', (Paris, 15 mai 1994), p. 3.

⁷ O'Keefe, P. J., *Le Commerce des Antiquités – Combattre les Destructeurs et le Vol*, (Unesco: Paris, 1999), p. 25; Brodie, N., "Export Deregulation and the Illicit Trade in Archaeological Material", in: J. R. Richman and M. P. Forsyth, *Legal Perspective on Cultural Resources*, (Altamaria Press, 2004), p. 86; Gerstenblith, P., "Chapter 15 – Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage", in: J. A. R. Nafziger and A. M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, (Martinus Nijhoff Publishers, 2009), p. 305; Brodie and Renfrew, (2005), p. 348; Nafziger, J. A. R., Kirkwood Paterson, R., Dundes Renteln, A., *Cultural Law- International, Comparative and Indigenous*, (Cambridge University Press: Cambridge, 2010), p. 217; this is also submitted by Richard Leventhal in Burnett, (2007), *op. cit.*; Desmarais, (2015), p. ix: "As long as there will be a demand for those objects, there will be people looting them. In this case, the seemingly simplistic equation 'no buyer, no looter' is very close to the truth"; see also the commentary of Michael Müller-Karpe in Wessel, G., 'Dealers and Collectors, Provenances and Rights: Searching for Traces', in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protection the World's Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Goods: Paris, 2015), p. 3: "[...] 'it is well known that in a market economy, demand determines supply. We therefore have to tackle the problem where such objects are in demand, here in the West'".

⁸ Collectors are the final consumers of artefacts, thus contributing to the demand for artefacts. See Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 209.

⁹ See for example the recent setbacks of the Metropolitan Museum of Art regarding the acquisition of two Greek vases – including the Euphronios Krater – that were looted in Italy and which is reported in Mashberg, T., 'Ancient Vase Seized From Met Museum on Suspicion It Was Looted', *The New York Times*, 31 July 2017, available at https://www.nytimes.com/2017/07/31/arts/design/ancient-vase-seized-from-met-museum-on-suspicion-it-was-looted.html?_r=0, last retrieved on 01.03.2018.

¹⁰ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), pp. 216-217; individuals often acquire archaeological objects for decorative purposes. Decorative fashions or fads that entice dilettantes to own artefacts thereby encourage thieves to direct their attention to objects of lesser importance. See Brodie, (2004), p. 91.

¹¹ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), pp. 216-217.

suppliers acting systematically include professionally organised looters, criminal organisations, state officials, soldiers and – as recent newcomers – terrorists. When acting systematically, these actors have the intention of actively participating in the illicit traffic and to generate profit from the activities undertaken. Professional looters are often active on a local scale and constitute the main cause of the dissipation of archaeological materials in source states.¹² These local thieves will dispose of their loots through a complex chain of transactions, involving one or more middlemen that will sell the artefacts to domestic or foreign antiquities dealers. In general, professional looters use a systematic methodology, they are well organised and well-financed.¹³ In certain states, some of these thieves are so notorious that they have gained general recognition. For example, the Italian *tombaroli* and *clandestini*,¹⁴ the *chicleros* of Central America and the *huaqueros* of Peru, Bolivia and Ecuador¹⁵ are famous for the clandestinity of their activities;¹⁶ artefacts are also coveted by criminal organisations.¹⁷ These organised groups generally already have access to vast networks that they are able to exploit in order to dispose of other illegal merchandise – such as weapons and drugs –, making the trade in artefacts a profitable sideline; agents entrusted with the task of protecting their state's archaeological sites are also, at times, made accomplices to the illicit traffic in artefacts. Guards and border control agents often lack the experience required to deal with the problem of archaeological theft or they are easily prone to bribery due to their low incomes.¹⁸ Hence, they play a key role in the depletion of a state's cultural identity,¹⁹ as widespread corruption is an important contributing factor to the smuggling of archaeological objects.²⁰ What is more, in times of political turmoil, soldiers can also contribute to the plundering of archaeological sites. Their involvement in the loots can either be to support their political cause – e.g. for the sake of purchasing weapons –, or for personal gain. For example, long before the depletion conducted by the Islamic State came to the fore, different rebel fractions active in the conflict between Bashar al-Assad and the Syrian rebels were feeding off artefacts so as to buy weapons.²¹ Last but not least, terrorists seem to have recently profiled themselves as another important category of systematic suppliers of stolen antiquities: with the apparition of the *Islamic State of Iraq and the Levant* – hereinafter IS or ISIL –, concerns as to the exploitation of cultural materials as a source of revenue to finance terrorist activities have been expressed by the international media.²² Nevertheless, in spite of the public outcry at the destruction of the temple of Bel, of the Arch of Triumph of Palmyra (Syria) and of the temple, palace and ziggurat of Nimrud (Iraq), it remains unsettled as to whether IS actively exploits antiquities for the purpose of financing their activities.²³ Several experts have pointed out that there is no proof to be able to draw such a conclusion,²⁴

¹² Bator, P. M., 'An Essay on the International Trade in Art', 34 *Stanford Law Review*, (1982), p. 292.

¹³ Bator, (1982), p. 292.

¹⁴ Monique Olivier specifies that the term 'tombaroli' is used in the vicinities of Rome, whilst the term 'clandestini' is used in other parts of Italy. See Olivier, M., 'The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property', 26 *Golden Gate University Law Review*, (1996), p. 634.

¹⁵ Dwyer, E., 'Critical Comments on the Draft Principles to Govern a Licit International Traffic in Cultural Property', in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 106.

¹⁶ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 241.

¹⁷ Protz, L. V., 'Keynote Address: The Prospects for the Recovery of Cultural Heritage Looted from Iraq', in: The International Bureau of Permanent Arbitration (ed), *Resolution of Cultural Property Disputes. Papers Emanating From the Seventh PCA International Law Seminar May 23, 2003*, (Kluwer Law International [et al.]: The Hague [et al.], 2004), p. 29; INTERPOL, *Protecting Cultural Heritage – An Imperative for Humanity*, (United Nations, 22 September 2016), p. 7, available at <https://www.interpol.int/News-and-media/Publications2/Leaflets-and-brochures/Protecting-Cultural-Heritage>, last retrieved on 01.03.2018.

¹⁸ Warring, J., 'Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review* (2005), p. 237; Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 242; Roodt, C., 'Keeping cultural objects 'in the picture': traditional legal strategies', 27 (3) *The Comparative and International Law Journal of Southern Africa*, (1994), p. 315; INTERPOL, (2016), p. 7.

¹⁹ Warring, (2005), p. 237; Bator, (1982), p. 292.

²⁰ Bator, (1982), p. 292; Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), p. 155.

²¹ See for example Luck, T., 'Syrian rebels loot artefacts to raise money for fight against Assad', *The Washington Post*, 12 February 2013, text available at the following url: https://www.washingtonpost.com/world/middle_east/syrian-rebels-loot-artefacts-to-raise-money-for-fight-against-assad/2013/02/12/ae0cf01e-6ede-11e2-8b8d-e0b59a1b8e2a_story.html, last retrieved on 01.03.2018. In the same vein, Cristina Ruiz – reporter for the Art Newspaper – quotes Mike Giglio who advanced that "Every armed group in Syria is involved" and that "We focus on Isis so much because they want us to and also because the US government wants us to as well, because we're at war; it's propaganda from both sides". Ruiz, C., 'What do we really know about Islamic State's role in Illicit Antiquities trade?' *The Art Newspaper*, 1 March 2016, text available at <http://old.theartnewspaper.com/news/news/what-do-we-really-know-about-islamic-state-s-role-in-illicit-antiquities-trade/>, last retrieved on 01.03.2018.

²² See for example Bohstrom, P., 'ISIS Plundered, Destroyed Ancient Assyrian City in Syria, Liberators Find', *HAARETZ*, 8 August 2016, available at <http://www.haaretz.com/jewish/archaeology/1.735889>, last retrieved on 01.03.2018.

²³ See for example INTERPOL, (2016), p. 19: "Special attention was given to items excavated illicitly at Syrian and Iraqi archaeological sites. There is a dearth of information about the actual number of items, and so far very few objects looted from these countries have been seized on the international market. These findings stand in stark contrast to daily media reports on the number and value of looted

although these findings appear to be contradicted by other commentators and other sources.²⁵ But for this lack of clarity as to ISIL's involvement in the said traffic, the case has raised concerns as to the exploitation of archaeological theft for the purpose of financing terrorism.²⁶ Next to the aforementioned categories of systematic contributors to the illicit trafficking in artefacts, suppliers acting on a sporadic basis include local opportunists, tourists, diplomats,²⁷ chance finders and constructors / exploiters. Although they do not directly and actively participate in the illicit traffic in artefacts, these actors may actually exacerbate the problem: the population of regions that are rich in cultural artefacts hunt for treasures²⁸ and, in doing so, they also plunder the region's cultural identity.²⁹ By way of contrast to looting that is exercised by professionals, loots led by local opportunists are typically unorganised, sporadic, episodic and often merely incidental.³⁰ Furthermore, the exploitation of local archaeological materials by these persons frequently takes place in countries that have dysfunctional and tardy law enforcement³¹ or a policy of complete preservation for archaeological sites.³² The incentives for looting by these protagonists involve financial prospects,³³ as these persons consider the appropriation of the 'fruits' of the land as their right – and therefore an opportunity – to ameliorate their living standards.³⁴ Put differently, these individuals will put their personal interests above the cultural interests of their state, considering the discovery or plundering of these objects as an opportunity to support their personal cause.³⁵ Sometimes, local opportunists find solace in looting: instead of financial gain, the exploitation can be out of necessity³⁶ or for the sake of survival.³⁷ The lack of awareness amongst local populations of the relevance and importance of archaeological remnants to the history of their nation³⁸ – as reflected in the intentional and unfettered plundering and spoiling of archaeological sites³⁹ contributes to the sustainment of the market in

items, and the relative profits for the perpetrators of these illegal activities. The discrepancy between popular perception and the actual statistics has led experts to make different and sometimes contradictory conclusions. [...] According to experts, the number of seizures of items most likely taken from Syria and Iraq (no more than fourteen thousand items) is "insignificant" on a world scale. Moreover, the various national agencies have so far identified very few objects for sale on the international art markets. These facts led to two conclusions. First that most of the looted archaeological artefacts are probably still hidden close to original sites, until the right opportunity arises for shipment to destination countries. Second, by sending small amounts of the stolen objects at a time, the criminal and terrorist groups involved in trafficking are testing the capacity of the current system to curb illicit exports". See also more generally Abdulkarim, M., 'Illicit trafficking of Syrian cultural property', 20 *Uniform Law Review*, (2015), pp. 561-567.

²⁴ As was reported by Ruiz "Michael Will, the manager of the Organised Crime Networks Group at Europol, the European Union's law enforcement agency, went further. "We have no evidence that Isis is selling antiquities to fund its activities," he said." See Ruiz, (2016), *op. cit.*

²⁵ See for example Pipkins, J., 'ISIL and the Illicit Antiquities Trade', XXIV *International Affairs Review*, (2016), pp. 100-119.

²⁶ See for example UN Security Council Resolution 2199 (2015), available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20%282015%29, last retrieved on 01.03.2018, INTERPOL, (2016), pp. 7 and 9, or United States Attorney's Office of the District of Columbia, 'United States Files Complaint Seeking Forfeiture of Antiquities Associated with the Islamic State of Iraq and the Levant', *Press release*, available at <https://www.justice.gov/usao-dc/pr/united-states-files-complaint-seeking-forfeiture-antiquities-associated-islamic-state>, last retrieved on 01.03.2018.

²⁷ See for example the case of Leonardo Patterson, Pedro Julio Díaz Vargas and Ulf Lewin discussed in Torres López, F., 'Diplomats and collectors under suspicion in the trafficking of Latin American art', *Memoria Robada*, available at <https://memoriarobada.oyo-publico.com/investigaciones/diplomats-and-collectors-under-suspicion-in-the-trafficking-of-latin-american-art/>, last retrieved on 01.03.2018.

²⁸ Warring, (2005), p. 237; see for example Jarus, O., 'Blood & Gold: Children Dying As Egypt's Treasures Are Looted', *Live Science*, 8 August 2016, available at <http://www.livescience.com/55687-children-dying-in-egypt-looting.html>, last retrieved on 01.03.2018 where it is reported that children from the local populace are being paid by professional looters in order to access underground tombs that are only accessible via narrow passages. See also Qin, A., (2017), *op. cit.*

²⁹ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 241.

³⁰ Bator, (1982), p. 292.

³¹ Prott, "Keynote Address: The Prospects for the Recovery of Cultural Heritage Looted from Iraq", (2004), p. 29.

³² See for example Quin, (2017), *op. cit.*, where it is explained that the Chinese government does not allow tombs to be opened, even by professionally trained archaeologists, preferring instead to ensure the conservation of their content.

³³ Ardouin, C. D., "Vers un Trafic Licite des Biens Culturels? Quelques Reflexions et Questions à Partir d'une Perspective Anthropologique", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 83.

³⁴ Gerstenblith, P., *Art, Cultural Heritage, and the Law: Cases and Materials*, (Carolina Academic Press: Durnham, Fourth Edition, 2008), p. 603.

³⁵ O'Keefe, (1999), p. 30.

³⁶ The undocumented and usually illegal plundering of a nation's archaeological materials from archaeological sites for subsistence purposes has been termed 'subsistence digging'. For more information about this qualification, see Brodie, N., "Archaeological Looting and Economic Justice", in: P. M. Messenger, G. S. Smith (eds), *Cultural Heritage Management: A Global Perspective (Cultural Heritage Studies)*, University Press of Florida: Tampa, 2010), pp. 262 and ff.

³⁷ For example, as was noted by Ruiz the on-going plundering of sites in Syria by the local population constitutes their salute in escaping the war waged upon the Syrian territory. Quoting Mike Giglio, Ruiz specifies "It's a sign of the desperation of the people affected by the conflict... they see artefacts buried in the ground as their ticket out of their current hell". See Ruiz, (2016), *op. cit.*

³⁸ O'Keefe, (1999), p. 30.

³⁹ Gerstenblith, (2008), p. 617.

stolen antiquities. Furthermore, although not technically speaking an illegal activity relating to the illicit traffic of archaeological materials, chance finds also contribute to nurturing the illegal market in artefacts. In some states, domestic laws entitle the state to either confiscate a piece of land in which an artefact has been found, or to oblige the finder to transfer the possession of the object to the state without the payment of a finder's fee or he is requested to transfer the find to the state for an often meagre reward.⁴⁰ In these states, the finder will usually not report his discovery due to the lack of an appropriate reward, and will instead dispose of the object by selling it on the black market.⁴¹ Although this could be remedied by prescribing the payment of a (reasonable) finder's fee to the chance finder, the lack of financial resources that many source states suffer from means that this option is non-viable:⁴² whilst many chance finders are willing to notify their discovery to the national authorities, often there is no financial *quid pro quo* to these finds, or the compensation is not adequate and does not compete when compared to the international price that could be fetched for these objects,⁴³ thereby resulting in the non-reporting of the find to the authorities of the source state. Archaeological materials can also be disposed of in case of obstruction of construction works or of commercial exploitation. The discovery of archaeological sites due to construction work occurs regularly.⁴⁴ If artefacts are found on construction sites, reporting the find to the authorities can result in the government putting a halt to the work and, therefore, sometimes considerably delay the project.⁴⁵ The financial ramifications resulting from the delay are often important for the entrepreneur, which may force their hand by paying workers to silence the find⁴⁶ and to dispose of the items discovered. Similar scenarios occur when the land is being drilled for the purpose of commercial exploitation; tourists are another important category of actors contributing to the loss of culture in source states.⁴⁷ Their motives for misappropriating objects can, nevertheless, be at odds with the ones of the aforementioned actors: recreational theft is often conducted to acquire a genuine souvenir from their visit⁴⁸ instead of contemplating the financial prospects of their discovery.

Alongside the high demand for artefacts, several factors inherent to the activity constitute stimuli for responding to the demand: firstly, archaeological theft perdures because of the low rate of crime detection. In

⁴⁰ Olivier, (1996), p. 636, footnote 56.

⁴¹ Olivier, (1996), p. 636, footnote 56; Renold, M. A., 'The Legal and Illegal Trade in Cultural Property to and Throughout Europe: Facts, Findings and Legal Analysis', Joint European Commission-UNESCO Project, "Engaging the European Art Market in the fight against the illicit trafficking of cultural property", Study for the capacity-building conference, 20-21 March 2018, p. 7.

⁴² Hoffman, B., 'How Unidroit Protects Cultural Property: Part II', 213 (46) *New York Law Journal*, (10 March 1995), p. 3.

⁴³ Shyllon, F., 'Private Law Beyond Markets for Goods and Services: The Example of Cultural Objects', 8 *Uniform Law Review*, (2003), p. 521; it should be noted that Article 2 (iii) of the Valetta convention (1992) obliges its contracting states to adopt provisions to the effect that finders of chance discoveries are obliged to report their discovery to the national authorities: "Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for: [...] iii. the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and making them available for examination". The convention can be retrieved at the following link: <https://rm.coe.int/168007bd25>, last retrieved on 01.03.2018.

⁴⁴ Two recent examples are provided with the construction of a new metro station in Rome, Italy and the construction of a tramway line in Florence. See BBC News, 'Italy unearths huge Roman barracks during Rome metro dig', 17 May 2016, available at <http://www.bbc.com/news/world-europe-36311156>, last retrieved on 01.03.2018 and La Repubblica, 'Roman Necropolis Emerges From The Excavations Of Florence Tramway', *Archaeology News Network*, 10.02.2018, available at <https://archaeologynewsnetwork.blogspot.nl/2018/02/roman-necropolis-emerges-from.html?m=1#OHF7zSVpuYDpOf71.97>, last retrieved on 01.03.2018. For another recent and considerable find, see the story of the discovery of Roman coins in the vicinities of Sevilla, Spain, see Lockhart, K., 'Construction workers unearth over half a tonne of Roman coins in Spain', *The Telegraph*, 29 April 2016, available at <http://www.telegraph.co.uk/news/2016/04/29/construction-workers-unearth-over-half-a-tonne-of-roman-coins-in/?cid=sf25340211&sf25340211=1>, last retrieved on 01.03.2018.

⁴⁵ Olivier, (1996), p. 636, footnote 56.

⁴⁶ Olivier, (1996), p. 636, footnote 56; nonetheless, this is not always the case. The recent find around Sevilla shows the willingness of some constructors to report archaeological discoveries that are found at construction sites. See Lockhart, (2016), *op. cit.*

⁴⁷ Warring, (2005), p. 237.

⁴⁸ Warring, (2005), p. 237; in order to remedy to this situation, UNESCO has tried to raise awareness of the consequences of recreational theft between tourists. See UNESCO, 'UNESCO and Lonely Planet: Do not pack other people's cultural heritage in your luggage!', available at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/awareness-raising-initiatives/lonely-planet/>, last retrieved on 01.03.2018 and UNESCO, 'A good practice against illicit trafficking UNESCO clips on display in airport', available at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/awareness-raising-initiatives/georgia-good-practice/>, last retrieved on 01.03.2018. Although not concerned with the spoliation of an archaeological site, China is struggling with the theft of the bricks from the Great Wall – a UNESCO World Heritage Site – by tourists. See Mackey Frayer, J., 'China to crack down on brick-by-brick theft of Great Wall', *The Guardian*, 29 July 2016, available at <https://www.theguardian.com/world/2016/jul/28/china-to-crack-down-brick-by-brick-great-wall-theft>, last retrieved on 01.03.2018; see also the case of Toby Robyns – a UK citizen arrested in Turkey for a find he made whilst snorkelling during his holiday in the country – discussed by Alexander Herman – Assistant Director to the Institute of Art & Law –, interview to be found in Swait, A., 'Commentary on prosecution of UK man for antiquities smuggling', *Institute of Art & Law*, 30 August 2017, available at: <https://www.ial.uk.com/commentary-on-prosecution-of-uk-man-for-antiquities-smuggling/>, last retrieved on 01.03.2018.

fact, it is often impossible for source states to discover the existence of certain artefacts or even of their removal from their territory for two reasons: in the first instance, the theft of an object whose existence is unknown ensures that the crime remains ‘victimless’, and thus concealed from the authorities of the source state.⁴⁹ In the second instance, because the theft is often unknown and unreported to the aforementioned authorities, the discovery of the artefact and of the crime mostly occurs when the object is disposed of on the licit market.⁵⁰ It is even possible for the object to have been subjected to several transactions, and for many years to have expired before its existence and removal are acknowledged by the source state.⁵¹ The example of the Guennol Stargazer aptly illustrates this point.

The Guennol Stargazer – a five thousand year-old stone idol considered to be one of the finest and largest preserved Anatolian marble female idols of Kiliya type – was auctioned at Christie’s in April 2017.⁵² The 22,8 cm high idol that was estimated to be worth three millions U.S. dollars had been for sale on the U.S. market since 1966 and – despite lacking any documentation relative to its excavation – it was sold for 14,5 million dollars mainly due to its fifty years of recorded provenance within the United States.⁵³ Before the April sale, Turkey filed a suit with the Southern District Court of New York to prevent the auctioning of the Stargazer so that it would be able to recover it. Although it could easily have been aware of the presence of the statue in the United States decades earlier, Turkey currently avers that the statue was illicitly excavated in the 1960s in its territory⁵⁴ and that it should, hence, be returned to it.

In contrast to other cultural objects, looted artefacts cannot be reported in databases that maintain lists of stolen cultural objects.⁵⁵ The difficulties in traceability are further exacerbated by the secrecy with which archaeological marauders operate, thereby rendering detection, control or prosecution particularly difficult: ⁵⁶ after the misappropriation, the object enters into a smuggling phase by which it is transported from the find site to targeted retail markets. Little is known, at least specifically, as to the methods used in the disposal of artefacts from the find sites to these markets, most notably because the journey of looted artefacts is often kept secret.⁵⁷ Nevertheless, it is clear that this subtractive process, when exercised professionally, has developed its own cross-border infrastructure, which might involve transporters, middlemen and experts or art dealers.⁵⁸ Campbell has recently provided a model by which he categorises the process of looting in four stages:⁵⁹ ‘looter, early stage middleman or intermediary, late stage intermediary, and collector’.⁶⁰ Although Campbell does not exclude the possibility that more categories of individuals may be involved in these four stages,⁶¹ Campbell’s schematisation of the looting process permits one to conceptualise it. More importantly, it must be realised that the entire operation that takes place between the excavation and the sale to a consumer is subject to

⁴⁹ Gerstenblith, (2009), p. 311.

⁵⁰ Lalive D’Epinay, P., ‘Une avancée du droit international: la Convention de Rome d’Unidroit sur les biens culturels volés ou illicitement exportés’, 1 *Uniform Law Review*, (1996), p. 52; Gerstenblith, P., *Art, Cultural Heritage, and the Law, Cases and Material*, (Carolina Academic Press, Third Edition, 2004), p. 385.

⁵¹ Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 385.

⁵² The press release of the sale of the statue can be found at the following link: http://www.christies.com/presscenter/pdf/8647/REL_StarGazer_8647_1.pdf, last retrieved on 01.03.2018.

⁵³ See Committee for Cultural Policy, ‘The Guennol Stargazer – Pre-1970 provenance isn’t good enough?’, 27 April 2017 / Updated 1 May 2017, text available at <https://committeeforculturalpolicy.org/the-guennol-stargazer-pre-1970-provenance-isnt-good-enough/>, last retrieved on 01.03.2018.

⁵⁴ Amineddoleh, L., ‘Why Turkey Tried—and Failed—to Halt Christie’s Auction of a \$14.4 Million Statue’, *Artsy Editorial*, 3 May 2017, available at <https://www.artsy.net/article/artsy-editorial-turkey-failed-halt-christies-auction-144-million-statue>, last retrieved on 01.03.2018.

⁵⁵ Love Levine, (2010-2011), p. 755; Gerstenblith, *Art, Cultural Heritage, and the Law, Cases and Material*, (2004), p. 424.

⁵⁶ Love Levine, (2010-2011), p. 755.

⁵⁷ As noted by Interpol in 2016 “Given the lack of reliable data available to the international community on the transnational nature of trafficking in cultural property, such as trafficking routes, extent, patterns, modus operandi and financial gains from trafficking, international organizations should consider undertaking studies and research to fill these knowledge gaps. They should also consider how they can provide technical advice and support to Member States to facilitate their data collection and analysis capacity on these issues. In general, closer systematic cooperation between States and international organizations in this area is a critical issue”. There thus seems to be little information available about smuggling networks, coupled with a lack of exchange of information between states.

⁵⁸ As was noted by Gerstenblith in 2009, recent ethnographic studies have shown that the disposal post-removal is particularly well organised. See Gerstenblith, (2009), p. 305.

⁵⁹ See Pipkins, (2016), pp. 103 and ff., referring to the work of Campbell published in Campbell, P. B., ‘The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage’, 20 (2) *International Journal of Cultural Property*, (2013), pp. 113-153.

⁶⁰ See Campbell, (2013), p. 116.

⁶¹ Campbell, (2013), p. 116.

compartmentalisation,⁶² making it particularly difficult to establish a direct link between the excavation and the retail trade.⁶³ Compartmentalisation constitutes a particularly propitious instrument that allows an individual to legitimise an unlawful situation.⁶⁴ Through means of compartmentalisation, the process of looting, smuggling, laundering and retailing are presented in isolated sequences, making it only possible to discern the phases individually.⁶⁵ There is, in the end, a remote connection between the excavation and the displaying of an object in a dealer's shop window. This renders it particularly difficult to discover the machinery that underpins the looting and smuggling process. This, in turn, causes the rate of detection of the illegal act to be lower than for other thefts, especially considering that the unlawful act is unknown until the objects appears on the market. Next to the compartmentalised and obscure journey that archaeological objects are subjected to, the process of laundering the origin of these objects is facilitated by three factors: 1) the selling of the looted objects abroad serves the purpose of disconnecting the illegal act from the item's entry onto the art market;⁶⁶ 2) artefacts often make their way from archaeological sites to private collections in other countries with made up or falsified provenances so as to legitimise their introduction onto the licit art market.⁶⁷ The international transfer of the object makes it difficult to verify the information that has been supplied and which allegedly guarantees the item's provenance; 3) the secrecy overcasting acquisitions of antiquities by antiques dealers, museums or collectors – inherent in the opacity of the market in cultural objects – guarantees the non-disclosure of the process.⁶⁸

To recapitulate, the aggregate result of the lack of information about the find site, of the impossibility to link some artefacts to a specific region of origin, of the compartmentalisation process in disposing of the artefact, of the cross-border smuggling of archaeological materials and of the opacity of the art market render the illicit traffic in archaeological objects *ipso facto* a particularly enticing, profitable and thriving criminal enterprise. In summary, the lack of fast detection of the crime and the impossibility of identifying the stolen property thus makes it possible for looters or others actors operating in smuggling networks to build a long-lasting concealed economic activity. Secondly, the profit generated at each stage of this process gives sufficient impetus to the parties involved to undertake or pursue the activities: whilst the object goes up the chain of transactions, the sale price increases⁶⁹ sufficiently so as to satisfy each party involved in compensating for the efforts and risks that are intrinsic to the activity. Thirdly, the high prices fetched at the end-of-the-chain-of-transactions will whet the

⁶² Campbell submits that the process is divided on the basis of specialisation, advancing for example that the looter does not know how to smuggle the artefact and must, therefore, rely on another person who has insights in this latter practice. Concurrently, this is the reason why payment for the object is effectuated upon the handing over of the object to the next specialist and why the profit increases per transaction (as specified below). See Campbell, (2013), pp. 116 and ff.

⁶³ See for example INTERPOL, (2016), p. 7.

⁶⁴ Tubb notes that this process of compartmentalisation allows for a relatively safe way of dealing with illegally excavated artefacts, notably through the crossing of one or two borders. See Tubb, K. W., 'Thoughts in Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property', in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 113; an obnoxious paragon of the effectiveness of compartmentalisation can be found in the use of gas chambers meant for the annihilation of Jews in work camps during the Second World War (see Bauman, Z., 'Social production of moral invisibility', in *Modernity and the Holocaust*, (Cornell University Press: Ithaca, New York, 1986), pp. 24 and ff.). Mass killings in work camps were made possible because of the application of processes of compartmentalisation. The process of killing was divided into sequences disconnecting the acts of German soldiers from their consequences, by making these consequences invisible to the agent that performed the act. As was noted by Bauman: "With this effect of the invisibility of victims in mind, it is perhaps easier to understand the successive improvements in the technology of the Holocaust. At the Einsatz-gruppen stage, the rounded-up victims were brought in front of machine guns and killed at point-blank range. Though efforts were made to keep the weapons at the longest possible distance from the ditches into which the murdered were to fall, it was exceedingly difficult for the shooters to overlook the connection between shooting and killing. This is why the administrators of genocide found the method primitive and inefficient, as well as dangerous to the morale of the perpetrators. Other murder techniques were therefore sought - such as would optically separate the killers from their victims. The search was successful, and led to the invention of first the mobile, then the stationary' gas chambers; the latter - the most perfect the Nazis had time to invent - reduced the role of the killer to that of the 'sanitation officer' asked to empty a sackful of 'disinfecting chemicals' through an aperture in the roof of a building the interior of which he was not prompted to visit" (see Bauman, Z., *Modernity and the Holocaust*, (Cornell University Press: Ithaca, New York, 1986), p. 26). Because their moral integrity was not affected, German soldiers did not question the acts that they were asked to perform. Subsequently, the death machinery could proceed without much ado. This example illustrates, in the most appropriate manner, how effective compartmentalisation can be in concealing the illegal character of the acts performed.

⁶⁵ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 217.

⁶⁶ Bator, (1982), p. 292.

⁶⁷ Lunden, 'The Illicit Antiquities Trade. Raising Public Awareness, Governments, non governmental institutions and civil society – an indispensable partnership', in UNIDROFF, (2012), forthcoming.

⁶⁸ For the contribution of museums' secrecy to the illicit traffic in archaeological materials, see Elsen, A. E., "Full Disclosure by Museums to Improve the Licit International Traffic in Art", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), pp. 117-119.

⁶⁹ Brodie and Renfrew, (2005), p. 348; Campbell, (2013), p. 116.

appetite of retailers and therefore incentivise them to acquire more tainted objects. This will automatically generate a follow-up demand that stimulates repetition, resulting in a renewal of the looting-smuggling-retailing cycle.⁷⁰ Fourthly, even if the looted item is returned to its legitimate owner, the financial loss suffered by the person placing the object on the licit market is minimal,⁷¹ as it is possible to recoup this loss on subsequent transactions.⁷² Finally, the lack of effectiveness in preventing and in detecting the theft by law enforcement agencies,⁷³ the unlikeliness of being caught,⁷⁴ and the remoteness of sites in which the artefacts are taken contribute to ensuring that archaeological theft is a sustainable commercial undertaking.⁷⁵

(2) Protecting artefacts *in situ* and *ex situ*

As specified above, the depletion of archaeological materials from source states is exacerbated by the complexities inherent to protecting archaeological sites from spoliation. In order to remedy the problem of archaeological looting, many source states have adopted a variety of measures to tackle the issue.⁷⁶ Irrespective of how this protection has been translated into domestic law, market states have often accused source states of not being able to protect their archaeological sites and their artefacts from looting effectively.⁷⁷ This argument has often been used by market states to justify their acquisitions of misappropriated artefacts. In light of this criticism, account must be given of the difficulties encountered by source states in protecting artefacts and archaeological sites from archaeological theft. Listing these difficulties will help to understand the heavy burden that source states have to cope with in addressing the problem adequately.

Protecting archaeological sites (protection *in situ*)

An important difficulty encountered in providing effective protection to artefacts *in situ* relates to the challenges that source states encounter in protecting archaeological sites themselves. Following the views of Gerstenblith, an archaeological site is best explained as a ‘complex of ancient artefacts and other material remains of the past preserved in a contextual relationship’.⁷⁸ One of the most fundamental problems relating to the protection of these sites resides in the lack of knowledge of their exact whereabouts.⁷⁹ Although attempts are made at recording and protecting known sites, it is impossible to protect sites whose existence is not known or not reported to a source state. Thenceforth, an important part of the plundering of artefacts is not within the state’s knowledge because it takes place without it even being aware of the existence of the find site.⁸⁰ The recent discovery of the Lost City of the Monkey God in Honduras aptly illustrates the difficulties that source states may experience in unveiling the existence of archaeological sites within their territory.

In early 2015, a team of American and Honduran explorers discovered the Lost City of the Monkey God – also known as the Ciudad Blanca or the White City of Gold – located in the Mosquitia rainforest, Honduras. Its existence had first been reported in 1526 by Hernando Cortez to King Charles V of Spain and, ever since, it was believed to be a myth. As a legend, it inspired the redaction of many books and the filming of many movies. Efforts to authenticate its existence were undertaken from the 20th century onwards, when expeditions aimed at its discovery were organised in the 1920s. Two decades later, an explorer known as Theodore Morde declared that he had found the lost city. It is reported that for fear of looting, Morde never disclosed the exact whereabouts of the lost city and died prematurely through an obscure death in the 1950s.⁸¹ His abrupt demise resulted in the apparent

⁷⁰ Brodie and Renfrew, (2005), p. 348.

⁷¹ Gerstenblith, (2009), p. 315.

⁷² Gerstenblith, (2009), p. 315.

⁷³ Gerstenblith, (2009), p. 614.

⁷⁴ Gerstenblith, (2009), p. 614.

⁷⁵ Alder, C., Polk, K., “The Illicit Traffic in Plundered Antiquities”, in: P. Reichel (ed), *Handbook of Transnational Crime and Justice*, (Sage Publications: California, 2005), p. 100.

⁷⁶ Kirby, C. L., ‘Stolen Cultural Property: Available Museum Responses to an International Dilemma’, 104 *Dickinson Law Review*, (1999-2000), p.732; Forrest, (2010), p. 157.

⁷⁷ This submission stands notwithstanding important legislative reforms that certain states have undertaken to counter the illicit traffic in archaeological materials. Peru is one of the many examples of states that have undertaken these reforms without successfully achieving the objective of discarding the looting of archaeological sites from its territory. On the contrary, most of these measures have had an aversive effect on the work of the scientific community, without affecting the activities of the *huauqueros*. For more detail in this regard, see Dwyer, (1996), pp. 105-106.

⁷⁸ Gerstenblith, (2009), p. 305. The definition provided by Gerstenblith takes into account the intertwined nature of archaeological objects with their provenience.

⁷⁹ Bator, (1982), p. 290.

⁸⁰ Bator, (1982), p. 290.

⁸¹ There exist different reports of Morde’s death: although it has been submitted that he committed suicide in his parents’ house, it has also been reported that he died in a car accident in London.

loss of the only information available since the sixteenth century as to the whereabouts of the lost city.⁸² More than sixty years later, the city was (re)discovered in 2012 through the use of LIDAR – an acronym for Light Detection and Ranging – remote sensing technology.⁸³ Recent on the ground explorations also confirmed the LIDAR readings. The discovery of the city was only made possible after a filmmaker gathered more than one million euros from private funds to finance the LIDAR analysis. Without this technology and these funds, the research as to the whereabouts of the city would most probably have remained unfruitful.⁸⁴

The case of the Lost City of the Monkey God is a paradigm which helps to identify the difficulties that a source state is often faced with in knowing about the existence of archaeological sites for the following reasons: firstly, it should be noted that the site was famous and that its existence whetted the interest of many explorers. Despite its fame, figuring out its exact whereabouts seemed to be utterly complicated, as expeditions for finding the lost city had been on-going for almost a century without success. It was only through the use of the latest technologies and by investing considerable amounts of money that the lost city's location was ultimately found. The difficulties inherent in unveiling an entire city whose existence is rumoured adequately illustrates the problem with finding any archaeological site. All the more so because the majority of these sites are not rumoured or known to exist. For these sites, the discovery remains purely fortuitous and it can, therefore, occur almost randomly. For example, discoveries often take place during construction works, much like the situation in the Spanish Cartagena, where a Roman theatre dating from between the year five and one BC was discovered in 1988 during the construction of the *Centro regional de artesanía*. The discovery can also result from random searches stemming from mere curiosity: the Siedenbergh House in the old city of Jerusalem, Israel, and the find site of the Ringlemere gold cup are good examples of discoveries by individuals that were purely fortuitous. All in all, as long as an archaeological site is not known to the source state, it is virtually impossible for the state to guard and protect the site from being looted.⁸⁵ What is more, even when something is fortuitously discovered, the whereabouts of these sites can intentionally be kept hidden from the state authorities. This is notably the case when the site is discovered whilst conducting economic activities such as agriculture, urban developments⁸⁶ – including road constructions⁸⁷ – or the extraction of natural resources.⁸⁸ When the discovery of artefacts or archaeological sites mandates that a report should be filed with the source state and to suspend the activity for the sake of studying the site, many entrepreneurs might prefer to sell the artefacts on the black market rather than reporting their find to the authorities of the source state. In this situation, it is also particularly difficult for the source state to know of the existence of the site and to reprehend the spoliation of its artefacts. Thus, clandestine excavations taking place in these situations can remain unbeknownst to the source state for many years.⁸⁹

⁸² Nevertheless, Douglas Preston – one of the explorers that discovered the lost city in 2012 – has discredited the story told by Morde. Preston was able to retrieve Morde's personal notes in which the latter explained that he had not found the lost city but that he had, instead, been looking for gold in Honduras. For a full report of this story, see Douglas Preston's presentation of his book on the discovery of the city of the Monkey God at University Book Store in Seattle, available at <https://www.youtube.com/watch?v=dGpmXsKYMx0>, last retrieved on 01.03.2018.

⁸³ This technology is particularly promising in detecting anomalies in the stratum that could indicate the presence of archaeological sites. See for example the discovery of a Medieval city in Cambodia and reports about the use of LIDAR in general in Evans, D., 'Meet Lidar: the amazing laser technology that's helping archaeologists discover lost cities', *The conversation*, 14 June 2016, available at http://theconversation.com/meet-lidar-the-amazing-laser-technology-thats-helping-archaeologists-discover-lost-cities-60915?utm_medium=email&utm_campaign=Latest+from+The+Conversation+for+June+15+2016+-+5038&utm_content=Latest+from+The+Conversation+for+June+15+2016+-+5038&utm_cid_97ad8c6841e35de0b8dd53f2946877fd&utm_source=campaign_monitor_uk&utm_term=Meet+Lidar+the+amazing+laser+technology+thats+helping+archaeologists+discover+lost+cities, last retrieved on 01.03.2018 and Dunston, L., 'Revealed: Cambodia's vast medieval cities hidden beneath the jungle', *The Guardian*, 11 June 2016, available at https://www.theguardian.com/world/2016/jun/11/lost-city-medieval-discovered-hidden-beneath-cambodian-jungle?CMP=Share_AndroidApp_Facebook, last retrieved on 01.03.2018.

⁸⁴ Preston, D., 'Exclusive: Lost City Discovered in the Honduran Rain Forest', *National Geographic*, 2 March 2015, available at <http://news.nationalgeographic.com/2015/03/150302-honduras-lost-city-monkey-god-maya-ancient-archaeology/>, last retrieved on 01.03.2018; Leonard, T., 'Cannibals. Human sacrifice. Have explorers finally found the fabled lost City of the Monkey God?', *Daily Mail*, 6 March 2015, available at <http://www.dailymail.co.uk/news/article-2982044/Have-explorers-finally-fabled-lost-City-Monkey-God.html>, last retrieved on 01.03.2018; see also Dunne, D., 'PICTURE EXCLUSIVE: Inside the 'Lost City of the Monkey God' protected from visitors by a flesh-eating disease', *Daily Mail*, 8 March 2017, available at <http://www.dailymail.co.uk/sciencetech/article-4290690/Douglas-Preston-talks-Lost-City-Monkey-God.html>, last retrieved on 01.03.2018.

⁸⁵ Bator, (1982), p. 311.

⁸⁶ Gerstenblith, (2008), p. 617. A minority of states have instated legal obligations to hold surveys and to vet the site for archaeological remains before resuming the construction work (*idem*).

⁸⁷ Tubb, (1996), p. 114.

⁸⁸ Brodie and Renfrew, (2005), p. 343; Brodie N., "An Archeologist's View of the Trade in Unprovenanced Antiquities", in: B. T. Hoffman, *Art and Cultural Heritage – Law, Policy and Practice*, (Cambridge University Press: Cambridge, 2009), p. 52.

⁸⁹ Bator, (1982), p. 311.

Even if the site is known to the source state, other complications might preclude these states from providing the appropriate safeguards. These constraints mainly relate to practical difficulties such as logistical problems – notably reflected in the long distances separating the sites –, of access,⁹⁰ in setting up means of communication in remote territories,⁹¹ or – in exceptional circumstances – of the dangers encountered in accessing the sites.⁹² Axiomatically, these complications depend mainly on a multitude of variables, such as the vastness of the territory of the source state or of the topographical landscape within which the security is set to operate. This means that source states that only have a few sites to protect are able to implement safeguarding measures more effectively,⁹³ whilst bigger states, or states with many excavation sites, might not be able to deploy enough resources to protect the entirety of the sites adequately. What is more, even if all excavation sites are known and accessible, not every source state has the capacity to guard every site:⁹⁴ one of the most important burdens that source states face in protecting their known sites – if not the most important – is the need to dispose of sufficient financial means in order to exercise permanent supervision over the areas that are in need of protection. In many developing states – which are often rich in artefacts – the lack of financial resources due to economic precariousness jeopardises the protection of the domestic archaeological heritage.⁹⁵ Furthermore, in both developed and developing countries, only a very small portion of the public budget is allocated to the protection of sites.⁹⁶ This lack of financial resources is not only an issue for the protection and preservation of known sites, but it also constitutes a problem when too little – if any – money is allocated to the discovery of new archaeological sites.⁹⁷ Thenceforth, the lack of measures relating to the effective protection of excavation sites naturally makes artefacts more vulnerable and prone to unlawful appropriation and alienation. Consequently, the complexities inherent to the protection of find sites requires a distinction to be drawn between archaeological theft and the theft of other cultural materials.⁹⁸

⁹⁰ Bator, (1982), p. 312. For example, in the case of the Lost City of the Monkey God that was mentioned above, it is worth mentioning that the site could only be accessed by helicopter, making it particularly difficult to reach. Whilst the remote location of the site explains why looters had not yet plundered it, this remoteness made it particularly difficult for the government of Honduras to provide effective protection on a permanent basis. See Preston, (2015), *op. cit.*

⁹¹ O’Keefe, (1999), p. 31.

⁹² For example, access to the City of the Monkey God is particularly dangerous as the site is contaminated by a deadly flesh eating bacteria, making any prospects of lawful or unlawful excavation potentially life threatening. See Dunne, (2017), *op. cit.*

⁹³ O’Keefe, (1999), p. 31.

⁹⁴ Bator, (1982), p. 312.

⁹⁵ Ardouin, (1996), p. 83.

⁹⁶ O’Keefe, (1999), p. 30; see for example the problems linked to the effective protection of cultural artefacts in Egypt that is explained in Hassan, K., ‘Weak security plagues Egypt’s archaeological sites’, *Al-Monitor*, 7 September 2015, <http://www.al-monitor.com/pulse/originals/2015/08/egypt-lax-security-archaeological-sites.html#>, last retrieved on 01.03.2018; this limited budgetary apportioning to protect archaeological objects is a result of prioritisation (see O’Keefe, (1999), p. 30), and correspondingly, of state policies. Prioritisation in more urgent societal needs entails that the protection and preservation of excavation sites is typically not adequately financed. See Bator, (1982), p. 292; Forrest, (2010), p. 137.

⁹⁷ Bator, (1982), p. 292; Forrest, (2010), p. 137.

⁹⁸ Renold, M. A., ‘Les Principales Règles de la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés’, in: M. A. Renold and C. Breidler, *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 27.

Protecting artefacts (protection *ex situ*)

The protection of artefacts from spoliation afforded by source states cannot be limited to archaeological sites. In fact, artefacts are not, per definition, to be found amidst a ‘complex of ancient artefacts and other material remains of the past preserved in a contextual relationship’.⁹⁹ In many instances, artefacts or collections of artefacts have not been discovered within archaeological sites, but instead they have been found in isolation. A good illustration is provided by the multitude of hoards that have been found throughout the United Kingdom,¹⁰⁰ which were usually found *ex situ*. These finds appear on a sporadic basis and their whereabouts are unpredictable, making their protection by the source state virtually impossible. Furthermore, another important difficulty intrinsic to the detection of the possession of unlawfully excavated items stems from identifying an undocumented object as having been recently unearthed:¹⁰¹ without adequate paperwork as to the provenance or provenience of the object (see below), it proves extremely intricate to distinguish a recently unlawfully excavated object from an object that has been lawfully put on the market when there was no legislation regulating the matter.¹⁰² Identifying the period or year of extraction of artefacts is crucial considering that the ethics of collecting have changed considerably since 1970.¹⁰³ In fact, the adoption of the 1970 UNESCO convention is considered by – *inter alia* – many museums as the turning point for the change in the ethics of collecting.¹⁰⁴ Moreover, archaeologists have put the focus upon collecting and preserving the non-renewable information that can be extracted from proper excavations of future discoveries since 1970.¹⁰⁵ In doing so, they have condoned the loss of information that has occurred as a result of pre-1970 excavations, but also the fact that the objects that were excavated before this date can be handled freely on the art market.¹⁰⁶ The distinction between objects spoiled prior to 1970 and those unearthed post 1970 – whose presence on the art market deserves further inquiry – is difficult to draw if it is scientifically impossible to determine when an undocumented object has been excavated, making it considerably difficult for states to determine whether the artefact has been unlawfully excavated or not.¹⁰⁷ But for this remark, the majority of artefacts on the antiquities market have been acquired, or are transacted, without the necessary documentation. The general lack of adjoined information is partly due to the lack of interest amongst art dealers in paperwork, which used to hold the stage in the antiquities market – rarely probing or questioning the origin of an object –, ultimately invoking the secrecy of the art market to cover up their omission.¹⁰⁸ It must be emphasised here that failing to record the provenience of an artefact and of its subsequent provenance may adequately serve the purpose of erasing any trace of illegality relating to the origins of a looted object.¹⁰⁹ If information relating to the circumstances of the discovery was to be disclosed at the time of handing over of the object on the market, the protection of the possessor through means of innocent acquisition could be more easily contested.¹¹⁰ Henceforth, the practice of the deliberate loss of information as to the excavation of an archaeological object is a practice that was solidly grounded in the antiquities market.¹¹¹ As a

⁹⁹ See the definition of ‘archaeological site’ given by Gerstenblith above.

¹⁰⁰ The Staffordshire Hoard, the Harrogate Hoard, the Derrynaflan Hoard, the Cuerdale Hoard, the Hoxne Hoard, the Viking Hoard, the Frome Hoard, the Seaton Down Hoard and the Ophel Treasure are just a few notable examples.

¹⁰¹ Bator, (1982), p. 311.

¹⁰² O’Keefe, (1999), p. 32; Gerstenblith, (2008), p. 605; this difficulty is also apparent to the trained eye, as no scientific means exist to distinguish between artefacts that have recently entered the market and items that are inventoried in existing collections; See also INTERPOL, (2016), p. 10.

¹⁰³ Vitelli, K. D., “An Archaeologist’s Response to the Draft Principle to Govern a Licit International Traffic in Cultural Property”, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 111.

¹⁰⁴ Vitelli, (1996), p. 111; it should be noted that 1970 saw the introduction of measures of self-policing by many art museums, notably in the United States. See Anderson, M. L., “Art Market Challenges for American Museums”, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 121.

¹⁰⁵ Vitelli, (1996), p. 111.

¹⁰⁶ Vitelli, (1996), p. 111.

¹⁰⁷ As noted by Protz after the third session of the CGE: “There are many objects which are clandestinely excavated which may not be known to be so: e.g. whether an object was part of a grave-goods (*sic*), part of a monumental complex or a freestanding object made for commercial purposes is in many cases not clear”. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit preliminary draft convention on stolen or illegally exported cultural objects as revised June 1993 (prepared by Ms Lyndel V. Protz, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 42, Rome, September 1993, p. 5.

¹⁰⁸ Gerstenblith, (2008), p. 605.

¹⁰⁹ Brodie and Renfrew, (2005), p. 353.

¹¹⁰ Brodie and Renfrew, (2005), p. 353.

¹¹¹ Brodie and Renfrew, (2005), p. 353. Brodie and Renfrew provide several examples of instances where the illegal origins of important unexcavated materials could be either suspected from the facts of the case, or demonstrated beyond reasonable doubt. They refer, amongst others, to the Sesvo and the Lydian treasures (*idem*).

counterargument, it is worth noting that the establishment of the sound provenance of an object did not use to be a relevant prerequisite to the acquisition of an artefact because looting, in itself, was not seen as an issue for a rather long period of time.¹¹² This attitude has nowadays changed as a result of the many international efforts undertaken, including the changes brought about by dealers' and museum associations' codes of ethics. Nowadays, mindsets have changed and the art market requires objects to be joined with an adequate proof of provenance. This change in attitude towards archaeological objects cannot be traced back to one specific event, albeit it is understandable that the efforts by the international community coupled with the change in codes of ethics of museums and dealers associations that have taken place since 1970 have had a profound impact on changing mindsets. Therefore, a complete lack of provenance in today's market may be indicative of an illicit origin.¹¹³ The issue of proper documenting the provenience / provenance of the item is further complicated by the use of made up or falsified provenances: although good provenance is important for archaeological goods, most unearthened objects lack any type of documentation, as witnessed by offers on the antiquities market. Because excavated objects are foreign to the market until their introduction in the art circuit by their digger or subsequent trafficker, it is not difficult for the person disposing of the item to create a fake provenance.¹¹⁴ In creating these, specific techniques are used to launder the illicit origins of a good. For instance, the incorporation of a looted artefact in a well-known collection allows for it to enter the market in antiquities without too much complication.¹¹⁵ Furthermore, displaying a tainted object alongside items whose origins are undisputed has the effect of embedding it with the unquestioned approval of a licit origin by the art market.¹¹⁶

Other contributing factors

War, poverty,¹¹⁷ political instability,¹¹⁸ indifference, lack of proper measures of protection or conservation,¹¹⁹ inefficiency / insufficiency of the adopted measures¹²⁰ and political interference¹²¹ are a few additional factors that contribute to the depletion of artefacts from source states. Combined with a lack of enforcement¹²² or a partial enforcement of the protective measures,¹²³ or with difficulties in implementing complex regulatory systems,¹²⁴ it often makes the protection of archaeological materials from removal an unsurmountable task.

2. THE EXTERNALITIES OF CLANDESTINE EXCAVATIONS

Irrespective of how the process of clandestine excavations is put into practice, of how many parties are involved or of the difficulties encountered by source states in protecting their archaeological materials from this illegal activity, unsupervised excavations and the pillaging of archaeological sites bear dramatic consequences for human knowledge. In fact, the externalities of archaeological theft can have more severe outcomes when compared to the theft of other types of cultural property. More specifically, archaeological theft can result in the loss of information important to mankind; in damage to irreplaceable and finite objects and in other societal externalities.

¹¹² Gerstenblith, (2008), p. 606.

¹¹³ Brodie and Renfrew, (2005), p. 350.

¹¹⁴ O'Keefe, (1994), pp. 3-4; Gerstenblith, (2008), p. 607; a famous example is given in the case of *United States v. Schultz* whereby Frederick Schultz and Jonathan Tokeley-Parry made up the Thomas Alcock Collection in order to dispose of Egyptian antiquities stolen in Egypt on foreign markets. See *United States v. Schultz*, 178 F. Supp. 2d 445, (January 3, 2002) and *United States v. Schultz*, 333 F.3d 393, (June 25, 2003) for the details of the case. A summary of the case is given in Chechi, A., Bandle, A. L., Renold, M. A., 'Case Egyptian Archaeological Objects – United States v. Frederick Schultz', Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva, available at <https://plone.unige.ch/art-adr/cases-affaires/egyptian-archaeological-objects-2013-us-v-schultz/case-note-2013-egyptian-archaeological-objects-2013-united-states-v-schultz>, last retrieved on 01.03.2018. See also Haldimann, M.-A., 'Tradition de collection et trafic d'antiquités: une réflexion sur la collection privée au XXI^e siècle', 20 *Uniform Law Review*, p. 615.

¹¹⁵ Brodie and Renfrew, (2005), p. 354.

¹¹⁶ Brodie and Renfrew, (2005), p. 354.

¹¹⁷ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 242.

¹¹⁸ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 242.

¹¹⁹ Bator, (1982), p. 298; Forrest, (2010), p. 155.

¹²⁰ Bator, (1982), p. 297.

¹²¹ Forrest, (2010), p. 156.

¹²² Forrest, (2010), p. 155.

¹²³ Forrest, (2010), p. 155.

¹²⁴ Forrest, (2010), p. 155.

(1) Destruction of information

While the discourse on the protection of artefacts is one that is tainted by emotions and tends, at times, to be over-simplified,¹²⁵ important considerations must be taken into account: by way of contrast to the theft of other cultural materials, archaeological theft has a destructive effect¹²⁶ as it results in a loss in historical, archaeological and scientific information of paramount importance to the history of mankind.¹²⁷ Therefore, debates such as those relating to cultural nationalism and cultural internationalism are not relevant to the problem of archaeological theft.¹²⁸ Instead, the paramount goal of protecting human knowledge constitutes a more laudable objective in tackling this issue.¹²⁹ The loss of information ensuing from unlawful excavations bears severe consequences for the human psyche and for the conservation of knowledge of past civilizations.¹³⁰ This is why the international community has generally condemned it. The Preamble to the 1956 UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations* first gave international recognition to the importance of protecting this information from destruction.¹³¹

Recital 4 Preamble UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (1956) – **Considering that the history of man implies the knowledge of all different civilizations; and that it is therefore necessary, in the general interest, that all archaeological remains be studied and, where possible, preserved and taken into safe keeping, [...].**

This Recital takes account of the importance of knowing all civilizations – as a representation of the history of Man – through the study, preservation and protection of all domestic archaeological remains.¹³² The UNIDROIT convention further takes account of this loss of information as a result of pillaging in Recital 3 of its Preamble:

Recital 3 Preamble UNIDROIT Convention (1995) – DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information, [...]

The damage to the information of archaeological, historical and scientific relevance to mankind mentioned in the Preamble relates either to information that can be garnered from the object itself, or from its provenience. Most prominently, the provenience of an artefact will suffer as a result of the activities of unauthorised diggers: once they are taken out of their find site, archaeological items lose their value by means of decontextualisation.¹³³ Decontextualization has the practical effect of divesting the object from any piece of information that can provide evidence of the psyche of the culture that produced it and converts the artefact into a merchantable commodity without much historical value.¹³⁴ Consequently, by unwarrantedly excavating artefacts, not only does the object itself lose value but the find site equally loses an important piece of evidence with regard to its historical record.¹³⁵ Next to the provenience, the physical integrity of the object can also be affected by its removal from the find site or throughout the smuggling process. In certain situations, an object will be looted from a site and subsequently mutilated or altered so as to make its removal or smuggling easier. There are many causes to the mutilation or to the alteration of an artefact, ranging from the use of rudimentary means of

¹²⁵ Bator, (1982), p. 294.

¹²⁶ Brodie, (2004), p. 86.

¹²⁷ Lalive D'Épinay, "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)", (1997), p. 20; Gerstenblith, (2008), p. 599, citing Merryman, J. H., "The Free International Movement of Cultural Property", 31 *New York University Journal of International Law & Policy* 1, (1998), pp. 4-14; Ardouin, (1996), p. 82.

¹²⁸ Sánchez Cordero, J., "The Protection of Cultural Heritage: a Mexican Perspective", 8 *Uniform Law Review*, (2003), p. 567.

¹²⁹ Sánchez Cordero, (2003), p. 567.

¹³⁰ O'Keefe, (1999), p. 25; Forrest, (2010), p. 5.

¹³¹ A first attempt at the protection of archaeological materials was formulated through several principles that were expressed in the 1956 UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations*. See http://portal.unesco.org/en/cv.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html, last retrieved on 01.03.2018. These principles were first expressed in the Final Act of the Conference of Cairo in 1937 and later served as a premise to the 1956 Recommendation. See Protz, L. V., "International Control of the Illicit Movement of the Cultural Heritage: the 1970 UNESCO Convention and Some Possible Alternatives", 10 *Syracuse Journal of International Law and Commerce*, (1983), p. 338.

¹³² Although merely prescribing recommendations and thus – per definition – not legally binding, the Recommendation was formalised through the adoption of the 1970 convention. See Forrest, (2010), p. 134.

¹³³ Sánchez Cordero, (2003), p. 567.

¹³⁴ Brodie, (2004), p. 85; see also Coggins, C. C., "A Licit International Traffic in Ancient Art", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art – Vol. V – International Sales of Works of Art*, (ICC Publishing: Paris / New York; Kluwer Law International: The Hague / London / Boston, 1996), p. 48.

¹³⁵ Sánchez Cordero, (2003), p. 567; Warring, (2005), p. 243.

extraction to the mere disguise of the object – such as covering up the artefact with coating substances to make it look like a cheap souvenir – in order to facilitate the smuggling thereof.¹³⁶ Certain particularly sizeable cultural objects cannot easily be removed from the site by looters, leaving them with no other option than to mutilate it.¹³⁷ This is notably the case for sculptures, bas-relief, and mosaics or even for sarcophagi.¹³⁸ Through the mutilation process, the object is disfigured, desymbolised and, consequently, important information intrinsic to its meaning as an unaltered whole is lost. Not only does the process of dismantling an artefact create a loss of information, but it also makes it particularly difficult for a state to identify the object after its removal has been effectuated.

The looting of Mayan stelae provides a good example of the destruction of both the object and the provenience, where the loss of information was considerable.¹³⁹ The Hollinshead case appropriately illustrates this point.



The mutilation and smuggling of a Mayan stela was the subject of the *Hollinshead* case decided in 1974 by a U.S. Federal Court of Appeals of the Ninth circuit.¹⁴⁰ In this instance, a stela that was erected during the Mayan era was stolen from its find site in Guatemala at the end of the 1960s. Prior to the theft, the site had been discovered by archaeologist Ian Graham in 1961, who – one year after its discovery –, meticulously registered the site's formation and its constitutive parts through the use of pictures, models and drawings.¹⁴¹ Coined 'Machaquilla' by Graham, the site remained untouched until at least 1968, after which stela number two disappeared.¹⁴² This stela (see illustration) was one of the seventeen stelae that were present on site.¹⁴³ In order to be removed from and smuggled outside of Guatemala, it was cut into pieces and sent to Clive Hollinshead's address in the United States under a 'personal effects' denomination.¹⁴⁴ It reappeared, reassembled, in 1971 when the Florida-based art dealer Hollinshead proposed it for sale to the Brooklyn Museum.¹⁴⁵ Unbeknownst of the stela's prior history and of its ties to Graham, the curator of the Museum – reacting to Hollinshead's offer – contacted the former in order to obtain his expert opinion as to an eventual purchase. Graham directly recognised the stela and promptly notified the competent authorities.¹⁴⁶ Several months afterwards, the government of Guatemala initiated civil proceedings for the return of the object against Hollinshead.¹⁴⁷ During the proceedings, the FBI seized the stela because the customs declaration had not been properly filed at the moment of its import.¹⁴⁸ Stela nr. 2 was thus forfeited to the U.S. government and prosecution, on the basis of the National Stolen Property Act – hereinafter NSPA –, was initiated against Hollinshead. He was found guilty of transporting and conspiring to transport stolen property in interstate and foreign commerce on the basis of the NSPA.¹⁴⁹

Hollinshead is instructive of how the removal of a stela affects both its physical integrity and the find site for two reasons: firstly, stelae are usually of non-negligible proportions and are sculpted using heavy materials, making their removal without the appropriate (heavy) machinery a complex task. Considering that looters act as discreetly as possible, the use of tools that are adequate for proper extraction is often limited, resulting in the use of more primitive removal techniques that have the effect of damaging the stelae. Moreover, in order to facilitate transportation, looters often cut or shatter stelae into many pieces,¹⁵⁰ thereby damaging their physical integrity. Secondly, the hieroglyphs on these stelae can only be deciphered by studying the carvings in context. This means that the position of the stelae *in situ* is of paramount importance to understand its meaning, as it is only possible to interpret its carvings based on the exact location of the stelae.¹⁵¹ As such, the information available on the stela is

¹³⁶ Warring, (2005), p. 242; in the case of *United States v. Schultz* that was mentioned above, artefacts were smuggled outside of the Egyptian territory by covering up the objects with a plastic coating in order to make them look like cheap souvenirs. Once they arrived at their destination, the coating was then removed. See *United States v. Frederick Schultz*, 333 F.3d 393, (June 25, 2003), at 396.

¹³⁷ Bator, (1982), p. 278.

¹³⁸ See for example Mueller, (2016), *op. cit.*

¹³⁹ Bator, (1982), pp. 278-279.

¹⁴⁰ *United States v. Hollinshead*, 495 F.2d 1154, (June 17, 1974).

¹⁴¹ Bator, (1982), p. 345.

¹⁴² Bator, (1982), p. 345.

¹⁴³ Bator, (1982), p. 345.

¹⁴⁴ O'Keefe, P. J., 'Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level', 10 *Syracuse Journal of International Law and Commerce*, (1983), p. 355.

¹⁴⁵ Bator, (1982), p. 345.

¹⁴⁶ Bator, (1982), p. 345.

¹⁴⁷ Bator, (1982), p. 345.

¹⁴⁸ Bator, (1982), p. 345.

¹⁴⁹ Bator, (1982), p. 346.

¹⁵⁰ Bator, (1982), p. 278.

¹⁵¹ Bator, (1982), p. 279.

either devoid of any meaning or it raises important questions as to its religious, historical or even astronomical relevancy to the Mayan civilization when read *ex situ*.¹⁵² It is also possible for the carvings of several stelae present on the same site to be interconnected.¹⁵³ It goes without saying that removing the stela from the site and from its original position in these situations has dramatic consequences to the study of the customs and beliefs of the Mayas.

Henceforth, archaeologists do not support the market in ancient objects.¹⁵⁴ In fact, archaeologists, historians and ethnologists have expressed disdain for the activity of collecting artefacts merely for their aesthetics;¹⁵⁵ and they have also raised concerns as to the insatiable appetite of the art market for archaeological materials, resulting in illegal excavations and the pillaging of archaeological sites.¹⁵⁶ To archaeologists, the value of an artefact is defined by its contribution to understand the past, and not by its aesthetic appearance.¹⁵⁷ Additionally, the artefacts themselves are often less important to archaeologists than the context within which these are found.¹⁵⁸ Because archaeological sites are often embedded with cultural or religious significance,¹⁵⁹ archaeologists strongly support the need to extract artefacts without affecting the context within which these objects are found, often laying down comprehensive rules about the extraction to ensure the most extensive retrieval of information possible.¹⁶⁰ To them the contextual information of the object needs to be preserved for several reasons: by studying this context, the object is analysed in a setting that allows for a proper understanding of its usage,¹⁶¹ ultimately fostering knowledge of past civilizations to the benefit of society as a whole.¹⁶² As the stratum bears important information about the past,¹⁶³ these extractions must take place methodologically and they must be appropriately recorded.¹⁶⁴ From the archaeological point of view, the destruction of the context is permitted so long as any destruction is minimal¹⁶⁵ and is exclusively needed for the sake of further collecting information about the discovered site.¹⁶⁶ In fact, archaeologists' philosophy put in a synopsis entails allowing the study of archaeological sites and of the object *in situ*,¹⁶⁷ provided vetting the site does not result in the loss of knowledge that the site could, now and in the future, unveil.¹⁶⁸ Without a proper provenience, the object's historical significance can only be partly recovered¹⁶⁹ or confusion as to the culture to which the object is

¹⁵² Bator, (1982), p. 279.

¹⁵³ Bator, (1982), p. 279.

¹⁵⁴ Coggins, (1995), p. 62; Gerstenblith, (2008), p. 599, citing Merryman, J. H., 'The Free International Movement of Cultural Property', 31 (1) *New York University Journal of International Law & Policy*, (1998), pp. 4-14; Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 221; Vitelli has even advanced that archaeologists are 'at war' with the art market because of its lack of concern for the retrieval of the information adjacent to the item handled. See Vitelli, (1996), p. 110.

¹⁵⁵ Bator, (1982), p. 294.

¹⁵⁶ Lalive D'Épinay, "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)", (1997), p. 20; Coggins, in her work, has shown that a non-negligible amount of cultural objects stemming from archaeological sites in the jungles of Central America has made its way into the collections of highly reputable dealers and collectors. See Bator, (1982), p. 280; the concerns raised are a result of the mistrust that exists between the former researchers and art dealers. See Coggins, (1995), p. 62. Nonetheless, this mistrust is not uniquely directed at art dealers, as they are not the only contributors to the plundering of archaeological sites: as noted above, notwithstanding the ethical and legal rules addressed to them, the museum community has also been qualified as an important contributing factor to the depletion of archaeological sites. See Brodie and Renfrew, (2005), pp. 345, 349 and more particularly 354. See also Boonyakiet, J., 'LICOM et la lutte contre le trafic illicite des biens culturels', École du Louvre, *Monographie*, (1998-1999), p. 18; Coggins has demonstrated that artefacts shorn from the same archaeological sites have been acquired by highly reputable American and European museums. See Bator, (1982), pp. 279-280.

¹⁵⁷ Forrest, (2010), p. 132; Prot L. V., O'Keefe, P. J., 'Cultural Heritage' or 'Cultural Property?', 1 *International Journal of Cultural Property*, (1992), p. 308.

¹⁵⁸ Dwyer, (1996), p. 105; Vitelli, (1996), p. 109.

¹⁵⁹ Brodie, (2009), p. 52.

¹⁶⁰ O'Keefe, (1999), p. 15; Gerstenblith, (2008), pp. 598-599, citing Merryman, J. H., 'The Free International Movement of Cultural Property', 31 (1) *New York University Journal of International Law & Policy*, (1998), pp. 4-14; Gerstenblith, (2009), p. 305; Bator, (1982), p. 301; Vitelli, (1996), p. 110.

¹⁶¹ Warring, (2005), p. 260.

¹⁶² Warring, (2005), p. 260; Gerstenblith, (2009), p. 305.

¹⁶³ Gerstenblith, (2008), pp. 603-604; Vitelli, (1996), p. 109.

¹⁶⁴ Brodie, N., "Export Deregulation and the Illicit Trade in Archaeological Material", in: J. R. Richman and M. P. Forsyth, *Legal Perspective on Cultural Resources*, (Altamaria Press, 2004), p. 85.

¹⁶⁵ And this destruction is always present, even if the artefacts are removed following the regulations and even when all the necessary precautions have been taken. See Dwyer, (1996), p. 105; Tubb has submitted that often the excavation of archaeological objects is not in the best interest of the object itself, unless the non-extraction results in further damage or loss to it. See Tubb, (1996), p. 114.

¹⁶⁶ O'Keefe, (1999), p. 15.

¹⁶⁷ Forrest, (2010), pp. 5, 137.

¹⁶⁸ O'Keefe, (1999), p. 15.

¹⁶⁹ Bator, (1982), p. 301. It should be noted here that Bator refers in his analysis to the 'provenance' instead of the 'provenience' of an archaeological object. He also submits that the site where the object is buried and the relation to other objects present *in situ* are

attributed can materialise.¹⁷⁰ If the extraction happens *en bonne et due forme*, the maximum information can be extracted from the object, its setting and its surroundings, making it possible to remove it without affecting its significance.¹⁷¹ This stance – focusing on the historical and contextual,¹⁷² instead of aesthetic, values¹⁷³ – is defended in order to protect the interests of all generations.¹⁷⁴ Thus, all in all, artefacts are considered an important medium for garnering historical information.¹⁷⁵ From a commercial perspective, the contextual information does not only enrich the knowledge about past civilizations, but it also increases the pecuniary value of the artefacts extracted.¹⁷⁶ As such, all stakeholders in the antiquities market have an interest in safeguarding this contextual information.¹⁷⁷ For example, ICOM also recognises the need to extract artefacts *in situ* with precaution so as to obtain as much information as possible about the object in context.¹⁷⁸ Without this information, the object becomes a ‘dead witness’ of history that cannot provide information about the object itself or about the civilization it was used in.¹⁷⁹ Consequently, objects displayed in museums can only expose their full cultural potential when all information available can be recorded and documented in the most meticulous manner possible.¹⁸⁰ Such a display is impossible when the artefact is looted. Aside from the destruction of information, it is also important to recall that archaeological materials are unique because of their irreplaceable nature.¹⁸¹ This means that – with the exception of artefacts that are part of reserves – the mutilation of the object by the use of gross means of excavation can result in the destruction of unique artefacts, of which it is unknown whether other such specimens exist.

(2) Societal externalities

The looting of artefacts also creates other important ancillary externalities: source states have to spend millions in order to protect their national cultural resources. As such, they lose the ability to build-up the nation,¹⁸² to increase the national capital¹⁸³ and to secure the financial¹⁸⁴ wealth of the nation and of the population through the intrinsic¹⁸⁵ and extrinsic¹⁸⁶ value of the objects discovered;¹⁸⁷ the public loses the enjoyment of the objects in their original context – resulting, for example, in a loss of profits generated by cultural tourism¹⁸⁸ –, this also has consequences for the psychological well-being of the nation;¹⁸⁹ political frictions between states ensue as a result

determinative in understanding the function of an artefact. This clearly points at the provenience of the object and not at its provenance, which is only relevant as to the determination of ownership over the object in a post-excavation situation.

¹⁷⁰ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 241.

¹⁷¹ Bator, (1982), p. 301.

¹⁷² Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), pp. 208 and 221.

¹⁷³ Bator, (1982), p. 297.

¹⁷⁴ O’Keefe, (1999), p. 15.

¹⁷⁵ Brodie, (2009), p. 52.

¹⁷⁶ Dwyer, (1996), p. 106.

¹⁷⁷ Dwyer, (1996), p. 106.

¹⁷⁸ Boonyakiet, (1998-1999), p. 17.

¹⁷⁹ Boonyakiet, (1998-1999), p. 17.

¹⁸⁰ Boonyakiet, (1998-1999), p. 17.

¹⁸¹ Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 252.

¹⁸² O’Keefe, (1999), p. 25.

¹⁸³ Bator, (1982), p. 303.

¹⁸⁴ The archaeological heritage of a state can potentially generate important revenues for the state. See Brodie, (2009), p. 52; Forrest, (2010), p. 7. In practice, these revenues will be generated through an increase in cultural tourism (see O’Keefe, (1999), p. 25; Forrest, (2010), p. 7; Olivier, (1996), p. 640).

¹⁸⁵ The intrinsic value constitutes the financial value that the object can fetch by leaving the national collections, mainly through its sale on the international antiquities market. See Mastalir, R. W., ‘A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law’, 16 (4) *Fordham International Law Journal*, (1992), p. 1044.

¹⁸⁶ On the other hand, the extrinsic value is the financial value that an object can generate by remaining in its country of origin. See Mastalir, (1992), p. 1044; Forrest, (2010), pp. 5, 159.

¹⁸⁷ Mastalir, (1992), p. 1044; Forrest, (2010), pp. 5, 159.

¹⁸⁸ In certain states, tourism is driven by the promotion of the state’s national cultural heritage. See for example Al-Afyouni, A., Shafiq, A., ‘How archaeological heritage boosts tourism’, *IOL*, 16 May 2016, available at <http://www.iol.co.za/travel/world/africa/how-archaeological-heritage-boosts-tourism-2022181>, last retrieved on 01.03.2018.

¹⁸⁹ Furthermore, the protection of archaeological objects helps to protect the national identity (see Mastalir, (1992), p. 1044; Olivier, (1996), p. 640) notably through the establishment of social and psychological benefits by binding the inhabitants to their past (see Bator, (1982), p. 303; Forrest, (2010), p. 158) or through entitling inhabitants to express local or – in certain instances – national proudness (Forrest argues that private collections might not contribute to the welfare of society and can, therefore, be excluded from this assertion. Nonetheless, he does not consider the possibility for the owner to donate the items to the nation for tax purposes or through bequeathing it). See Forrest, (2010), p. 158 and O’Keefe, (1999), p. 25; see also the analysis of the importance of art to society that is presented in Bator, (1982), pp. 304 and ff.

of claims in restitution or from the lack of prosecution of individuals that handle stolen artefacts in foreign states and the academic world is deprived of important study materials.¹⁹⁰ Furthermore, the sales of objects that have been illicitly excavated are not recorded and, thenceforth, no taxes can be collected from their licit sale.¹⁹¹ Consequently, there exist many reasons as to why source states should find appropriate solutions to counter the illicit traffic in clandestinely excavated archaeological objects.

¹⁹⁰ Warring, (2005), pp. 242-244.

¹⁹¹ Brodie, (2004), p. 86.

B. The Response of Source States

Because of archaeological remains' faculty of justifying a nation's – and concomitantly a state's – very existence, through a process of witnessing the state's history and psyche, source states attach particular importance to these resources.¹⁹² Concurrently, the role of a source state as a custodian of its cultural heritage must not be understated.¹⁹³ This role entails that each state is entitled to protect its national identity – as expressed through its cultural patrimony – in any way it deems fit.¹⁹⁴ Consequently, an artefact that has been excavated in a source state belongs to that state,¹⁹⁵ and source states are in the best position to manage their archaeological heritage on behalf of mankind.¹⁹⁶ Because of this custodianship, finding the right solutions to protect their archaeological heritage from spoliation constitutes a priority to them.¹⁹⁷ Therefore, many of these states have, for example, tried to protect their archaeological patrimony through establishing specialised police units,¹⁹⁸ adopting export restrictions,¹⁹⁹ instating obligations to seek permission for extractions,²⁰⁰ or by declaring that all of the objects found in the soil of their territories are state-owned through the adoption of patrimonial laws.²⁰¹⁻²⁰² Having considered the special circumstances within which clandestine excavations take place and having highlighted the difficulties that source states are confronted with in tackling the supply of looted artefacts, attention is now devoted to alternative tools of avail for source states to counter archaeological theft.

1. CONTROLLING THE DEMAND – PATRIMONIAL CLAIMS

Instead of attempting to counter the supply of looted artefacts, a viable alternative can be found in the adoption of measures operating at the marketability stage, and thus tackling the demand side of the market in artefacts. By increasing the instances of recovery of marketed artefacts that lack a proper provenience / provenance – consequently reducing the demand for these items in the long run²⁰³ –, it is possible to constrain the looting of archaeological objects by controlling the demand for antiquities.²⁰⁴ Changing the behaviour of the art market

¹⁹² Brodie, (2009), p. 52.

¹⁹³ This special link is not a novelty. It is traditionally accepted that a national heritage has a peculiar link with the nation to which it belongs. See Lalive, (1999), p. 175; Siehr recognises the existence of this role but supports the need to establish this 'special link' between the source state and the object. In his opinion, a special link needs to be established because: a) the object is adjoined to the territory of the source state, b) it has been manufactured there for cultural and historical purposes, c) artefacts are usually connected to other artefacts on the find site and d) the source state adopts protective measures because of a degree of relativity with the object. See Siehr, K. G., "The Beautiful One Has Come – to Return" in: J. H. Merryman, *Imperialism, Art and Restitution*, (Cambridge University Press, 2009), p. 129.

¹⁹⁴ Lalive, P., "Réflexions sur un ordre public culturel", in: E. Wyler / A. Papaux (eds), *L'Extranéité ou le dépassement de l'ordre juridique étatique : actes du colloque des 27 et 28 novembre 1997 organisé par l'Institut d'études de droit international de la Faculté de droit de l'Université de Lausanne*, (Pédone: Paris, 1999), p. 174.

¹⁹⁵ Siehr, (2009), p. 131.

¹⁹⁶ Forrest, (2010), p. 140.

¹⁹⁷ It should be noted that the present research does not link the archaeological heritage to the culture to which it belongs, as the determination of the nexuses with the said culture is a problem *sui generis*. It suffices here to refer to the source state, as this state is – ultimately – seen as a proxy to the culture concerned and as the primary authority that can undertake the necessary legal steps for the recovery of the objects. For more information on this point, see Forrest, (2010), pp. 146-148.

¹⁹⁸ The first one being the Cultural Heritage division of the Italian Carabinieri – also known as the *Comando Carabinieri Tutela Patrimonio Culturale* – (see <http://www.carabinieri.it/multilingua/en/english/carabinieri-for-the-protection-of-cultural-heritage-and-anti-counterfeiting>, last retrieved on 01.03.2018) and the most recent being the gendarmerie of the Mexican Federal Police, whose mandate was recently broadened in order to include the protection of Mexico's cultural patrimony. See García, D., 'Gendarmería protegerá el patrimonio cultural', *El Universal*, 26 August 2017, available at <http://www.eluniversal.com.mx/nacion/seguridad/gendarmeria-protegera-el-patrimonio-cultural>, last retrieved on 01.03.2018 and Zamarrón, H., 'Gendarmería vigilará el patrimonio cultural', *Milenio.com*, 21 August 2017, available at http://www.milenio.com/policia/gendarmeria-vigilara-patrimonio-cultural-proteger-inah-inba-milenio_0_1015698439.html, last retrieved on 01.03.2018.

¹⁹⁹ Lalive D'Epinay, "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)", (1997), p. 20.

²⁰⁰ O'Keefe, (1999), p. 24.

²⁰¹ O'Keefe, (1983), p. 359; O'Keefe, (1999), p. 24; Forrest, (2010), p. 157.

²⁰² These measures have mainly been adopted by so-called 'third world' countries that are generally afraid of the disappearance of their cultural identity. See Lalive D'Epinay, "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)", (1997), p. 20.

²⁰³ It has been submitted that the obligation for an acquirer *a non-domino* to give the object back has the intended effect of decreasing the demand for these objects and results, therefore, in an overall reduction in the traffic of artefacts. See O'Keefe, (1999), p. 29.

²⁰⁴ Gerstenblith, (2009), p. 306; Bator, (1982), p. 310; Forrest, (2010), p. 137; Nafziger, Kirkwood Paterson and Dundas Renteln, (2010), p. 218 comparing the trade in artefacts with other antisocial behaviours such as "poaching endangered animals, the burning of the rainforest, smoking in public, or the wearing of animal furs".

implies advocating a trade in artefacts with sound provenance,²⁰⁵ subject to the caveat of restitution if the object lacks the appropriate pedigree. Whilst it is possible for a source state to prohibit or to regulate the marketability of artefacts within its territorial boundaries, the removal of the item from its territory may considerably thwart any prospects of recovering the looted item. In fact, once a purloined artefact is marketed outside of the territory of the source state and is acquired by a third party, the said state will need to try to recover it by judicial means. In doing so, it will have the choice between either demanding the return of the illegally exported item or introducing a patrimonial claim in the foreign jurisdiction, the success of either one of these two procedures depends on the distinction between *acta jure imperii/acta iure gestionis*.²⁰⁶ In general, source states will have more success with patrimonial claims than with demands for the return post-illegal export based on a violation of export restrictions.²⁰⁷ This is notably due to the fact that violations of export restrictions are often not echoed in foreign jurisdictions:²⁰⁸ foreign courts will generally not enforce another state's export legislation because of its *acta iure imperii* character, unless this is specifically provided for in their legislation.²⁰⁹ Although domestic courts refrain from enforcing foreign export restrictions, they tend to accept patrimonial claims based on a right of ownership.²¹⁰ A patrimonial claim is a claim that is based on a state's assertion of ownership that is formulated in his capacity as the protector of the public property of its nation.²¹¹ This assertion of state ownership happens either *ex lege*, or through means of expropriation.²¹² Because it is generally accepted that the reliance upon patrimonial laws falls within the *acta iure gestionis* category, foreign courts seized with a patrimonial claim will thus often treat it on par with a claim for restitution brought by an individual.²¹³ As such, patrimonial laws have proved particularly helpful for reclaiming looted artefacts²¹⁴ and the use of patrimonial claims constitutes an effective means for a state to recover looted artefacts in foreign jurisdictions.²¹⁵ For example, in the cases of *Republic of Turkey v. OKS Partners*²¹⁶ (discussed below) and *United States v. Pre-Columbian Artefacts*,²¹⁷ ownership laws were considered as a way for source nations to have their measures aimed at protecting cultural property recognised and enforced by foreign courts.²¹⁸ Moreover, patrimonial laws play a key role in protecting artefacts that are not yet known and that are yet to be discovered.²¹⁹ Consequently, the vesting of ownership of archaeological objects in the source state constitutes one of the most reliable means of protection against archaeological theft – thereby increasing the probability that the owning state will regain possession²²⁰ –, leading to a decrease in the demand for unprovenanced artefacts and, ultimately, to a diminution in loots.²²¹

²⁰⁵ Gerstenblith, (2009), p. 311; Nafziger, Kirkwood Paterson and Dundes Renteln, (2010), p. 218; unfortunately, the restitution of objects that lack a registered origin does not in itself always translate into disincentives to buying artefacts. See Gerstenblith, (2009), p. 315. Furthermore, often, when an object lacking the said provenance is to be given back, it is possible to spread the loss on other acquisitions (*idem*).

²⁰⁶ It is possible for a state to enforce an *acta iure gestionis* of a foreign sovereign but not an *acta iure imperii*. See Vigneron, S., "Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects", in: V. Vadi and H. Schneider (ed), *Art, Cultural Heritage and the Market – Ethical and Legal Issues*, (Springer-Verlag: Berlin-Heidelberg, 2014), p. 121.

²⁰⁷ Lowenthal, C., "Critical Comments on the Draft Principles for a Licit Trade in Cultural Property", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 130.

²⁰⁸ Nafziger and Kirkwood Paterson, (2014), p. 40; Droz, (1997), p. 243.

²⁰⁹ Last, K., "The Resolution of Cultural Property Disputes: Some Issues of Definition", in: The International Bureau of Permanent Arbitration (ed), *Resolution of Cultural Property Disputes. Papers Emanating From the Seventh PCA International Law Seminar May 23, 2003*, (Kluwer Law International [et al.]: The Hague [et al.], 2004), p. 70.

²¹⁰ Kaye, L. M., "The Future of the Past: Recovering Cultural Property" 4 (1) *Cardozo Journal of International and Comparative Law*, (1996), pp. 31-32; Özel, S., "Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey", 38 (2) *International Journal of Legal Information*, (2010), p. 178.

²¹¹ McLachlan, C., *Foreign Relations Law*, (Cambridge University Press: Cambridge, 2014), p. 446; Mastalir, (1992), p. 1051.

²¹² Armbrüster, C., 'La Revendication de Biens Culturels du Point de Vue du Droit International Privé', *Revue Critique du Droit International Privé*, (2004), p. 731.

²¹³ Forrest, (2010), p. 148.

²¹⁴ Forrest, (2010), p. 159.

²¹⁵ This is notably true for the United States, where it is possible for the foreign state to initiate an action in replevin in order to recover objects taken outside of its territory in violation of its patrimonial laws. Gerstenblith, (2009), pp. 312-313.

²¹⁶ See *Republic of Turkey v. OKS Partners*, 797 F.Supp. 64, (July 20, 1992), at 66.

²¹⁷ See *U.S. v. Pre-Columbian Artifacts*, 845 F.Supp. 544, (October 14, 1993), at 546.

²¹⁸ Yasaitis, K. E., 'Case note – National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz', 12 (1) *International Journal of Cultural Property*, (February 2005), p. 104.

²¹⁹ Warring, (2005), p. 274; Mastalir, (1992), p. 1051.

²²⁰ Gambaro, A., "Community, State, Individuals and the Ownership of Cultural Objects", in: J. A. Sánchez Cordero (ed), *La Convención de la UNESCO de 1970 – Sus Nuevos Desafíos*, (Universidad Nacional Autónoma de México: México, 2014), p. 149.

²²¹ Gerstenblith, (2008), p. 644; therefore, some source states have prescribed, in their domestic laws, that all antiquities found in their soil are considered to be state property. See Siehr, K., 'A Special Regime for Cultural Objects in Europe', 8 *Uniform Law Review* (2003-1/2), p. 552; Renold, M.-A., "The International Protection of Archaeological Heritage: Questions of Private Law and of Legal Harmonization", in: J. A. Sánchez Cordero (ed), *La Convención de la UNESCO de 1970 – Sus Nuevos Desafíos*, (Universidad Nacional Autónoma de México:

Nevertheless, the validity of this argument is only relative, as it depends on third party protection,²²² as witnessed by the Swiss ‘Indian gold coins’ case.



Hyderabad coin (silver)

coins and the defendants were thus entitled to keep these.²²⁷

In the Indian gold coins case,²²³ which was adjudicated on in Switzerland in 2005, the Indian government attempted to claim back two golden coins that were minted in the city of Hyderabad in 1613 and 1614 respectively.²²⁴ The government of India claimed ownership of the coins and, additionally, advanced that the two coins had been removed from its territory in violation of its export legislation.²²⁵ Although the existence of the right of ownership to the coins that was invoked by India was disputable, the court found the establishment of the exact determination of this ownership unnecessary. This was due to a valid acquisition of the coins by the defendants through the establishment of a right of pledge.²²⁶ Consequently, the Indian government was barred from recovering the

Therefore, similar to claims brought by individuals, means of third party protection can thus bar a state from recovering a looted artefact through the lodging of a patrimonial claim.²²⁸ Furthermore, patrimonial claims only play a residual role in appropriately tackling the problem of archaeological theft: patrimonial claims do not constitute the most adequate means of preventing the destruction of the information that can be deciphered from the antiquities in context.²²⁹ In fact, much of the information that is significant to the artefact or its context has already been lost by the time it has reached the borders of the source state to be illegally exported or removed from its territory.²³⁰ From the perspective of the preservation of information, it matters little that artefacts are recuperated through legal proceedings *ex post*, as the loss of contextual information cannot be remedied through the recovery.²³¹ Consequently, working at the end-of-the-chain-of-transactions stage does not seem to be the most congruous course of action, albeit it constitutes the most appropriate means of constraining the trafficking in artefacts hitherto. Therefore, for want of effective alternative solutions to prevent loots, the latter measures are not to be considered as second best in the fight against archaeological theft. Moreover, the use of patrimonial claims is not without its own difficulties: ²³² a lack of financial means and expertise to lodge these claims,²³³ the need to discharge heavy burdens of proof to assert the spoliation, the lack of evidence to prove the allegations²³⁴ or difficulties in proving the right of ownership²³⁵ make their use particularly challenging. Moreover, in certain instances, the regime of protection established in the source state is not adequate enough to bring a patrimonial claim to successful completion;²³⁶ although domestic courts tend to accept patrimonial claims, this acceptance is subject to these courts’ appreciation of the declaration of ownership.

2. PATRIMONIAL LAWS – PITFALLS

As established above, vesting the ownership of discovered and undiscovered cultural artefacts in the state by adopting domestic legislation to this effect is one of the prerogatives of a state, which constitutes an exercise of

México, (2014), p. 297; for an overview of a few domestic laws that have instated this right of ownership in the state, see Sánchez Cordero, (2014), pp. 297-298, notably footnote 1; an important amount of these states enacted ownership legislation after they ratified the 1970 convention. The adoption of these patrimonial laws was one of the requirements for enjoying the full protection of the convention (see Mastalir, (1992), p. 1051). Concomitantly, states have either assimilated extraction to theft or criminalised the export of archaeological objects without a permit issued by the state. Brodie and Renfrew, (2005), p. 347; Alder and Polk, (2005), p. 100.

²²² O’Keefe, (1999), p. 29.

²²³ Tribunal Fédéral Suisse, *Union de l’Unde, contre Crédit Agricole Indosuez (Suisse) SA*, ATF 131 III 418, JdT 2006 I 63.

²²⁴ Renold, (2014), p. 300.

²²⁵ Renold, (2014), p. 300.

²²⁶ For more details about this case, see Siehr, K., ‘Private international law and the difficult problem to return illegally exported cultural property’, 20 *Uniform Law Review*, (2015), p. 511.

²²⁷ Renold, (2014), p. 300.

²²⁸ The impact of means of third-party protection in cross-border cases was addressed at length in ‘Part II - Cultural Property Theft’ of the present research. For more information about this aspect, the reader is advised to consult this part, and more particularly Chapters 2 and 3 of the present dissertation.

²²⁹ O’Keefe, (1999), p. 29.

²³⁰ Vitelli, (1996), p. 111.

²³¹ Vitelli, (1996), p. 109.

²³² Forrest, (2010), p. 156.

²³³ Forrest, (2010), p. 156.

²³⁴ Forrest, (2010), p. 156.

²³⁵ Özel, (2010), p. 177.

²³⁶ Forrest, (2010), p. 155.

its sovereignty.²³⁷ This prerogative is of paramount importance to the effective protection of a state's cultural heritage, which has led the Irish Supreme Court in the case of *Webb v. Ireland*²³⁸ to qualify the declaration of ownership as an obligation incumbent upon a state.²³⁹

In *Webb v. Ireland*, two Irish citizens discovered the Derrynaflan Hoard – one of the most important treasures of Christian art – in Derrynaflan, Ireland. The hoard is reported to be from the ninth century and is considered to be of invaluable importance for human knowledge.²⁴⁰ It is composed of 'a chalice, silver paten, silver and bronze paten stand, gilt bronze strainer and a bronze basin'. Although legal proceedings were initiated because the payment of a finder's reward had not yet been made, the case involved ancillary legal questions, such as the determination of the ownership of treasure trove.

Concurring with Justices Henchy and Griffin, Chief Justice Finlay made a particularly important submission in his analysis as to the role of a state in representing its citizens and as to its adjacent role of being a custodian of the cultural heritage of the nation: to all three Justices, it was "universally accepted [...] that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history". Because of this, the trio went on to qualify ownership declarations by a state over undiscovered artefacts as a "necessary ingredient to sovereignty".²⁴¹ This affirmation was further refined by Justice Walsh, who qualified the said ingredient as a "right and duty [...] to exercise dominion upon all objects forming part of the national heritage, whether they be found or not", subject to the caveat that no other owner can be identified.²⁴² In this landmark judgment, the Irish court conscientiously expressed the importance of the role of a state in protecting the cultural heritage of its people. Because of this role, a state has the right – and following the court, also the duty owed to its citizens –, to be the custodian of this heritage. *Ergo*, this *dictum* emphasises that each state has the right to declare itself the owner of all artefacts constitutive of the archaeological heritage of the nation. Similarly, the aforementioned 1956 UNESCO Recommendation also affirms this right as it clarifies that states are to provide a legal status to archaeological materials found in their sub-soil and that they may enact patrimonial rights over these materials when they consider it desirable to do so.²⁴³ Subsequently, the right of states to adopt legislation that creates strong property interests in objects found in their soil is an accepted state prerogative.²⁴⁴

It has, nonetheless, been emphasised that, even though certain states have made use of this prerogative by instating patrimonial laws, the outcome of proceedings in foreign jurisdictions are unpredictable:²⁴⁵ domestic courts will still test the validity of the ownership declaration against their domestic standards of validity and clarity.²⁴⁶ Therefore, to be effective in restitution proceedings, the blanket declaration of ownership must ideally comply with certain conditions.²⁴⁷ For example, it can neither be applied retroactively, nor materialise after the object is taken outside of the territory of the source state.²⁴⁸ While it is important for a state to posit a right of ownership in its domestic legislation so as to eventually secure the restitution of a stolen artefact, attention must be devoted to the formulation of the right of dominion in order to secure the *ipso jure* effect of the patrimonial right so as to increase the probability of a successful recovery. Thus, the present subsection takes account of the difficulties that source states might encounter in having their patrimonial laws recognised by foreign courts. By pointing out the flaws in these patrimonial laws, this section attempts to provide guidelines to source states as to which legal pitfalls they should avoid when framing the required legislation.

²³⁷ Sánchez Cordero, (2003), p. 568.

²³⁸ *Webb v. Ireland*, [1988] IR 353; [1988] ILRM 565.

²³⁹ O'Keefe, (1999), p. 48.

²⁴⁰ *Webb v. Ireland*, [1988] IR 353; [1988] ILRM 565.

²⁴¹ *Webb v. Ireland*, [1988] IR 353; [1988] ILRM 565.

²⁴² *Webb v. Ireland*, [1988] IR 353; [1988] ILRM 565.

²⁴³ Protz, (2009), p. 225, citing point II (c) of the 1956 Recommendation: "Define the legal status of the archaeological sub-soil and, where State ownership of the said sub-soil is recognized, specifically mention the fact in its legislation; [...]".

²⁴⁴ Kaye, (1996), p. 32.

²⁴⁵ Frigo, M., 'Model Provisions on State Ownership of Undiscovered Cultural Objects – Introduction', *Uniform Law Review*, (2011), p. 1032.

²⁴⁶ Forrest submits that certain domestic courts will still test the validity of the ownership declaration against their domestic standards of validity and clarity. See Forrest, (2010), p. 151.

²⁴⁷ This submission is notably implied in the argumentation that is posited by Frigo in Frigo, (2011), p. 1032.

²⁴⁸ Gerstenblith, (2008), p. 692.

(1) Ownership versus possession

Firstly, it is important to note that most legal systems make a clear distinction between possession and ownership. In order to be effective, the claiming state preferably needs to be able to demonstrate the existence of a right of ownership, and thus not merely the existence of a possessory title. As was noted by the court in the case of *United States v. McClain*,²⁴⁹ possession is not considered to be the *sine qua non* of ownership²⁵⁰ and, consequently, both concepts ought to be clearly distinguished from one another.²⁵¹ Certain legal system will consider a right to immediate possession as a valid property right upon which a claim for the recovery of the object can be based. This is notably the case in English law, as was noted by the court in the case *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*.²⁵²

In *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, antiquities originating from the Jiroft region in Iran and excavated between the years 2000 to 2004 were found in the possession of the Barakat gallery in London. These antiquities included eighteen carved jars, bowls and cups made out of chlorite dating from the period 3000-2000 BC. The government of Iran attempted to recover these artefacts from the gallery by submitting that Iran had acquired ownership over these objects through its domestic laws, and that – although a clear declaration of ownership in the state's laws could not specifically be evidenced – the effect of the domestic legislation was to vest the ownership of all excavated cultural objects in the said state. In first instance, the High Court of Justice of the Queen's Bench Division was not convinced that Iran's domestic legislation had the effect of vesting ownership in the Iranian state. Instead, it found the law relied upon to be of a penal character and, therefore, the nature of that law would deprive it from any effect outside of the Iranian territory. Subsequently, the Court of Appeal of the Supreme Court of Judicature (Civil Division) found that the lower court erred in its assessment of Iranian law and that its effect was clearly to deprive any other party than the Iranian state from owning any excavated cultural materials.

Despite the fact that English law distinguishes possessory rights that are proprietary in nature from possessory rights that are not proprietary in nature – e.g. through bailment –, CJ Lord Phillips of Worth Matravers – adjudicating in the Court of Appeal in the Barakat case – recognised that only the former type of possessory right would constitute a satisfactory prerequisite to achieve the recovery of a stolen artefact.²⁵³ Therefore, to be given echo in the English jurisdiction, the Iranian patrimonial law relied on had to prescribe a right that was proprietary in nature.²⁵⁴ Consequently, to curtail complications inherent in appreciating the proprietary interests of the claiming state, it is recommended that the declaration made by the source state in its patrimonial law be conspicuously one of ownership, and not one of immediate possession.

(2) Sufficiently clear, unambiguous and intelligible declaration

Secondly, while a right of ownership is required in order to increase the odds of successfully securing the restitution of artefacts, the declaration of this property right should be explicitly, unambiguously²⁵⁵ and intelligibly formulated. Thus, even if the legislation exists at the time of removal and intends to vest a right of ownership in the state, this law must be clear, comprehensible and unambiguous. This requirement is particularly important to the determination of the illegality of the taking, as uncertainties about the ownership of the artefact might result in the looters acquiring a *de facto* right to the artefact that is thus deemed *res nullius*, a right that

²⁴⁹ *United States v. McClain*, 545 F.2d 988, (January 24, 1977).

²⁵⁰ *United States v. McClain*, 545 F.2d 988, (January 24, 1977), at 991; Gerstenblith, (2008), p. 692.

²⁵¹ This statement by the court was a reaction to one of the assertions of the defendants that ownership for undiscovered archaeological materials could not vest with the Mexican state without the taking of possession of the objects by the said state. This argument was at the epicentre of considerable debates within the United States at the time of the proceedings. By rejecting this submission, the court in *McClain* clarified that state declarations of ownership did not require prior possession to be recognised as valid and effective by U.S. jurisdictions for the purposes of the NSPA. Consequently, a wrongful taking of undiscovered archaeological materials will be considered as theft by U.S. courts whenever the state had previously declared its dominion over these goods. See Prot, *Commentary on the Unidroit Convention*, (1997), p. 32.

²⁵² *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWHC 705 (QB), at 3.

²⁵³ *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, at 15-31.

²⁵⁴ *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, at 49: "In deciding whether the Republic has ownership under Iranian law, it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of conflict of laws. The issue with which we are concerned is whether the rights enjoyed by Iran in relation to the antiquities equate to those that give standing to sue in conversion under English law"; consequently, the Court of Appeals did recognise an unconditional right of ownership in favour of the Iranian government. See *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, at 80, 84 and 149.

²⁵⁵ Forrest, (2010), p. 152.

cannot then be challenged *ex post*.²⁵⁶ For example, in the 1989 *Government of Peru v. Johnson* decision,²⁵⁷ after a thorough examination of Peruvian law, the court of the Central District of California concluded that this legislation was incomprehensible and inadequate to the claim of recovery.²⁵⁸

In *Government of Peru v. Johnson*, the possession of ninety-three artefacts found in the hands of Johnson was questioned. Johnson – the defendant in the case – was an art collector who specialised in Pre-Columbian artefacts and who resided in the United States. Prior to the institution of the recovery proceedings, the US Customs Service had seized the artefacts on unrelated grounds. Subsequently, the Government of Peru initiated an action in conversion against the defendant. Peru claimed that the objects had been illegally excavated in 1987 from the site of Sipán, and that they had been exported to the United States, where the defendant acquired these in good faith. Peru's objective was to have its ownership right over the items recognised by the court so as to secure their return. The burden of proof imputed upon the government was seen as particularly problematic, and the court – although it sympathised with Peru's cause and deplored the depletion of its cultural heritage²⁵⁹ – emphasised that the Peruvian government had to make true its allegations for it to be successful in its démarche.²⁶⁰ While it was able to point at two specific domestic laws that – in its opinion – vested ownership of all artefacts found in its soil in the Peruvian state, the federal court was not satisfied with these findings.²⁶¹ More specifically, the court viewed both Law 6634 (1929) and Law 24047 (1985) (repealing the 1929 act) as export restrictions instead of patrimonial declarations.²⁶² The court found that “There is no indication in the record that Peru has ever sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru concerning its artefacts could reasonably be considered to have no more effect than export restrictions, and, [...] export restrictions constitute an exercise of police power of a state; [...]”²⁶³ through which no property right could be inferred.

The Peruvian domestic laws were considered to be inadequate because they lacked a clear declaration of ownership in favour of the Peruvian state.²⁶⁴ Consequently, Peru was not able to live up to the standard required by the burden of proof as to its patrimonial claim.²⁶⁵ The court further understood Peruvian law as instating an interest in owning the object from the moment that it leaves the Peruvian territory,²⁶⁶ discarding the existence of any genuine right of ownership over an item that was still in its territory. Instead, Peru's interest seemed to be more entangled with an export control than with a genuine exercise of ownership by the state. The case of *Government of Peru v. Johnson* can be contrasted with the cases of *The Republic of Turkey v. OKS Partners*²⁶⁷ and *Türkische Republik v. Kanton Basel-Stadt und Prof. Dr. Peter Ludwig*. In *OKS*, Turkey brought proceedings before the Massachusetts District Court for the return of the Elmali Hoard – a collection of two thousands ancient Greek and Lycian silver coins – that was presumably unlawfully excavated near Elmali, Turkey in April 1984.²⁶⁸ The Massachusetts court seized by the action in replevin recognised Turkey's right of ownership upon the Helmali Hoard.²⁶⁹ In *Türkische Republik v. Kanton Basel-Stadt*, a patrimonial claim over five gravestones lodged by Turkey before a Swiss court and based on the same Turkish law as the one that was invoked in *OKS* was rejected.²⁷⁰ In this case, the Swiss court came to the conclusion that the Turkish law did not confer a right of ownership on Turkey.²⁷¹ These cases are illustrative of the importance for the declaration of ownership to be clear, unambiguous and intelligible. If not, discrepancies in the recognition of the right of dominion by the source state may materialise, as witnessed by the differences in outcomes in the two aforementioned cases.

²⁵⁶ Bator, (1982), p. 286.

²⁵⁷ *Government of Peru v. Johnson*, 720 F.Supp. 810, (June 29, 1989).

²⁵⁸ Kaye, (1996), p. 32; Gerstenblith, (2008), p. 664.

²⁵⁹ *Government of Peru v. Johnson*, (1989), at 811.

²⁶⁰ *Government of Peru v. Johnson*, (1989), at 812.

²⁶¹ *Government of Peru v. Johnson*, (1989), at 814.

²⁶² *Government of Peru v. Johnson*, (1989), at 814.

²⁶³ *Government of Peru v. Johnson*, (1989), at 814.

²⁶⁴ Gerstenblith, (2008), p. 664.

²⁶⁵ Yasaitis, (2005), p. 101.

²⁶⁶ Yasaitis, (2005), p. 101.

²⁶⁷ *The Republic of Turkey v. OKS Partners*, 797 F. Supp. 64. (D. Mass. 1992), motion to dismiss denied. *The Republic of Turkey v. OKS Partners*, 146 F.R.D. 24 (D. Mass. 1993), discovery motion granted in part and denied in part. *The Republic of Turkey v. OKS Partners*, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994), summary judgment denied. *The Republic of Turkey v. OKS Partners*, 1998 U.S. Dist. LEXIS 23526 (D. Mass. 1998), summary judgment and partial summary judgment denied, motion to strike denied.

²⁶⁸ *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, (February 3, 1993).

²⁶⁹ Özel, (2010), p. 181.

²⁷⁰ *Türkische Republik v. Kanton Basel-Stadt und Prof. Dr. Peter Ludwig*, 16 August 1993, unpublished.

²⁷¹ Özel, (2010), p. 184.

Nonetheless, a dearth of clear and comprehensible rules does not take away the possibility for a domestic court to infer a sufficient property interest in the source state's national law. In the above-mentioned *Barakat* decision, the High Court of Justice of the Queen's Bench Division seized in first instance did not consider the lack of an explicit ownership declaration or of a declaration of effective possession as an impediment to finding such a property interest in Iranian law.²⁷² Iran submitted that civil and penal provisions in force at the time of the illicit appropriation pointed indirectly at the fact that it owned the artefacts subject to the litigation. Subsequently, the High Court of Justice conceded that it was possible to infer the existence of a right in the item by interpreting that law in accordance with the intention thereof.²⁷³ Although it did not conclude that the Iranian law relied upon by the plaintiff proved that Iran owned the items, this conclusion was reversed by the Court of Appeal. Unlike the High Court of Justice, it interpreted Iranian law as having the effect of automatically embedding the government of Iran with the required ownership right, notwithstanding that it lacked a clear declaration to this effect. The Court of Appeal reached this conclusion through an *a contrario* reasoning: it analysed the instances where private parties could acquire ownership of discovered antiquities, which were *nihil* post amendments brought about by the introduction of a bill in 1979.²⁷⁴ Consequently, the court inferred Iran's ownership right by means of exclusionary reasoning. Additionally, the Court of Appeal justified the lack of an explicit ownership declaration by submitting "that the draftsman started from the premise that antiquities were owned by Iran".²⁷⁵ In conclusion, although it is possible for a court to infer a right of ownership from the domestic laws of a state, it is advisable to frame ownership rights over artefacts in a clear, unconditional and intelligible manner so as not to jeopardise the chances of recovery.²⁷⁶

(3) Conditionality of ownership

In assessing the state's right of ownership, several elements can be taken into consideration by domestic courts in order to determine whether this right is absolute or conditional. An unfettered right will allow the source state to claim restitution, whilst conditionality in the exercise of the right of ownership might lead to the dismissal of the claim.²⁷⁷ In determining the presence of conditionality, elements, such as the recognition of private rights of ownership, differentiation in state ownership depending on the categories of objects protected, mandatory registration schemes and other constraints on the state's dominion play an important role.²⁷⁸ For example, if private ownership is authorised by the domestic law of the source state, it might be difficult for it to prove that it has a claim over the item as it could originally have been acquired by private parties that were legally entitled to own it. Because the claiming state must normally bear the burden of proof in substantiating its allegations, these kinds of situations make it particularly difficult for the state to advance that it unconditionally owned the item and that the said property could not be privately handled. Henceforth, it is advisable not to constrain the right of dominion in allowing exceptions.

Conditionality of ownership may also exist in other forms: the case of *Attorney General of New Zealand v. Ortiz & Sotheby's*²⁷⁹ provides a good illustration of the difficulties that can materialise when patrimonial rights are made conditional.

²⁷² *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWHC 705 (QB).

²⁷³ *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWHC 705 (QB), paragraph 37.

²⁷⁴ *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, paragraph 64.

²⁷⁵ *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, paragraph 82.

²⁷⁶ Forrest, (2010), p. 203.

²⁷⁷ Forrest, (2010), p. 150.

²⁷⁸ Eyster, J., 'United States v. Republic of Guatemala: Expansion of National Stolen Property Act in its Application to Illegally Exported Cultural Property – Case Notes', 5 (1) *International Journal of Cultural Property*, (1996), p. 188. It should be noted that Eyster mentions these elements in the context of the application of the NSPA, an Act that is only applicable in the United States of America. This submission can, nevertheless, be applied *mutatis mutandis* to the present analysis, as these considerations will be given weight in determining the extent of the patrimonial law when clarifications are needed.

²⁷⁹ *Attorney General of New Zealand v. Ortiz & Sotheby's*, [1984] AC 1.

In the case of *Attorney General of New Zealand v. Ortiz & Sotheby's*,²⁸⁰ the government of New Zealand tried to obtain a carved Maori totaro wooden door – referred to as the Motunui panels – that, originally, had been the door of a treasure house (i.e. pātaka) that belonged to a Maori chief in New Zealand. The door – composed of five exquisitely carved panels (see illustration) – was unearthed in 1972 by a local resident known as Manukonga and had, subsequently, been exported illegally by an English dealer that specialised in primitive works of art. The dealer directly purchased the panels from Manukonga and, later, sold them to George Ortiz – a Swiss art collector – in 1973. Several years later, the daughter of Ortiz was kidnapped and he put the Maori door up for auction with Sotheby's London in order to raise enough money to pay the ransom. After its publication in Sotheby's catalogues, the New Zealand Attorney-General discovered the existence of the door and became aware of its sale only days before the auction was due to take place. It promptly instructed Sotheby's not to put the item up for sale. As a follow-up, New Zealand initiated proceedings before an English court in order to recover the door. The legislation of New Zealand that was in force in 1972 authorised the state of New Zealand to forfeit cultural goods that would be exported in contravention of its domestic export legislation. This forfeiture had the effect of vesting a property right over the item in the state of New Zealand, but only after the item was illegally exported and seized by the New Zealand Crown. Since the goods had first been sold to the English dealer in New Zealand and then resold abroad, this meant that they were exported in contravention of New Zealand's domestic legislation. As such, the forfeiture had not been operative before the item had left New Zealand's territory without having been seized by the Crown. Although the Attorney General of New Zealand averred that the applicable New Zealand law automatically vested a right of ownership in the New Zealand state in case of illegal export, the English House of Lords found that – unlike what the Attorney General was advancing – the law in fact required a physical seizure before the ownership would pass to the state. In its attempt to rely on the forfeiture in the English jurisdiction, the government of New Zealand was, in fact, asking for the application of an *acta iure imperii* through the enforcement of the forfeiture. Thenceforth, the *iure imperii* character of the forfeiture would preclude its application by the foreign court, because the forfeiture was an official act of state.²⁸¹ Lord Denning, therefore, rejected New Zealand's demand on the grounds that applying the forfeiture provision would have had the effect of enforcing New Zealand's public law in the United Kingdom.



In the *Ortiz* case, the forfeiture was only to take effect by means of seizure of the illegally exported item by the New Zealand Crown. As such, forfeiture – and, therefore, acquisition of ownership by New Zealand – presupposed seizure in order to take effect.²⁸² Nevertheless, once the door was exported outside of New Zealand, its government had not yet enforced the forfeiture upon the wooden panels through seizure, and thus it could not claim that it had acquired ownership of the Maori door.

The enforcement of the forfeiture after the panels had left the territory of New Zealand would require the foreign court to pronounce the seizure, which would be tantamount to enforcing New Zealand's public law.²⁸³ In other words, provided the claiming state has not exercised the forfeiture in its own territorial boundaries,²⁸⁴ the enforcement of provisions on forfeiture in foreign jurisdictions constitutes an extraterritorial exercise of the claiming state's sovereignty.²⁸⁵ Consequently, the source state that cannot rely on a patrimonial right before foreign courts because of the conditionality of this declaration of dominion through means of forfeiture should prescribe automatic forfeiture²⁸⁶ upon departure of the item from its territory and not make it conditional upon seizure.

(4) Language hurdles

Another adjacent variable to the determination of ownership under foreign laws lays in the difficulties of translating technically complex or unspecific foreign laws.²⁸⁷ In the case of *United States v. McClain (McClain II)*, difficulties in translating Mexico's patrimonial law made it particularly difficult to ascertain the exact meaning thereof.

²⁸⁰ For a concise and accurate summary of the facts, see Yates, D., 'Motunui Panels', *Trafficking Culture*, 3 April 2015, available at <http://traffickingculture.org/encyclopedia/case-studies/motunui-panels/>, last retrieved on 01.03.2018.

²⁸¹ Droz, (1997), p. 244; Ambrüster, (2004), pp. 727-728.

²⁸² O'Keefe, (1983), p. 362.

²⁸³ *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, at 98-100; O'Keefe, (1983), p. 361; McLachlan, (2014), p. 447.

²⁸⁴ McLachlan, (2014), p. 441.

²⁸⁵ McLachlan, (2014), p. 441; O'Keefe, (1983), p. 361.

²⁸⁶ O'Keefe, (1983), p. 361.

²⁸⁷ Bator, (1982), p. 354.

In *McClain*, a handful of U.S. citizens were being prosecuted in the United States under Sections 2314 and 2315 of the *National Stolen Property Act* (18 U.S.C.) for the acts of conspiring to transport and receiving stolen Pre-Columbian artefacts – figures in terra cotta, pottery, beads, etc. – that were owned by the Mexican state.²⁸⁸ Although the case mainly dealt with prosecution under the NSPA for the fencing of stolen property,²⁸⁹ a preliminary issue that was crucial to the prosecution was whether the Mexican state owned the artefacts that were the subject of the litigation. As such, the US Court of Appeals of the Fifth Circuit had to determine whether a pre-1972 Mexican law that was applicable at the time of the excavation and removal from the territory of Mexico had the effect of vesting ownership in the Mexican state.

As was noted by the court: “It may well be, as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artefacts for almost 100 years. If so, however, it has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens”.²⁹⁰ Furthermore, it was added “One of the government experts testified that a literal translation of the Mexican statutes into English would mislead those familiar with Mexican law into thinking such movables had been capable of being privately owned”.²⁹¹ Although the convicted individuals were finally found guilty of conspiracy to sell stolen artefacts in the United States on the basis of an unequivocal post-1972 Mexican law for acts that took place after the changes were operated, the Court of Appeals of the Fifth Circuit did not consider the said law unambiguous once it had been translated. In order to avoid similar difficulties, it is, thus, recommended to frame the patrimonial right using clear and unequivocal language that will not get lost in translation.

(5) Declaration of ownership precedes the removal of the object

As was correctly submitted by Gerstenblith: “the national ownership law must take effect while the objects at issue are still located within the territory of the state; that is, the effect of the statute can be neither retroactive nor extra-territorial”. If the artefact has been exported before the patrimonial law enters into force, then this law will not be applied to the exported item. This means that if a property right can be inferred from the domestic law of the source state, it is of paramount importance for the source state to be able to prove that this domestic law precedes the removal of the object from the territory of the source state.²⁹² As recalled by the Greek government during the first special committee that was set up in order to review the practical operation of the

²⁸⁸ *United States v. Patty McClain*, 545 F.2d 988, (January 24, 1977), at 992.

²⁸⁹ It seems appropriate here to provide more background information on the NSPA in order to understand its relevancy in the context of stolen state owned property. The function of the *National Stolen Property Act*, 18 U.S.C. §§ 2311-2318 (1976) is to criminalise, at the federal level, the transport or the disposal of stolen goods that have a minimal value of 5,000 dollars, knowing that these goods have either been stolen, converted or taken by means of fraud (see United States Code, Title 18, Part I (Crime), Chapter 113 – Stolen property, § 2314 and 2315). The Act criminalises certain acts of thefts, including theft of cultural objects (cf. United States Code, Title 18, Part I (Crime), Chapter 113 – Stolen property), although this is not its original purpose. In fact, the NSPA was adopted in 1934 for the federal prosecution of individuals dealing in stolen cars (see Yasaitis, (2005), pp. 95-96 and Eyster, (1996), p. 185). In 1934, the theft of cultural property was not as problematic as it would become several decades later (Yasaitis, (2005), p. 97). In fact, although it is still used for that specific purpose (*idem*), the Act makes no specific reference to the protection of cultural property and it can be considered as an emerging instrument for the protection of cultural property in United States Federal Law (Yasaitis, (2005), p. 109). The provisions that are relevant to cultural property can be found in §§ 2314-2318. What is more, to date, the NSPA is considered to be one of the most effective instruments for the recovery of stolen cultural property (*ibidem*, p. 106). Furthermore, it is important to note that the instrument is only concerned with stolen objects, that it does not function as an import restriction (Yasaitis, (2005), p. 106) but it, nevertheless, helps to prevent future thefts from taking place (Yasaitis, (2006), p. 106). As such, it is never triggered by the violation of foreign export legislation (Eyster, (1996), p. 185). Thus, as long as an object can be considered stolen, even under a foreign definition, the NSPA might be applicable (Yasaitis, (2005), p. 97). This allows foreign states to determine what will be considered to be theft in the United States (*idem*).

²⁹⁰ *United States v. McClain* 593 F.2d 658 (April 23, 1979), at 670.

²⁹¹ *United States v. McClain*, (1979), at 670. See also footnote 20: “Carlos Schon took issue with the translations offered in evidence by the defendants the translations used by the earlier panel in assessing the Mexican statutes. He especially objected to translating the word “propriedad” as “ownership” or “property,” though he conceded that that rendering was proper in Some (*sic*) of the statutory passages. He said that only one familiar with the Mexican law could decide when to translate the word as “ownership” because in many instances regarding artifacts the law limits “propriedad” to connoting mere Possessory (*sic*) rights. Translation of “propriedad” as “property” might incorrectly lead those unfamiliar with Mexican law to believe some artifacts could be “outright property.” Mr. Schon further testified that “translacion de dominion” could be translated as “acts of conveyance,” provided the latter term was not understood to include “transfer of property or outright ownership.” The literal translation, “transfer of dominion,” would also be misleading, since the correct meaning of the law does not go beyond allowing “transfer of possession.””

²⁹² Armbrüster, (2004), p. 731; Kaye, (1996), p. 31; see also *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, at 85; Gerstenblith, (2009), p. 311; O’Keefe, (1983), p. 363.

1995 convention,²⁹³ proving this antecedent might be particularly problematic for several reasons: firstly, from as early as the 18th century, a considerable amount of archaeological materials had been removed from the territory of many source states. This removal took place before legislative initiatives were adopted to protect these materials from dissipation; secondly, the place and time of the excavation of an artefact are usually unknown,²⁹⁴ making it particularly difficult to ascertain whether they fall under the aegis of the adopted legislation. Demonstrating the time and place of the theft are two virtually impossible tasks in case of archaeological theft.²⁹⁵ An adequate illustration of this problem concerns ancient coins, which were crafted for the purpose of being easily moved around. As Prott specified after the first session of the CGE: “[...] it has to be recognised that it is almost impossible to identify some materials illegally excavated as having come from a particular site or territory of a State: many cultures cross national boundaries and expert opinion identifying e.g. ceramics, is by no means uniform, especially when no scientific information is preserved or location details disclosed by the clandestine excavators”.²⁹⁶ Furthermore, because it is virtually impossible to determine when an artefact has been excavated, it becomes difficult to establish under which legal regime the removal of the artefact falls, especially when changes in the law have been made throughout the years. For example, in *McClain*, the Mexican government had progressively adopted protective legislation for archaeological materials: the first legislative measure was adopted in 1897 and this piece of legislation only protected archaeological monuments and their contents. It was not until 1972 that the Mexican state formulated a fully-fledged declaration of ownership over all archaeological movable items to be found in its soil. Because it was not possible to prove when the objects had been removed,²⁹⁷ the court in *McClain* could only condemn the individuals on the basis of the NSPA due to the continuity of their activities post-1972.²⁹⁸ Similarly, in the case of *Government of Peru v. Johnson* discussed above, Peru had the difficult task of proving that the artefacts had been removed after the adoption of what it considered to be a patrimonial law. Peru was unable to prove when the misappropriation had actually taken place.²⁹⁹

It is only in rare cases – where the existence of the item has been recorded beforehand or is reliably reported afterwards – that it is possible to determine with certainty when the theft took place. For example, in some cases it was possible to establish when the object had been removed because its existence had previously been recorded. This was notably the case in the *Ortiz* case, where Manukonga had photographed the carved panels before he sold them to the English dealer.³⁰⁰ Similarly, in *Hollinshead*, Ian Graham had recorded the existence of Stela 2 and was, coincidentally, later consulted as a specialist when it was proposed for sale after the illegal export.³⁰¹ Moreover, in the *Bumper Development* case, India was able to determine the moment of the theft by interviewing the thieves that had taken the Siva Natarasja. Nonetheless, these scenarios remain particularly rare because the existence of artefacts is often unknown up until the apparition of the object on the licit market, or because the identity of the looters remains unknown.

(6) Exercised right

Even if a property interest is vested in the foreign state before the removal of the artefact and the domestic court seized is willing to recognise it, it is advisable for the foreign state to behave like a conscientious owner by exercising its ownership right over the object whenever it is possible for it to do so. Failing to exercise a patrimonial right might lead foreign courts to conclude that the source state was negligent towards its property. According to Özel, this was notably the conclusion reached by the Swiss courts in the case of *Türkische Republik v. Kanton Basel-Stadt*.³⁰² In this case, Swiss judges dismissed Turkey’s claim over the five Phrygia gravestones because Turkey. These Swiss courts reached this conclusion because – by way of contrast to the *OKS* case – they,

²⁹³ Greek Delegation, ‘Observations / Questions of participants / Discussions’, in: UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

²⁹⁴ Bator, (1982), p. 286; Forrest, (2010), p. 150.

²⁹⁵ Greek Delegation, in UNIDROIT, (2012), forthcoming.

²⁹⁶ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of international organisations on the Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Unesco, Interpol), Study LXX – Doc. 25, Rome, January 1992, p. 12.

²⁹⁷ O’Keefe, (1983), p. 357.

²⁹⁸ *United States v. McClain*, (1979), at 671.

²⁹⁹ *Government of Peru v. Johnson*, 720 F.Supp. 810 (June 29, 1989).

³⁰⁰ O’Keefe, (1983), p. 358.

³⁰¹ O’Keefe, (1983), p. 358.

³⁰² For a concise summary of the different Swiss decisions in this case, see Özel, S., ‘Case Notes – The Basel Decisions: Recognition of the Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Country of Origin’, 9 (2) *International Journal of Cultural Property*, (2000), pp. 315-340.

somehow oddly,³⁰³ construed Turkish law as not instating an *ipso jure* patrimonial right in favour of Turkey. Instead, these courts found that, even if Turkey had a right of ownership to the gravestones, the patrimonial law required the Turkish government to assert its right of ownership over the items within a reasonable period of time, and that the failure to promptly exercise the said right resulted in a waiver thereof.³⁰⁴ Therefore, Turkey had in any case lost its right to the stones by means of inactivity. This case demonstrates that it is recommended for source states to exercise their ownership prerogative over their artefacts whenever possible.

(7) Exclusive right

Another particularly important issue to deal with when faced with an international dispute as to the ownership of unlawfully excavated artefacts stems from the determination of who the rightful owner is.³⁰⁵ In certain instances, concurring claims of ownership by two or more states might be running upon the same artefact because of difficulties in determining the ‘nationality’ of the item.³⁰⁶ It is, thus, for the state of origin to prove that an artefact has been excavated and taken from its territory,³⁰⁷ an exercise that can be close to impossible in practice.³⁰⁸ In fact, as the notion of ‘state of origin’ is disputable, the determination of the state of origin constitutes a problem *sui generis*. It has been submitted that the state of origin refers to the place of discovery or excavation in modern times.³⁰⁹ Kaye refers to this as the need to establish the ‘find site’ of the excavated object.³¹⁰ This can be extremely challenging when dealing with objects that have been extracted from the soil on the basis of unauthorised excavations.³¹¹ In order to determine the find site, the claiming nations will refer to the testimonies of experts, notably archaeologists³¹² or anthropologists. For a source state to succeed in asserting ownership over an artefact, it is particularly important for this state to prove that the object finds its origin in its modern day territory. This must be proved “beyond a balance of probabilities”, or else the claim might be rejected.³¹³ The act of proving “beyond a balance of probabilities” that the object originates from the territory of the claiming state can be a particularly difficult exercise when dealing with items that have been taken by means of archaeological theft.³¹⁴ For example, through the migration of certain civilizations, the identification of the exact place of origin is particularly difficult to ascertain, even for specialists.³¹⁵ This is notably the case for the Maya civilization, whose migration is not unbeknownst:³¹⁶ the case of *Government of Peru v. Johnson* appropriately illustrates the difficulties that can arise in establishing the source state.³¹⁷ In this case, it was only possible to rely on the opinion of experts in order to identify the connection between Peru and the objects that were the subject

³⁰³ For an analysis of the incorrect interpretation that was rendered by the Swiss courts in relation to Article 697 of the Turkish Civil Code, see Özel, (2000), pp. 328 and ff.

³⁰⁴ See Özel, (2010), p. 184: “The court went on to examine the 1906 decree and the 1973 law and came to the conclusion that Turkish laws on antiquities did not provide *ipso jure* ownership for the state. Furthermore, the court stated that even if Turkish law had provided *ipso jure* ownership rights, Turkey could not have taken the advantage of *ipso jure* ownership because Turkey waived its ownership rights through inactivity. The Swiss federal court also stated that ownership vested in private persons, so that it was necessary for the state to perform an act of acquisition in order to exercise its ownership rights. [...] According to Swiss courts, Turkey lost its ownership rights through inactivity, because it did not inform clearly private persons involved in clandestine activities, and within a reasonable time, that it desired the return of looted and smuggled objects”; see additionally Özel, (2000), p. 320: “In conclusion, the court of appeals stated that the issue of whether the Turkish State waived its *ipso iure* right of ownership was irrelevant to the determination of the case. According to the court, the plaintiff had lost all rights to the stones in dispute through inactivity”. Furthermore, “The court suggested that, in the interests of law and order, the Turkish State was required to clearly inform any private persons involved (the finders and the owners of the land), in an appropriate form and within a reasonable period of time, whether it was asserting or waiving its right of ownership or acquisition over the object found; otherwise, ownership of new finds could float in legal limbo for decades, which would be irreconcilable with the nature of ownership” (cf. Özel, (2000), p. 319).

³⁰⁵ Forrest, (2010), p. 150.

³⁰⁶ Warring, (2005), p. 289.

³⁰⁷ Kaye, (1996), p. 29; Forrest, (2010), p. 146.

³⁰⁸ Forrest, (2010), p. 150.

³⁰⁹ Gerstenblith, (2008), p. 642; this understanding can be implicitly derived from the judgment in the case of *United States v. An Antique Platter of Gold* but it also finds support in customs regulations. See Gerstenblith, (2009), p. 314; *United States v. An Antique Platter of Gold*, 184 F.3d 131 (July 12, 1999).

³¹⁰ Kaye, (1996), p. 29.

³¹¹ Kaye, (1996), p. 29; Warring, (2005), p. 289.

³¹² Warring, (2005), p. 289.

³¹³ Forrest, (2010), p. 146.

³¹⁴ Forrest, (2010), p. 146.

³¹⁵ Sánchez Cordero, (2003), p. 568.

³¹⁶ Sánchez Cordero, (2003), p. 568.

³¹⁷ *Government of Peru v. Johnson*, 720 F.Supp. 810 (June 29, 1989).

of the litigation.³¹⁸ Dr. Iriarte – an expert witness testifying for Peru – recognised that the objects concerned were of Peruvian style and culture, but that this style and culture would extend beyond the actual borders of the modern day Peruvian state. In his opinion, the items could have originated ‘from Peru’ – referring to Pre-Columbian Peru – and, thus, this would extend the find site beyond the Peruvian territory to parts of the territories of Bolivia and Ecuador.³¹⁹ As such, the goods could equally have been found in the soil of these two other states, leaving Peru’s claim ungrounded.³²⁰ *Ergo*, expert testimonies and other evidence were not conclusive in demonstrating that the goods had been taken from Peru.³²¹

In certain situations, there might be several claimants for the same object, each of which being required to prove their assertions. In the case of *Republic of Lebanon v. Sotheby’s*,³²² the three states that claimed the Sesvo treasure (i.e. Croatia, Hungary and Lebanon) failed to prove that it had been excavated from their respective soils.³²³ In the settlement reached in *Republic of Croatia v. The Trustee of the Marquess of Northampton*,³²⁴ two of the states that were claiming ownership of the Sesvo treasure were unable to prove that the items were excavated within their territory.³²⁵ It was only after a settlement had been reached that new evidence revealed that it was in fact Hungary that was the source state.³²⁶

In rare occasions, it is possible to determine with certainty the origin of an artefact: in the American case of *Hollinshead* that was discussed above, the stela smuggled outside of Guatemala at the end of the 1960s had been registered in 1962 by Ian Graham, the archaeologist that discovered the Machaquilla. Due to Graham’s registration of the site in 1962, Guatemala could irrefutably prove that the stela in Hollinshead’s possession originated from its territory.³²⁷ The odds were in the favour of the Guatemalan state, as Graham happened to be the expert that was consulted by the potential buyer when the stela was put up for sale by Hollinshead. Henceforth, he was the most suited – and probably the only – person able to corroborate the affirmation of the Guatemalan government as to the origin of the stela.³²⁸ Considering that these circumstances were rather exceptional, this case is considered so rare that it has been qualified by Bator as being a fluke.³²⁹ In the English *Bumper Development* case,³³⁰ the composite metallurgical and stylistic characteristics³³¹ of the disputed Nataraja statue were similar to the metallurgical characteristics of statues from the same site.³³² Additionally, the pattern of termite mounds that were present on the litigious statue and the presence of a specific type of soil on its surface were indicative of the item’s correlation with the Indian site.³³³ This similarity helped India to show that the statue originated from its territory. In *Ortiz*, it was possible to identify with certainty that the wooden panels were the same as the ones that had been found and exported illegally from New Zealand. This was made possible due to a damage to one of the panels: when unearthing the wooden panels, Manukonga had accidentally made a cut with his spade in one of the panels, thereby facilitating the identification thereof.³³⁴ The picture taken by Manukonga corroborated the veracity of his reports about this incident, proving that it was the same object as the one found by Manukonga in New Zealand. In the case of *Republic of Turkey v. Metropolitan Museum of Art*, Turkey won the contention because eyewitnesses – i.e. the thieves – provided indications that the pieces had been taken from sites in Turkey.³³⁵ What is more, further archaeological analysis proved that the pieces were

³¹⁸ Kaye, (1996), p. 27; Kaye, L. M., ‘The Recovery of Stolen Cultural Property: A Practitioner’s View - War Stories and Morality Tales’, 5 (1) *Jeffrey S. Moorad Sports Law Journal*, (1998), p. 9.

³¹⁹ *Government of Peru v. Johnson*, 720 F.Supp. 810 (June 29, 1989); *Government of Peru v. Wendt*, 933 F.2d 1013, 1991 WL 80599 (Table), (May 15, 1991).

³²⁰ Kaye, (1996), p. 29.

³²¹ Kaye, (1996), p. 29; Gerstenblith, (2008), p. 664.

³²² *Republic of Lebanon v. Sotheby’s*, 167 A.D.2d 142, 561 N.Y.S.2d 566, (November 8, 1990).

³²³ Kaye, (1996), pp. 29-30; Warring, (2005), p. 289.

³²⁴ *Republic of Croatia v. The Trustee of the Marquess of Northampton*, 203 A.D.2d 167, 610 N.Y.S.2d 263 (April 21, 1994).

³²⁵ Gerstenblith, (2008), p. 664.

³²⁶ Gerstenblith, (2008), p. 664.

³²⁷ Bator, (1982), p. 346.

³²⁸ Bator, (1982), p. 346.

³²⁹ Bator, (1982), p. 346.

³³⁰ *Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis* [1991] 4 All E.R. 638.

³³¹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 32.

³³² Forrest, (2010), p. 146.

³³³ Forrest, (2010), p. 146.

³³⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 32.

³³⁵ See Montagu, A. A., ‘Recent Cases on the Recovery of Stolen Art – The Tug of War Between Owners and Good Faith Purchasers Continues’, 75 *Columbia-VLA Journal of Law & The Arts*, (1993-1994), p. 96 specifying that both eyewitnesses to the looting and some employees of the Metropolitan Museum of Art were prepared to testify that the items were illegally excavated from Turkey. See also Spiegler, H. N., Kaye, L. M., ‘American Litigation to Recover Cultural Property: Obstacles, Options, and a Proposal’, in: N. Brodie, J.

specifically from that region.³³⁶ In the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.* case, the court relied on eyewitness testimonies in order to establish that the objects were located in the Cypriot Church before the theft took place.³³⁷

Although it might prove practically difficult to overcome the ‘nationality’ problem through the issuance of the patrimonial law, it is recommendable for the source state to catalogue its archaeological materials so as to demonstrate similarities between its cultural heritage and the artefact that it wishes to retrieve. Ideologically, when uncertainties about the origin of an object are encountered, the criterion that is used in determining the success of a claim for restitution should reflect the best cultural interest in the context of preservation of cultural and human knowledge.³³⁸

3. PATRIMONIAL LAWS – GUIDELINES

To conclude, in order for a state to increase its chances of restitution – and thus remedy the dissipation of its subsoil archaeological materials by means of patrimonial claims –, a declaration of state ownership needs to comply with the following requirements:

1. The patrimonial law needs to vest a right of ownership in the state that is of an absolute character and which is recognised *erga omnes*. Because acceptance of other property interests as the basis of a claim in restitution is left to the discretion of the domestic courts seized, a fully-fledged declaration of ownership is to be preferred.
2. All in all, a clear and comprehensible legislative declaration of ownership alleviates difficulties that might materialise in restitution proceedings. Therefore, the declaration of ownership needs to be as clear, unequivocal and intelligible as possible. A source state needs to keep the declaration simple and use terminology whose understanding cannot give rise to any doubts as to its substance and meaning. This call for simplicity must also take another dimension into consideration, namely the fact that the domestic legislation might have to be translated into a different language for the purpose of being applied by foreign courts and that, hence, semantics matter. It is thus of paramount importance to use notions whose understanding is universal or transposable.
3. If the source state has excluded certain objects or certain categories of objects from its national patrimony, the exclusion needs to be formulated as clearly as possible. By being able to point specifically at the exceptions, a state can demonstrate by *a contrario* reasoning that the litigious item is part of its patrimony and could not be privately owned.
4. The declaration of state ownership must be formulated before the item is deemed stolen. If this has not yet been done, it is particularly important for a source state to express and formalise its declaration of ownership of the relevant materials as soon as possible. By doing so, a source state will increase its chances of recovering any archaeological materials that are found in its soil through means of patrimonial claims.
5. Once a sufficient and timely declaration of ownership is formulated, it is important to recall that the source state needs to behave like a conscientious owner. If an archaeological site is discovered and notified to the authorities, the source state must adopt a proactive attitude in securing its property.
6. At last, sometimes an object will be subjected to several claims issued by different states. For a source state to be successful in proving the superiority of its claim, a meticulous account of the circumstances of the misappropriation or of the link between the object and domestic cultural materials must be established. If this account cannot disprove the claims of other nations, it must at least create a strong presumption that the source state has the strongest claim over the object, or, ultimately, that restitution to it is the most beneficial to the preservation of cultural and human knowledge.

Doole and C. Renfrew (eds), *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, (McDonald Institute Monographs: Oxford, 2001), p. 122 for a detail explanation as to the role played by a thief as key witness to the case.

³³⁶ Kaye, (1996), pp. 28-29; See also Kay, (1998), p. 11, footnote 44.

³³⁷ Kaye, (1996), p. 30.

³³⁸ Sánchez Cordero, (2003), p. 570.

Finally, it should be remarked that it might not always be possible to demonstrate that all these conditions have been complied with: due to the difficulties for the claimants to prove these allegations, courts have been particularly receptive in accepting claimants' assertions as to the origin of the litigious object(s), the time of the misappropriation or the illegal nature of the removal of the object from the source state.³³⁹

³³⁹ In the Barakat decision that was discussed above, the Court of Appeals based its judgment on the assumptions that the litigious objects came from the Jirof region in Iran, that these had been excavated recently (meaning before the latest reform brought by an 1979 Iranian Bill) and that the removal of the objects was illegal. See *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*, [2007] EWCA Civ 1374, paragraph 94.

C. The Unidroit Solution

Having set archaeological theft in context and having discussed the role of patrimonial laws in constraining the said activity, the present research now analyses the solution that was adopted by the UNIDROIT convention to tackle the problem. Despite the vehement opposition that was expressed by many delegates throughout the negotiations,³⁴⁰ a majority of state representatives that took part in the negotiations towards the adoption of the convention continuously insisted on the importance of laying down clear and specific rules for archaeological goods.³⁴¹ In fact, opinions were divided as to the necessity of adopting specific provisions to this effect: some participants insisted on the paramount importance of having unlawfully excavated artefacts classified as stolen, whilst others considered the said classification to be redundant and confusing.³⁴² But for this disparity of opinions, if any such provisions had to be adopted, it was unclear to the participants whether these dispositions should be added to Chapter II or Chapter III of the future convention.³⁴³ In fact, from the early drafts onwards, provisions were already mandating the return of illegally exported archaeological objects post-illegal export. On the other hand, the regime applicable to stolen cultural objects did not include any provision for artefacts. More particularly, a provision similar to Article 3 (2) of the convention was specifically excluded from the PDC so as to avoid bare retentionism by source states.³⁴⁴ Thenceforth, the Mexican delegation posed the question of whether objects originating from clandestine excavations should be assimilated to stolen objects for the purpose of the convention during the first session of the CGE.³⁴⁵ During this gathering, it was advanced that a crescendo of states' representatives had raised concerns with regard to clandestine excavations and wanted to introduce provisions to the effect of addressing this specific issue in the PDC under revision.³⁴⁶ Hence, the same delegation proposed introducing an article that would assimilate clandestine excavations to theft and thus fall within the ambit of Chapter II of the convention.³⁴⁷ What is more, various forces were conjoined on this issue: states, museums, archaeologists and even collectors showed specific interest in protecting these objects.³⁴⁸ It is due to the lobbying by these stakeholders that specific provisions for excavated cultural objects were included in the text of the convention.³⁴⁹ The U.S. Delegation then made a similar call during the third meeting of the CGE³⁵⁰ and pushed for the inclusion and adoption of Article 3 (2) into the final version of the draft convention.³⁵¹ Assimilation to theft was already familiar to certain domestic laws,³⁵² a reason why it was submitted that the convention should follow this line of reasoning in its provisions.³⁵³ Prott – the UNESCO representative that took part in the CGE sessions – noted that the inclusion of a provision that assimilated all

³⁴⁰ Sidorsky, E., 'The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration', 5 (1) *International Journal of Cultural Property*, (1996), p. 26.

³⁴¹ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 33.

³⁴² Sidorsky, (1996), p. 26.

³⁴³ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 33; the representatives present during the DC fiercely disagreed as to whether to include the provision that can now be found in Article 3 (2) in either Chapter II or Chapter III, or whether to strike the entire article out of the draft. See Sidorsky, (1996), p. 26; a first proposal to subsume clandestine excavations under the concept of theft was made by the Secretariat of UNIDROIT in a working paper issued for consultation at the first meeting of the CGE. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the first session of the committee (Rome, 6 to 10 May 1991), Study LXX – Doc. 22, Rome, July 1991, pp. 6 and 13; this proposal was also supported by the government of Mexico, which had advanced a similar proposal at the same stage of the elaboration of the convention. See *Ibidem*, p. 22.

³⁴⁴ Merryman, J. H., 'The Unidroit Convention: Three Significant Departures from the Urtext', in: J. H. Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, (Kluwer Law International: The Hague / London / Boston, 2000), p. 275.

³⁴⁵ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, p. 14; after the first session of the CGE, China echoed the proposal that was made by Mexico. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of governments on the Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Canada, China, France, Islamic Republic of Iran, Norway, Sweden and Turkey), Study LXX – Doc. 24, Rome, January 1992, p. 6.

³⁴⁶ UNIDROIT, (1991), Study LXX – Doc. 23, p. 46.

³⁴⁷ UNIDROIT, (1991), Study LXX – Doc. 23, p. 46.

³⁴⁸ Renold, (1997), p. 27.

³⁴⁹ Merryman, (2000), p. 274.

³⁵⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 33.

³⁵¹ This inclusion was not unthought of, as the delegation comprised of one archaeologist. See Merryman, (2000), p. 274.

³⁵² The assimilation of illicit excavations of artefacts to theft is not a new practice, as it already existed in certain legal systems before the adoption of Article 3 (2) (see Lalive D'Épinay, 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)', (1997), p. 74). For example, in Switzerland, Article 723 of the Swiss Civil Code *juncto* Article 137 of the Swiss Penal Code envisages a similar solution (see Renold, (1997), p. 26).

³⁵³ See for example the Turkish commentary in UNIDROIT, (1992), Study LXX – Doc. 24, pp. 20-21.

clandestinely excavated artefacts to stolen cultural objects might have a deterring effect to participation in the regime of the convention.³⁵⁴ In her opinion, this general assimilation was not necessary when the object was owned by someone (i.e. a state or individual) – since this would in any case trigger the rules of Chapter II –, but in other cases the assimilation to theft would depend on the qualification of the concept ‘stolen’.³⁵⁵ Protz also pointed out the fact that archaeological materials already fell within the ambit of Article 5 (3) (a) and (c) because of the destruction of contextual information and of information of a scientific and / or historical nature.³⁵⁶ Although the content of Article 5 (3) remained undisputed, other delegations supported the assimilation to theft and made proposals to this effect.³⁵⁷ Consequently, the Mexican delegation proposed Article 3 (2) – an article that was almost similar to what is now Article 3 (2) in its present form – before the third session of the CGE.³⁵⁸ The committee supported the inclusion of a specific article or paragraph that would be devoted to the specific issue of clandestine excavations or of misappropriation following lawful excavations.³⁵⁹ The proposed Article 3 (2) was, therefore, considered as providing a special treatment to products of clandestine excavations, which was needed having regard to the widespread nature of the activity.³⁶⁰ During the DC, it was the same Mexican delegation that pushed for the assimilation of archaeological theft to stolen cultural objects for the purpose of the convention.³⁶¹ In this respect, it should be noted that, certain delegations taking part in the DC favoured the deletion of Article 3 (2) from the draft convention.³⁶² This was notably the case for Japan,³⁶³ the United States of America,³⁶⁴ Australia,³⁶⁵ France,³⁶⁶ Switzerland,³⁶⁷ The Netherlands,³⁶⁸ the International Bar Association³⁶⁹ and Protz in her capacity as UNESCO representative.³⁷⁰ The arguments raised in favour of deletion were that some participants considered that the issue of clandestine excavations fell exclusively within the ambit of Chapter III,³⁷¹ and that the absence of this provision would attract more states,³⁷² most likely because there were already

³⁵⁴ UNIDROIT, (1992), Study LXX – Doc. 25, p. 11.

³⁵⁵ UNIDROIT, (1992), Study LXX – Doc. 25, p. 11.

³⁵⁶ UNIDROIT, (1992), Study LXX – Doc. 25, p. 12. See also the same observation that was formulated by the Committee of Governmental Experts during its second session in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the second session (Rome, 20 to 29 January 1992) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 30, Rome, June 1992, p. 26. The same observation was made during the third session of the Committee. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the third session (Rome, 22 to 26 February 1993) (prepared by the Unidroit Secretariat), Study LXX – Doc. 39, Rome, May 1993, pp. 10 and 28.

³⁵⁷ See for example UNIDROIT, (1992), Study LXX – Doc. 30, p. 11, or the proposal by the American delegation in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the third session of the Committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 38, Rome, April 1993, p. 22.

³⁵⁸ See UNIDROIT, Study LXX – Doc. 38, p. 38. The proposed Article 3 (2) was formulated in the following words: “For the purposes of this Convention, an object which has been unlawfully excavated or unlawfully removed following a lawful excavation shall be deemed to have been stolen”.

³⁵⁹ See UNIDROIT, (1993), Study LXX – Doc. 39, p. 13.

³⁶⁰ See paragraph 44 of the ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’ in Presidenza del Consiglio dei Ministri, Dipartimento per l’informazione e l’editoria, Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings, Rome, June 1995 (1996), CONF. 8/3, December 1994, p. 27.

³⁶¹ Sánchez-Cordero, J., ‘The Unidroit cultural Convention. The unfulfilled tasks’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

³⁶² During the Diplomatic Conference, the U.S. – together with Japan – retreated from their first position that was favourable to the inclusion of Article 3 (2) and tried to have the article excluded from the convention (see Protz, *Commentary on the Unidroit Convention*, (1997), p. 33). For more discussion about the deletion of the provision, see Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 73 and CONF. 8/C.1/S.R.2, 13 June 1995, pp. 169 and ff.

³⁶³ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 73 and CONF. 8/C.1/S.R.2, 13 June 1995, p. 169.

³⁶⁴ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 82.

³⁶⁵ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 169.

³⁶⁶ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 170.

³⁶⁷ Represented by Renold and Fraoua during the negotiations. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 170 and CONF. 8/C.1/S.R. 16, 22 June 1995, p. 282.

³⁶⁸ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 171 and CONF. 8/C.1/S.R. 16, 22 June 1995, p. 282.

³⁶⁹ Represented by Crewdson. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 172 and CONF. 8/C.1/S.R. 16, 22 June 1995, p. 281.

³⁷⁰ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 73 and CONF. 8/C.1/S.R.2, 13 June 1995, pp. 169–170 and 172.

³⁷¹ If ownership could not be established, Renold advanced that the situation would residually fall within the ambit of Chapter III of the convention. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 170.

³⁷² Several delegations expressed their concerns in relation to this provision, specifying that it might constitute a barrier to the accession of their government. See Merryman, (2000), p. 274.

provisions for stolen objects within which artefacts would fall when these would be owned.³⁷³ What is more, Renold submitted that “The aim of the future Convention was to assist in the return of stolen and illegally exported cultural objects and not to fill the gaps in the internal law of each State, and Article 3(2) led only to the confusion of those aims”.³⁷⁴ Evans – the Secretary-General of the Diplomatic Conference – recalled that the removal of Article 3 (2) would reduce the scope of Chapter II without conclusively leading to the application of Chapter III.³⁷⁵ This was notably so because Article 3 (2) extended the notion of theft not only to objects that had been unlawfully excavated, but also to artefacts that had been lawfully excavated but unlawfully retained, and thus – depending on the national legislation regulating this matter – it is this last category that might be excluded from the regime of Chapter II if Article 3 (2) were to be deleted. The inclusion of this provision in the final version of the Draft convention was thus disputed and it was ultimately adopted by a divided Conference.³⁷⁶ Consequently, it was agreed to subsume archaeological theft to both chapters of the convention: therefore, Article 3 (2) assimilates clandestine excavations to theft for the purpose of applying the regime of Chapter II, whilst Article 5 (3) gives recognition to certain interests upon which a request in return on the basis of Chapter III might be based.³⁷⁷ Nevertheless, it is important to note that if the legislation of the source state does not prohibit the excavation and subsequent misappropriation of the object or the unauthorised retention, then it is not possible to bring a claim on the basis of the convention for these materials. This is notably so because both Article 3 (2) and Article 1 (b) of the convention specifically refer to the domestic laws of the source state for the purpose of using the mechanisms laid down in Chapter II and Chapter III respectively. Articles 3 (2) and 5 (3) are given individual consideration below.

1. ASSIMILATION TO THEFT (CHAPTER II)

Article 3 (2) was added by the drafters of the convention in order to tackle archaeological theft, a problem that is – by definition – undocumented and pervasive.³⁷⁸ In this regard, it was established above that artefacts are particularly vulnerable due to many different considerations³⁷⁹ and – more importantly – that their depletion through clandestine activities constitutes a problem *sui generis* because of the destruction of historical and scientific information.³⁸⁰ Taking into consideration the aforementioned difficulties inherent in protecting antiquities from being plundered, the drafters of the UNIDROIT convention understood all too well the relevancy of patrimonial laws and that acting on the demand side of the antiquities market was an effective means of deterring archaeological theft.³⁸¹ Hence, Article 3 (2) *juncto* Article 3 (1) palliatively address archaeological theft by securing automatic restitution.

Article 3 UNIDROIT Convention (1995) – (1) The possessor of a cultural object which has been stolen shall return it.

³⁷³ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 169; see also the commentary of the American delegation in CONF. 8/C.1/S.R. 5, 17 June 1995, p. 190; Renold advanced that the provision was idle because if the object was owned, it could be claimed back on the basis of Chapter II (see Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 170).

³⁷⁴ See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 170.

³⁷⁵ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, p. 172.

³⁷⁶ Merryman, (2000), p. 274.

³⁷⁷ It should also be noted that the CGE had considered the option of either inserting an article or creating an additional chapter dealing with clandestine excavations (see for example UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the fourth session (Rome, 29 September to 8 October 1993) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 48, Rome, February 1994, p. 13). The idea of mentioning the problem in the text of the convention was finally retained (see UNIDROIT, (1993), Study LXX – Doc. 39, p. 11), although adopting a specific chapter for clandestine excavations was deprecated by UNESCO. This was notably because this would have created confusion, as situations dealing with archaeological theft are often more difficult to address due to the difficulties that are inherent in detecting the theft of artefacts (see for example UNIDROIT, (1993), Study LXX – Doc. 42, p. 5 and UNIDROIT, (1994), Study LXX – Doc. 48, p. 13). Furthermore, adopting an entire chapter derogating from Chapters II and III would not be adequate as it would have been considered unreasonable to require from the acquirer to try to retrace how the artefact entered the market, as this exercise was also impossible for experts. See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, pp. 94-95; although it was noted above that export restrictions have little effect in reclaiming clandestinely-excavated artefacts, it was deemed possible to give effect to export restrictions established on archaeological materials because of the innovative character of Chapter III.

³⁷⁸ Hoffman, (10 March 1995), p. 1; Olivier, (1996), p. 659.

³⁷⁹ See section A.1 above.

³⁸⁰ Cf. section A.2 above for more details about the destruction of information; see also Hoffman, (10 March 1995), p. 1.

³⁸¹ Recognizing that the use of patrimonial laws is a second best to tackling archaeological theft, the drafters of the convention recalled in Recital 8 of the Preamble to the convention that its implementation should be accompanied with measures on physical protection of archaeological sites: “ACKNOWLEDGING that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as [...] the physical protection of archaeological sites [...]”.

(2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

The practical effect of Article 3 (2) is to bestow the favourable regime of restitution of Chapter II on any newly discovered archaeological objects that have been misappropriated by means of archaeological theft.³⁸² Three elements in the wording of Article 3 (2) require further consideration: 1) the classification of archaeological materials as cultural objects; 2) the illegality of the acts of appropriation and 3) the assimilation of archaeological theft to theft for the purpose of applying Chapter II. These elements are addressed separately below.

(1) Cultural objects

Instead of attempting to provide a universal definition of archaeological objects – an exercise that would in any case be utterly complicated having regard to the manifold national definitions in existence –, Article 3 (2) was astutely drafted so as to avoid problems in semantics. More particularly, the 1995 convention does not foresee a specific definition for artefacts. Instead these objects fall within the definition of Article 2 through the following wording “For the purpose of this convention, cultural objects are those which, on religious or secular grounds, **are of importance for archaeology, prehistory, history** [...]”.³⁸³ Additionally, artefacts can be subsumed under the categories (a)-(f) of the Annex to the convention.³⁸⁴ What is more, the terminology of Article 3 (2) specifically focuses on the acts of excavation and retention to qualify the types of cultural objects targeted, leaving the intricate meaning of what constitutes archaeological objects unaddressed.

A few additional remarks relating to the meaning of excavated cultural objects need to be formulated: first of all, it should be emphasised that Article 3 (2) does not give any additional nuance to the meaning of cultural object for the purpose of the convention. For example, contrary to what had been originally proposed in the elaboration of the convention,³⁸⁵ there is no harmonised age restriction on the categories of archaeological materials that are covered by the provisions of the convention. The generality of Article 3 (2) stems notably from the choice to make a cross-reference to the domestic laws of the source state for the purpose of identifying the archaeological objects that fall within the regime of Chapter II: the use of this cross-reference means that the definition of archaeological objects will be further refined by the national law of the source state. This entails that it might be possible that the categories of archaeological objects reclaimed on the basis of Article 3 (2) are narrower than the broad definition prescribed by Article 2 of the convention, although it should be emphasised that this submission would depend primarily on the nuancing that is given by the domestic laws of the source state, if any. Secondly, contrary to Article 5 (3), Article 3 (2) does not take any interest into consideration when giving recognition to the domestic law of the source state.³⁸⁶ This implies that the foreign law is given full effect throughout Article 3 (2),³⁸⁷ irrespective of its content. This in turn entails that it is possible for a source state to demand the restitution of any clandestinely excavated object or unlawfully retained artefact post-excavation – including those that it has never had in its possession³⁸⁸ – provided that it has enacted a domestic law regulating excavations to protect antiquities before the misappropriation takes place. Consequently, the convention not only addresses identified cultural objects, but it rather protects all archaeological materials³⁸⁹ – irrespective of whether these have been unearthed or publicly known to exist –, provided that the source state has protected these materials through the adoption of a specific law to this effect prior to the misappropriation.

³⁸² Warring, (2005), p. 257; Siehr, (2009), p. 131.

³⁸³ The same observations were formulated by the CGE during its third session in relation to the use of the adjective ‘archaeological’ that is found in Article 2. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 10; the reference to ‘archaeology’ as referring to products of clandestine excavations for the purpose of the convention was also noted in paragraph 44 of the ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 27.

³⁸⁴ These terminological remarks are equally applicable to archaeological objects falling within the ambit of Article 5 (3) of the convention (see section C.2 below).

³⁸⁵ For this proposal, see for example UNIDROIT, The Protection of Cultural Property – Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable in 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (Prepared by Gerte Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law), Study LXX – Doc. 1, Rome, December 1986, p. 14.

³⁸⁶ Love Levine, (2010-2011), p. 774.

³⁸⁷ Love Levine, (2010-2011), p. 774.

³⁸⁸ Olivier, (1996), p. 660.

³⁸⁹ Hoffman, (10 March 1995), p. 1.

(2) Illegality of the act of appropriation

Recalling the wording of Article 3 (2), archaeological objects will be considered stolen for the purpose of Chapter II in two situations: when the artefact is unlawfully excavated or lawfully excavated but unlawfully retained. For the sake of appreciating the illegal acts governed by Article 3 (2), three concepts need to be explained further: ‘excavation’, ‘unlawfulness’ and ‘retention’.

Excavation

The precise meaning of excavation has been left undefined in the provisions of the convention. Nevertheless, Prott advances that the term is to be understood in the same way as it is in the domestic law of the source state or in the first paragraph of the 1956 UNESCO *Recommendation on the International Principles Applicable to Archaeological Excavations*.³⁹⁰ Because of the plethora of disparate national definitions, attention is exclusively paid to the meaning of excavation as prescribed by the Recommendation for the purpose of the present chapter.

UNESCO Recommendation on the International Principles Applicable to Archaeological Excavations (1956) – (1) For the purpose of the present Recommendation, by **archaeological excavations** is meant **any research aimed at the discovery of objects of archaeological character, whether such research involves digging of the ground or systematic exploration of its surface or is carried out on the bed or in the sub-soil of inland or territorial waters of a Member State**.

Following the Recommendation, the concept of ‘archaeological excavation’ is to be interpreted broadly as it refers to any digging that has been undertaken for the purpose of finding one or more objects of an archaeological character. More specifically, this refers to any digging in the soil of the territory of the state concerned and any systematic research conducted in its stratum, or to diggings that have been effectuated in the bed or sub-soil of the territorial sea and inland waters – such as lakes or rivers – as is defined in Articles 2 and ff. of the United Nations *Convention on the Law of the Sea*.³⁹¹ Because of the focus on the terminology ‘excavated’ in Article 3 (2), it is assumed that not all discovered objects that are addressed by the domestic laws of contracting states will fall within the ambit of this article.³⁹² For example, chance finds and treasure trove could fall foul of the focus on excavation.³⁹³ This also explains why the supplementary 2011 *Model Provisions on State Ownership of Undiscovered Cultural Objects* – hereinafter Model Provisions – (discussed below) have tangentially changed the terminology by focusing on the notion of excavation of Article 3 (2) to the qualification ‘undiscovered cultural objects’.³⁹⁴

Unlawfulness

The ambit of Article 3 (2) is relativised by the requirement that the theft be consistent with the domestic legislation of the state of excavation.³⁹⁵ A reference to the domestic legal order of the contracting state was first made by a proposal issued by the delegation of the United States of America.³⁹⁶ Nevertheless, this reference had not been retained and it only reappeared after the informal Working Group that was led by the Mexican delegation produced the final version of the convention. Henceforth, Article 3 (2) refers to the national legislation of the contracting state concerned as *lex causae* to the determination of the illicit nature of the transaction.³⁹⁷ It thus prescribes the use of the law of the place where the object was excavated in order to

³⁹⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 34.

³⁹¹ The text of the convention can be retrieved at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, last retrieved on 01.03.2018.

³⁹² Love Levine, (2010-2011), p. 774.

³⁹³ See for example Vrellis, S., ‘Les biens archéologiques et la Convention d’UNIDROIT (1995) sur les biens culturels volés ou illicitement exportés’, 20 *Uniform Law Review*, (2015), p. 578, referring to fortuitous discoveries such as those resulting, for example, from the demolition of a building.

³⁹⁴ More information about the Model Provisions is given below.

³⁹⁵ Lalive D’Épinay, ‘Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)’, (1997), p. 74.

³⁹⁶ See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Working documents submitted during the fourth session of the committee (Rome, 29 September to 8 October 1993), Study LXX – Doc. 47, Rome, February 1994, p. 1 (G.E./C.P. 4th session, Misc. 1).

³⁹⁷ Coulé, (2000), p. 361; throughout the convention’s creation, little discussion was devoted as to the meaning that should be given to the ‘unlawful’ qualification. The only certainty in this regard is that the illegality of the excavation needs to be addressed in light of the domestic law of the contracting state concerned, as is specified by Article 3 (2) *in fine*.

determine the illicit character of the excavation.³⁹⁸ This applicable law will determine whether the object will be considered as having been stolen or not.³⁹⁹ Nevertheless, a few remarks regarding the assessment of the illegality of the excavation need to be considered: firstly, it is not possible, on the basis of Article 3 (2), to discern the type of domestic measures that have to be violated for the purpose of the present qualification. In fact, what must be understood under the qualification ‘unlawfully excavated or lawfully excavated but unlawfully retained’ says little to nothing about the types of domestic measures that have to be infringed for the sake of triggering Article 3 (2) of the convention. A broad appreciation of the adjective ‘unlawful’ suggests that the violation of any type of legally binding rule, irrespective of the aim it strives for – being for example either preservative, conservational or environmental –, during the excavation of the artefact might be sufficient to consider the object that is taken abroad as stolen for the purpose of Article 3 (2). Such a broad appreciation seems, however, undesirable: in fact, instating an action in restitution on the basis of Chapter II is tantamount to recognising and ensuring proprietary rights or superior possessions.⁴⁰⁰ This further implies that the measures of domestic law that are to be violated should relate to proprietary or possessory considerations and thus, indirectly, to patrimonial laws. This approach is further corroborated by the fact that it was emphasised by one representative during the third session of the CGE that it would be particularly important to be able to prove dominion over the artefacts before it would be possible to assimilate their misappropriation to theft.⁴⁰¹ Correspondingly, from a teleological perspective, it is possible to infer that the ambit of Article 3 (2) is limited to questions of involuntary loss of ownership or of possession through theft, in line with the remainder of Chapter II. This purposive interpretation is further corroborated by means of contextualisation: the provision is designed to counter the activities of looters – such as *tombatori* and others – by placing constraints on their retail market. Additionally, this property law contextualisation is also reflected in the 2011 Model Provisions addendum that was created to supplement the regime of Article 3 (2) of the convention. It is, therefore, unquestionable that the violation of legally prescribed extraction procedures – such as deeds of concession – addressed at securing the maintenance of a find site and the protection of the provenience of the object discovered should not qualify as ‘unlawful excavation’ for the purpose of this article. It is thus the interference with the proprietary / possessory scheme laid down in the contracting state’s legislation⁴⁰² – by means of unauthorised extraction interfering with ownership rights – and the subsequent removal of the artefact from the territory of the contracting state that must be measured for the purpose of Article 3 (2).⁴⁰³

UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects (2011)

To assist source states in overcoming the problems that are linked to the establishment of state dominion over undiscovered archaeological objects for the purpose of Article 3 (2), the UNESCO ICPD, the Governmental Council of UNIDROIT and both the secretariats of UNESCO and UNIDROIT have joined forces to create the *Model Provisions on State Ownership of Undiscovered Cultural Objects*.⁴⁰⁴ These were drafted between September 2010 and July 2011⁴⁰⁵ amidst the framework of the Expert Committee on State Ownership of Cultural Heritage, in order to support the 1970 UNESCO and 1995 UNIDROIT conventions in their application.⁴⁰⁶ The backdrop of the enactment of the Model Provisions can be found in the extraordinary session of the ICPD that took place

³⁹⁸ Bergé, J.-S., ‘La Convention d’Unidroit sur les Biens Culturels (*): Remarques sur la Dynamique des Sources en Droit International’, 127 *Journal du Droit International*, (2000), p. 247.

³⁹⁹ Bergé, (2000), p. 247.

⁴⁰⁰ For more details about the scope of application and operation of Chapter II, the reader is invited to consult Chapters 1 and 4 above.

⁴⁰¹ See UNIDROIT, (1993), Study LXX – Doc. 39, p. 17. Although the commentary was formulated by one representative and it related to the need to specify that the provision was about ownership and theft, the members of the CGE then proceeded to vote on the article and appeared, thus, implicitly to agree that the issue was one of state ownership.

⁴⁰² It would either be possible for the source state to own the artefact – provided the dominion of this state over the object has been pronounced by means of a patrimonial law –, or for domestic law to confer ownership either upon the excavator, the owner of the land where the object was extracted or to a chance finder. See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

⁴⁰³ Vrellis, (2015), p. 576: “En outre, on soutient que l’État requérant la restitution doit « prouver » que les faits délictueux *in concreto* sont assimilables au vol conformément à la loi de l’État de la fouille; et que, par conséquent, il doit prouver que la propriété du bien litigieux lui appartient.”

⁴⁰⁴ The Model Provisions can be found at the following link: http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO-UNIDROIT_Model_Provisions_en.pdf, last retrieved on 01.03.2018.

⁴⁰⁵ Frigo, (2011), p. 1024.

⁴⁰⁶ Bandarin, F., ‘Opening remarks’, UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

in Seoul in November 2008.⁴⁰⁷ During this session, concerns were raised as to the nebulous character of domestic patrimonial laws in relation to the conferral of ownership of undiscovered cultural materials to the state.⁴⁰⁸ In this respect, it was submitted that the lack of clarity of some of these laws often resulted in the non-recognition of the dominion that is required in order to successfully claim restitution before the foreign court seized.⁴⁰⁹ During this extraordinary venue, O’Keefe invited states to claim an unconditional and inalienable right of ownership over their undiscovered cultural heritage.⁴¹⁰ Following this invitation, Sánchez Cordero proposed drafting a uniform law refining domestic patrimonial laws so as to increase the ratification of both the 1970 UNESCO and 1995 UNIDROIT conventions.⁴¹¹ The ICPRCP picked up Sánchez Cordero’s proposal in May 2009, exhorting UNESCO and UNIDROIT to set up a committee to draft model legislative provisions for effective domestic patrimonial laws.⁴¹² In June 2010, the ICPRCP reiterated the importance for states that are asserting an ownership right to establish ‘clear and precise legislation’ so as to build strong premises upon which a restitution claim could be grounded.⁴¹³ These provisions should come as no surprise considering that UNESCO has already recommended to the state parties to the 1995 convention to assert state ownership over “cultural property yet excavated, or illicitly excavated from the national territory” in order to increase the probability of successful restitution when an artefact is taken abroad.⁴¹⁴ Furthermore, Prott noted that both secretariats undertook this study because of the failure and protraction of certain legal proceedings due to source states’ experienced difficulties in assessing ownership rights.⁴¹⁵ These various considerations led to the finalisation of the Model Provisions in 2011.⁴¹⁶

The *Explanatory Report with model provisions and explanatory guidelines* of the Model Provisions⁴¹⁷ – hereinafter the MP Explanatory Report – specifically states that the purpose of the Model Provisions is to assist states in adopting the standards required to establish dominion over their undiscovered cultural heritage.⁴¹⁸ This can happen through either adopting new provisions to this effect in states that have not yet instated a regime of protection, or through modifications to the existing rules in states that have already legislated on the matter in their internal legal order.⁴¹⁹ The reason why an unambiguous declaration of dominium is of paramount importance in protecting undiscovered cultural materials relates to problems that have materialised in reclaiming these objects in foreign jurisdictions, particularly when such a declaration has not been formulated clearly⁴²⁰ and unequivocally *ex ante*. It is thus for the sake of alleviating difficulties tied to interpreting foreign patrimonial laws by domestic courts⁴²¹ that the Model Provisions were designed.⁴²² Thenceforth, these provisions provide guidelines to states that are willing to establish an overarching patrimonial right over their undiscovered cultural material, with the ultimate goal of facilitating future claims in restitution if the litigious goods are moved outside

⁴⁰⁷ Expert Committee on State Ownership of Cultural Heritage, ‘Expert Committee on State Ownership of Cultural Heritage, Model Provisions on State Ownership of Undiscovered Cultural Objects – Explanatory Report with model provisions and explanatory guidelines, endorsed by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in its Seventeenth session’, Paris, UNESCO Headquarters, on 30 June – 1 July 2011, CLT-2011/CONF.208/COM.17/5, p. 2.

⁴⁰⁸ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 2.

⁴⁰⁹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 2.

⁴¹⁰ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 2.

⁴¹¹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 2.

⁴¹² Expert Committee on State Ownership of Cultural Heritage, (2011), p. 2.

⁴¹³ Renold, (2014), p. 306.

⁴¹⁴ UNESCO, ‘Legal and Practical Measures Against Illicit Trafficking in Cultural Property – UNESCO Handbook’, CLT/CH/INS-06/22, (2006), p. 5.

⁴¹⁵ Prott, L. V., ‘Strength and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption (Background paper)’, in UNESCO, ‘The fight against the illicit trafficking of cultural objects, The 1970 convention: past and future’, (UNESCO Headquarters, Paris, 15-16 March 2011), p. 4.

⁴¹⁶ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 3.

⁴¹⁷ The Explanatory Report is available at the following link: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO-UNIDROIT_Model_Provisions_en.pdf, last retrieved on 01.03.2018.

⁴¹⁸ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 1.

⁴¹⁹ Frigo, M., ‘Model Provisions on State Ownership of Undiscovered Cultural Objects – Introduction’, *Uniform Law Review*, (2011), p. 1024.

⁴²⁰ It should be noted that the Explanatory Report expresses the need for the rules to be clearly formulated so as to make these understandable to foreigners. The report refers to the *dictum* in the case of *United States v. McClain* 593 F2d 658 (April 23, 1979), where the court required Mexican law to be clear enough so that – once translated – it could be understandable enough to bind American citizens (see Expert Committee on State Ownership of Cultural Heritage, (2011), p. 4). In the above, it was also recommended to formulate clear and unambiguous patrimonial rights to overcome any translation problems (see section B.2 and B.3 above).

⁴²¹ These difficulties have been scrutinized in details in section B. above.

⁴²² Frigo, (2011), p. 1028.

the territorial boundaries of the state of origin.⁴²³ The existence of the Model Provisions ultimately exhorts states to protect their archaeological heritage effectively.⁴²⁴ Furthermore, these provisions do not only allow states to adopt intelligible rules that protect their archaeological heritage, but they will, additionally, save considerable time and effort to domestic courts that are tasked with interpreting – and sometimes deciphering – foreign laws in order to establish the existence of a property right.⁴²⁵ Through the hortatory adoption of simple rules inspired by the Model Provisions, it is possible to remove any traces of ambiguity that could result in the dismissal of the claim in restitution.⁴²⁶ Furthermore, it is important to mention that the Model Provisions are not designed to solve all of the issues that are related to the legal status of archaeological objects.⁴²⁷ Additionally, the provisions do not attempt to review topics that have already been settled by the convention, such as *bona fide* acquisitions or the exercise of due diligence.⁴²⁸ Finally, it should be noted that the provisions are optional,⁴²⁹ not legally binding⁴³⁰ and – similar to the remarks formulated in conclusion of section B above – are merely intended to help states with undiscovered archaeological materials to adopt intelligible rules that unconditionally vest ownership of these objects in the state.⁴³¹ Consequently, these Model Provisions were established to ensure the protection of archaeological objects,⁴³² or more particularly, to protect undiscovered archaeological materials.⁴³³

The Model Provisions are composed of a total of six short articles. This conciseness in drafting was intelligently opted for in order to simplify the provisions as much as possible, whilst discarding at the same time, any concerns of oversimplification.⁴³⁴ The present section takes note of each provision separately.

Provision 1 – General Duty

Provision 1 Model Provisions (2011)– General Duty – The State shall take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations.

Provision 1 establishes a general duty for states to adopt necessary and appropriate measures in order to protect their undiscovered cultural materials.⁴³⁵ This general duty is preliminary to the implementation of the other Model Provisions.⁴³⁶ In fact, the CGE that drafted the Model Provisions believed that the expression of this general statement could be used in the preamble of the domestic laws inspired by it.⁴³⁷ As to the provision's substance, it gives recognition to the fact that source states not only have a right to seek protection against the plundering of their archaeological materials, but they also have a duty to defend themselves⁴³⁸ from these attacks to their cultural identity. This provision thus reflects the aforementioned *dictum* of the court in *Webb v. Ireland*, as it considers that states are under a duty to adopt adequate measures to protect their archaeological heritage for both present and future generations.⁴³⁹ No further details are given by the provisions as to the specifics of this obligation to protect.⁴⁴⁰ In fact, it is for each state to establish – on a case-by-case basis – and in accordance with its domestic law and the international instruments available,⁴⁴¹ what this obligation actually entails.⁴⁴²

⁴²³ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 1.

⁴²⁴ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 3.

⁴²⁵ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 4.

⁴²⁶ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 4.

⁴²⁷ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 8.

⁴²⁸ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 8.

⁴²⁹ Frigo, (2011), p. 1028.

⁴³⁰ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 3.

⁴³¹ See the explanation provided by UNESCO at <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/standards-for-ownership/>, last retrieved on 01.03.2018; Expert Committee on State Ownership of Cultural Heritage, (2011), p. 3.

⁴³² Expert Committee on State Ownership of Cultural Heritage, (2011), p. 4.

⁴³³ Frigo, (2011), p. 1026.

⁴³⁴ Frigo, (2011), pp. 1024, 1026.

⁴³⁵ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 4.

⁴³⁶ Frigo, (2011), p. 1026.

⁴³⁷ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 5.

⁴³⁸ Lalive D'Epinay, 'Une avancée du droit international: la Convention de Rome d'Unidroit sur les biens culturels volés ou illicitement exportés', (1996), p. 52, citing Scalfaro.

⁴³⁹ Frigo, (2011), p. 1026.

⁴⁴⁰ Frigo, (2011), p. 1026.

⁴⁴¹ In this regard, attention should be given to the obligations that are laid down in the 1992 European *Convention on the Protection of the Archaeological Heritage* (Valetta) for its contracting states. The text of the convention can be found at the following url: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007bd25>, last retrieved on 01.03.2018.

⁴⁴² Frigo, (2011), p. 1026.

Provision 2 – Definition undiscovered cultural objects

Provision 2 Model Provisions (2011) – Definition – Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater.

Provision 2 defines ‘undiscovered cultural objects’, which is composed of four elements: firstly, it relates to ‘undiscovered’ cultural objects; secondly these objects need to be located either in the soil or underwater; thirdly, the said objects must be ‘of importance for archaeology, prehistory, literature, art or science’ and, finally, the fourth element relates to a cross-reference to the national law of the legislating state.

With regard to the first element, it must be stressed that the terminology ‘undiscovered cultural objects’ refers to objects whose existence is unknown. Recalling that the Model Provisions are meant to facilitate the enactment of proper patrimonial rights over unknown archaeological materials, the reference to undiscovered cultural materials alleviates difficulties inherent in attempting to provide a harmonised definition of the archaeological materials subjected to the patrimonial claim. In relation to the second element, it should be stressed that the Model Provisions are not directed at all undiscovered cultural objects: Provision 2 specifies *in fine* that it is addressed at objects ‘located in the soil or underwater’, thus referring explicitly to unexcavated archaeological materials or archaeological materials that are hidden underwater,⁴⁴³ objects that are often the victim of archaeological theft and whose existence is often unbeknownst to the source state. Furthermore, it should be emphasised that underwater undiscovered cultural objects are automatically excluded from the scope of Provision 2 for those states which have ratified the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*.⁴⁴⁴ As to the third element, Provision 2 was specifically designed to affirm the definitional standard of ‘cultural object’ that was previously posited for cultural property in Article 1 of the 1970 convention and for cultural objects in Article 2 of the 1995 convention.⁴⁴⁵ In doing so, it uses the same ‘item-oriented’ qualification as the one that is found in those two articles. Taking the purpose of the aforementioned proposal introduced by Sánchez Cordero into consideration, the terminological choice of Provision 2 is not unintentional because it provides a non-exhaustive generic definition and does not further refine the particular categories of objects concerned, thus leaving enough discretion to states to model the provisions in line with their respective needs.⁴⁴⁶ This is also the reason why a reference to domestic law is made for the determination of the meaning of undiscovered cultural objects.

Provision 3 – General declaration of dominion upon undiscovered cultural objects

Provision 3 Model Provisions (2011) – State Ownership – Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership.

In order to avoid problems of interpretation of the domestic legislation, Provision 3 instates a clear, comprehensible and unambiguous right of ownership for undiscovered objects found within the state.⁴⁴⁷ As to the choice of terminology, it must firstly be noted that – considering that differences in domestic property law definitions of ownership preclude harmonisation – the provision does not squander on deciding which domestic definition must be preferred.⁴⁴⁸ Instead, it merely refers to ownership in the general sense of the term. In fact, the terminology ‘owned’ was preferred over other terms – such as property – for the sake of clarity and specificity,⁴⁴⁹ but also to discard legal ambiguities as to the link between an artefact and the state.⁴⁵⁰ Secondly, the ownership right is subject to the caveat that no other pre-existing ownership right has been established: Provision 3 makes a reservation as to objects that are already owned by third parties, provided this ownership can be established without any doubts.⁴⁵¹ Since the existence of this previously established property right is dependent on the domestic legislation of the state where the undiscovered object is located, the Model Provisions have specifically avoided laying down the means by which the patrimonial right must be established: it is up to the state that uses the Model Provisions to decide whether there is a need to specify which methods of

⁴⁴³ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 5.

⁴⁴⁴ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 5.

⁴⁴⁵ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 5.

⁴⁴⁶ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 5.

⁴⁴⁷ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 5.

⁴⁴⁸ Frigo, (2011), p. 1028.

⁴⁴⁹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6; Frigo, (2011), p. 1028.

⁴⁵⁰ Frigo, (2011), p. 1028.

⁴⁵¹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6.

acquisition of ownership are implied by Provision 3,⁴⁵² whilst still complying with the caveat of prior ownership posited by the provision.⁴⁵³ It is recommended to the state that uses Provision 3 to consider the impact that an extensive declaration of ownership inspired by this provision might have on other considerations, such as constitutional fundamental rights or international human rights.⁴⁵⁴

Provision 4 – Assimilation to theft

Provision 4 Model Provisions (2011) – Illicit excavation or retention – Cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects.

Because the Model Provisions are intended to facilitate the enforcement of the 1995 convention,⁴⁵⁵ Provision 4 shares similar traits with Article 3 (2) of the UNIDROIT convention. It should, nevertheless, be remarked that the two provisions have an autonomous existence:⁴⁵⁶ the Model Provisions have prescribed autonomous notions of illicit excavation and licit excavation but illicit retention, allowing states relying on the Model Provisions that are not yet party to the convention to make changes to their domestic legislation so as to bring the said rules more in line with the treaty.⁴⁵⁷ As such, the domestic legislation would assimilate these acts to theft and, consequently, they would entitle the owner to benefit from the favourable regime of restitution of stolen cultural objects.⁴⁵⁸ Similar to Article 3 (2) of the convention, the assimilation to theft is used, *inter alia*, to tackle the argumentation that possession is the *sine qua non* of ownership.⁴⁵⁹ The cross-reference to the domestic law allows for each state to determine for itself what it considers to be an illicit discovery.⁴⁶⁰ Moreover, the deliberate choice for a cross-reference takes account of the pre-existing domestic legislation.⁴⁶¹ The qualification ‘licitly excavated but illicitly retained’ encompasses situations where the item has been lawfully excavated and, subsequently, temporarily exported but not returned in compliance with the export license to theft.⁴⁶²

Provision 5 – Inalienability

Provision 5 Model Provisions (2011) – Inalienability – The transfer of ownership of a cultural object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.

Provision 5 regulates the private law aspect of the eventual acquisition of undiscovered cultural objects. It specifically prohibits the alienability of these objects, rejecting any possibility for private parties to acquire artefacts that are owned by the source state,⁴⁶³ unless the transferor has a valid title enabling him to transfer ownership to another person. Because of the impossibility to alienate the artefact, this statement reinforces the contention that undiscovered cultural objects are assimilated to stolen materials for the purpose of Article 3 (2) of the 1995 convention. While this declaration of inalienability is valid in the territory of the Sovereign, its application in foreign jurisdictions is dependent upon the adoption of the same rule in the jurisdiction where the object is transferred to.⁴⁶⁴ The second part of the sentence specifies that non-state actors, such as natural and legal persons, can be exempted from the rule laid down in the first part of Provision 5 provided that they already had acquired a valid title to the artefact on the basis of domestic law.⁴⁶⁵ In other words, objects that were owned by private parties before the adoption of the patrimonial law based upon the Model Provisions are exempted from the regime of inalienability that is prescribed by this provision.⁴⁶⁶

⁴⁵² Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6; Frigo, (2011), p. 1026.

⁴⁵³ Frigo, (2011), p. 1026.

⁴⁵⁴ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6.

⁴⁵⁵ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6.

⁴⁵⁶ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6.

⁴⁵⁷ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 6.

⁴⁵⁸ Expert Committee on State Ownership of Cultural Heritage, (2011), pp. 6-7.

⁴⁵⁹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7: “The provision follows the wording of the 1995 Convention “are deemed to be stolen” and not “are stolen” to answer a problem which some States could have because as long as it is not in a possession of the object, such object cannot be stolen. A retention for the purpose of this provision would not then be a theft. This is why a broader formula has been chosen.”

⁴⁶⁰ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

⁴⁶¹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

⁴⁶² Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

⁴⁶³ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

⁴⁶⁴ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

⁴⁶⁵ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

⁴⁶⁶ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 7.

Provision 6 – International enforcement

Provision 6 Model Provisions (2011) – International enforcement – For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects.

Provision 6 prescribes two means of corrective justice: firstly, it relies on judicial cooperation in criminal matters to ensure the return of the illicitly discovered cultural object removed from the territory of the source state. This is notably due to the fact that the item is assimilated to an object that has been misappropriated through criminal means.⁴⁶⁷ Secondly, it allows for an easy qualification of the removal as theft, ensuring the possibility for a state to bring a claim for the objects that are found abroad: the export of the artefact from the territory of the claiming state after a declaration of ownership on the basis of Provision 3 is formulated will lead to the automatic qualification of this removal as theft. Thenceforth, a foreign court will generally accept the claim in restitution as a well-grounded patrimonial claim⁴⁶⁸ – provided a patrimonial right is ascertainable (cf. Provision 3 above) –, which in turn will be followed by the ordering of the restitution when the claim does not fail on technical grounds peculiar to the *lex causae*. In states that have ratified the 1995 convention, and provided that the scope of application of the convention is respected, the construction of Provisions 3 and 6 *juncto* to the convention allow for an enhanced protection of undiscovered cultural objects.⁴⁶⁹ As such, the illicitly discovered cultural objects that have been removed from the source state will be subject to the provisions of Chapter II of the convention and thus benefit from this *lex specialis*. This has the implicit effect of ensuring the inalienability of unlawfully acquired archaeological objects through the mandatory obligation to give these back,⁴⁷⁰ although subject to the temporal limitations established in Article 3.⁴⁷¹

Evaluation of the Model Provisions

In accordance with the proposed guidelines that have been drafted in section B above, the Model Provisions are a welcome initiative that will provide a state of the art solution for source states lacking the expertise that is required to formulate comprehensive and effective patrimonial laws. As was pointed out by Renold, the Model Provisions constitute a movement towards the harmonisation of substantive rules on state ownership:⁴⁷² the lack of clarity and the ambiguous nature of some of these laws were contributory factors to the lack of recognition and enforcement of patrimonial rights in foreign domestic courts.⁴⁷³ It is to remedy this lack of clarity and this ambiguity that the Model Provisions have been drafted.⁴⁷⁴ Nonetheless, because of their mere guiding character, it remains to be seen how states will implement these in their domestic legal systems.⁴⁷⁵ Provided the implementation is carried out rigorously, it is for now unclear how foreign courts will receive this assertion of ownership.⁴⁷⁶ Additional concerns, such as the evidentiary difficulties in demonstrating the place and time of excavation – which are not addressed and cannot be solved by the present Model Provisions – will play a determinative role in the success of future claims in restitution.⁴⁷⁷ In fact, the Model Provisions do not pretend to provide a remedy to these additional aspects, as these are usually fact-dependent and cannot be solved by standardised model rules alone.⁴⁷⁸

⁴⁶⁷ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 8.

⁴⁶⁸ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 8.

⁴⁶⁹ Expert Committee on State Ownership of Cultural Heritage, (2011), p. 8.

⁴⁷⁰ Renold, (2014), p. 307.

⁴⁷¹ For more information in this regard, please consult section B of ‘Chapter 4 – The Unidroit Solution’ above.

⁴⁷² Renold, (2014), p. 307.

⁴⁷³ Frigo, (2011), p. 1028.

⁴⁷⁴ Frigo, (2011), p. 1028; having regard to the recommendations in establishing a patrimonial right that have been provided above (cf. section B), Provision 3 concurs with guidelines 1 and 2 and is, therefore, a welcomed initiative. It does instate a comprehensible primary property right with sufficient clarity and subjects this right to an ascertainable conditionality.

⁴⁷⁵ Chile has provided the first example of reliance upon the Model Provision in amending its domestic law after having ratified the 1970 UNESCO convention. See Planche, E., ‘Le point de départ, la Convention de l’UNESCO de 1970 concernant les mesures à prendre pour interdire et empêcher l’importation, l’exportation et le transfert de propriété illicites des biens culturels’, 20 *Uniform Law Review*, (2015), p. 521, referring to article 21 of Law n. 17.288 on national monuments.

⁴⁷⁶ Frigo, (2011), p. 1034.

⁴⁷⁷ Frigo, (2011), p. 1034; it should, nonetheless, be remarked that, for the purpose of Article 3 (2), Vrellis has argued that it is preferable to require the source state to establish that the artefact has probably been removed illegally from its territory than to require from the said state to prove the said removal. See Vrellis, (2015), p. 575.

⁴⁷⁸ Frigo, (2011), p. 1034.

Retention

In case of unlawful excavation, it is clear that the scenario refers to any excavation without specific governmental authorisation or without the authorisation of the owner of the land to dig in his land when such permission is legally required.⁴⁷⁹ The situation of lawful excavation with unlawful retention is less straightforward. The proposition to add this second qualification was made by one representative during the second session of the CGE.⁴⁸⁰ In fact, unlawful appropriations – often following a lawful excavation – were seen by many members of the committee as an act of purloining.⁴⁸¹ Nonetheless, during the DC, the government of Japan noted that there was no need to assimilate unlawful retention to theft considering that lawfully excavated artefacts that are subsequently stolen or illegally exported after the entry into force of the convention would already fall within its ambit.⁴⁸² But for these affirmations, the debates about the meaning of ‘lawful excavation but unlawful retention’ throughout the creation of the convention remained – similar to the notion of unlawful excavation – unavowed. Instead, in the same vein as for unlawful excavations, the unlawfulness of the retention will depend on the conditions that are stipulated in the domestic law concerned and may range from unauthorised possession after the excavation – such as a violation of the rules on the assignation of the finding(s) –, to failure to notify the finding(s) to the competent authority.⁴⁸³ Importantly, this qualification refers to acts of illegal transfer post-legal excavations.⁴⁸⁴ On the one hand, Japan, followed by the United States, noted that the qualification ‘unlawfully retained’ was too broad for it to be assimilated to theft.⁴⁸⁵ On the other hand, it should be added that the cross-reference to the domestic law of the source state for the purpose of assessing the unlawful retention has narrowed the meaning of retention. Furthermore, the focus on retention helps to alleviate the limitations inherent in the use of the terminology excavation that were discussed above. As such, it allows including chance finds and treasure trove in the equation. Finally, it should be noted that in cases of unlawful retention, it might become particularly difficult to establish the moment at which the object is considered stolen,⁴⁸⁶ which constitutes a difficulty in the application of any absolute period.

(3) Assimilation to stolen cultural objects

A peculiarity of the convention relates to the treatment that is given to unlawfully excavated cultural objects or cultural objects that have been lawfully excavated but not lawfully retained. These objects fall within the ambit of Article 3 (2) and are, thus, considered to be stolen for the purpose of the convention.⁴⁸⁷ There was some hesitation in using the notion of theft for clandestine excavations, since some states did consider these objects as being stolen on the basis of their national laws, whilst others did not share this assimilation.⁴⁸⁸ In fact, the term ‘removed’ was originally preferred to that of ‘stolen’ because it would be more neutral in relation to domestic approaches to archaeological theft.⁴⁸⁹ Additionally, during the sixteenth session of the Committee of the Whole, organised during the DC, the Chairman of the committee proposed replacing the assimilation to theft laid down in the wording ‘shall be considered stolen’ by the sentence ‘shall be governed by the provisions of this

⁴⁷⁹ In this regard, it is important to note that Article 3 of the 1992 Council of Europe *Convention for the Protection of the Archaeological Heritage of Europe* (revised) already prescribed obligations for contracting states to impose constraints to the excavation of the archaeological materials found in its soil. The text of the convention is available at the following link: <https://rm.coe.int/168007bd25>, last retrieved on 01.03.2018.

⁴⁸⁰ See UNIDROIT, (1992), Study LXX – Doc. 30, p. 27.

⁴⁸¹ See UNIDROIT, (1992), Study LXX – Doc. 30, p. 11, also referring to Unidroit, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the second session of the committee (Rome, 20 to 29 January 1992), Study LXX – Doc. 29, Rome, February 1992, Misc. 31).

⁴⁸² Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 73.

⁴⁸³ O’Keefe, P. J., ‘Developments in Cultural Heritage Law: What is Australia’s Role?’, *Australian International Law Journal*, (1996), p. 42.
⁴⁸⁴ See in this regard UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the third session (Rome, 22 to 26 February 1993) (prepared by the Unidroit Secretariat), Study LXX – Doc. 39, Rome, May 1993, p. 10.

⁴⁸⁵ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5 Add. 1, April 1995, p. 73 and CONF. 8/C.1/S.R.2, 13 June 1995, p. 169.

⁴⁸⁶ See the commentary of the People’s Republic of China in ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects’, to be found in ‘Draft Final Provisions Capable of Embodiment in the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Notes drawn up by the Unidroit Secretariat’ in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/5, Add. 1, April 1995, p. 68.

⁴⁸⁷ Presidenza del Consiglio dei Ministri, (1996), p. 68 (commentary by the Turkish delegation).

⁴⁸⁸ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 90.

⁴⁸⁹ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 90.

Convention'.⁴⁹⁰ As correctly noted by him, the latter formulation would alleviate concerns raised by museums of being stigmatised by the media as detaining 'stolen' artefacts.⁴⁹¹ Nonetheless, there was little practical difference with the actual formulation of the provision and the reference to theft was retained to ensure a coherent whole with the remainder of Chapter II. Assimilating these types of misappropriations to theft is not a preposterous suggestion, as in pragmatic terms many source states have adopted domestic legislation vesting ownership in the state for cultural objects discovered in their soil.⁴⁹² A subsequent misappropriation and disposal through removal from their territory would thus result in the theft of the object.⁴⁹³ What is more, because of the difficulties encountered in precisely determining the moment and whereabouts of the theft,⁴⁹⁴ its removal from the territory of the source state is salient in establishing the moment of the said misappropriation.⁴⁹⁵

The meaning of 'stolen' for the purpose of excavated cultural objects is no different than the meaning of 'stolen' that is applied in Chapter II of the convention.⁴⁹⁶ Nevertheless, it is important to note that the last sentence of Article 3 (2) requires assessing the illicit character of the act in light of the domestic legislation of the country where the excavation took place. Consequently, unlike the autonomous definition of theft for other cultural objects falling within the ambit of Chapter II, it is important here to note that the *lex originis* determines whether a theft has taken place for the purpose of Article 3 (2).⁴⁹⁷

2. ASSIMILATION TO ILLEGAL EXPORT (CHAPTER III)

The early adoption of the list of interests of Article 5 meant that clandestine excavations were included from the outset in the regime of protection of the convention. As noted by Prott and Merryman, archaeological materials that have been misappropriated by means of clandestine excavations fall within the ambit of Article 5 (3) (a)-(c) and can be returned if their removal significantly impairs one or more of the interests listed in the following subparagraphs.

Article 5 UNIDROIT Convention (1995) – (3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;
- (b) the integrity of a complex object;
- (c) the preservation of information of, for example, a scientific or historical character;

A proposal was formulated during the third session of the CGE to create an interest in Article 5 (3) that would specifically relate to clandestine excavations.⁴⁹⁸ This proposal was not followed up by the committee because point (c) *in fine* appeared sufficient to cover the products of clandestine excavations.⁴⁹⁹ Furthermore, it was

⁴⁹⁰ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 281.

⁴⁹¹ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 16, 22 June 1995, p. 281.

⁴⁹² Crewdson confirmed this approach in a conference organised by the Art Loss Register in London in 1995 by stating that the position adopted by Article 3 (2) of the 1995 UNIDROIT convention only reflected the general practice of many states, except the practice of the UK and the USA. See Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 34.

⁴⁹³ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 34; this is why some scholars have not hesitated to advance that Article 3 (2) extends the definition of 'stolen' goods to two situations that, traditionally, are not to be considered as theft but rather as illegally import / export. See for example Bengs, (2000), p. 526.

⁴⁹⁴ See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 7, 26 and 64; CONF. 8/C.2/W.P. 18)' addressed during the twelfth meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 12, 23 June 1995, p. 250; Lowenthal, (1996), p. 130.

⁴⁹⁵ A proposal issued by the Greek delegation before the DC was made to the effect that when the moment of the clandestine excavation or of the unlawful retention could not be proved, the convention would be applied by default. See UNIDROIT, (1993), Doc. 47, (Misc. 29), p. 34 for the proposal. See also 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 7, 26 and 64; CONF. 8/C.2/W.P. 18)' addressed during the twelfth meeting of the Committee of the Whole, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 12, 23 June 1995, p. 250 for the reiteration of the proposal during the DC. This proposal was ultimately not retained because of the fear that the provisions of the convention may be applied retroactively (see UNIDROIT, (1994), Study LXX – Doc. 48, p. 60).

⁴⁹⁶ In this regard, the reader is invited to consult section B. 2. (1) of 'Chapter 1 – Presentation and Applicability of the Convention' above.

⁴⁹⁷ Symeonides, S. C., 'A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Objects', 38 *Vanderbilt Journal of Transnational Law*, (2005), p. 1187.

⁴⁹⁸ UNIDROIT, (1993), Study LXX – Doc. 39, p. 28.

⁴⁹⁹ UNIDROIT, (1993), Study LXX – Doc. 39, p. 28.

considered that the situation had also been adequately addressed under Chapter II of the convention, through the means of Article 3 (2).⁵⁰⁰ More attention is given to the three interests reproduced above in the context of the return of clandestinely excavated archaeological materials.

(1) Article 5 (3) (a) – physical preservation of the object or of its context

In the context of clandestine excavations, this first interest refers to two important aspects that are worthy of protection: the physical damage to archaeological sites – or, in other words, to the provenience – and the damage to the object itself⁵⁰¹ caused by clandestine excavations and pillage.⁵⁰² As noted by Prott after the third session of the CGE, “[...] it would be evident that the removal of every clandestinely excavated object had impaired the interest of the physical preservation of the context of the object [...]”⁵⁰³ Furthermore, Prott also remarked that due to the nature of artefacts, their removal would affect the preservation of both the items and their contexts.⁵⁰⁴

(2) Article 5 (3) (b) – integrity of a complex object

Prott noted after the third session of the CGE that the removal of a clandestinely excavated artefact might also affect the integrity of a complex object.⁵⁰⁵ Subsequently, archaeological materials stemming from clandestine excavations can be reclaimed on the basis of Article 5 (3) (b)⁵⁰⁶ provided that the artefact has been shorn from a complex object located in an archaeological site.

(3) Article 5 (3) (c) – preservation of information of, for example, a scientific or historical character

Alongside the two submissions described above, Prott also averred that the removal of clandestinely excavated objects would affect the preservation of information of a scientific or historical character.⁵⁰⁷ It is for the purpose of alleviating the loss of information to humanity as a whole – instead of the loss of information to the culture from which the object originates – that this interest was drafted.⁵⁰⁸ The interest laid down in Article 5 (3) (c) is relevant whenever the removal of the object has caused irreversible damage to the context within which it has been taken.⁵⁰⁹ This is notably the case when the stratigraphy has been affected by the extraction, when documentation is lost or when a collection is dismantled.⁵¹⁰

3. INTERACTIONS BETWEEN CHAPTER II AND CHAPTER III

A majority of the members of the CGE that participated in its second session shared the opinion of the SG that it would be preferable to leave discretion to the claiming state to decide which procedure would be more appropriate to its needs, even if this would entail the use of the two procedures cumulatively.⁵¹¹ This was even more desirable considering that the object would often first be stolen and then illegally exported,⁵¹² rendering

⁵⁰⁰ UNIDROIT, (1993), Study LXX – Doc. 39, pp. 28-29.

⁵⁰¹ UNIDROIT, (1993), Study LXX – Doc. 42, p. 39; ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

⁵⁰² See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects as Revised June 1993 (prepared by Ms Lyndel V. Prott Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 42, Rome, September 1993, p. 29; see also ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

⁵⁰³ UNIDROIT, (1993), Study LXX – Doc. 42, pp. 4-5.

⁵⁰⁴ UNIDROIT, (1993), Study LXX – Doc. 42, p. 5.

⁵⁰⁵ UNIDROIT, (1993), Study LXX – Doc. 42, p. 5.

⁵⁰⁶ ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

⁵⁰⁷ UNIDROIT, (1993), Study LXX – Doc. 42, p. 5.

⁵⁰⁸ See paragraph 85 of the ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 35.

⁵⁰⁹ UNIDROIT, (1993), Study LXX – Doc. 42, p. 29.

⁵¹⁰ UNIDROIT, (1993), Study LXX – Doc. 42, p. 29.

⁵¹¹ UNIDROIT, (1992), Study LXX – Doc. 30, p. 27; see also the commentary of Fraoua in relation to the intention of the Study Group in CONF. 8/C.1/S.R.2, 13 June 1995, p. 171. Fraoua further justified this choice by advancing that it was not possible to foresee in advance which of the two chapters would better suit the choice of source states (CONF. 8/C.1/S.R.2, 13 June 1995, p. 171).

⁵¹² UNIDROIT, (1992), Study LXX – Doc. 30, p. 27.

both remedies available. Furthermore, the possibility to rely on either one of these chapters when dealing with artefacts ensured that the limitation periods in both chapters would be brought on the same line.⁵¹³

Consequently, the convention is silent as to any hierarchy between Article 3 (2) and Article 5 (3) and there are no guidelines as to which article should take precedence over the other in contentious cases, if any at all.⁵¹⁴ The choice operated between the regime of Chapters II or III by the state of origin will depend, most importantly, upon the difficulties in alleviating the burden of proof:⁵¹⁵ when no offence against ownership was committed by the appropriation and the removal to another state, it would only be possible to rely on Chapter III in order to demand the return of the object.⁵¹⁶ Consequently, as noted by Protz, the use of Chapter II in cases dealing with clandestinely excavated cultural objects would depend on the possibility to prove theft⁵¹⁷ in violation of a valid proprietary right. If a declaration of state ownership is not sufficient, or even lacking, a source state can still rely on Article 5 (3) (a), (b) or (c)⁵¹⁸ provided that the litigated property was subject to export restrictions before its unauthorised removal⁵¹⁹ and that the export legislation had been adopted for the purpose of protecting the state's cultural heritage. In other words, while it will be possible for a claimant with a valid proprietary right over the artefact to rely on Article 3 (2) of the convention and to ensure the restitution of the object, Article 5 (3) creates a safety net that can be relied upon by contracting states⁵²⁰ in order to ensure the return of clandestinely excavated cultural objects when no proprietary right can be invoked.⁵²¹

In order to assist source states in determining which chapter of the convention is more suited to their needs, it appears particularly important to distinguish both chapters on the basis of their differences: one of the main differences between the regimes of Chapters II and III stems from the imputability of the burden of proof and the degree of diligence that is expected from the possessor.⁵²² Whilst the possessor has the burden to prove that he did not know or ought to have known that the object had been stolen and that he exercised due diligence in this regard, the imputability of the burden of proof in relation to Chapter III might be allocated differently by the court seized (compare Articles 4 and 6 of the 1995 UNIDROIT convention). Furthermore, with regard to the absolute period, the running of this period would depend on the materialisation of the illegal act. For example, in the present context, it might be easier to prove the moment of the export of the artefact than the time of the theft (although it is not impossible for the court seized to consider that it was stolen at the moment of its export from the territory of the source state). In respect of the relative period, the legal effect of the expiration of this period might differ depending on which chapter is used.⁵²³ Furthermore, in cases where the source state cannot afford to pay the fair and reasonable compensation, only Chapter III proposes alternative solutions to this payment through Article 6 (3). This entails that the source state that bases its claim on Chapter III may avoid having to pay the compensation to the possessor by conceding to the return of the object to a public institution situated within its territorial boundaries. Recalling the above, it should be kept in mind that another difference

⁵¹³ See notably UNIDROIT, (1994), Study LXX – Doc. 48, p. 14, paragraph 92 of the 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report prepared by the Unidroit Secretariat'. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 36 and Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R.2, 13 June 1995, pp. 169-170.

⁵¹⁴ Love Levine, (2010-2011), p. 774.

⁵¹⁵ Delepierre, S., Schneider, M., 'Ratification and Implementation of International Conventions to Fight Illicit Trafficking in Cultural Property', in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protecting the World's Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Good: Paris, 2015), p. 314; Vtellis, (2015), pp. 575-576.

⁵¹⁶ UNIDROIT, (1993), Study LXX – Doc. 42, p. 4.

⁵¹⁷ UNIDROIT, (1993), Study LXX – Doc. 42, p. 5.

⁵¹⁸ 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94; Delepierre and Schneider, (2015), p. 134; as was noted by Protz during the DC, the first and third categories would encompass all clandestine excavations for which no recourse is made to Chapter II of the convention. See Protz, *Commentary on the Unidroit Convention*, (1997), p. 34.

⁵¹⁹ Protz, *Commentary on the Unidroit Convention*, (1997), p. 34.

⁵²⁰ It is not possible for an individual to rely upon Article 5 (3) without state intervention. For more details in this regard, please consult section B. 2. (4) of 'Chapter 1 – Presentation and Applicability of the Convention' above.

⁵²¹ 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

⁵²² UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the fourth session (Rome, 29 September to 8 October 1993) (prepared by the Unidroit Secretariat), Study LXX – Doc. 48, Rome, February 1994, p. 13; this commentary was also made by the UNESCO representative about the draft *Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects* during the Diplomatic Conference. See 'Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (UNESCO)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 94.

⁵²³ The extinction of the right versus the extinction of the remedy was discussed in detail in 'Chapter 4 – The Unidroit Solution' above (see section B.3.).

between the use of Chapters II or III is also a probatory one:⁵²⁴ whilst Chapter II requires the claimant to prove ownership of the object, it would suffice to prove the illegal export in order to request the return of the object on the basis of Chapter III.⁵²⁵

Despite these remarks, Fraoua advanced during the DC that source states might be more inclined to give precedence to Chapter II because it would be easier to trigger the provisions thereof.⁵²⁶ Henceforth, in his opinion, it is more likely that source states might make use of Chapter II in practice.⁵²⁷ In fact, these nations would, most likely, rely on Article 3 (2) because it gives them an unconditional right of restitution,⁵²⁸ provided the claim is introduced in the timeframe given. In this respect, it has been noted that Article 3 (2) is, for example, beneficial to African states because of the problems that these states encounter in protecting their cultural materials.⁵²⁹ Due to the provision's wording, unlawfully excavated or lawfully excavated but unlawfully retained objects will automatically be considered to have been stolen and provide the state concerned with the beneficial regime of Chapter II in order to claim the restitution of the object.⁵³⁰ This choice might then amount to depriving Article 5 (3) (a), (b) and (c) of any direct relevancy for excavated cultural objects,⁵³¹ although this does not exclude the appreciation of Article 5 (3) as a second best. From a different perspective, if the domestic courts or competent authorities seized with the case are to redefine the legal basis upon which the claim is based, it is possible that they will consider Article 5 as a more specific legal basis than Article 3 (2).⁵³² This is definitely true if the court cannot pinpoint an unconditional conferral of ownership over the object by the source state.

⁵²⁴ As was noted by Protz during the fifth meeting of the Committee of the Whole. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 192.

⁵²⁵ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 192.

⁵²⁶ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 194.

⁵²⁷ Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 5, 17 June 1995, p. 194.

⁵²⁸ Merryman, (2000), p. 275.

⁵²⁹ Organised groups of looters and porous borders contribute to the depletion of African states' cultural artefacts. Shyllon, in UNIDROIT, (2012), forthcoming.

⁵³⁰ Shyllon, in UNIDROIT, (2012), forthcoming.

⁵³¹ Merryman, (2000), p. 275.

⁵³² Merryman, (2000), p. 275.

Summary

Causes and effects – Next to cultural property theft, archaeological theft constitutes a distinguishable – although non-negligible – facet of the illicit traffic of in cultural property. Considered as the world’s second oldest profession, it has a long historical record and is still very pervasive and widespread in today’s society. Furthermore, it is considered to be a problem *sui generis* because it is embedded with peculiar issues that are inoperative within the context of cultural property theft. In fact, unlike cultural property theft, archaeological theft is sustained due to the causes underlying the activity, the plurality of actors involved in the pilfering of archaeological sites and the difficulties for source states to protect these sites and to detect these so-called victimless crimes.⁵³³

Demand and supply – Archaeological theft has perdured for several reasons: first and foremost, it is appealing to thieves because of the high demand for artefacts. Furthermore, the supply of such looted items is perpetrated by a plurality of stakeholders. These actors are either operating on a systematic or sporadic basis. Actors operating on a systematic basis include professional looters, criminal organisations, state officials, soldiers and terrorists. When acting on a systematic basis, the actors have the intention of becoming directly involved in the illicit traffic in cultural property and to generate a profit from their activities. Actors operating on a sporadic basis include local opportunists, tourists, diplomats, and – somehow unwittingly – chance finders and constructors / exploiters. Secondly, the rate of crime detection is lower as source states often do not know of the existence of the item looted and of its removal from these states’ territorial confinements. Because the crime is ‘victimless’, it is not reported to the authorities of the source state. It is only once the item makes its way onto the licit market in antiquities that it is possible for the source state to determine that the artefact sold might have been looted from its territory. Sometimes, the item might have been on the lawful market for several years or decades, and it is possible that the source state might only come to realise that the item was stolen from its territory after this protracted period of time. For these reasons, it is not possible to list artefacts stemming from archaeological theft in databases on stolen cultural objects. Furthermore, archaeological theft is difficult to detect because tomb raiders, marauders and smugglers operate in secret. Moreover, little is known about the processes of looting, smuggling and retailing artefacts and the use of compartmentalisation in these processes makes the detection of archaeological theft a rather arduous task. Additionally, the detection of these processes is made more complicated due to the fact that artefacts are often sold abroad, in order to disconnect the loot of the item from its entry onto the licit market. The making up or falsification of provenance also contributes to obscuring the origin of these objects. Finally, the lack of inquiries by acquirers and the opacity of the antiquities market have the effect of shielding the illegal activity. The aggregate result of the lack of information about the find site, of the impossibility to link some artefacts to a specific region of origin, of the compartmentalisation process in disposing of the artefact, of the cross-border smuggling of archaeological materials and of the opacity of the art market render the illicit traffic in archaeological objects *ipso facto* a particularly enticing, profitable and thriving criminal enterprise. The stakeholders involved in the looting and smuggling process can, therefore, build a long-lasting economic activity that is concealed from the authorities. What is more, the profits generated at each stage of the process provide sufficient impetus to the various actors involved in the process to further pursue these activities. The high retail prices also whet retailers to acquire more artefacts, thus perpetuating the looting-smuggling-retailing cycle. Furthermore, even if the item is to be returned to its owner, the loss suffered by the retailer may be recouped upon subsequent transactions. At last, the difficulties for source states to prevent or detect archaeological theft, the low expectancy of being caught and the remoteness of sites contribute to making archaeological theft a sustainable economic activity.⁵³⁴

Protecting artefacts *in situ* – In addition to these contributory factors, the effective protection of archaeological sites by source states is fraught with difficulties. Acknowledging the presence of these intricacies is important when one considers that many market states justify their acquisitions of misappropriated artefacts by reproaching source states for not protecting their archaeological materials adequately. A first – and particularly important – difficulty encountered by source states relates to the lack of knowledge of the existence and location of many of these sites. Whilst many source states attempt to record and protect known sites, it is virtually impossible to guard and protect unknown sites. Furthermore, even when a site is fortuitously discovered, its

⁵³³ Cf. sections A. and A. 1. above.

⁵³⁴ Cf. section A. 1. (1) above.

existence can be kept hidden from the authorities when other interests are at stake. Economic activities such as agriculture, urban development or the extraction of natural resources can victimise an archaeological site: when the fortuitous discovery of an archaeological site might imperil the commercial exploitation of the site, some exploiters will try to hide the discovery and to dispose of the artefacts found in the site to prevent losing money or avoid experiencing any delays in their business endeavours. When a site is known to the source state, other complications may make it impossible to effectively protect archaeological sites. For example, logistics, difficulties in accessing the site, problems in setting up means of communication in remote territories or dangers in reaching the site make the protection of archaeological sites a daunting task for source states. What is more, even when all sites are known and accessible, source states often lack the capacity to guard all of them: the lack of financial means which ensues from budgetary constraints constitute the main hurdle to the effective protection of archaeological sites. This problem is not only relevant to developing countries, but developed states often, similarly, allocate too little of their budget to the protection of their sites or to the discovery of new sites.⁵³⁵

Protecting artefacts *ex situ* – The protection given by source states is not only limited to archaeological sites. In fact, artefacts are not always to be found in a ‘complex of ancient artefacts and other material remains of the past preserved in a contextual relationship’. Finds *ex situ* are possible, as witnessed by the many hoards found in the United Kingdom. It is virtually impossible for a source state to afford protection to these artefacts when these are buried *ex situ*. Furthermore, it is also scientifically impossible to determine when an artefact has been excavated. Without documentation as to the provenance or the provenience of the item, it is utterly difficult to determine whether the item has been recently illegally excavated or if it was lawfully placed on the antiquity market in the past, when there was no legislation regulating the matter. The determination of the period of excavation is salient considering that the adoption of the 1970 UNESCO convention introduced important changes to the ethics of collecting artefacts. It is, thus, particularly difficult for states to determine whether an undocumented artefact has been unlawfully excavated or not. Since the majority of artefacts have been acquired or are transacted without documentation, it proves particularly arduous to assess the licit origin of these undocumented antiquities. The absence of paperwork that is often concomitant with antiquities is partly due to the lack of interest of art dealers in asking questions, ultimately relying upon the secrecy of the art market to cover up their omissions. Some antiquities’ dealers might even refrain from vetting the origin of the artefact or from asking for the production of paperwork because they have a vested interest in erasing traces as to the origin of the good. Any information relating to its origin that is made available with the object could result in a claim for its recovery when it is possible to identify a dubious origin. As counterargument, it should be noted that the recording of the origin of an artefact was not always important, as the looting of artefacts was not seen as an issue for a rather long time. Nevertheless, mindsets have changed since 1970, and it is now deemed appropriate to transact an archaeological item with an adequate provenance. Therefore, a complete lack of documentation may be indicative of an illicit origin. The use of fake provenance further complicates the issue of proper documenting the provenience / provenance of the item. Because unlawfully acquired artefacts are foreign to the antiquities market and introduced for the first time on the said market, it is not difficult for launderers to make up a background history for the transacted item. Other contributory factors that render the protection of artefacts from archaeological theft difficult to source states include: war, poverty, political instability, indifference, lack of proper measures of protection or conservation, inefficiency / insufficiency of the adopted measures, political interference, lack of enforcement or partial enforcement of the protective regime and difficulties in implementing complex regulatory regimes.⁵³⁶

Destruction of information – The externalities flowing from archaeological theft weigh considerably: firstly, this activity results in a loss of archaeological, historical and scientific information of importance to humanity as a whole. The process of decontextualisation to which artefacts are subjected results in the loss of important information as to the artefact and the society to which it belongs. Decontextualisation has the practical effect of shearing the object from any piece of information that can provide evidence of the psyche of the culture that produced the object and converts the artefact into a merchantable commodity without much historical value. The unwarranted removal of the artefact affects not only the value of the object itself, but it also results in a loss of information of human legacy. The illegal removal of the object can also result in considerable damage to the physical integrity of the item itself as, sometimes, damage is inevitable to loot the artefact. Through the looting

⁵³⁵ Cf. section A. 1. (2) above.

⁵³⁶ Cf. section A. 1. (2) above.

and smuggling process, archaeological materials may be disfigured, desymbolised and information intrinsic to their meaning as an unaltered whole can therefore be lost forever. Furthermore, the damage caused to the item can also make it more difficult for the source state to identify the object after its removal. Consequently, archaeologists, historians and ethnologists are askant to the practice of collecting artefacts merely for their aesthetics and express unreserved concerns as to the insatiable appetite of the art market for artefacts. Instead, archaeologists believe that the value of an artefact is defined by its contribution to understand past societies. Furthermore, the context in which the item is found is often more important to them than the item itself. This is why these stakeholders support the proper extraction of artefacts without damaging the find site and lay down comprehensive rules on extraction to ensure the most extensive extraction of data. Aside from the destruction of information, it is important to note that archaeological theft can also result in the destruction of finite resources, of which it is unknown whether there are more of them.⁵³⁷

Societal externalities – What is more, archaeological theft costs fortunes to source states in policing, it deprives them of abilities to build up the nation, to increase their national capital, to secure the financial wealth of the nation and of their population through either the intrinsic or extrinsic values of the item, results in a loss of enjoyment of the item in context, has consequences for the psychological well-being of the nation, creates political frictions between nations when claims in restitution are lodged abroad or when there is no prosecution of the thieves or fencers in the foreign jurisdiction, it results in the deprivation of important study materials for the academic world and entails that no taxes can be levied for the sale of the looted items. The externalities resulting from archaeological theft are thus particularly important.⁵³⁸

The response of source states – Because of the faculty of artefacts to justify a nation's – and adjacently a state's – very existence, through a process of witnessing the state's history and psyche, source states attach particular importance to their archaeological resources. Furthermore, the role of source states as custodians of their cultural patrimony cannot be understated. As such, these states are entitled to protect their national identity – as expressed through their cultural patrimony – in the way they deem fit. Therefore, items excavated in these states belong to them and source states are in the best position to manage their archaeological heritage on behalf of mankind.⁵³⁹

Patrimonial claims – Due to the difficulties connected to the protection of archaeological sites, a viable alternative to controlling the supply of looted artefacts can be found in the adoption of measures aimed at controlling the marketability of the looted items. By forcing the restitution of the item that has no paperwork providing a sound provenience / provenance, a source state can constrain the demand for undocumented artefacts and thus reduce the demand for looted items in the long run. Whilst this scheme may work within the territorial confinements of a source state, the removal of the artefact from the territory of the said state may thwart any prospects of recovering the item. Once the item is marketed and sold to a third party in a foreign jurisdiction, the source state will only be able to recover the artefact by judicial means. Patrimonial claims prove to be the most effective measures to recover looted artefacts that have been taken abroad. Nevertheless, the success of these claims will depend on the court's appreciation of the declaration of ownership that is formulated by the source state.⁵⁴⁰

Patrimonial laws - guidelines – To be effective, patrimonial declarations of ownership must comply with certain requirements. Firstly, it is preferable for patrimonial laws to prescribe unconditional ownership in the source state instead of a mere right to possession. Secondly, a declaration of ownership must be sufficiently clear, unambiguous and intelligible. An unclear, ambiguous and obscure law will lead to different interpretations by courts in different jurisdictions. Thirdly, the right of ownership laid down in the patrimonial law ought not to be conditional. Exceptions in state ownership – such as allowing private ownership of discovered antiquities or making the vesting of ownership in the state conditional upon seizure – might jeopardise the success of a claim in recovery that is initiated abroad. What is more, to ensure that the patrimonial right survives translation, the patrimonial law should not be too complex, technical, or drafted in ambiguous, intricate or vague terms. Moreover, the vesting of ownership in the source state must precede the removal of the artefact from the

⁵³⁷ Cf. section A. 2. (1) above.

⁵³⁸ Cf. section A. 2. (2) above.

⁵³⁹ Cf. section B. above.

⁵⁴⁰ Cf. section B. 1. above.

territory of the source state. The effect of the statute may neither be retroactive, nor extraterritorial. Additionally, the source state must exercise its right of ownership over its artefacts whenever possible, subject to the risk of having its right of ownership waived by a foreign court. Finally, difficulties in determining the ‘nationality’ of a disputed artefact make its recovery more problematic. A claiming state needs to demonstrate beyond a balance of probabilities that the object was excavated from its modern day territory. This could prove particularly complicated when the artefact could have originated from different states and when more than one state claims the recovery of the item. Finally, it should be noted that it is often impossible for a source state to prove some of its allegations regarding the time and place of the theft. Therefore, courts have sometimes been receptive in accepting the assertions of the said states in relation to these points.⁵⁴¹

The UNIDROIT solution – In the regime of the 1995 UNIDROIT convention, provisions to regulate archaeological theft are stipulated in both Chapters II and III thereof.

Assimilation to theft (Chapter II) – In Chapter II, Article 3 (2) *juncto* Article 3 (1) palliatively address archaeological theft by securing automatic restitution. Article 3 (2) makes it possible to assimilate the product of archaeological theft to stolen cultural property, so as to apply the regime of Chapter II to the situation.

Cultural objects targeted – The convention has not given an independent definition as to what constitutes an artefact. Instead, Article 3 (2) was drafted so as to avoid defining the notion of artefacts, which – having regard to the manifold definitions in existence – might have proved too difficult to achieve. Instead, the notion is to fall within the ambit of Article 2 of the convention due to its reference to cultural objects ‘of importance for archaeology, prehistory, history’. Additionally, artefacts may be subsumed to the categories of cultural objects that are listed in categories (a)-(f) of the Annex to the convention. What is more, Article 3 (2) focuses upon the acts of excavation and retention. As such, it does not add any other qualification to Article 2 as to the nature of the object concerned. Instead, the convention makes a cross-reference to the domestic law of the source state in order to determine the categories of archaeological materials that will fall within the regime of the convention. Domestic law will thus further refine the categories of archaeological objects that will be able to benefit from the regime of Chapter II of the convention. Therefore, the categories of artefacts protected by the regime of Chapter II might be narrower than the broad definition of cultural objects given in Article 2 of the convention. What is more, the domestic law of the source state is given blanket recognition. *Ergo*, Chapter II of the convention applies to all artefacts protected under the domestic law of the source state, irrespective of whether it has been excavated, whether it is publicly known to exist or whether the source state has had possession over these items before the misappropriation.⁵⁴²

Illegality misappropriation – In assessing the illegality of the misappropriation, the convention specifies that unlawfully excavated or lawfully excavated but unlawfully retained archaeological materials will be protected, in accordance with the domestic law of the source state. Although the term ‘excavation’ has not been defined in the convention, reference ought to be made to domestic definitions or to point 1 of the 1956 UNESCO *Recommendation on the International Principles Applicable to Archaeological Excavations*. A mere focus upon excavation for the purpose of Article 3 (2) could lead to the exclusion of chance finds and treasure trove. Furthermore, neither the convention, nor the preparatory work have given consideration to the meaning of ‘unlawful’. Therefore, the convention says nothing about the unlawful character of the misappropriation of an artefact. Instead, the domestic law of the contracting state concerned is to determine the illegality of the misappropriation. Nonetheless, attention should be given to the domestic provisions on ownership and possession due to the nature of Chapter II of the convention. Therefore, the determination of the unlawfulness of the misappropriation is to be assessed in the light of patrimonial laws. To assist contracting states in benefiting from Article 3 (2) to its fullest, the ICPRCP, the Governmental Council of UNIDROIT and both UNESCO and UNIDROIT’s Secretariat have worked together to create the *Model Provisions on State Ownership of Undiscovered Cultural Objects*. These provisions – established in 2011 within the framework of the Expert Committee on State Ownership of Cultural Heritage – were adopted to support both the application of the 1970 and 1995 conventions. More specifically, these provisions serve as a model for contracting states in adopting effective patrimonial rights, so as to benefit, for example, from Article 3 (2) to its fullest. Provision 1 of the Model Provisions establishes a general obligation for states to adopt appropriate measures aimed at protecting

⁵⁴¹ Cf. sections B. 2. and 3. above.

⁵⁴² Cf. section C. 1. (1) above.

undiscovered cultural objects and at preserving them for present and future generations. States are particularly free to protect and preserve their undiscovered cultural objects in any way they deem fit. Provision 1 does not, therefore, instate a mandatory rule for the states relying upon the Model Provisions. Provision 2 defines the concept of ‘undiscovered cultural object’, referring to cultural objects that are undiscovered, either located in the soil of the source state or underwater in the territorial waters of the said state, that are of importance for archaeology, prehistory, literature, art or science, provided that this qualification is consistent with the national law of the state concerned. The definition of Provision 2 is left intentionally broad to make it possible for states interested in the Model Provisions to adapt the definition to their respective needs. Nonetheless, the definition is in accord with the definition of cultural property that is found in Article 1 of the 1970 UNESCO convention and in Article 2 of the 1995 UNIDROIT convention. Provision 3 proposes a clear, unequivocal and intelligible declaration of state ownership. This declaration of ownership is possible, so long as there is no pre-existing private ownership. Similar to Article 3 (2) of the 1995 convention, Provision 4 specifies that undiscovered “cultural objects excavated contrary to the law or licitly excavated but illicitly retained” are considered to be stolen. The cross-reference to the domestic law of the source state makes it possible for the said state to determine the fringes of the concept of stolen and takes account of prior legislation. Provision 5 specifies that cultural objects that are deemed stolen on the basis of Provision 4 cannot be alienated. This submission is, nonetheless, not absolute as it is possible for a transferor with a valid title to transfer ownership to another. This is notably the case when private parties already legally own the property on the basis of the applicable domestic law. The inalienability posited by Provision 5 is only relative in an international context, as it will only be effective if the state where the object has been transferred to has also adopted the same or a similar rule. Provision 6 secures the return or the restitution of the artefact through criminal and civil channels. The civil channel makes it possible for the source state to have the object classified as stolen and for it to rely on its patrimonial right in order to recover the item, subject to the constraints prescribed in the *lex causae*. Furthermore, state parties to the 1995 UNIDROIT convention will be able to benefit from Article 3 (2) of the convention to its fullest.⁵⁴³

Unlawful retention – Although not conspicuously defined within the convention or throughout the making of the convention, unlawful retention is also construed as theft for the purpose of Article 3 (2). The unlawfulness of the retention is to be determined by the domestic law of the state concerned. Although some delegations considered the qualification ‘unlawfully retained’ to be too broad, the cross-reference to the domestic law of the source state narrows the meaning of these terms. Furthermore, the focus on retention makes it possible to overcome the limitations that are inherent in the use of the terminology ‘excavation’ that was discussed above. As such, chance finds and treasure trove can also be governed by Article 3 (2). Nevertheless, because the focus is upon unlawful retention, it is difficult to determine when the theft has taken place.⁵⁴⁴

Assimilation to theft – When the above-mentioned conditions are complied with, Article 3 (2) assimilates the misappropriation to theft for the purpose of Chapter II of the 1995 convention. This assimilation conforms to the practice whereby source states rely on their patrimonial laws in order to recover artefacts that have been illegally removed from their territories. Nevertheless, the qualification of the misappropriation as theft is – unlike theft for other cultural objects – dependent on the domestic law of the source state concerned.⁵⁴⁵

Assimilation to illegal export (Chapter III) – Alongside the assimilation to theft, the convention has also classified the removal of artefacts to illegal export in Article 5 (3) thereof. Article 5 (3) (a)-(c) lists the interests that are relevant to archaeological materials removed by means of archaeological theft. Article 5 (3) (a) specifies that the significant impairment of the physical preservation of the object or of its context is sufficient ground to have the illegal exported artefact returned to the requesting state. The first interest highlights the importance of preserving the provenience of the item and the item’s physical integrity. This provision will automatically lead to the return of an artefact as its removal will always significantly impair the provenience or the physical integrity of the item.⁵⁴⁶ Article 5 (3) (b) makes it possible to have an artefact that is part of a complex object returned when its removal affects the integrity of this complex object.⁵⁴⁷ Finally, Article 5 (3) (c) makes it possible to recover the

⁵⁴³ Cf. section C. 1. (2) above.

⁵⁴⁴ Cf. section C. 1. (2) above.

⁵⁴⁵ Cf. section C. 1. (3) above.

⁵⁴⁶ Cf. section C. 2. (1) above.

⁵⁴⁷ Cf. section C. 2. (2) above.

illegally exported artefact when its removal affects the preservation of information of a – for example – scientific or historical character. This interest was drafted to tackle the loss of information to humanity as a whole. Furthermore, it translates in mandating the return of the artefact whenever its removal has irreversibly caused damage to the context, when documentation is lost or when a collection is dismantled.⁵⁴⁸

Interactions between Chapter II and Chapter III – Although the drafters have not foreseen of a hierarchy between Chapters II and III of the convention, Article 5 (3) constitutes a safety net for contracting states that encounter difficulties in reclaiming the artefact on the basis of Article 3 (2) of the convention, provided the domestic legislation in force prohibits the export of the items concerned. The state trying to recover the artefact will select the chapter it wants to rely on based upon the difficulties in alleviating the burden of proof requirement. Thus, an important difference between Chapters II and III resides in the burden of proof and the degree of diligence that is expected from the possessor. Although he must demonstrate his due diligence for the purpose of Chapter II, this might not be the case when acting on the basis of Chapter III.⁵⁴⁹ Furthermore, for the purpose of the absolute period, it might be easier for the source state to prove the removal of the item from its territory than the moment of the exact misappropriation by means of unlawful excavation or lawful excavation but unlawful retention. What is more, the expiration of the relative period might entail different legal effects depending on which chapter is being relied on. Moreover, if the source state cannot pay the fair and reasonable compensation, it could rely on Chapter III of the convention to benefit from the alternative solutions proposed in Article 6 (3). At last, there is a probatory difference between Chapters II and III, as the former requires evidence that a theft took place, whilst the latter merely requires evidence that the item was illegally exported.⁵⁵⁰

⁵⁴⁸ Cf. section C. 2. (3) above.

⁵⁴⁹ Cf. Articles 4 and 6 of the convention.

⁵⁵⁰ Cf. section C. 3. above.

PART IV
APPLICATION OF THE CONVENTION

CHAPTER 6 |

APPLICATION OF THE CONVENTION

CHAPTER 6 | APPLICATION OF THE CONVENTION

Introduction 437

A. APPLICATION 438

- 1. Interaction between Chapter II and Chapter III..... 438
- 2. Reservations 438
- 3. Direct applicability..... 441
- 4. Modulation 442
 - (1) Rules more favourable to restitution or return..... 444
 - (2) No obligation to recognise the more favourable regime of other state parties..... 447
- 5. Interpretation 448
 - (1) General rule on the interpretation of treaties 450
 - (2) Supplementary means of interpretation..... 453
 - (3) Interpretation of treaties authenticated in two or more languages..... 455

B. MONITORING 456

- 1. Special Committee to Review the Practical Operation of the Convention..... 456
- 2. 1995 Unidroit Convention Academic project..... 459

Summary..... 460

Introduction

To complete the analysis given above, the present chapter addresses residual considerations that are relevant to the application of the convention. Because these considerations further nuance how the regime of Chapter II is to be applied, they play a particularly important role in sketching a complete picture of this regime. What is more, unlike for the 1970 UNESCO convention, UNIDROIT has embedded the 1995 convention with several supervisory mechanisms. These tools may prove of avail in elucidating the uncertainties surrounding its application. Therefore, the output of these mechanisms constitutes an integral part of the convention that deserves particular consideration for the purpose of the present disquisition.

Consequently, this chapter analyses the following aspects: section A. 1. discusses the possibility to simultaneously make use of Chapter II and Chapter III. The fact that a cultural object has been both stolen and illegally exported raises questions with regard to the interactions between these two chapters, which this section attempts to answer; section A. 2. addresses the impossibility to formulate reservations to the provisions of the convention. Because of the fragile equilibrium that has been achieved between the provisions of both chapters, the drafters have discarded the possibility of formulating reservations thereof, favouring an 'all-or-nothing' approach; the direct applicability of the convention's provisions is addressed in greater detail in section A. 3.; the modulation of the clauses laid down in Chapters II and III that may be undertaken by contracting states to foster restitution and return is explained in section A. 4. This modulation is particularly important in understanding how contracting states that want to go the extra mile may derogate from the minimum threshold established by the convention, in order to apply a regime more favourable to claims in restitution or requests in return brought before either their domestic courts or other competent authorities; subsequently, the means of interpreting the convention are analysed in section A. 5. Since it was drafted in general terms to accommodate the differences in variegated domestic private laws that it was set to harmonise, the interpretation of its provisions constitutes an important aspect in understanding its application. Finally, the supervisory mechanisms that are designed to alleviate difficulties in applying the convention are discussed in sections B. 1. and B. 2. of the present chapter respectively. Both the convening of special committees to review the practical operation of the convention (cf. section B.1) and the newly established 1995 UNIDROIT Convention Academic Project – hereinafter UCAP – (cf. section B.2) will be explained in greater detail.

A. Application

1. INTERACTION BETWEEN CHAPTER II AND CHAPTER III

The possibility for a state to rely upon both chapters of the convention at the same time was addressed during the first session of the Committee of Governmental Experts. During this session, it was proposed to add a provision to the draft convention clarifying that an action can be brought under either Chapter II or Chapter III when the object has been both stolen and illegally exported.¹ Another proposal, which was formulated during the third session of the CGE, was to have Chapter II superpose Chapter III in similar scenarios.² Although both recommendations were not retained in the final text of the convention, it remains possible for a state to rely on both chapters when the object has been illegally exported and stolen because the regimes of these chapters are not mutually exclusive. This means that in situations of illegal export, it is possible that the contracting state is not the owner of the exported item and will not base the action in recovery on a patrimonial right but on the restriction to export it outside of its territory.³ This situation is then specifically governed by Chapter III. Nevertheless, if the state is the owner, it would be possible to qualify the object's removal from its territory as theft,⁴ allowing for the use of Chapter II instead.⁵ As such, a state's claim is not be constrained by the conditionality of Chapter III.⁶ Therefore, it is also possible for a contracting state to base its claim for the restitution or the return of an object on both chapters at the same time,⁷ provided that that claim is substantiated under both chapters.⁸ This can notably be useful in case of archaeological theft⁹ or to increase the chances of recovery. Concurrently, it was deemed important to have the limitation periods of both chapters match one another because certain cultural materials could have been stolen and illegally exported at the same time.¹⁰⁻¹¹

2. RESERVATIONS

During the negotiations that preceded the adoption of the convention, the possibility of creating an 'à la carte' regime was brought forward, which would entitle contracting states to cherry-pick among the provisions of the convention and adopt a regime that would best suit their needs:¹² as Prott noted, some state representatives that took part in the Diplomatic Conference proposed to make it possible to 'opt out' of either Chapter II or Chapter

¹ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, p. 42.

² UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Report on the third session (Rome, 22 to 26 February 1993) (prepared by Unidroit), Study LXX – Doc. 39, Rome, May 1993, p. 32.

³ Lagarde, P., 'La restitution internationale des biens culturels en dehors de la Convention de l'UNESCO de 1970 et de la Convention d'UNIDROIT de 1995', 11 *Revue de droit uniforme*, (2006), p. 89.

⁴ Lagarde, (2006), p. 89.

⁵ Warring, J., 'Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review*, (2005), p. 256.

⁶ UNIDROIT, (1991), Study LXX – Doc. 23, p. 31.

⁷ Prott, *Commentary on the Unidroit Convention*, (1997), p. 53; Lalive, P., "Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)" in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 74; a joint proposal formulated by the Secretariat of UNIDROIT and by the Turkish government to incorporate a provision stipulating the choice for the claimant or for the requesting state to base the demand on either one of these two chapters was submitted for consideration before the first session of the Committee of Governmental Experts. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the first session of the committee (Rome, 6 to 10 May 1991), Study LXX – Doc. 22, Rome, July 1991, pp. 12 and 25.

⁸ Warring, (2005), p. 254.

⁹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 53; Office Fédéral de la Culture (Suisse) (ed), 'Transfert International des Biens Culturels. Convention de l'Unesco de 1970 et Convention d'Unidroit de 1995, Rapport du Groupe de Travail', (l'Office Fédéral de la Culture: Berne, 1998), p. 17.

¹⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 36.

¹¹ Nevertheless, it is important to note that the main difference between the time limitations contained in Chapter II and Chapter III pertain to the question of inalienability – dealt with in the exceptions to Article 3 (3) posited in Article 3 (4)-(8) –, which is not relevant to Chapter III. In fact, this is notably due to the fact that the violation of export legislation has no bearing on questions of ownership, of inalienability or of imprescriptibility, but is merely concerned with illegal export. Consequently, and contrary to the regime of Chapter II, the two exceptions in Articles 3 (4) and 3 (5) have not found their way into Chapter III. Article 5 does not exempt objects that are part of a public collection, part of an identified monument or of an identified archaeological site from the general rule of its fifth paragraph. See Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), p. 212 and Renold, M. A., "Les Principales Règles de la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés", in: M. A. Renold and C. Breidler, *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 31.

¹² UNIDROIT Secretariat, 'Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', 3 *Uniform Law Review*, (2001), p. 560.

III.¹³⁻¹⁴ Some delegations went even further by proposing to allow contracting states to opt out of both chapters, which would have left the convention with residual provisions of meager value in achieving the set objectives.¹⁵ These propositions were dismissed by the DC, which excluded the possibility to formulate reservations at all.¹⁶ In fact, the provisions of the convention were the result of many compromises from the many different states that participated in its elaboration.¹⁷ Because the drafting of the convention had been marred by compromises and concessions, and because the final ‘package deal’ had been difficult to reach, allowing reservations to either one of the two chapters would have upset the fragile compromise that was achieved and many states would have, as a result, shied away from becoming a party to the convention.¹⁸ Hence, the final agreement was not to allow reservations to be made but to adopt an ‘all-or-nothing’ approach¹⁹ for the sake ensuring a progressive step against the illicit traffic in cultural materials²⁰ and for the sake of true reciprocity.²¹ What is more, a uniform regime was preferred because there was a lack of support for the adoption of uniform rules in the regime of the

¹³ Prot, L.V., “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)” in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 83.

¹⁴ The possibility to ‘opt out’ of certain parts of the convention was considered by the different participants to the DC (see Lalive D’Epinay, “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)”, (1997), p. 82). This terminology had first been advanced by the U.S. Delegation (Prot, *Commentary on the Unidroit Convention*, (1997), p. 86) and proved to be a particularly difficult point of discussion: the United States were exponents of the possibility to opt out of Chapter III (see for example ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 7, 31, 39, 40, 51, 59, 65 Corr., 66, 72 Corr., 78, 79 and 81; CONF. 8/D.C./Doc. 2 and Add.)’ in Presidenza del Consiglio dei Ministri, (1996), pp. 311-312 in which the United States delegate that took part in the DC raised concerns about Chapter III and proposed to include an opt-out provision in the convention itself. This proposal was justified by submitting that it would be preferable to adopt part of the convention instead of nothing. This proposal was also supported by Germany (*ibidem*, p. 312); see also Prot, *Commentary on the Unidroit Convention*, (1997), p. 86). Japan took this idea a step further by proposing to be able to opt out of either Chapter II or Chapter III (see Presidenza del Consiglio dei Ministri, (1996), pp. 71 and 312, where the Japanese delegation explained that there might be constitutional – or other – reasons that would prevent it from adopting the convention in its entirety; see also Prot, *Commentary on the Unidroit Convention*, (1997), p. 86).

¹⁵ See Prot, L. V., “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (Débats)”, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 83; notwithstanding the Preamble, this solution would have rendered Chapter I together with the final clauses of Chapter V as the only binding provisions of the instrument. To avoid such an outcome, it was decided to eliminate this possibility. See Prot, “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (Débats)”, (1997), p. 83; UNESCO already opposed the idea of deleting or allowing reservations to exclude the regime of Chapter II after the third session of the CGE (see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. *Commentary on the UNIDROIT preliminary draft Convention on Stolen or Illegally Exported Cultural Objects as revised June 1993* (prepared by Ms Lyndel V. Prot, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 42, Rome, September 1993, pp. 19-20). It also proposed, at the same time, to introduce an article to prohibit the making of reservations to Chapter II (*idem*). Additionally, Interpol specified that deleting Chapter II would constitute a retrogression when compared to Article 7 (b) (ii) of the 1970 convention. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. *Observations of Governmental delegations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Interpol)*, Study LXX – Doc. 44, Rome, September 1993, p. 1.

¹⁶ Prot, *Commentary on the Unidroit Convention*, (1997), p. 86; during the DC, UNESCO opposed the proposed deletion of Chapter II or the possibility to formulate reservations to the convention. In justifying its opposition, it explained that the *raison d’être* of the convention was to make changes to the private law regimes of contracting states. Therefore, if the participating states were not prepared to make the necessary changes to their private laws, the entire exercise would be rendered pointless. See ‘Comments by International Organizations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), p. 108. See also the different pro and contra arguments put forward during the Diplomatic Conference in ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Object (CONF. 8/3; CONF. 8/C.1/W.P. 7, 31, 39, 40, 51, 59, 65 Corr., 66, 72 Corr., 78, 79 and 81; CONF. 8/D.C./Doc. 2 and Add.)’, in Presidenza del Consiglio dei Ministri, (1996), pp. 312-313.

¹⁷ Prot, *Commentary on the Unidroit Convention*, (1997), p. 86.

¹⁸ Prot, “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (Débats)”, (1997), p. 83; put differently, doing away with the uniformity of the convention’s regime would have had the effect of dismantling part of the compromises that were achieved: allowing reservations would jeopardise the well balanced compromise achieved, which was undesirable considering the difficulties that were met in reaching this equilibrium. (see Prot, *Commentary on the Unidroit Convention*, (1997), p. 86).

¹⁹ Byrne-Sutton, Q., “Introduction”, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 13; Lalive D’Epinay, “Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)”, (1997), p. 82.

²⁰ Delepierre, S., Schneider, M., ‘Ratification and Implementation of International Conventions to Fight Illicit Trafficking in Cultural Property’, in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protecting the World’s Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Good: Paris, 2015), p. 136.

²¹ Prot, *Commentary on the Unidroit Convention*, (1997), p. 16.

1970 UNESCO convention.²² Nonetheless, consistency in legislation and in regulations must exist for certain regimes to work properly.²³ Hence, the lack of uniformity in the 1970 convention was seen as an important flaw in its regime.²⁴ Consequently, Article 18 ensures uniformity of the minimum standard instated by the convention (see below) in all contracting states.²⁵

Article 18 UNIDROIT Convention (1995) – **No reservations are permitted** except those expressly authorised in this Convention.

Article 18, in its final version, does not permit reservations, except for those that have been explicitly authorised by the other provisions of the convention. It should be noted that this article literally reproduces the wording of Article 22 of the UNIDROIT *Convention on the International Financial Leasing* signed on 28 May 1988 in Ottawa.²⁶ Furthermore, it follows the classical Public International Law guidelines as to reservations, which are now codified in Article 19 (b) of the 1969 United Nations *Vienna Convention on the Law of Treaties*, hereinafter VCLT.

Article 19 Vienna Convention on the Law of Treaties (1969) – A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Interestingly, none of the other provisions of the convention allow for reservations, making the wording of Article 18 *in fine* otiose²⁷ and, thus, somewhat questionable. In fact, the second part of the sentence was introduced under time pressure in the finalisation of the convention: Article 18 was hastily drafted by the Secretariat of UNIDROIT in the last hours of the informal Working Group and in anticipation of a final text that might include explicit reservations.²⁸ Because the DC had opted for an ‘all-or-nothing’ approach, the formulation of Article 18 was left unchanged since it did not affect the regime of the convention.²⁹ Moreover, it must be stressed that the impossibility to make reservations to the regime of the convention is in conformity with the object and purpose of the instrument, which is to fight the illicit trafficking of cultural objects.³⁰

Article 18 plays a key role in the regime of the convention. The duality between theft / illicit export is considered by the Secretariat of UNIDROIT as being amongst one of the strengths of the treaty because it instates a minimum set of rules that is particularly appropriate for tackling the illicit trafficking of cultural property.³¹ Nonetheless, the inclusion of Article 18 seems to make the ratification of the convention more difficult. In fact, it has been argued that states will be more reluctant to become a party to the convention if they are forced to take part on an all-or-nothing basis.³² An important criticism in this regard concerns the fact that the convention covers several aspects that do not reflect the same degree of agreement between states: whilst those participants

²² Love Levine, A., ‘The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention’, 36 (2) *Brooklyn Journal of International Law*, (2010- 2011), p. 773.

²³ Love Levine, (2010-2011), p. 773.

²⁴ Love Levine, (2010-2011), p. 773.

²⁵ Love Levine, (2010-2011), pp. 772-773.

²⁶ See the ‘Draft Final Provisions Capable of Embodiment in the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Notes’ drawn up by the Unidroit Secretariat, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/4, January 1995, p. 47.

²⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 85.

²⁸ Protz, *Commentary on the Unidroit Convention*, (1997), p. 85.

²⁹ Protz, *Commentary on the Unidroit Convention*, (1997), p. 85.

³⁰ UNIDROIT Secretariat, (2001), p. 560.

³¹ See ‘Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, E. Reservations’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming. In this regard, see also Bergé, J. -S., ‘La Convention d’UNIDROIT les biens culturels: retour sur un texte majeur dans la lutte contre un fait international illicite de circulation’, 20 *Uniform Law Review*, (2015), pp. 545-546. In this extract, Bergé specifies that the impossibility to separate the regimes of Chapter II and of Chapter III is because both regimes are complementary to fight the illicit trafficking of cultural property. Consequently, the drafters rejected reservations to secure an instrument that would be tailor-made in addressing the said traffic.

³² Merryman, J. H., ‘The Unidroit Convention: Three Significant Departures from the Urtext’, in: J. H. Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, (Kluwer Law International: The Hague / London / Boston, 2000), p. 277;

Jolles, A., ‘Un Regard Critique sur la Convention d’Unidroit’, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 60; Aubert, J.-F., ‘Conclusions’, in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, et M.-A. Renold (eds), *La Convention d’UNIDROIT du 24 juin 1995 sur les biens culturels volés ou illicitement exportés. Actes d’une table ronde organisée le 2 octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 92.

that took part in the drafting of the convention seemed aligned with regard to cultural property theft, the subject of illegal export was much more disputed. It has thus been questioned why theft had to be associated with illicit export in the same instrument: as submitted by Merryman, a distinction must be made – legally speaking – between theft and illegal export because of the implications of their justiciability before domestic courts.³³ Courts will be more reluctant to enforce export laws of a foreign government than to help dispossessed owners.³⁴ In the context of the present convention, it was argued that the concerted front to take action against cultural property theft had been abused to propose solutions to illicit exports.³⁵ Henceforth, both subjects were dealt within the provisions of the UNIDROIT convention, and this was done, ostensibly, to its detriment.³⁶ Additionally, it was submitted that the fact that states are not permitted to make reservations was problematic for those states that would not be able to easily implement the convention because of their internal distribution of competences.³⁷ Conscious of the problems that would result from the pragmatism of Article 18, the drafters of the convention sacrificed popularity in favour of an instrument that would constitute real progress in this area of the law.³⁸

Instead of making reservations, states are allowed to make declarations of interpretation at the time of adhering to the convention.³⁹ Nonetheless, a declaration cannot have the effect of a reservation,⁴⁰ but can help national courts to interpret the convention in a way that a state is willing to understand it.⁴¹ Because of Article 18, it is only possible for states to adopt declarations, provided they do not weaken the minimum threshold for restitution and return established by the convention or discard any of its provision, therefore, having a similar effect to a reservation.⁴²

3. DIRECT APPLICABILITY

Although it was originally not intended for the convention to be self-executing,⁴³ it was, nevertheless, drafted in comprehensive terms that make it possible for individuals to rely on its provisions without the need for any implementation.⁴⁴ In fact, the convention is not addressed to the legislative branch of the state, but rather to the

³³ Kuitenbrouwer, F., 'The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance', 13 *European Review*, (2005), p. 599; in fact, domestic courts are not obliged to enforce public laws of other states in their domestic legal system. This idea stems from the principles of Sovereignty and Equality of States. See also Merryman, J. H., "A Licit Trade in Cultural Objects", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996) pp. 22-23.

³⁴ Kuitenbrouwer, (2005), p. 599.

³⁵ Byrne-Sutton, (1997), p. 16; Browne, A., 'Unesco and Unidroit: The Role of Conventions in Eliminating the Illicit Art Market', 7 (1) *Art, Antiquity and Law*, (March 2002), p. 382; Vernet, J., 'Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)' in: C. Breitler, Q. Byrne-Sutton, F. Geisinger-Mariétoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), pp. 79-80; Prott, *Commentary on the Unidroit Convention*, (1997), p. 28; as such, many 'southern' states refused to distinguish international theft of cultural goods from illegal export because they believed that both activities should be treated equally due to the seriousness of their implications. See Crewdson, R., 'Putting Life into a Cultural Property Convention: UNIDROIT'; Still Some Way to Go.', 17 *International Legal Practitioner* (1992), p. 47; Browne, (2002), p. 382; Lalive submitted that the issues of theft, illegal export and illegal excavations are intertwined with one another, thereby constituting another reason why they had to be dealt with in one document. See Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 21.

³⁶ Browne, (2002), pp. 382 and 385; Bergé supports the view that the two mechanisms of return and of restitution are to be combined into one documents because both mechanisms are used to protect national cultural patrimonies. See Bergé, J. -S., 'La Convention d'Unidroit sur les Biens Culturels (*): Remarques sur la Dynamique des Sources en Droit International', 127 *Journal du Droit International*, (2000), p. 228.

³⁷ Byrne-Sutton, (1997), p. 13.

³⁸ See 'Part I – The Unidroit Convention on Stolen or Illegally Exported Cultural Objects', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

³⁹ Renold, (1997), p. 23; Office Fédéral de la Culture (Suisse), (1998), p. 77.

⁴⁰ Renold, (1997), p. 23; the said declarations cannot have any effect on the provisions of the convention but can only give some guidelines to the domestic courts as to how the convention should be understood. See Office Fédéral de la Culture (Suisse), (1998), pp. 77-79.

⁴¹ Although Kuitenbrouwer has advanced the possibility that such necessary declarations might be seen as reservations and, therefore, prohibited. See Kuitenbrouwer, (2005), p. 601.

⁴² UNIDROIT Secretariat, (2001), p. 560; this was notably a concern raised by the British Ministerial Advisory panel on Illicit Trade. In its opinion, there exists a risk that certain desirable declarations might be considered as reservations (see Department of Cultural, Media and Sport, 'Report of the Ministerial Advisory panel on Illicit Trade', (December 2000), p. 23, point 49 (also Kuitenbrouwer, (2005), p. 601).

⁴³ See for example the commentary of Prott in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Commentary on the UNIDROIT preliminary draft Convention on Stolen or Illegally Exported Cultural Objects as revised June 1992 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 36, Rome, February 1993, p. 1.

⁴⁴ Fraoua, R., 'La mise en œuvre en Suisse de la Convention sur les biens culturels volés ou illicitement exportés', in: C. Breitler, Q. Byrne-Sutton, F. Geisinger-Mariétoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 48.

executive (i.e. administrative organs) and/or to the judiciary.⁴⁵ It was thus drafted in such a way that it could be embedded with direct applicability,⁴⁶ reflective of its self-executive nature.⁴⁷⁻⁴⁸ More specifically, most of its provision are directly applicable:⁴⁹ although the provisions of both Chapters II and III do not necessitate implementation, some provisions of the final chapter – such as Articles 8 and 16 thereof – ought to be transposed into the relevant domestic law.⁵⁰ Implementation is thus not a *sine qua non* to the convention's application, but is recommended with regard to the designation of the domestic procedure that is to be followed for introducing a claim in restitution or a request in return,⁵¹ or for clarifying unsettled concepts. To assist states in undertaking this endeavour, the Secretariat of UNIDROIT provides tailor-made technical expertise to help states implement the provisions of the 1995 convention adequately, when the said expertise is lacking at the domestic level.⁵² What is more, a Task Force to promote the ratification of the 1995 UNIDROIT convention was established under the auspices of UNIDROIT in order to secure a higher incidence of ratification.⁵³

4. MODULATION

The Loewe draft Convention envisaged the future instrument as a 'minimum set of uniform rules',⁵⁴ foreseeing the possibility for states to adopt further measures.⁵⁵ Therefore, Article 9 of this early draft already made it possible to derogate from the provisions of the convention to extend the protection of cultural property by:

⁴⁵ Fraoua, (1997), p. 47.

⁴⁶ Delepierre and Schneider, (2015), p. 135.

⁴⁷ Fraoua, R., 'Arab States and the 1995 UNIDROIT Convention', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming; Office Fédéral de la Culture (Suisse), (1998), p. 15.

⁴⁸ The self-executive character of the convention has, sometimes, constituted a hurdle for some states to join the regime of the convention for political, legal, cultural or bureaucratic reasons. These specific problems have led some states interested in the regime of the 1995 convention to adopt a UNESCO Plus solution. See Lee, K. G., 'Round table on the influence of the 1995 Unidroit Convention (good practices, national legislation of states non-parties, case law, international instruments)', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

⁴⁹ Office Fédéral de la Culture (Suisse), (1998), p. 23.

⁵⁰ Office Fédéral de la Culture (Suisse), (1998), p. 76.

⁵¹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 84.

⁵² Delepierre and Schneider, (2015), p. 315; to facilitate the accessibility of the convention, the Secretariat of UNIDROIT has created two documents in order to help states to ratify, or access to, the instrument. For states that have already signed the convention – but that have not yet ratified it – the Secretariat of UNIDROIT has drafted a standardised ratification form that is available at the following link: <http://www.unidroit.org/english/conventions/1995culturalproperty/modelforratification-e.pdf>, last retrieved on 01.03.2018. For states that have neither signed the convention nor ratified it, the Secretariat has prepared another form to facilitate accession: <http://www.unidroit.org/english/conventions/1995culturalproperty/modelforaccession-e.pdf>, last retrieved on 01.03.2018. The two documents provided by the Secretariat are reflective of its willingness to remain active in the fight against the illicit traffic in cultural property. See UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming. Furthermore, the Secretariat has often indicated that it will undertake every effort to promote the convention in order to increase ratification or accession. In demonstrating its commitment in this regard, it has recently established a Task Force for the promotion of the implementation of both the 1970 UNESCO and the 1995 UNIDROIT conventions (UNIDROIT, 'Promoting and Strengthening the International Legal Framework for the Protection of Cultural Heritage – The 1995 Convention. New York, UN Headquarters, 28 February 2017.', available at <http://www.unidroit.org/537-events/2134-promoting-and-strengthening-the-international-legal-framework-for-the-protection-of-cultural-heritage-the-1995-convention-new-york-un-headquarters-28-february-2017>, last retrieved on 01.03.2018 and discussed below).

⁵³ The Task Force was established during a special event on "Promoting and Strengthening the International Legal Framework for the Protection of Cultural Heritage – the 1995 Unidroit Convention and Other Relevant Legal Instruments and Initiatives" that was organized on Tuesday 28 February 2017 at the United Nations Secretariat Building, New York. According to the concept note of the meeting, "1. The purpose of the Task Force will be to promote further ratification of the UNIDROIT Convention. 2. It will operate under the supervision of the Secretary General of UNIDROIT. 3. The Task Force will be open for participation by interested States. 4. States will be represented by one representative/contact point designated from their Permanent Mission in New York. 5. The Task Force will convene once a year in New York, and on a more regular basis if need be, to review the situation as to the status of ratification of the UNIDROIT Convention and other international legal instruments pertaining to the protection of cultural heritage, to organize its outreach activities and to exchange views on other relevant matters". See UNIDROIT, Permanent Mission of Italy to the United Nations and Permanent Mission of the Republic of Cyprus to the United Nations, 'Concept Note – Promoting and Strengthening the international legal framework for the protection of cultural heritage – the 1995 UNIDROIT Convention', 28 February 2017, 10.30 a.m., UN Headquarters, New York, Conference Room 5, text available at <http://www.unidroit.org/english/news/2017/170228-cp-ny/concept-note-e.pdf>, last retrieved on 01.03.2018. See also the last paragraph of the summary of the event in UNIDROIT, 'Special event on "Promoting and Strengthening the international legal framework for the protection of cultural heritage-the 1995 UNIDROIT Convention and other relevant legal instruments and initiatives" (New York, Tuesday, 28 February 2017) – Summary', available at: <http://www.unidroit.org/english/news/2017/170228-cp-ny/summary-e.pdf>, last retrieved on 01.03.2018. Furthermore, the Task Force will be assisted by the 1995 UNIDROIT Convention Academic Project (cf. below).

⁵⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 74.

⁵⁵ Prott, *Commentary on the Unidroit Convention*, (1997), p. 74.

expanding the definition of cultural property or by mandating restitution in circumstances that were not foreseen by the draft convention by either discarding or restricting the possessor's right to compensation.⁵⁶ Due to fears that the general formulation of the article would result in the convention not being uniformly applied – leading to differences in treatment depending on the state concerned –, the inclusion of this provision in the regime of the convention failed to gain the necessary support. According to some members of the Study Group, this general provision would have jeopardised the balance that the drafters were striving to achieve.⁵⁷ Although Article 9 of the Loewe draft Convention was, subsequently, subject to much debate,⁵⁸ the drafters intended to give a lot of discretion to each state in modulating the convention's regime through the implementation of its provisions.⁵⁹ In fact, flexibility was required, as both the SG and the CGE were of the opinion that the convention was to establish a minimum regime and that it should in no way tamper with domestic laws that were more inclined towards protecting the interests of claimants.⁶⁰ In order to operationalise this idea, certain experts thought that a formal list providing for the more favourable scenarios should be established.⁶¹ The said list was thus included in Article 11 of the PDC.⁶² With regard to the general provisions, it was notably possible to:⁶³

- apply the convention to domestic matters;⁶⁴
- apply the convention to acts that took place before its entry into force;⁶⁵
- extend the period in which a claim in restitution or a request for return can be brought;⁶⁶
- allow claims that are brought after the periods established in Article 3 (3)-(8);⁶⁷

⁵⁶ "Article 9 – Any State Party to this Convention may extend the protection of cultural property beyond that contemplated therein, either by broadening the notion of cultural property, or by making provision for its restitution in circumstances in which such restitution is not required by the Convention by disallowing or restricting the right to compensation of the person in possession or in any other manner". See UNIDROIT, Preliminary draft Convention on the restitution of cultural property (drawn up by Mr Roland Loewe in the light of the two studies prepared by Mme G. Reichelt), Study LXX – Doc. 3, Rome, June 1988, pp. 4-5.

⁵⁷ UNIDROIT, The International Protection of Cultural Property. Preliminary draft Convention on Stolen or Illegally Exported Cultural Objects approved by the UNIDROIT study group on the international protection of cultural property, with Explanatory Report (prepared by the Secretariat), Study LXX – Doc. 19, Rome, August 1990, p. 38.

⁵⁸ Protz, *Commentary on the Unidroit Convention*, (1997), p. 75.

⁵⁹ Droz, G. A. L., "Mémoire sur le Projet de Convention d'Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés", in: P. J. I. M. de Waart, G. A. L. Droz, F. Rigaux, C. J. H. Brunner, *Kunsthandel (Inclusief Antiquiteiten) en de Beschermt van Nationaal Cultureel Erfgoed* (Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, 109), (Kluwer: Deventer, 1994), p. 57, commenting about the Draft UNIDROIT Convention; Klein, F.-E., 'En Relisant la Convention UNIDROIT du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés : Réflexions et Suggestions' 118 *Zeitschrift für Schweizerisches Recht*, (1999), p. 271.

⁶⁰ See 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 41.

⁶¹ Protz, *Commentary on the Unidroit Convention*, (1997), p. 75.

⁶² The first apparition of a formal list was in Article 11 of the *Preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects* (approved by the Unidroit study group on the international protection of cultural property at its third session on 26 January 1990), reproduced in UNIDROIT, The International Protection of Cultural Property. Summary report on the third session of the UNIDROIT study group on the international protection of cultural property, held at the seat of the Institute from 22 to 26 January 1990 (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 18, Rome, May 1990, Appendix III (see also UNIDROIT, (1990), Study LXX – Doc. 19, p. 2-6). Article 11 would read: "Each Contracting State shall remain free in respect of claims brought before its courts or competent authorities: (a) for the restitution of a stolen cultural object: (i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object; (ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3 (2); (iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by article 4 (1). (b) for the return of a cultural object removed from the territory of another Contracting State contrary to the export legislation of the State: (i) to have regard to interests other than those material under article 5 (3); (ii) to apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7. (c) to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object occurred before the entry into force of the Convention for that State". This article thus contained a tripartite division: point (a) being concerned with modulation of the regime dealing with stolen objects, point (b) with the modulation of the rules applicable to illegal exports and point (c) applying to the modulation of the temporal scope of the draft. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 37. The members of the SG considered this list to be exhaustive. See UNIDROIT, (1990), Study LXX – Doc. 19, p. 38.

⁶³ See for example the enumeration given by the Secretariat of UNIDROIT, in UNIDROIT Secretariat, (2001), p. 546; see also Fach Gómez, K., 'Algunas Consideraciones en Torno al Convenio de Unidroit sobre Bienes Culturales Robados o Exportados Illegalmente', *Anuario de Derecho Internacional Privado*, (2004), p. 27, Droz, G. A. L., 'La Convention d'UNIDROIT sur le Retour International des Biens Culturels Volés ou Illicitement Exportés (Rome, 24 juin 1995)', 86 (2) *Revue Critique de Droit International Privé*, (1997), pp. 269-270 and Droz, (1994), p. 57, commenting about the Draft UNIDROIT Convention; Fox, C., 'The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property', 9 (1) *American University International Law Review*, (1993), pp. 258 (notably footnote 235) and 265.

⁶⁴ Protz, *Commentary on the Unidroit Convention*, (1997), p. 76.

⁶⁵ UNIDROIT, The International Protection of Cultural Property. Summary report on the second session of the UNIDROIT study group on the international protection of cultural property, held at the seat of the Institute from 13 to 17 April 1989 (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 14, Rome, June 1989, p. 28; see also Protz, *Commentary on the Unidroit Convention*, (1997), p. 76

⁶⁶ See also Protz, *Commentary on the Unidroit Convention*, (1997), p. 76.

⁶⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 76.

- discard the payment of compensation to the acquirer that has exercised due diligence, in conformity with the domestic law of the state where the demand for restitution or return is introduced.⁶⁸

In case of theft – Chapter II –, the following modulations were considered:

- extending the definition of theft to other acts;⁶⁹
- extending the period to introduce a claim for the restitution of an archaeological object to a longer period, as is prescribed by the domestic law of the state concerned.⁷⁰

For illegal export – Chapter III –, the possible modulations were:

- allowing more interests to be added to Article 5 (3) as a basis for the demand for return;⁷¹
- applying the regime of Chapter III to the scenarios exempted by Article 7;⁷²
- discarding the alternative solutions prescribed by Article 6 (3);⁷³
- imputing the payment of the cost of return prescribed by Article 6 (4) upon another party.⁷⁴

Whilst it was assumed that any departure from the uniform regime established by the convention should be clearly posited by the convention through the use of a list of possible modulations,⁷⁵ the participants to the CGE came to realise that laying down an exhaustive list might result in excluding situations that should have been listed.⁷⁶ Consequently, the use a general formulation was preferred.⁷⁷ Irrespective of the form given to the modulation, there was a consensus among the DC that allowing states to go beyond the minimal set of rules laid down by the convention would be beneficial to the future regime.⁷⁸

(1) Rules more favourable to restitution or return

Although Article 11 of the PDC was ultimately not retained in the final version of the convention,⁷⁹ it remains possible for states to shape the contours of the convention through Article 9 (1) thereof.

⁶⁸ This possibility already found codification in Article 10 of the *Preliminary draft Convention on restitution and return of cultural objects* (prepared by the Unidroit Secretariat). See UNIDROIT, *Preliminary draft Convention on the restitution and return of cultural objects* (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 11, Rome, February 1989, p. 8; See also UNIDROIT, (1993), Study LXX – Doc. 36, pp. 48-49: “The aim of the whole UNIDROIT project was to improve the protection of cultural property by ensuring its return to its owner.

Compensation was considered only because depriving a possessor of an object in some legal systems would be a major change, and the reference to compensation would make the presentation of this change politically and philosophically more acceptable. AT NO STAGE WAS IT EVER INTENDED TO SUGGEST THAT NATIONAL SYSTEMS WHICH ALREADY PROVIDED FOR RETURN OF STOLEN CULTURAL OBJECTS WITHOUT COMPENSATION TO THE POSSESSOR SHOULD CHANGE THIS RULE BY PROVIDING COMPENSATION [emphasis added by Prott]” and Prott, *Commentary on the Unidroit Convention*, (1997), p. 76.

⁶⁹ This was already made possible in the Loewe draft Convention. See Prott, *Commentary on the Unidroit Convention*, (1997), pp. 74 and 76 (referring to Article 2 of the Loewe draft Convention); see also UNIDROIT, (1993), Study LXX – Doc. 36, pp. 48-49.

⁷⁰ See for example UNIDROIT, (1993), Study LXX – Doc. 36, pp. 48-49.

⁷¹ Prott, *Commentary on the Unidroit Convention*, (1997), p. 76; for the SG, see UNIDROIT, (1990), Study LXX – Doc. 19, p. 29. The CGE did not believe that it was impossible for contracting states to broaden the list of interests that it was willing to give recognition to, provided this broadening would take place through the modulation of the convention’s provisions. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 31; see also Prott, *Commentary on the Unidroit Convention*, (1997), p. 58. Please note that Prott incorrectly refers to Article 10 of the convention, which was the numeration used in a prior draft; Schneider, M., “Le Projet de Convention d’Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés”, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 149; Sidorsky, E., “The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration”, 5 (1) *International Journal of Cultural Property*, (1996), p. 28.

⁷² Prott, *Commentary on the Unidroit Convention*, (1997), p. 76.

⁷³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 76.

⁷⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 76.

⁷⁵ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 42; UNIDROIT Secretariat, (2001), p. 546.

⁷⁶ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Report’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 42.

⁷⁷ *Idem*.

⁷⁸ See ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (Conf. 8/3; CONF. 8/5 Add. 1 and 2; CONF. 8/6; CONF. 8/C.1/W.P. 7, 28, 38, 55 and 56)’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 10, 21 June 1995, p. 235; although the modulation of the provisions of the convention affects its uniform application, it was required in order to achieve a compromise between the parties. See UNIDROIT Secretariat, (2001), p. 556.

⁷⁹ The level of detail achieved by this clause created an imbalance between the list and other provisions of the convention. Moreover, the further detailing of these more favourable scenarios created additional problems that would have required additional fine-tuning. These two reasons were sufficient for the drafters to reverse the process and go back to a simple version of the article. See Prott, *Commentary on the Unidroit Convention*, (1997), p. 76; the removal of Article 11 to the benefit of a general provision sharing the main traits of Article 9 (1) was discussed at the CGE’s third session upon a proposal of one representative. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 49, referring to the proposal in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the third session of the Committee (Rome, 22 to 26 February 1993), Study LXX – Doc. 38, Rome,

Article 9 UNIDROIT Convention (1995) – (1) Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.

To avoid an infinite discussion on the details of the provisions – and due to the complexities inherent in any fine-tuning⁸⁰ – Article 9 (1) was drafted with the intention of retaining the idea of flexibility that was originally envisaged by the drafters without necessarily having to foresee each and every aspect thereof.⁸¹ Additionally, as was already emphasised above, Article 9 (1) was upheld because some states having domestic provisions that provide for the non-compensation of a *bona fide* acquirer – and considering that these provisions were more favourable to restitution or return – did not want their provisions to be set aside by the convention.⁸² Thus, whilst Article 4 (1) prescribes the payment of compensation to a diligent acquirer so as to whet the appetite of states that have rules about third-party protection, Article 9 (1) was specifically designed not to impose this obligation of compensation on states that do not consider compensation to have an added value for the restitution or return of cultural materials.⁸³ This does not mean to say that ratifying or acceding states can forego the payment of fair and reasonable compensation to a diligent acquirer; this interpretation was deemed unacceptable by the SG.⁸⁴ Instead, through the provision of Article 9 (1), it is possible for a state that adheres to the regime of the convention to be a step ahead of what is prescribed in the treaty.⁸⁵ This possibility of furthering the regime of the convention affirms that the mechanism instated is intended to set a minimal threshold without affecting the rules that already exist in domestic laws.⁸⁶ This means that states are not to interpret their participation in the convention as an obligation to restrict the extent of existing means of

April 1993, p. 1. See also the proposal of the Finnish delegation in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of Governmental delegations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Finland, Netherlands, Sweden, Turkey and Venezuela), Study LXX – Doc. 32, Rome, November 1992, pp. 3-4. For an overview of the development of Article 11, see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the fourth session (Rome, 29 September to 8 October 1993) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 48, Rome, February 1994, p. 61.

⁸⁰ UNIDROIT Secretariat, (2001), p. 546.

⁸¹ Droz, (1994), p. 57, commenting about the Draft UNIDROIT Convention.

⁸² Droz, (1997), p. 269; Prott, *Commentary on the Unidroit Convention*, (1997), p. 74; This is notably so because the requirement to pay compensation laid down in Article 7 (b) (ii) of the 1970 UNESCO convention had already been “contested by many countries whose domestic law favors an original owner over a bona fide purchaser.” See Kinderman, S. A., ‘The Unidroit Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property’, 7 *Emory International Law Review*, (1993), p. 475. See for example Bolaño, M. F., ‘International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the Unesco Convention’, 15 *Fordham International Law Journal*, (1991-1992), p. 165 for the United States’ difficulties with the just compensation of Article 7 (b) of the UNESCO convention.

⁸³ UNIDROIT Secretariat, (2001), p. 490; O’Keefe, P. J., ‘Developments in Cultural Heritage Law: What is Australia’s Role?’, *Australian International Law Journal*, (1996), p. 41; the Study Group noted that states that have enacted a regime with more thorough protection for dispossessed owners should not be forced to lower their standards to ensure uniformity of application of the convention. See UNIDROIT, The International Protection of Cultural Property – Summary report on the first session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 12 to 15 December 1988 (prepared by the Unidroit Secretariat), Study LXX – Doc. 10, Rome, January 1989, p. 7; following Prott, legal systems with no third-party protection are more favourable to restitution. See Prott, L. V., ‘Unesco and Unidroit: A Partnership Against Trafficking in Cultural Objects’, in: N. Palmer (ed), *The Recovery of Stolen Art – A Collection of Essays*, (Kluwer law international, 1998), p. 213; Prott noted after the second session of the CGE that the convention was not meant to instate an obligation of compensation in contracting states that did not know of such obligation when mandating the restitution of the object. Consequently, these states can maintain their more favourable rules on restitution when these rules do not prescribe the payment of compensation to the possessor obliged by the restitution. See UNIDROIT, (1993), Study LXX – Doc. 36, p. 17.

⁸⁴ UNIDROIT, (1989), Study LXX – Doc. 14, pp. 25-26.

⁸⁵ In fact, in drafting the convention, the Study Group encountered problems as to the exact formulation of this idea. Whilst Article 10 of the *Preliminary draft Convention on restitution and return of cultural objects* stated that “Any State Party to this Convention may extend the protection accorded [...]” a more nuanced wording was sought to clarify that the provisions were not to oblige states parties to retrograde their existing laws. Consequently, alternative qualifications, such as ‘maintain the protection accorded’ or ‘may accord wider protection’ were considered at the SG so as to take existing further protection into account. See UNIDROIT, (1989), Study LXX – Doc. 14, p. 26; as was noted by the CGE during its third session: “The Study Group had been conscious of the fact that many provisions of the draft Convention did not always reflect the differing practices of different countries and that some of those practices went further than the system contemplated under the Convention (for example the absence of compensation for “good faith” possessors). The study group had been of the belief that those countries should retain such provisions as were more favourable to return, as the draft Convention laid down only minimum standards. It had never been the intention of the study group to oblige States to reduce that protection and, to avoid any misunderstanding on this point, a proposal had been made at the second session of the committee to render obligatory, and not optional, the application of the domestic law of a State addressed when that was more favourable to the restitution or return of stolen or illegally exported cultural objects (cf. Study LXX – Doc. 31, note 72). Another proposal along the same lines was to be found in document Study LXX – Doc. 36, pp. 49A and 49B.” See UNIDROIT, (1993), Study LXX – Doc. 39, p. 48.

⁸⁶ UNIDROIT Secretariat, (2001), p. 546.

restitution or return prescribed in their legal order;⁸⁷ clearly, the convention must not constitute a setback to the enhanced protection that is afforded in certain states⁸⁸ and, therefore, a lowering of the existing standards is not precluded by it.⁸⁹ Instead, these states have the discretion to decide whether their domestic regime should remain more progressive than the convention's regime of restitution and / or return, or whether the latter's regime should supersede the internal rules for claims that have an international character.⁹⁰

Despite the laudable nature and the progressive character of Article 9 (1),⁹¹ the inclusion of such a generally drafted mechanism does not clearly indicate what measures could be seen as favouring restitution or return.⁹² Similar to the rules that were laid down in Article 11 PDC, a few examples of measures that are more favourable could be: applying the convention to claims of a national character;⁹³ retracting the payment of compensation to an acquirer in good faith;⁹⁴ extending the period of time for recovering the stolen property;⁹⁵ adopting longer periods for the introduction of a demand in return;⁹⁶ enabling the return of illegally exported cultural objects without having to demonstrate that the export constituted a significant impairment to the interests listed in Article 5 (3) (a)-(d) or that the item has a significant cultural importance to the requesting state;⁹⁷ applying the regime of the convention to the exempted situations foreseen in Article 7⁹⁸ or imputing the costs of return differently under Article 6 (4).⁹⁹ Another particularly interesting 'more favourable rule' concerns the possible retroactive effect of the convention, a point that was highly disputed throughout its negotiation.¹⁰⁰ During its elaboration, Droz – the representative of the Permanent Bureau for the Hague Conference on Private International Law – made a proposal to include a provision foreseeing the possibility for state parties to issue a declaration in which they would decide at the time of adhesion whether the convention is to be applied retroactively or not.¹⁰¹ This proposal did not gain support in the final version of the convention,¹⁰² but it remains possible for states to apply the text retroactively by making a declaration to this effect in conformity with Article 15. Thus, contrary to what has been established above, it is important to reconsider the non-retroactivity of the convention in light of Article 9 (1).¹⁰³ Consequently, it is possible to adopt 'rules more favourable to restitution or return' by prescribing the retroactive working of the convention through Article 9 (1) thereof.¹⁰⁴

But for these remarks, it is important to recall that the convention is designed to instate minimum – and not general – uniform rules,¹⁰⁵⁻¹⁰⁶ in accordance with the Loewe vision. It is thus impossible to be more generous to an acquirer in good faith than the regime of the convention by pronouncing the payment of compensation when the said acquirer has not exercised due diligence during the acquisition, or to foresee a higher amount of compensation than the one prescribed by the convention.¹⁰⁷ It is, thus, not allowed to weaken the minimum uniform regime established by the convention. Additionally, provided that states decide to make use of these modulating rules, they can do so as long as the depository of the convention is formally notified and that other contracting states are concurrently given notice of such a modulation.¹⁰⁸ Henceforth, states making use of this

⁸⁷ Sidorsky, (1996), p. 30; this was notably a concern that was raised by states that do not foresee the payment of compensation to the purchaser in good faith. See Droz, (1997), p. 269.

⁸⁸ Protz, *Commentary on the Unidroit Convention*, (1997), p. 74.

⁸⁹ UNIDROIT Secretariat, (2001), p. 546.

⁹⁰ Sidorsky, (1996), p. 30.

⁹¹ Droz, (1994), pp. 49 and 57.

⁹² See Protz, *Commentary on the Unidroit Convention*, (1997), p. 76; Klein, (1999), p. 271.

⁹³ Klein, (1999), p. 272.

⁹⁴ Lalive, 'La Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', (1997), p. 36, footnote 70; Forrest, (2010), p. 206 pointing at the fact that developing states might shy away from claiming restitution if they have to pay a compensation to a duly diligent acquirer that these states cannot afford to pay.

⁹⁵ Droz, (1997), p. 269.

⁹⁶ Droz, (1997), p. 269.

⁹⁷ Forrest, (2010), p. 211.

⁹⁸ Droz, (1997), p. 269.

⁹⁹ Droz, (1997), p. 269.

¹⁰⁰ See the discussion in section B. 2. (3) of 'Chapter 1 – Presentation and Applicability of the Convention' above concerning the temporal scope of the convention.

¹⁰¹ Droz, (1997), p. 273.

¹⁰² Droz, (1997), p. 273.

¹⁰³ UNIDROIT Secretariat, (2001), p. 558.

¹⁰⁴ UNIDROIT Secretariat, (2001), p. 550.

¹⁰⁵ Protz, *Commentary on the Unidroit Convention*, (1997), p. 77; See also 'Chapter 1 – Presentation and Applicability of the Convention' above.

¹⁰⁶ As such, the convention constitutes "uniform mandatory minimum rules for the protection of the interests of the lawful owner of a cultural object in international cases" (as was noted by the Delegation of Finland at the CGE (see UNIDROIT, (1992), Study LXX – Doc. 32, p. 1)).

¹⁰⁷ UNIDROIT, (1992), Study LXX – Doc. 32, p. 1.

¹⁰⁸ UNIDROIT Secretariat, (2001), p. 556.

malleable provision are compelled to publish the changes undertaken by means of declaration formulated in accordance with Article 15 of the convention.¹⁰⁹

(2) No obligation to recognise the more favourable regime of other state parties

Despite the general wording of Article 9 (1), it is certain that the more favourable regime is optional and that it, therefore, does not create an obligation for state parties to adopt more measures with the aim of enhancing restitution or return.¹¹⁰ Furthermore, this more favourable regime is only relevant for the courts of the state where the claim in restitution or the request for return is introduced.¹¹¹⁻¹¹² No other state can force the said state to apply different rules than the ones it intends to apply,¹¹³ and these more favourable rules must not be recognised and automatically applied by other state parties, as clarified in Article 9 (2) of the 1995 convention.

Article 9 UNIDROIT Convention (1995) – (2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

During the third session of the SG, it was recognised that if a state was to offer extended protection in its domestic law, it could not expect another state to afford the same protection.¹¹⁴ To the SG, this meant that more favourable rules could only be binding in the state that is addressed by the request for return or by the claim in restitution.¹¹⁵ This is notably so because a state could decide to adopt more favourable rules for itself, but it could not force other states to give effect to this more favourable regime.¹¹⁶ In fact, a member of the SG explained that two scenarios would be foreseeable: when the legal proceedings are initiated in the contracting state where the stolen or illegally exported cultural object is located (cf. the first part of Article 8 (1)), the court would have to apply the modulated regime adopted by that state.¹¹⁷ Instead, if the jurisdiction seized by the matter is not the jurisdiction where the cultural object is located – such as the jurisdiction of domicile of the defendant (see Article 8 (1) *in fine*) – enforcement of the judgment would be required in the state where the cultural object is situated.¹¹⁸ If the latter state had not adopted the same modulated rules, then this state is not compelled to recognise the enhanced regime that was adopted by the first state.¹¹⁹ Furthermore, Article 9 (2) was elaborated because of concerns raised by the French delegation during the DC¹²⁰ that claimants – having in mind the disparities in national laws that Article 9 (1) could lead to – might, for example, make use of *forum shopping* in order to avoid the payment of compensation.¹²¹ Although these concerns were not shared by other delegations,¹²² Article 9 (2) was adopted so as to resolve problems of recognition and enforcement of more favourable rules that would conflict with the national spirit.¹²³ This means that the adoption of more favourable rules in a state party are only to be applied for claims in restitution or requests for return introduced within its territorial boundaries and that this choice does not have to be recognised and enforced in other jurisdictions.¹²⁴ As such, Article 9 (2) rightfully confirms that the domestic courts of a contracting state entrusted with the enforcement of a foreign judgment issued in another contracting state and that is based on the regime of the

¹⁰⁹ UNIDROIT Secretariat, (2001), p. 556.

¹¹⁰ UNIDROIT Secretariat, (2001), p. 546.

¹¹¹ See UNIDROIT, (1991), Study LXX – Doc. 23, p. 45: “[...] under both Chapter II and Chapter III the only State which assumed obligations was the State addressed; no State could extend the obligations of another State, which means that if the requesting State’s legislation offered greater protection, that State could not invoke such legislation against the State addressed (cf. paragraphs 89 and 90 of the explanatory report, Study LXX – Doc. 19)” and ‘Draft Final Provisions Capable of Embodiment in the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Notes’, in Presidenza del Consiglio dei Ministri, (1996), p. 42. See also UNIDROIT Secretariat, (2001), p. 546 and Prott, *Commentary on the Unidroit Convention*, (1997), p. 76.

¹¹² Moreover, the court seized may only apply its own substantive law to provide for a more favourable regime to ensure the restitution or the return of the object, even though its domestic conflict-of-law rules would point to the application of the substantive law of a different contracting state. This was noted by the Finnish delegation in UNIDROIT, (1992), Study LXX – Doc. 32, p. 3.

¹¹³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 76; Caamiña Domínguez, C. M, Conflicto de Jurisdicción y de Leyes en el Tráfico Ilícito de Bienes Culturales, (Colec: Madrid, 2007), p. 147.

¹¹⁴ UNIDROIT, (1990), Study LXX – Doc. 18, p. 36.

¹¹⁵ UNIDROIT, (1990), Study LXX – Doc. 18, p. 36.

¹¹⁶ UNIDROIT, (1990), Study LXX – Doc. 18, p. 38.

¹¹⁷ UNIDROIT, (1990), Study LXX – Doc. 18, p. 38.

¹¹⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 38.

¹¹⁹ UNIDROIT, (1990), Study LXX – Doc. 18, p. 38.

¹²⁰ UNIDROIT Secretariat, (2001), p. 548; Prott, *Commentary on the Unidroit Convention*, (1997), p. 77.

¹²¹ UNIDROIT Secretariat, (2001), p. 548; Prott, *Commentary on the Unidroit Convention*, (1997), p. 77.

¹²² In responding to the French concerns, it was submitted that the situation of *forum shopping* is already taking place outside of the convention’s regime. See UNIDROIT Secretariat, (2001), p. 548.

¹²³ UNIDROIT Secretariat, (2001), p. 548.

¹²⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 77.

convention do not need to recognise the more favourable measures that have been adopted in the latter contracting state when they are giving effect to the judgement.¹²⁵⁻¹²⁶ In other words, this entails that in seeking the recognition and enforcement of a judgment that has been issued by the court of a contracting state, the judge seized with the demand can refuse to apply any part of the judgment that conflicts with national values.¹²⁷ Consequently, the effect of Article 9 (2) is similar to a defence based on public order,¹²⁸ although it is not vested with such terms. What is more, this article should be read in conjunction with the fifth Recital of the Preamble to the 1995 UNIDROIT convention:¹²⁹

Recital 5 Preamble UNIDROIT Convention (1995) – EMPHASISING that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, **does not imply that such remedies should be adopted in other States,** [...]

The statement that is made in Recital 5 reinforces the limitation laid down in Article 9 (2).¹³⁰

Despite these submissions, Droz has argued that Article 9 (2) is unnecessary since it is based on a misconception: as the convention does not regulate the aspects of recognition and enforcement of foreign judgments, Droz correctly points out that Article 9 (2) does not affect other rules on the recognition and enforcement of foreign decisions,¹³¹ thereby rendering paragraph 2 otiose.

5. INTERPRETATION

For the sake of not overburdening the convention with complex definitions,¹³² domestic judges have been left with a degree of flexibility with regard to the convention's application.¹³³ In fact, the UNIDROIT text does not clearly define most of the basic concepts used throughout its regime and many of the terms used are, therefore, subject to further interpretation.¹³⁴ Fraoua – who was a member of the SG – recalled during the DC that it would have been impossible to agree on the definitions of many of these notions in a way that would accommodate the legal systems of all contracting states.¹³⁵ Therefore, the future instrument had been drawn as a minimum set of uniform rules, leaving key notions such as 'possessor', 'theft', 'claimant' and 'owner' undefined.¹³⁶ In fact, the drafters produced an instrument that would alleviate the concerns of both source and market states without attempting to harmonise domestic civil codes or criminal laws.¹³⁷ Hence, it was preferred to keep the convention simple and the many specificities of its application were thus delegated to domestic

¹²⁵ Renold, (1997), p. 32. Renold submits that the convention does not explicitly make a statement to this effect. Nevertheless, the wording of Article 9 (2) indicates that this is the meaning that must be given to it (*idem*); UNIDROIT Secretariat, (2001), p. 548.

¹²⁶ The Secretariat of UNIDROIT has qualified the formulation of Article 9 (2) of the convention as 'clumsy' (see UNIDROIT Secretariat, (2001), p. 548). Nonetheless, an example will help to unravel the inexactitude of Article 9 (2): in a case where a cultural object is claimed back in the state of domicile of the defendant – which does not entitle the *bona fide* purchaser to any compensation – and the judgment is to be enforced in another state (e.g. the state where the cultural object is located) where deprivation of private property cannot be executed without just compensation, the state where enforcement is sought will not apply the part of the judgment discarding the payment of the compensation (see a similar example given in Droz, (1997), pp. 270-271). Instead, the judge seized with the demand in recognition and enforcement will have to reinstate the payment of compensation to the possessor obliged by the restitution.

¹²⁷ Droz, (1997), pp. 77 and 270.

¹²⁸ UNIDROIT, (1990), Study LXX – Doc. 18, p. 38.

¹²⁹ Klein, (1999), pp. 270-271; Forrest, (2010), p. 199.

¹³⁰ Prott, *Commentary on the Unidroit Convention*, (1997), p. 20.

¹³¹ Droz, (1997), pp. 270-271.

¹³² Renold, (1997), p. 26, footnote 8.

¹³³ Renold, (1997), p. 26.

¹³⁴ Nafziger, J. A. R., "Towards a More Collaborative Regime of Transnational Cultural Property Law", in: J. Basedown, K. Siehr and T.M.C. Asser Instituut (eds), *Private Law in the International Arena. From National Conflict Rules Towards Harmonization and Unification. Liber Amicorum Kurt Siehr*, (T.M.C. Asser Press: The Hague, Schulthess: Zürich, 2000), p. 502; as was highlighted in prior chapters, many of the concepts laid down in the convention are left undefined: concepts such as 'theft', 'illegal export', 'stolen', 'possessor', 'claimant', 'due diligence' – although article 4 (4) gives some of the constitutive elements of due diligence – and 'fair and reasonable compensation' are not properly defined under the regime of the convention. See Sidorsky, (1996), p. 32.

¹³⁵ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 13 June 1995, p. 168.

¹³⁶ *Idem*; other aspects are also ignored by the convention and left to the discretion of national laws or domestic judges, including: the determination of the status of cultural objects, the governance of peripheral actions available to the original owner after he has compensated the purchaser in good faith, the determination of who will be considered as a possessor, the regulation of the ownership of the good after its restitution, etc. Furthermore, obliging judges to resolve all the aspects that have not been covered by the convention is increasingly burdensome for domestic courts. See Bergé, (2000), p. 251.

¹³⁷ 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2)', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 2, 13 June 1995, p. 168.

judges, who are tasked with applying the corresponding definitions in accordance with the applicable law,¹³⁸ or having recourse to autonomous conceptualisations.¹³⁹ As such, much discretion has been left to domestic courts in determining how pivotal concepts used throughout the convention are to be understood.¹⁴⁰ Because such a wide discretion is left to the national judiciaries, the convention is not all-encompassing, thus making its regime less than comprehensive.¹⁴¹ Albeit the nebulosity of its provisions was purposely adopted to encourage participation in its regime,¹⁴² the lack of specificity of its terminology will result in a heterogeneous application of the convention's provisions:¹⁴³ because courts in different jurisdictions tend to use different methods of interpretation, thereby leading to different results for similar cases,¹⁴⁴ leaving the interpretation of many provisions of the convention to these courts affects the idea of minimum uniformity that underlined the convention's adoption.¹⁴⁵ Because several of the key concepts used in the convention are to be interpreted by national authorities, discrepancies will naturally appear through the different interpretations rendered.¹⁴⁶ Not everyone, however, shares this view: it was submitted at the time of the convention's adoption that there was a certain synergy between domestic courts in trying to interpret key concepts of international treaties in one specific manner, notably in light of the purpose and goal of the treaty.¹⁴⁷ Furthermore, it was repeatedly emphasised throughout the making of the convention that the explanatory report attached to it might be of assistance in explaining how these provisions are to be understood.¹⁴⁸

Notwithstanding the methods used by judges in dealing with this task, it should be recalled that – as a treaty – the convention must first and foremost be interpreted in accordance with the *Vienna Convention on the Law of Treaties* (1969).¹⁴⁹ More particularly, the interpretation must follow the guidelines prescribed by Articles 31-33 of the VCLT,¹⁵⁰ which must all be taken into consideration in interpreting treaty provision.¹⁵¹

¹³⁸ Renold, (1997), p. 26; to do so, Renold has argued that these judges will have to refer to the rules of private international law in order to determine the meaning of the manifold notions involved (*ibidem*, footnote 8).

¹³⁹ This was notably the opinion of one CGE member, which was expressed during the committee's first session. In this member's opinion, since the convention was set to instate a uniform regime, it was important that the future instrument be formulated in clear terms and that its concepts be interpreted autonomously. Another member of the committee believed that a provision should be added to the convention specifying that it must be interpreted uniformly having regard to the international purpose that it strives to achieve. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 24.

¹⁴⁰ See Sidorsky, (1996), p. 32; Klein, (1999), p. 271.

¹⁴¹ Love Levine, (2010-2011), p. 773.

¹⁴² Sidorsky, (1996), p. 32.

¹⁴³ As noted by the United States representative participating to the fourth session of the CGE, not defining key concepts such as 'stolen', 'claimant' and 'possessor' would entail that each contracting state should fill the definitional void by applying its own domestic conceptualization to these notions, which in turn would affect the uniform application of the convention. Another representative replied that in the experience of UNIDROIT, there was a tendency by domestic courts to give a uniform interpretation of international conventions to comply with the aim set by the document being interpreted. See UNIDROIT, (1994), Study LXX – Doc. 48, p. 11; See also 'Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 25.

¹⁴⁴ Voulgaris, I., 'Les Principaux Problèmes Soulevés par l'Unification du Droit Régissant les Biens Culturels', 8 *Uniform Law Review* (2003-1/2), pp. 547-548; Sidorsky, (1996), p. 32.

¹⁴⁵ A similar conclusion can be reached in cases where the contracting state decides to implement the convention in the internal legal order in line with its domestic rules. As Doyal notes, "If national legislators and interpreting judges in each of the ratifying states insist on interpreting the Convention pursuant to the terms of their respective legal systems, then the compromise achieved in the Convention is lost" (see Doyal, S., 'Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy', 657 *Columbia Journal of Transnational Law*, (2000-2001), p. 700). A good example of the problems that can ensue from incorrect transposition through implementation can be found in Italy: Article 4 (2) of the Law of 7 June 1999, n. 213 entitled *Ratifica ed esecuzione dell'Atto finale della Conferenza diplomatica per l'adozione del progetto di Convenzione dell'UNIDROIT sul ritorno internazionale dei beni culturali rubati o illecitamente esportati, con annesso, fatto a Roma il 24 giugno 1995*, published in the *Gazzetta Ufficiale* n. 153 of 2 July 1999 – hereinafter law 213/99 – provides a good example of how the fragile equilibrium achieved by the convention can be affected through domestic implementation. In this article, the concept of due diligence posited in article 4 (4) of the convention was transposed into the Italian domestic legal order as meaning *buona fede*, i.e. good faith (see Doyal, (2000-2001), p. 696). Therefore, Italian Law 213/99 has incorporated the notion of due diligence in its domestic legal order by referring to the existing concept of good faith that is found in Article 1147 of the Italian Civil Code (Doyal, (2000-2001), pp. 696-697). Considering that the use of the terminology 'due diligence' was specifically framed as such to avoid confusion with national concepts of good faith (see section D. 3. of 'Chapter 4 – The Unidroit Solution' above), the present implementation demonstrates that discrepancies can materialise between the intentions of the drafters and the practical application of the convention by contracting states.

¹⁴⁶ Sidorsky, (1996), p. 32; Klein, (1999), p. 284.

¹⁴⁷ Protz, *Commentary on the Unidroit Convention*, (1997), p. 87.

¹⁴⁸ See for example UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the second session (Rome, 20 to 29 January 1992) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 30, Rome, June 1992, pp. 10-11.

¹⁴⁹ As was pointed out by the Russian representative that took part in the DC, a treaty such as the 1995 convention ought not to be interpreted by reference to domestic laws, as was made clear by the 1969 VCLT. See 'Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3; CONF. 8/5 Add. 2; CONF. 8/C.1/W.P./ 28, 46 and 56; CONF. 8/D.C./Doc. 2), Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 15, 22 June 1995,

(1) General rule on the interpretation of treaties

Article 31 VCLT prescribes the general rule in relation to the interpretation of treaties. Because the article has been constructed as a crucible,¹⁵² the means of interpretation laid down in it are all of equal value and there exist no hierarchy between them.¹⁵³ Therefore, Article 31 VCLT has been framed as a general rule, thus explicitly rejecting any plurality of rules.¹⁵⁴

The starting point of the process of interpretation is to be found in the first paragraph of Article 31 VCLT:¹⁵⁵

Article 31 Vienna Convention on the Law of Treaties (1969) – (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31 (1) VCLT clarifies that the interpretation of a convention must be effectuated in good faith,¹⁵⁶ following the ordinary meaning¹⁵⁷ of the wording used according to the context of the convention and in light of

p. 275. This opinion is also shared by the UNIDROIT Secretariat, who believed that the task of defining all the concepts of the convention proved to be too daunting and that it was preferable to leave this to the discretion of domestic courts so as to come up with an harmonised definition in accordance with the traditional methods of interpretation of treaties prescribed by Article 31 (1) of the *Vienna Convention on the Law of Treaties* (1969). See UNIDROIT Secretariat, (2001), p. 500.

¹⁵⁰ Gardiner, R., “The Vienna Convention Rules on Treaty Interpretation”, in: D. B. Hollis (ed), *The Oxford Guide to Treaties*, (Oxford University Press: Oxford, 2012), p. 493: “[...] the Vienna rules are now the rules of customary international law applicable to all treaties, even though the VCLT itself is not retroactive. Thus, even though the law of treaties as stated in the VCLT has a more limited scope of application when applied to its parties than do the rules of customary international law, the Convention’s provisions on treaty interpretation now reflect the latter and have general application”.

¹⁵¹ Aust, A., *Modern Treaty Law and Practice*, (Cambridge University Press: Cambridge, 2007), p. 231: “The [International Law] Commission rejected the view that in interpreting a treaty one must give greater weight to one particular factor, such as the text (‘textual’ or ‘literal’ approach), or the supposed intentions of the parties, or the object and purpose of the treaty (‘effective’ or ‘teleological’ approach). Reliance on one to the detriment of the others was contrary to the jurisprudence of the International Court of Justice. Placing undue emphasis on the text, without regard to what the parties intended; or on what the parties intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more ‘effective’, irrespective of the intentions of the parties, is unlikely to produce a satisfactory result”; Nolte, G., “Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body”, in: E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention*, (Oxford University Press: Oxford, 2011), p. 140: “Articles 31–33 VCLT do not set up a rigid system, or method, of interpretation, but rather offer a range of means of interpretation whose relative importance must be assessed in a holistic fashion in the light of the particular circumstances of the case and of the treaty concerned”.

¹⁵² Gardiner, (2012), pp. 480-481: “The title of Article 31 indicates that the whole of the article is a general rule. The use of the singular ‘rule’ was deliberate. The ILC’s Commentary articulated a ‘crucible’ approach to interpretation: The Commission, by heading the article ‘General rule of interpretation’ in the singular and by underlying the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation of this article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, Article 27 [now 31] is entitled ‘General rule of interpretation’ in the singular, not ‘General rules’ in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule”; Villiger, M. E., “The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission”, in: E. Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention*, (Oxford University Press: Oxford, 2011), p. 118.

¹⁵³ Aust, (2007), p. 234: “Although at first sight paragraphs 1, 2 and 3 might appear to create a hierarchy of legal norms, that is not so: the three paragraphs represent a logical progression, nothing more. One naturally begins with the text, followed by the context, and then other matters, in particular subsequent material”; Villiger, (2011), pp. 113-114: “The order chosen in Article 31 among the various means therefore appears to be that of logic, proceeding from the intrinsic to the extrinsic, from the immediate to the remote”; Gardiner, (2012), p. 494; Sorel, J.-M., Boré Eveno, V., “Article 31 General rule of interpretation”, in: O. Corten, P. Klein (ed), *The Vienna Conventions on the Law of Treaties – A Commentary – Volume I* (Oxford University Press: Oxford, 2011), pp. 807 and 814-815.

¹⁵⁴ Aust, (2007), p. 234; Gardiner, (2012), p. 480; Sorel and Boré Eveno noted that the objective of Article 31 VCLT “is to find an interpretation that is simultaneously obvious (the ordinary meaning of terms), logical (an *acte clair*), and effective (a useful effect)”. See Sorel and Boré Eveno, (2011), pp. 808 and 816-817.

¹⁵⁵ Gardiner, (2012), p. 494; Sorel and Boré Eveno, (2011), p. 807.

¹⁵⁶ This good faith requirement flows from the *pacta sunt servanda* adage laid down in Article 26 VCLT (see Gardiner, (2012), p. 234); Villiger, (2011), pp. 108-109: “*Bona fides*, [...], prevents an excessively literal interpretation of a term, instead requiring consideration of its context and of other means of interpretation. Good faith implies consideration of the object and purpose of a treaty and plays a part in establishing the ‘acceptance’ in subparagraph 2(b) of Article 31 and in evaluating subsequent practice as in subparagraph 3(b). Finally, good faith assists in determining recourse to supplementary means of interpretation as set forth in Article 32. When interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing. Furthermore, good faith requires the parties to a treaty to act honestly, fairly, and reasonably, and to refrain from taking unfair advantage”.

¹⁵⁷ Villiger, (2011), p. 109: “The ordinary meaning of a term, as in Article 31(1), is the starting point of the process of interpretation. This is the current and normal, regular and usual meaning. A term may have a number of ordinary meanings, which may even change over time. This relativist view of hermeneutics underlines Article 31, which in paragraph 1 requires the ordinary meaning ‘to be given’ by the interpreter in good faith to the terms of the treaty. In other words, *that* particular ordinary meaning will be established which is the common intention of the parties. The relativity of the meaning of a term is confirmed by paragraph 4, which envisages the possibility of a ‘special’ meaning going beyond the ordinary meaning of terms. As the Court [referring to the International Court of Justice] stated in the *South West Africa Cases*, Preliminary Objects, the limits of this interpretation lie ‘in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained’; Aust, (2007), p. 235: “It is important to give a term its *ordinary*

its object and purpose. This starting point puts the emphasis on textuality – an objective assessment of meaning of the provision¹⁵⁸ – as primary means of interpretation.¹⁵⁹ In order to understand the depth of the provision fully, further consideration is given to the notions of context, subsequent agreement(s) and of object and purpose.

Context

Paragraph 2 of Article 31 VCLT clarifies how the context of the convention must be appreciated.

Article 31 VCLT (1969) – (2) The **context** for the purpose of the interpretation of a treaty **shall comprise, in addition to the text, including its preamble and annexes:**

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In order to assess the context of the 1995 UNIDROIT convention, attention must be devoted to its preamble and annexes (cf. chapeau of Article 31 (2) VCLT) and to any agreement made between the contracting states at the time of the conclusion of the treaty (cf. Article 31 (2) (a) and (b) VCLT) or thereafter (cf. Article 31 (3) VCLT).¹⁶⁰

Preamble

Article 31 VCLT (1969) – (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: [...]

Following this provision, the Preamble of the UNIDROIT convention – as discussed in Chapter 1 above – is thus embedded with an interpretative function, which domestic courts will have to respect in applying the provisions of the convention.¹⁶¹ This is notably due to the wording of Article 31 (2) VCLT, which gives a crucial interpretative role to it.¹⁶² In this regard, it should be recalled that the said Preamble had neither been developed by the SG,¹⁶³ nor by the CGE, and was instead drafted by the informal Working Group during the DC.¹⁶⁴ *Ergo*, it includes many terms that had purposely been avoided by the SG in drafting the PDC:¹⁶⁵ the terminology used throughout its recitals is not reserved as it refers to emotions-laden concepts, such as ‘cultural heritage’, ‘pillage’ and even ‘protection of cultural heritage’.¹⁶⁶ The SG had discarded these terms during the early stages of the convention’s elaboration on the basis that they were too sensitive to be included within the convention’s regime, notably because of the emotional connotation conveyed by it.¹⁶⁷ Nevertheless, the DC had been entrusted with the task of drafting the (still) missing Preamble when it was convened. Instead, the informal Working Group – led by the Mexican delegation – drafted it.¹⁶⁸ In doing so, it introduced the previously discarded terminology in the final draft, giving weight to it in the application of the convention.¹⁶⁹ Nevertheless, none of the added terms

meaning since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended¹⁷⁰.

¹⁵⁸ Sbolci, (2011), pp. 149-150; Le Bouthillier, (2011), p. 843.

¹⁵⁹ Sorel and Boré Eveno, (2011), p. 818; this approach was also already in use before the adoption of the VCLT. See Le Bouthillier, Y., “Article 32 Supplementary means of interpretation”, in: O. Corten, P. Klein (ed), *The Vienna Conventions on the Law of Treaties – A Commentary – Volume I* (Oxford University Press: Oxford, 2011), p. 844.

¹⁶⁰ It is also possible to take other elements into consideration in assessing the context within which the convention was adopted. In fact, the context is often interpreted as referring to the “state of mind” in which the provision ought to be envisaged. This refers thus to the intention of the parties to the interpreted treaty. See Sorel and Boré Eveno, (2011), p. 824.

¹⁶¹ UNIDROIT Secretariat, (2001), p. 490; Prott, *Commentary on the Unidroit Convention*, (1997), p. 19; Klein, (1999), p. 270.

¹⁶² Merryman, (2000), p. 271; for more information about the elaboration of the Preamble, please consult Prott, *Commentary on the Unidroit Convention*, (1997), p. 19.

¹⁶³ Nonetheless, a proposal was made at the third session of the SG to draft a preamble to the PDC in which problems linked to the illegal export of cultural materials and a possible reference to the 1970 convention could be expressed. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 4.

¹⁶⁴ Merryman, (2000), p. 271.

¹⁶⁵ Merryman, (2000), p. 271.

¹⁶⁶ Merryman, (2000), p. 271.

¹⁶⁷ Merryman, (2000), p. 271.

¹⁶⁸ See notably the commentaries about the informal Working Group established by the Mexican delegation in ‘Chapter 1 – Presentation and Applicability of the Convention’ above.

¹⁶⁹ Merryman, (2000), p. 271; as a basic tenet of public international law, it is accepted that whilst the preamble of a treaty merely has a non-binding character, its wording is relevant to establish the teleology of the convention (see Prott, *Commentary on the Unidroit Convention*, (1997), p. 19), thus unveiling the drafter’s intentions. The said intention could thus play a particularly crucial role in interpreting the

were defined, either throughout the convention's provisions or through its Annex, making the interpretation thereof problematic.

Annexes

To facilitate the legibility of the convention, the drafters annexed the list of categories given in Article 1 of the 1970 UNESCO convention to the 1995 instrument.¹⁷⁰ Therefore, the Annex to the convention is only relevant for the interpretation of the notion of 'cultural object' given in Article 2 of the 1995 convention.

Adjacent agreement(s)

Article 31 VCLT (1969) – (2) The **context** for the purpose of the interpretation of a treaty **shall comprise**, [...]

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Next to the treaty, its preamble and annexes, Article 31 (2) VCLT allows taking into account any other element that resulted from the conclusion of the treaty.¹⁷¹ Therefore, paragraph 2 (a) of Article 31 VCLT specifies that the context also includes agreements that were made at the time of conclusion of the treaty¹⁷² between all the parties to it and which are relevant to the convention (even when such agreements were made by one or more state parties but were afterwards accepted by all the other parties (cf. Article 31 (2) (b) VCLT)). This qualification requires taking into account any other document of direct interpretative significance that is indicative of the agreement reached between the parties thereto.¹⁷³ With regard to the 1995 UNIDROIT convention, such agreements are to be found in the Acts and Proceedings resulting from the Diplomatic Conference towards the adoption of the 1995 UNIDROIT convention¹⁷⁴ and in the explanatory report to the convention¹⁷⁵ (which have both been included within the present research).

Subsequent agreement(s)

Article 31 (3) VCLT additionally specifies that subsequent agreements or subsequent practices that have been adopted between the state parties after the conclusion of the convention or any other relevant rules of international law applicable between the parties can also be taken into account together with the context.

Article 31 VCLT (1969) – (3) There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

This paragraph – which is of equal value to paragraphs 1 and 2 of the same provision¹⁷⁶ – prescribes the use of additional elements to take into account in order to assist in determining the meaning of the provision(s) interpreted. The complementarity of the article allows furthering the meaning of the interpreted provision that results from the application of Article 31 (1) VCLT.¹⁷⁷ On the basis of Article 31 (3) (a), two additional mechanisms regarding the interpretation of the 1995 UNIDROIT convention require consideration.

context of the convention, a reason why the Preamble's wording bears considerable weight in the convention's application (Klein, (1999), p. 270).

¹⁷⁰ For more details as to this point, see 'Chapter 1 – Presentation and Applicability of the Convention' above.

¹⁷¹ Gardiner, (2012), p. 482; Aust, (2007), p. 234.

¹⁷² For more details about the meaning to be given to the notion of 'conclusion', see Gardiner, (2012), p. 484.

¹⁷³ Gardiner, (2012), p. 481.

¹⁷⁴ Text available at <https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-acts-e.pdf>, last retrieved on 01.03.2018.

¹⁷⁵ Text available at <https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf>, last retrieved on 01.03.2018.

¹⁷⁶ Gardiner, (2012), p. 485.

¹⁷⁷ Gardiner, (2012), p. 481.

Interpretative function of the special committee on the practical operation of the convention

As will be discussed in further detail below, Article 20 of the 1995 convention entitles the President of UNIDROIT to request the establishment of a special committee in order to ‘review the practical operation’ of the convention.¹⁷⁸ Despite the difficulties that are inherent in the establishment of an international review body,¹⁷⁹ this implies that the committee – alongside the other supervisory functions it is endowed with – can also review the interpretation that is given to the provisions of the 1995 UNIDROIT convention.¹⁸⁰ In this respect, it remains unclear whether this mechanism is as efficient as those that were established by the 1976 convention of San Salvador of the *Organización de los Estados Americanos*, and of the judicial review of the Court of Justice of the European Union that is available for both Directive 93/7/EEC and Directive 2014/60/EEC.¹⁸¹ This lack of clarity notably stems from the fact that no interpretative questions were raised during the first special committee that had been set up to review the practical operation of the 1995 UNIDROIT Convention (see below), leaving the interpretative function of the special committee unavowed to date.

Principles on consultation and cooperation through UNESCO

Enhanced coordination with respect to the interpretation of the convention can, additionally, be achieved through UNESCO consultations.¹⁸² This may also be done by the adoption of a set of principles on consultation and cooperation between states, which would constitute the first step towards the achievement of a better application of the convention.¹⁸³ So far, this mechanism has not been relied on for the purposes of the 1995 convention.

Object and purpose

The reference to the object and purpose of a treaty made by Article 31 (1) VCLT is meant to confirm the interpretation given to the interpreted provisions.¹⁸⁴ An interpretation that conflicts with the object and purpose of the interpreted convention will thus be deemed to be incorrect.¹⁸⁵ As such, this aspect of a treaty secures its *effet utile*.¹⁸⁶ The object and purpose of a treaty is to be inferred through evaluating the document in its entirety,¹⁸⁷ but is also traditionally inferred from the treaty’s preamble.¹⁸⁸ With regard to the 1995 UNIDROIT convention, the object and purpose has been discussed extensively in ‘Chapter 1 – Presentation and Applicability of the Convention’ of the present disquisition. For more information in this regard, the reader is advised to consult the said chapter.

(2) Supplementary means of interpretation

Article 32 VCLT foresees additional means of interpretation that can be resorted to when the text of the convention is not clear.¹⁸⁹

Article 32 VCLT (1969) – Recourse may be had to **supplementary means of interpretation**, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

¹⁷⁸ The reason behind discharging this obligation upon the president of UNIDROIT is that the negotiating states that took part in the drafting process of the convention thought that UNIDROIT could play “an active role in assuring the functioning of the Convention”, see Prott, *Commentary on the Unidroit Convention*, (1997), p. 85.

¹⁷⁹ Voulgaris, (2003), p. 548.

¹⁸⁰ Lalive, ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, (1997), p. 25, footnote 40.

¹⁸¹ Voulgaris, (2003), p. 548.

¹⁸² Nafziger, (2000), p. 506; Voulgaris, (2003), p. 550.

¹⁸³ Nafziger, (2000), pp. 507-508.

¹⁸⁴ Aust, (2007), p. 235; Villiger, (2011), p. 110.

¹⁸⁵ Aust, (2007), p. 235.

¹⁸⁶ Villiger, (2011), p. 110, citing the *ut res magis valeat quam pereat* adage. See also Gardiner, (2012), p. 496: “Finding a treaty’s object and purpose is a somewhat open-ended operation. The ILC and the ICJ have linked it with the good faith requirement in the opening words of the general rule to produce a ‘principle of effectiveness’. This principle has two aspects: (i) it incorporates the Latin maxim preferring a meaning that ascribes some effect to a term rather than no effect (*ut res magis valeat quam pereat*); and (ii) it imports a teleological element into the interpretation”. See also Sorel and Boré Eveno, (2011), pp. 816, 818 and 831-832.

¹⁸⁷ Hollis, D. B., “Initial Decisions on Treaty-Making”, in: D. B. Hollis (ed), *The Oxford Guide to Treaties*, (Oxford University Press: Oxford, 2012), pp. 657-658.

¹⁸⁸ Villiger, (2011), p. 110.

¹⁸⁹ When the text is clear, there seems to be no need to have resort to the additional means of interpretation. See Sorel and Boré Eveno, (2011), p. 819.

Contrary to Article 31 VCLT, which is formulated in compulsory terms and is directed at determining the meaning of the interpreted text,¹⁹⁰ Article 32 VCLT – addressing the intention of the parties to the convention¹⁹¹ – is framed as an optional means of interpretation.¹⁹² Despite the difference in formulation between the two, the distinction is merely indicative of priorities in the means of interpretation, and does not pertain to constrain the interpretation of treaty provisions to Article 31 VCLT¹⁹³ or even to establish a hierarchy between the two articles.¹⁹⁴ In fact, Article 32 VCLT makes it possible to take the preparatory work¹⁹⁵ and the circumstances surrounding the conclusion of the treaty¹⁹⁶ into account in order to confirm the interpretation of the convention following Article 31 VCLT,¹⁹⁷ or for the purposes of clarifying ambiguous, obscure, manifestly absurd or unreasonable results.¹⁹⁸ As such, there is technically no subordination between the provisions.¹⁹⁹

Preparatory work

Both the work of the Study Group and of the Committee of Governmental Experts has been reported by UNIDROIT on its website.²⁰⁰ These documents ought to be taken into consideration in the analysis of the preparatory work.²⁰¹ Additionally, the institute has also made the work of the Diplomatic Conference publicly available on its website (see Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria,

¹⁹⁰ Aust, (2007), p. 244; Gardiner, (2012), p. 487.

¹⁹¹ Aust, (2007), p. 244.

¹⁹² Gardiner, (2012), pp. 482 and 487.

¹⁹³ Gardiner, (2012), p. 482; Le Bouthillier, (2011), p. 842: “The ILC explained that Article 32 ‘does not provide for alternative, autonomous means of interpretation but only for means to supplement an interpretation governed by the principles’ contained in Article 31”.

¹⁹⁴ Sbolci, L., “Supplementary Means of Interpretation”, in: E. Cannizaro (ed), *The Law of Treaties Beyond the Vienna Convention*, (Oxford University Press: New York, 2011), pp. 147-148; Gardiner, (2012), p. 490: “Just as the ‘crucible’ approach does not see the elements of the general rule as hierarchical or sequential (other than as a sequence of thoughts which may be reiterated in a different order), so too the distinction between the general rule and supplementary means was not slotted into any particular sequence”.

¹⁹⁵ Villiger, (2011), p. 112, referring to the preparatory work as: “all documents relevant to the forthcoming treaty and generated by the parties during the treaty’s preparation up to its conclusion”; see also Aust, (2007), p. 246: “The International Law Commission did not seek to define what is included in the *travaux*, but it is generally understood to include written materials, such as successive drafts of the Treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries”; Le Bouthillier, (2011), p. 852, listing elements that ought to be taken into consideration in assessing the preparatory works, such as “official records of the negotiations between the parties; draft texts proposed during the negotiations; statements made by State representatives during the debates; diplomatic exchanges; and interpretations formulated by the president of the drafting committee and not contested”; an interesting discussion about the meaning of the concept *travaux préparatoires* can be found in Sbolci, (2011), p. 152-154; It is, nonetheless, important for the elements taken into consideration to have existed before the conclusion of the convention. See Le Bouthillier, (2011), p. 854; Gardiner, (2012), p. 488: “So the preparatory work must be reasonably limited to permanent records (the *travaux préparatoires*). The ILC sensibly declined to attempt a universal definition of such preparatory work. The ways in which treaties are negotiated and the modes of recording their developments are too multifarious. But the ILC followed Waldock’s recommended approach: Recourse to *travaux préparatoires* as a subsidiary means of interpreting the text, as already indicated, is frequent both in State practice and in cases before international tribunals. Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation. They are not, except in the case mentioned [agreements, instruments, and other documents ultimately covered elsewhere in the Vienna rules], an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understandings of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties” and “The cardinal principle for admissibility and use of preparatory work is that its cogency depends on how far it provides evidence of a ‘common understanding of the parties as to the meaning’ when weighed against other evidence” (*idem*). See also Le Bouthillier, (2011), p. 856 and ff.

¹⁹⁶ Sbolci, (2011), pp. 156-157: “There is no apparent hierarchical order among the supplementary means. Recourse to the preparatory works is more frequent, but this does not mean that it prevails over the other supplementary means, including the circumstances characterizing the conclusion of the treaty. Article 32 establishes that recourse may be had to supplementary means of interpretation, ‘including preparatory work of the treaty and the circumstances of its conclusion’. This additional category of supplementary means could overlap, at least partially, with the preparatory works. More specifically, the circumstances of conclusion could be included within the notion of preparatory works because they may reflect the intent of the contracting parties as determined by these circumstances. Generally, however, preparatory works can reflect only some of the circumstances in which a treaty is concluded. Consequently, the use of this further category of supplementary means can be considered independently”.

¹⁹⁷ Aust, (2007), pp. 244-245; Sbolci, (2011), p. 147 referring to the work of Special Rapporteur Waldock and p. 149; Le Bouthillier, (2011), p. 846.

¹⁹⁸ In which case the clarification does not serve to confirm the meaning of the interpreted provision, but instead of determining the meaning that it ought to be embedded with. See Aust, (2007), p. 245; Sbolci, (2011), p. 147 (again referring to the work of Waldock) and p. 149; Le Bouthillier, (2011), p. 846.

¹⁹⁹ Sbolci, (2011), p. 156.

²⁰⁰ See Study LXX – Doc. 1 to Doc. 50, available at <http://www.unidroit.org/preparatory-work-cp>, last retrieved on 01.03.2018.

²⁰¹ See Le Bouthillier, (2011), pp. 853-854 for a discussion about the inclusion of the work of committees of experts to the preparatory work of a treaty.

Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings, Rome, June 1995 (1996).²⁰²

Circumstances of the convention's conclusion

Because the convention is formulated in broad terms, it is possible to interpret it either extensively or restrictively.²⁰³ In doing so, one important circumstance must be taken into consideration: whilst there was clear agreement between the state parties with regard to Chapter II of the convention, Chapter III was heavily disputed. Thenceforth, it is clear that – contrary to Chapter II – a restrictive interpretation should be given to the provisions of Chapter III when applying the provisions of the convention.²⁰⁴

Other elements

Because Article 32 VCLT is not exhaustive,²⁰⁵ additional means of interpretation that can help in the process of interpreting are the preparatory work of an earlier version of the convention, interpretative declarations issued by the contracting states to the convention and that are not to be seen as reservations, “rational techniques of interpretation (such as *per analogiam*, *e contrario*, *contra proferentem*, *eiusdem generis*, *expressio unius est exclusio alterius*, *lex posterior derogate legi priori*; *lex specialis derogate legi speciali*, *in dubio mitis*, *interpretation in favorem debitoris*, etc.); [...] any non-authentic translations of the authenticated text”²⁰⁶ and the unilateral behavior of the parties after the conclusion of the convention.²⁰⁷

Next to the preparatory works of the convention, it must be noted that the drafters emphasised the importance of using an explanatory report in conjunction with the convention throughout the entire drafting process.²⁰⁸ As was correctly noted by the members of the CGE during its third session, this explanatory report has no official status.²⁰⁹ Nonetheless, for the sake of keeping the convention simple, the drafters gave an important supplementary role to the report in interpreting the convention. Therefore, as submitted by Renold in 1997, it is desirable to consult both the *travaux préparatoires* listed, as well as the explanatory report prepared by UNIDROIT,²¹⁰ in order to understand the workings of the convention correctly.²¹¹

(3) Interpretation of treaties authenticated in two or more languages

As prescribed by the convention's final paragraph, the 1995 instrument is authenticated in two languages – French and English – both being of equal value.²¹² Following Article 33 (1) VCLT, the texts in these two languages are authoritative.²¹³ Consequently, the other non-authentic versions²¹⁴ must be interpreted in accordance with the wording posited by these two authenticated texts.²¹⁵

²⁰² <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-acts-e.pdf>, last retrieved on 01.03.2018.

²⁰³ Droz, (1994), pp. 48-49.

²⁰⁴ Droz, (1994), p. 49.

²⁰⁵ Sbolci, (2011), p. 158; Le Bouthillier, (2011), pp. 851 and 861.

²⁰⁶ Villiger, (2011), pp. 112-113. Villiger notes that these supplementary means of interpretation are only helpful in the process of interpretation in that “The extent to which they are able to do so will depend on their cogency, in particular their accessibility, their direct relevance to the treaty terms at issue, the consistency among the means found, the number of parties involved in the evolution of the particular means, and the reactions of the other parties thereto”; see also Aust, (2007), pp. 248-249; Le Bouthillier, (2011), p. 863.

²⁰⁷ Sbolci, (2011), p. 158; Le Bouthillier, (2011), p. 861, excluding uniform practices by all States parties as these practices will fall within the ambit of Article 31 (3) (b) VCLT.

²⁰⁸ See for example UNIDROIT, (1992), Study LXX – Doc. 30, pp. 10-11. See also ‘Agenda Item 6: Consideration of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Objects (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/5; CONF. 8/5 Add. 1 and 3; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 1 and 3), in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/S.R. 1, 13 June 1995, p. 159: “The CHAIRMAN, in response to the representative of Thailand, expressed the hope that, in applying the future Convention, national courts would examine the Explanatory Report of the Secretariat and the *travaux préparatoires* in order to divine its meaning”.

²⁰⁹ UNIDROIT, (1993), Study LXX – Doc. 39, p. 18.

²¹⁰ <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf>, last retrieved on 01.03.2018.

²¹¹ Renold, (1997), pp. 14-15.

²¹² As is noted in the ‘Draft Final Provisions Capable of Embodiment in the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with Explanatory Notes’ drawn up by the Unidroit Secretariat, these two languages are the working languages of UNIDROIT and the authentic text of other conventions produced by UNIDROIT are written in these two languages. See Presidenza del Consiglio dei Ministri, (1996), CONF. 8/4, January 1995, p. 47

²¹³ Papaux, A., Samson, R., “Article 33 Interpretation of treaties authenticated in two or more languages”, in: O. Corten, P. Klein (ed), *The Vienna Conventions on the Law of Treaties – A Commentary – Volume I* (Oxford University Press: Oxford, 2011), p. 875, referring to the first sentence of Article 33 (1) VCLT.

²¹⁴ It should be noted that UNESCO has provided translations of the authentic texts into Arabic, Chinese, Russian and Spanish, the other official languages of the United Nations. See Part III – Promoting activities by the UNIDROIT Secretariat’, UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally

Article 33 VCLT (1969) – (1) When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

(2) A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

(3) The terms of the treaty are presumed to have the same meaning in each authentic text.

(4) Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

It should be stressed that there are some minor discrepancies between the English and the French authenticated texts that require cautiousness in interpreting the convention.²¹⁶⁻²¹⁷ Whilst Article 33 VCLT affords the means to bridge the differences in genius between authenticated texts drafted in different languages,²¹⁸ it is unclear whether the recorded differences ought to be constructed differently,²¹⁹ whether it suffices to read both texts and rely on the presumption of unity laid down in Article 33 (3) VCLT or whether one must adopt the meaning that best reconciles both authentic texts, as prescribed by Article 33 (4) VCLT.²²⁰

B. Monitoring

As specified above, two mechanisms have hitherto been established so far to supervise the application of the convention: 1. the convening of special committees to review the practical operation of the convention, and 2. the establishment of a 1995 UNIDROIT Convention Academic Project.

1. SPECIAL COMMITTEE TO REVIEW THE PRACTICAL OPERATION OF THE CONVENTION

Article 20 of the convention lays down the possibility to summon a follow-up committee in order to assess the practical operation of the convention.

Article 20 UNIDROIT Convention (1995) – The President of the International Institute for the Unification of Private Law (UNIDROIT) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention.

The wording of Article 20 clearly makes this mechanism optional. As, such, it ‘may’ be possible to convene a special committee, even at regular intervals if needed. This periodicity was not randomly considered: the DC expected UNIDROIT to follow-up the convention actively, thus prescribing the convening of a special committee

Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming; See also [http://www.unidroit.org/other-languages-cp/\[language\]](http://www.unidroit.org/other-languages-cp/[language]), last retrieved on 01.03.2018. For a direct link to one of the following target language, replace the textbox [language] by the one of the following options: Arabic, Chinese, Dutch, German, Greek, Italian, Portuguese, Russian, Spanish, Swedish, Ukrainian or Vietnamese.

²¹⁵ UNIDROIT Secretariat, (2001), p. 562.

²¹⁶ For example, it was established in Chapter 1 above that the terms ‘biens culturels’ – reflecting the terminology ‘cultural property’ in English was favoured instead of ‘objets culturels’ (see also UNIDROIT, (1990), Study LXX – Doc. 18, pp. 8-9). Similarly, the English version of the convention requires for the payment of ‘fair and reasonable compensation’ to a possessor that did not know, nor ought to have known that the cultural object was stolen and that can prove having exercised due diligence at the time of the acquisition. Instead, the French version requires the payment of an ‘indemnité équitable’.

²¹⁷ As noted by Gardiner: “[...] the ILC recognized that discrepancies between languages are bound to occur: Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of languages, the absence of a complete consensus ad idem, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts [emphasis added]. The result is that the provisions on languages do no more than raise some presumptions, leaving considerable discretion to the interpreter”.

²¹⁸ In this regard, see Papaux and Samson, (2011), p. 872.

²¹⁹ Papaux and Samson, (2011), p. 874: “While the unity of the treaty requires a solution to the problem of divergences in the genius of languages, this basic premise does not entail that any (formal) difference in the text will amount to a divergence of meaning. In other words, all divergences are not all relevant. As paragraph 4 of Article 33 implies, only a ‘difference of meaning’ arising from a comparison of authentic texts (in this specific interpretive context as compared to that of Arts 31 and 32) will be relevant”.

²²⁰ In this regard, see Aust, (2007), p. 254; see also Papaux and Samson, (2011), p. 880: “The ‘object and purpose of the treaty’ must be considered with a view to *reconciling* texts, not, as in Articles 31 and 32, to simply *discovering* a text’s meaning. Comparison and reconciliation are required by the principle of unity of the treaty, which underpins the first part of paragraph 1 and the presumption, in paragraph 3, that the terms of authentic texts have the same meaning. This principle permeates the spirit of the material rule of reconciliation found at paragraph 4 of Article 33. If no text prevails (either by virtue of the treaty itself or by agreement of the parties (para. 1)) and if (cumulatively) applying the general principles of Article 31 and 32 does not solve the divergence, the correct interpretation is the one which, *in light of the ratio legis* (ie the object and purpose of the treaty), ‘best’ harmonizes the conflicting texts, in reality the ‘conflicting interpretations’”.

at regular intervals.²²¹ Therefore, the Secretariat of UNIDROIT considers that Article 20 leaves enough flexibility to the President of the institute to determine the frequency of the meetings of the special committee in order to monitor the convention's application.²²² What is more, the Secretariat specified that it will convene a meeting through the President at any moment when convening the special committee is relevant to the proper monitoring of the application of the convention.²²³ Alternatively, if UNIDROIT's President does not convene a committee, five state parties can do so.²²⁴

The possibility to invoke a special committee was introduced by the Mexican and Turkish delegations, who were inspired by Article 42 of the *Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* (signed on 29 May 1993).²²⁵ The use of these special committees is not foreign to the international community: several inter-governmental organisations – including the Council of Europe, UNIDROIT and the Hague Conference on Private International Law – have established these committees to review the effectiveness and continuity of the international instruments that they have adopted.²²⁶ These committees have been referred to as 'special commission', 'permanent committees', 'convention committees' or – more recently with regard to UNIDROIT – 'evaluation conferences'.²²⁷ In the realm of cultural property, follow-up committees are important to monitor closely the ever-changing and fickle art market.²²⁸ More particularly, the mechanism instated by Article 20 entitles the follow-up committee to clarify ambiguous aspects of the convention or to cope with unexpected issues that materialise in the course of applying the convention.²²⁹ Hence, the drafters of the 1995 convention included the possibility to convoke special follow-up committees as an appropriate means to monitor the application of the convention.²³⁰ Thus, it allows civil servants of state parties to meet so as to discuss problems that are present in the operationalisation of the convention.²³¹

Hitherto, the special committee has met only once on 19 June 2012 in Paris:²³² during the 90th session of the Governing Council of UNIDROIT – which took place between 9-11 May 2011 in Rome –, the Governing Council invited the President of UNIDROIT to convene the first special committee to review the practical operation of the 1995 convention on the basis of Article 20 thereof.²³³ Sixteen years after the convention's inception, this invitation was the first triggering of Article 20 to date. The extraordinary meeting was subsequently held in Paris on 19 June 2012 at the Headquarters of UNESCO.²³⁴ Because it was the first time that the committee was convened, the organisation and conduct of the event was marred with uncertainties; in fact, since the 1995 convention is silent as to the composition of the follow-up committees,²³⁵ the determination of it was seen as one of the prerogatives of UNIDROIT's President.²³⁶ In order to reach the biggest audience possible, the Governing Council of UNIDROIT found it appropriate to send invitations to all state parties and signatory

²²¹ UNIDROIT Secretariat, (2001), p. 562.

²²² UNIDROIT, 'Summary of the conclusions of the Governing Council (90th session)', 9-11 May 2011, Rome (Unidroit 2011 – C.D. (90) Misc. 3); Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, B. Periodicity of the meetings', in UNIDROIT (2012), forthcoming.

²²³ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, B. Periodicity of the meetings', in UNIDROIT, (2012), forthcoming.

²²⁴ UNIDROIT Secretariat, (2001), p. 562.

²²⁵ 'Working Papers Submitted to the Final Clauses Committee', in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.2/W.P. 11 Corr. 2, 15 June 1995, p. 321.

²²⁶ UNIDROIT Secretariat, (2001), p. 562; Droz, (1997), p. 274; See 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee', in UNIDROIT, (2012), forthcoming.

²²⁷ It should be noted that special follow-up committees have been used by several inter-governmental organizations such as the Hague Conference on Private International Law and the Council of Europe. These committees have respectively been referred to as 'special commission' for the former organization, and 'permanent committees' or 'Convention committees' for the latter. More recently, UNIDROIT has created legal instruments prescribing the use of 'evaluation conferences' entrusted with the examination of, *inter alia*, the practical application of these instruments. See 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee', in UNIDROIT, (2012), forthcoming.

²²⁸ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee', in UNIDROIT, (2012), forthcoming.

²²⁹ Doyal, (2000-2001), p. 671.

²³⁰ UNIDROIT Secretariat, (2001), p. 562.

²³¹ Droz, (1997), p. 274.

²³² No periodic arrangement flowed from this meeting, making it the first and last planned committee to date.

²³³ UNIDROIT, 'Summary of the conclusions of the Governing Council (90th session)', 9-11 May 2011, Rome (Unidroit 2011 – C.D. (90) Misc. 3); See also 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, A. Legal Basis', in UNIDROIT, (2012), forthcoming.

²³⁴ The findings of the special committee have not been reported to date, although these were added to the present disquisition.

²³⁵ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, D. Composition', in UNIDROIT, (2012), forthcoming; UNIDROIT Secretariat, (2001), p. 562.

²³⁶ UNIDROIT Secretariat, (2001), p. 562.

states to the convention and to all the members of both UNESCO and UNIDROIT.²³⁷ Additionally, intergovernmental and non-governmental organisations having an interest in the operation of the 1995 convention were also invited.²³⁸ With regard to the membership of the committee, this point was not addressed by the convention.²³⁹ Instead, the participants in the special committee were given discretion as to issues of membership and the frequency of future meetings.²⁴⁰ Furthermore, the special committee's mandate is equally unaddressed by the convention. As no specific mandate for follow-up committees had been laid down in the treaty, it remained possible for the state parties to clarify the specificities of the mandate for the first meeting during the event itself.²⁴¹ Nevertheless, the participants did not make use of this prerogative²⁴² and the exact extent of the mandate of follow-up committees to be established on the basis of Article 20 remains, as a result, unclear. Article 20 merely states that the role of the special committee is "to review the practical operation of this Convention".²⁴³ In 2001, UNIDROIT's Secretariat foresaw that the possibility to invoke a special committee could be used as a mechanism for monitoring the case law of the national authorities entrusted with claims in restitution or requests for return under Article 16 of the convention.²⁴⁴ Furthermore, it also considered that the special committee would be an appropriate forum to draft proposals that morally complement the regime of the convention or to prescribe recommendations regarding its application.²⁴⁵ What is more, it was considered that Article 20 implies that state parties have the opportunity to epitomise the mechanisms laid down in its provisions and list the implications that flow from adhesion to the text.²⁴⁶ Henceforth, the special meeting is to function as a forum to exchange experiences in the application of the convention and it gives the opportunity to states to discuss the difficulties that they face in implementing the convention or in connection with the interpretation thereof.²⁴⁷ Finally, it should be noted that the date and location of the venue was meticulously selected: both UNIDROIT and UNESCO considered it appropriate to organise this first meeting of the special committee coterminously with two important meetings relating to the restitution and return of cultural property. The first meeting gathered the state parties to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* in their Second Meeting of State Parties thereof,²⁴⁸ whilst the second meeting concerned the 18th session of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in the case of Illicit Appropriation*, which were respectively held on the 20-21 of June and on the 22 of June 2012.²⁴⁹ Through these various assemblies, it was possible for the states that took part in the discussion to determine the effectiveness of the instated regimes to curtail the illicit traffic in cultural property.²⁵⁰ The organisation of the first special committee to review the practical operation of the convention during the two above-mentioned gatherings was a particularly astute choice for measuring the role and effectiveness of the 1995 convention amidst the international legal framework.

²³⁷ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, D. Composition', UNIDROIT, (2012), forthcoming.

²³⁸ *Idem*.

²³⁹ *Idem*.

²⁴⁰ At the launch of this first meeting, the participating states were entitled to deal with committee membership aspects and were further invited to make their preferences as to the composition of the committees and as to the frequency of future gatherings known during each individual meeting. See 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, D. Composition', in UNIDROIT, (2012), forthcoming; During the gathering, China proposed holding a special committee at the same time that the meetings relating to the 1970 convention were organised, and to borrow the same committee structure as the one used for those meetings. See Chinese Delegation, 'Observations / Questions of participants / Discussions', in UNIDROIT, (2012), forthcoming. Nonetheless, the same delegation conceded that further negotiations with UNESCO were needed in order to put forward concrete plans in this regard (*idem*).

²⁴¹ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, E. Mandate', in UNIDROIT, (2012), forthcoming.

²⁴² 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, E. Mandate', in UNIDROIT, (2012), forthcoming.

²⁴³ UNIDROIT Secretariat, (2001), p. 562.

²⁴⁴ UNIDROIT Secretariat, (2001), p. 562.

²⁴⁵ UNIDROIT Secretariat, (2001), p. 562.

²⁴⁶ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, E. Mandate', in UNIDROIT, (2012), forthcoming.

²⁴⁷ *Idem*.

²⁴⁸ See UNESCO, 'Second Meeting of State Parties to the 1970 Convention', available at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/meeting-of-states-parties/2nd-msp-2012/>, last retrieved on 01.03.2018.

²⁴⁹ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, C. Schedule', in UNIDROIT, (2012), forthcoming; Estrella Faria, J. A., 'Welcome address', in UNIDROIT, (2012), forthcoming.

²⁵⁰ 'Part I – The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, III. Special committee, C. Schedule', in UNIDROIT, (2012), forthcoming.

Article 20, alongside Article 17 of the convention, demonstrates that the drafters intended to give a special role to UNIDROIT in overseeing the application of the 1995 Convention.²⁵¹ In order to guarantee effectiveness and continuity in the convention's application, UNIDROIT demonstrated the willingness to participate in on-going discussions on the effectiveness of existing instruments in the field of the international protection of cultural property, including the 1995 UNIDROIT convention.

2. 1995 UNIDROIT CONVENTION ACADEMIC PROJECT

Next to the pragmatic approach offered by the convening of special committees to review the practical operation of the convention, UNIDROIT has recently decided to oversee the convention's application from a more theoretical perspective. As such, it unofficially decided in early 2017 to establish a 1995 UNIDROIT Convention Academic Project – also known as the UCAP –, to be officially launched in autumn 2017. The UCAP is designed to assist the Task Force in promoting the ratification of the 1995 UNIDROIT convention, which will convene annually in New York.²⁵² As noted by UNIDROIT in relation to the new project: “The 1995 UNIDROIT Convention Academic Project (‘UCAP’) seeks to assist scholars, students, practising lawyers, judges, other government officials, as well as art market players, such as art collectors, dealers, auction houses and museums by providing information about the Convention”. Recognising the importance of education in tackling the illicit trafficking of cultural property, the project is primarily designed to raise and increase awareness and knowledge as to the 1995 convention. Secondly, it aims to promote research on cultural heritage law and to link these various researchers, universities or other entities holding curricula on cultural heritage law together to foster knowledge about the convention. More information about the project can be found at the following website: <http://1995unidroitcap.org>.

²⁵¹ Protz, *Commentary on the Unidroit Convention*, (1997), p. 85.

²⁵² See UNIDROIT, ‘Promoting and Strengthening the International Legal Framework for the Protection of Cultural Heritage – The 1995 Convention. New York, UN Headquarters, 28 February 2017.’, available at <http://www.unidroit.org/537-events/2134-promoting-and-strengthening-the-international-legal-framework-for-the-protection-of-cultural-heritage-the-1995-convention-new-york-un-headquarters-28-february-2017>, last retrieved on 01.03.2018.

Summary

Interaction between Chapter II and Chapter III – Summarising the above considerations, it should be noted that when the situation is simultaneously one of theft and illegal export, contracting states may concurrently rely on both Chapters II and III of the convention. It is, nonetheless, important to note that a request for return based on Chapter III is conditional,²⁵³ whilst a claim in restitution of a stolen cultural object automatically leads to its restitution.²⁵⁴⁻²⁵⁵

Reservations – Article 18 of the convention does not allow contracting states to formulate reservations to the convention’s provisions. Article 18 gives an ‘all-or-nothing’ character to the convention to ensure uniformity in the application of the minimum standard posited in order to protect the fragile equilibrium that was reached by the drafters. Hence, reservations are discarded to ensure the effectiveness of the convention in tackling the illicit trafficking of cultural objects. Furthermore, the impossibility to formulate reservations coincides with the object and purpose of the convention, which is to fight the illicit trafficking of cultural goods. Instead of reservations, contracting states may formulate declarations to clarify the application of the convention for their domestic courts. These declarations cannot weaken the minimum threshold for restitution or return set by the convention or may not discard any of its provisions and, consequently, they may not have a similar effect to reservations.²⁵⁶

Direct applicability – With the exception of some of its articles, the convention – and more particularly Chapters II and III – is self-executing. In fact, implementation is not the *sine qua non* of the application of the convention, but it is recommended with regard to the procedures prescribed for introducing a claim in restitution or a request for return, or to clarify some of the unsettled concepts of the convention. To facilitate the said transposition, the UNIDROIT Secretariat provides tailor-made expertise to help states implement the provisions of the 1995 convention adequately. What is more, a Task Force to promote the ratification of the UNIDROIT convention was established in February 2017 with the view to secure a higher incidence of ratification of the convention.²⁵⁷

Modulation – Because the convention establishes a minimum standard of restitution and return, it is possible for contracting states to go further than the regime posited by it. Article 9 (1) makes it possible for such states to adopt rules more favourable to restitution and / or return and thus to go beyond the minimal regime established by the convention. Furthermore, it provides flexibility to contracting states because the drafters never intended for states with rules more favourable to restitution and / or return to retrograde their domestic laws so as to bring these in line with the standards laid down in the convention. Despite the broad formulation of Article 9 (1), rules that are more favourable to restitution or return include: applying the convention to claims of a purely national character; retracting the payment of compensation to an acquirer in good faith (only when the domestic law of the contracting state already foresees that no compensation is to be paid); extending the period of time for recovering the stolen property; adopting longer periods for introducing the demand in return; making it possible to have illegally exported cultural object returned without having to demonstrate that the export constituted a significant impairment to the interests listed in Article 5 (3) (a)-(d) or that the object has a significant cultural importance to the requesting state; applying the regime of the convention to the exempted situations foreseen in Article 7 or imputing the costs of return differently under Article 6 (4). Additionally, it is possible for a contracting state to extend the temporal scope of the convention by applying it to thefts or illegal exports that took place before the adoption of, or the adhesion to, the convention. Nonetheless, due to the minimum uniform regime established by the convention, it is for example not possible for a contracting state to be more generous to an acquirer in good faith. What is more, in order for the modulation based on Article 9 (1) to be valid, the contracting state that relies on this mechanism must inform the Depositary of the convention and the other contracting states. To do so, it must notify the other parties by means of declaration, in accordance with Article 15 of the convention.²⁵⁸

The modulation adopted by the contracting state will, nonetheless, only be relevant for the domestic courts of the derogating state and it will not always be recognised by the other parties. Therefore, Article 9 (2) functions as a public order defence, as it allows a contracting state in which recognition and enforcement of a

²⁵³ Cf. Article 5 (3) of the convention.

²⁵⁴ Cf. Article 3 (1) of the convention.

²⁵⁵ Cf. section A. 1. above.

²⁵⁶ Cf. section A. 2. above.

²⁵⁷ Cf. section A. 3. above.

²⁵⁸ Cf. section A. 4. (1) above.

judgment delivered in another contracting state is sought to refrain from giving effect to the parts of the judgment that are the result of the modulation of the convention's provisions by the other contracting state. It is unclear what the added value of Article 9 (2) is since the convention is not intended to regulate matters of recognition and enforcement of judgments in foreign jurisdictions. Furthermore, it does not affect these matters in any way. This renders paragraph 2 of Article 9 rather idle.²⁵⁹

Interpretation – The convention was drafted in general terms and many of the concepts used throughout its letter are undefined. For the sake of not overburdening its regime with definitions, it was decided to leave the interpretation of these notions to the domestic courts of contracting states seized by a contention. It remains unclear whether these courts will apply their conflict-of-law rules to define the notions in accordance with a specific domestic law, or whether these concepts must be given an autonomous definition.

However, the danger that arises from leaving discretion to domestic judges in interpreting the convention is that the minimum uniformity that the convention is to establish might be jeopardised as a result. Irrespective of how interpretation is effectuated, domestic courts should not forget that the convention is, first and foremost, to be interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties. As such, Article 31 (1) VCLT requires that an interpretation of the convention must be made in good faith, in accordance with the ordinary meaning to be given to the terms used throughout its provisions, in the light of the convention's context and its object and purpose. Article 31 (2) VCLT clarifies what is to be understood by 'context'. As such, both the Preamble and the Annex to the 1995 convention constitute crucial parts. In this regard, it must be emphasised that the Preamble was adopted by the informal Working Group that gathered at the end of the DC. This group introduced emotionally-laden terminology into the convention that the Study Group had previously discarded for fear of interpretational problems inherent to the use of certain terminology. Unlike the Preamble, the Annex to the convention relates only to Article 2 of the convention, as it merely contains the list of interests that are relevant to the definition of cultural objects. Alongside the Preamble and Annex, Article 31 (2) VCLT also specifies that adjacent agreements made in connection with the conclusion of the convention that were established by all contracting states – or by one or more contracting states, but that were subsequently adopted by all the parties – are, for the purpose of Article 31 (1) VCLT, also part of the context. No such agreement has been adopted in relation to the 1995 UNIDROIT Convention. Furthermore, Article 31 (3) VCLT adds that any subsequent agreement as to the convention's interpretation or application, any practice in the convention's application that establishes an agreement between parties in interpreting the convention, or any relevant rules of international law applicable to the relationship between the parties are also to be assimilated to the context of the convention. In this regard, both the Special Committee that was set up to review the practical operation of the convention and the principles on consultation and cooperation through UNESCO constitute two mechanisms that could establish an agreement between the parties in accordance with Article 31 (3) (a) VCLT. Moreover, the object and purpose of the convention have been explained in greater detail in 'Chapter 1 – Presentation and Applicability of the Convention' above. To complement Article 31 VCLT, Article 32 VCLT specifies that it is possible to take the circumstances of the conclusion of the convention and the preparatory work into account. Following this article, this is notably needed either to confirm the meaning resulting from the application of Article 31 VCLT, or to determine the meaning of the convention when the application of Article 31 VCLT leaves the said meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. In this regard, the bulk of the convention's preparatory work and the complementary explanatory report have been made available on UNIDROIT's website. Moreover, it must be emphasised that the circumstances surrounding the conclusion of the convention are predictive of a differentiation in application of Chapters II and III: whilst there was a general agreement between the drafters that theft was to be reprimanded worldwide, the same unanimity was lacking in with regard to illegal exports. Therefore, Chapter III should be interpreted more restrictively than Chapter II.²⁶⁰

Monitoring – Regarding the process of monitoring of the working of the convention, it should be stressed that Article 20 allows the President of UNIDROIT – or alternatively five Contracting States – to convene, at regular intervals, a special committee to review the practical operation of the convention. This mechanism is designed to clarify the ambiguities found in the provisions of the convention and to discuss the problems of operationalisation linked to the convention. Article 20 is, thus, optional but it demonstrates that UNIDROIT is to play a crucial role in overseeing the effectiveness and the continuity of the convention in order to achieve the international protection of cultural property. So far, the special committee has only met once in Paris on 19 June

²⁵⁹ Cf. section A. 4. (2) above.

²⁶⁰ Cf. section A. 5. above.

2012. Its findings have not yet been published at the time of writing, but they have been included throughout the different parts of the present dissertation.²⁶¹

Next to the use of pragmatic special committees to review the practical operation of the 1995 convention, UNIDROIT has recently launched the 1995 UNIDROIT Convention Academic Project (UCAP). This project is meant to increase knowledge about the convention from a more theoretical perspective. What is more, the project aims to link researchers and universities, or other bodies that provide education in the field of cultural heritage law, with one another. Finally, the UCAP will assist the Task Force in promoting the ratification of the 1995 UNIDROIT convention.²⁶²

²⁶¹ Cf. section B. 1. above.

²⁶² Cf. section B. 2. above.

CHAPTER 7 |
UNIDROIT AND THE WORLD

CHAPTER 7 – UNIDROIT AND THE WORLD

INTRODUCTION	465
A. COMPATIBILITY WITH OTHER MULTILATERAL TREATIES	466
1. Unidroit in the international norm-setting	466
2. The UNESCO – Unidroit Nexus	471
(1) Definition cultural property	473
(2) Means of corrective justice	473
(3) Time limitations	475
(4) Treatment of innocent purchasers	475
3. Interactions between the 1970 and 1995 conventions	476
B. IMPROVED APPLICATION OF THE CONVENTION	477
C. CLAUSE DE DÉCONNEXION	478
1. Directive 93/7/EEC (repealed by Directive 2014/60/EU).....	479
(1) Scope of application	483
(2) Conceptualisation.....	488
(3) Time limitations.....	489
(4) Obligation of return.....	489
(5) Standard of care during the acquisition.....	490
(6) Burden of proof	491
(7) Compensation.....	491
(8) Ownership returned object.....	492
(9) Modulation of the Directive’s provisions	492
(10) Cooperation between Member States.....	493
2. Directive 2014/60/EU (recast of Directive 93/7/EEC).....	493
(1) Scopes of application.....	495
(2) Time limitations.....	496
(3) Standard of care during the acquisition.....	497
(4) Burden of proof	497
(5) Cooperation between Member States.....	498
SUMMARY.....	499

Introduction

Finally, and in order to better appreciate the role played by the convention in tackling the theft of cultural property, it is important to address the convention's position in the international norm-setting context. In order to evaluate its appropriateness in addressing the contemplated illegal activity, attention must be devoted to its application in relation to other multilateral instruments. Furthermore, despite emphatic distinctions between the different instruments that regulate the field of cultural heritage / cultural property law, there appears to be quite some inexactitude and uncertainty as to the respective roles that are played by some of these instruments and as to their correlation with the 1995 convention. This inexactitude calls for placing the present convention within the contemplated framework. Consequently, this final chapter addresses the position of the convention within the international framework of cultural heritage and cultural property law. What is more, because the convention itself prescribes compatibility and supplanting rules in its relations with other bilateral and multilateral instruments, attention must be specifically dedicated to these provisions and the implications thereof. In vetting the nexuses between the convention and the other instruments, this chapter studies the 1995 treaty in light of two multilateral instruments, the scope of which coincides with the regime of the UNIDROIT convention, i.e. the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and the European Union 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)*. Thenceforth, the present chapter compares the main traits of these instruments so as to clarify their respective functions and compatibility with the 1995 UNIDROIT convention. As a subsidiary matter, the comparison is undertaken to demonstrate that, despite the low amount of ratification of the 1995 convention, this instrument is nevertheless gaining influence on the international plane. This is notably witnessed by the regime of the European Union Directives, which – as will be elaborated upon below – have been considerably inspired by the provisions of the 1995 convention.¹¹

Thenceforth, section A reviews the interconnection between the 1995 UNIDROIT convention and the other multilateral cultural property instruments that govern the same subject matter. Section B elaborates on the possibility for contracting states to the 1995 convention to enhance its application in mutual relations with other treaties by means of bilateral or multilateral agreements. Finally, section C analyses the *clause de déconnexion* that is provided for in Article 13 (3) of the convention. More conspicuously, this section discusses the use of this clause in relation to the regime that regulates the illegal export of national treasures within the European Union, as was initially codified in Directive 93/7/EEC and later amended in Directive 2014/60/EU. In order to meticulously explain the interactions between the 1995 convention and the two Directives, section C will, thus, compare the provisions of the two Directives with the regime of the Chapter III of the convention.

¹¹ More specifically, the present chapter will demonstrate that the European Economic Community Directive 93/7/EEC of 15 March 1993 *on the return of cultural objects unlawfully removed from the territory of a Member State*, repealed by Directive 2014/60/EU and thus inapplicable since March 2014, was originally influenced by the convention and that its recast – the aforementioned European Union Directive 2014/60/EU – was brought further in line with the regime of the convention.

A. Compatibility with other multilateral treaties

Article 13 (1) of the 1995 UNIDROIT convention regulates the interactions between the present instrument and other bilateral or multilateral instruments that govern similar matters.

Article 13 UNIDROIT Convention (1995) – (1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument.

In case of conflict between the present convention and any other legally binding instrument that possesses an international character “which contains provisions on matters governed by this Convention”, the first sentence of Article 13 (1) prescribes that the norms of the other international instrument to which the contracting state is already bound will prevail.² This subordination clause was initially proposed by the United States delegation in discussions about the interaction between the 1995 convention and other treaties, and more particularly those regulating the situation of armed hostilities and occupation.³ As such, it is clear that its provisions ought not to replace rules regulating the same subject matter found in other international instruments. Nonetheless, this hierarchy is not absolute since Article 13 (1) *in fine* makes it possible for adhering states to apply the rules of the UNIDROIT convention to the coinciding rules of these other agreements.

Article 13 UNIDROIT Convention (1995) – (1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, **unless a contrary declaration is made by the States bound by such instrument.**

Article 13 (1) *in fine* entitles contracting states to give direct precedence to the provisions of the 1995 convention when these provisions coincide with the rules that are contained in other binding treaties or in any future treaty. In order to do so, a declaration to this effect must be introduced – which can be done at any time – on the basis of Article 15 (3) of the UNIDROIT convention.⁴ To date, no contracting state has formulated such declaration.⁵

In order to fully appreciate the relative nature of the convention that has been created by Article 13 (1), it is firstly important to determine which other instruments – the scope of which coincides with the regime of the 1995 convention – have acquired force of law. In doing so, the present section will analyse the relative character of the convention in the context of multilateral norm-setting. The focus on multilateral instruments is justified by two considerations: firstly, many of the bilateral agreements in force are a derivative of the obligations imposed by multilateral instruments, thereby making the study of the interaction between bilateral agreements redundant;⁶ secondly, the regime of the convention will not be compared to bilateral agreements that cover matters which are governed by the convention for the sake of not overburdening this research with pedantic details. Instead, the purpose of the present section is to illustrate the relativity of the convention in the context of international norm-setting and it is, therefore, sufficient to assess this relativity in light of the applicable multilateral instruments.

1. UNIDROIT IN THE INTERNATIONAL NORM-SETTING

Before elaborating on the compatibility between the 1995 convention and other multilateral instruments, it should be noted that the utility of Article 13 (1) of the convention in the context of multilateral norm-setting is disputable:⁷ it is a neutral treaty that does not conflict with other multilateral regimes.⁸ In fact, it is the first

² UNIDROIT Secretariat, ‘Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report’, 3 *Uniform Law Review*, (2001), p. 554. For more information about the rules of compatibility laid down in treaty provisions, see United Nations, ‘Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur’, Document:- A/CN.4/167 and Add.1-3, (Extract from the Yearbook of the International Law Commission:- 1964, vol. II), pp. 37-38.

³ See ‘Working Papers Submitted to the Final Clauses Committee’, in Presidenza del Consiglio dei Ministri, Presidenza del Consiglio dei Ministri, Dipartimento per l’Informazione e l’Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings*, Rome, June 1995, (1996), CONF. 8/C.2/W.P. 6 Corr., 13 June 1995, and CONF. 8/C.2/W.P. 10, 14 June 1995, pp. 319-320.

⁴ UNIDROIT Secretariat, (2001), p. 554.

⁵ For more information about the many declarations formulated by the state parties, please consult the status of ratification of the convention that is available via the website of UNIDROIT: <http://www.unidroit.org/status-cp>, last retrieved on 01.03.2018.

⁶ See for example Last’s commentary about the recognition of export legislation through bilateral agreements which stems from the obligations imposed by the 1970 UNESCO convention, in Last, K., ‘The Resolution of Cultural Property Disputes: Some Issues of Definition’, in: The International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes. Papers Emanating From the Seventh P.C.A International Law Seminar May 23, 2003*, (Kluwer Law International [et al.]: The Hague [et al.], 2004), pp. 70-71.

⁷ Bergé, J. -S., ‘La Convention d’Unidroit sur les Biens Culturels (*): Remarques sur la Dynamique des Sources en Droit International’, 127 *Journal du Droit International*, (2000), pp. 236-237.

multilateral instrument to tackle the illicit trafficking of cultural property in peacetimes through regulating the demand side of the art market, as was established above. More specifically, it is the first international instrument to regulate instances of third-party protection in cases pertaining to the acquisition of stolen cultural objects. As such, it does not conflict with other international norms that have been promulgated with the aim of protecting cultural property or cultural heritage.⁹ In order to set the record straight, the only multilateral convention applicable in peacetimes that could conflict with the UNIDROIT regime is the 1970 UNESCO convention,¹⁰ because the former's provisions intend to respond to the latter's inhibition to regulate the sphere of private law.

The UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* is an international agreement that was concluded in Paris in November 1970 that is, hitherto, considered to be the most significant agreement concerning stolen and illegally exported cultural property.¹¹ In fact, it is the first international legally binding tool adopted to regulate the international illicit traffic of cultural materials in peacetimes.¹² It was drafted as a result of the increasing depletion of the cultural property of many source states to the benefit of museums and collectors in market states.¹³ Thenceforth, the convention aims to protect national cultural heritages¹⁴ – thus supporting the cultural nationalism theory¹⁵ – and, in this regard, departs from its 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention* predecessor, which was inspired by cultural internationalism.¹⁶ In fact, the regime of the 1970 convention elevates national problems to the international plane by prescribing the implementation of responsive remedies into the legal orders of contracting states.¹⁷ Because it creates a framework whereby state parties are incentivised to adopt measures addressed at the protection of their cultural materials,¹⁸ it enables these states to maintain their domestic legislations about import, export¹⁹ or theft of cultural property.²⁰ Hence, the convention leaves discretion to the state parties themselves with regard to the measures that are to be adopted against theft, illegal exports and clandestine excavations.²¹ Therefore, it seeks to adopt an intermediary position between two conflicting interests: the fight against the illicit trafficking of cultural

⁸ Bergé, (2000), p. 236; see also Bergé, J. -S., 'La Convention d'UNIDROIT les biens culturels: retour sur un texte majeur dans la lutte contre un fait international illicite de circulation', 20 *Uniform Law Review*, (2015), p. 553: "[referring to Article 13 (1) of the Unidroit convention] Au-delà de la formule, somme toute classique, on peut s'interroger sur l'utilité pratique d'une telle disposition. Manifestement, elle ne trouve pas à s'appliquer aux convention généralistes ou spécialisées portant proclamation de la protection du patrimoine culturel dans la mesure où la Convention d'UNIDROIT n'est pas destinée à y déroger, bien au contraire. De même, cet article n'est d'aucune utilité réelle pour les conventions posant, peu ou prou, un principe de restitution ou de retour dans un contexte plus étroit (conflits armés) ou différent (matière policière et pénale) de celui envisagé par la Convention d'UNIDROIT. Dans le premier cas (conflits armés), les conventions spécialisées ont naturellement vocation à déroger à la Convention d'UNIDROIT prise comme une règle générale. Dans le second cas (en matière policière et pénale), les textes internationaux en présence portent sur un objet différent de sorte que l'hypothèse du conflit de conventions est exclue."

⁹ Eventually, the convention could derogate from bilateral treaties but this is often a consequence of belated harmonisation. See Bergé, (2000), p. 237.

¹⁰ Bergé, (2000), p. 237 and Bergé, (2015), p. 553: "En définitive, si l'on écarte les conventions bilatérales entre États, la question de rapports entre la Convention d'UNIDROIT et les instruments internationaux préexistants n'est susceptible de se poser que pour la Convention de l'UNESCO".

¹¹ Warring, J., 'Underground Debates: the Fundamental Differences of Opinion that Thwart Unesco's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review*, (2005), p. 250.

¹² Goldrich, I. M., 'Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale', 23 (1) *Fordham International Law Journal* (1999), p. 135; Papademetriou, T., 'International Aspects of Cultural Property – An Overview of Basic Instruments and Issues', 24 *International Journal of Legal Information*, (1996), p. 289.

¹³ Mastalir, R. W., 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law', 16 (4) *Fordham International Law Journal*, (1992), p. 1054.

¹⁴ Klein, F.-E., 'En Relisant la Convention UNIDROIT du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés : Réflexions et Suggestions' 118 *Zeitschrift für Schweizerisches Recht*, (1999), p. 266.

¹⁵ Warring, (2005), p. 251; for this reason, Article 1 of the 1970 convention allows a state to designate the objects that will fall within the definition of what constitutes cultural property for the purpose of its regime.

¹⁶ Warring, (2005), p. 251.

¹⁷ Love Levine, A., 'The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention', 36 (2) *Brooklyn Journal of International Law*, (2010-2011), p. 760.

¹⁸ Droz, G. A. L., 'La Convention d'UNIDROIT sur le Retour International des Biens Culturels Volés ou Illicitement Exportés (Rome, 24 juin 1995)', 86 (2) *Revue Critique de Droit International Privé*, (1997), p. 246.

¹⁹ The 1970 convention is premised on the sovereign rights of states to enact export restrictions on their cultural materials. See Fox, C., 'The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property', 9 (1) *American University International Law Review*, (1993), p. 256.

²⁰ Love Levine, (2010-2011), pp. 762-763.

²¹ Love Levine, (2010-2011), p. 760; it further strives towards the prevention of the illegal transfer of cultural property, ensuring the return of the object to the rightful owner and allowing him to bring actions in recovery, irrespective of the limitations that are laid down in domestic legislation. Burke, K. T., 'International Transfer of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?', 13 *Loyola of Los Angeles International and Comparative Law Journal*, (1990-1991), p. 435.

goods and the free circulation of culture between nations.²² The 1970 convention is thus considered to be a tool of primordial importance in tackling the said traffic,²³ as it is one of the primary regulatory frameworks to introduce concrete solutions to counter this illegal activity.²⁴ As such, the said convention constitutes an important milestone in the protection of cultural property, as it has embedded cultural materials with a special status and created adjacent obligations of protection for its state parties.²⁵

Despite its innovative character, the approach of the 1970 convention has often been criticised as being ineffective,²⁶ too theoretical and as lacking concrete obligations to bind its ratifying parties.²⁷ Furthermore, because of the general character of its provisions, it constitutes a framework convention that cannot be given direct effect, or – put differently – that is not self-executing.²⁸ More conspicuously, the language used throughout its letter is broad and ambiguous,²⁹ affecting both its implementation and application.³⁰ For example, whilst Article 2 instates the idea that the illicit import / export – as well as other types of transactions embedded with an illicit character that relate to cultural materials – must be reprimanded by the state parties, the formulation of this provision imposes no concrete means of condemning these illegal activities. Instead, it constrains the efforts of state to the mere use of available means.³¹

Article 2 UNESCO Convention (1970) – (1) The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from (sic).

(2) To this end, the **States Parties undertake to oppose such practices with the means at their disposal**, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

Due to the lack of concrete coordinated course of action, the 1970 convention has been received lackadaisically.³² Additional criticisms addressed at the convention are that: it is only intended for states parties to the convention and, thus, individuals cannot make use of its regime to reclaim their property;³³ the ratifying states can still retain their own national legislation relative to the protection of cultural property and apply it.³⁴ In this respect, it is believed that both the adoption and the maintenance of diverging rules contribute to the furtherance of the illicit traffic in cultural property;³⁵ source states are given a ‘blank cheque’ because of the lack of a uniform meaning of the term ‘illicit’, which naturally requires a reference to the domestic law of the contracting parties.³⁶ Thenceforth, it has been advanced that the 1970 convention is more inclined towards ensuring the interests of source states and not of market states;³⁷ nevertheless, the obligations stemming from the 1970 convention have entailed financial complications for many source nations:³⁸ the important costs involved with compliance, including the need to establish inventories, to adopt effective protective measures or even to raise awareness, are evidence of these complications;³⁹ the convention does not foresee a lot of substantial provisions and concomitant means of enforcing these provisions;⁴⁰ regarding corrective justice, its impact is limited because it only protects objects that have been stolen “from a museum or a religious or secular

²² Burke, (1990-1991), p. 435.

²³ Goldrich, (1999), p. 135; Love Levine, (2010-2011), p. 760.

²⁴ Love Levine, (2010-2011), p. 757.

²⁵ UNIDROIT Secretariat, (2001), p. 478.

²⁶ Doyal, S., ‘Implementing the UNIDROIT Convention on Cultural Property Into Domestic Law: The Case of Italy’, 657 *Columbia Journal of Transnational Law*, (2000-2001), p. 665; Hoffman advances that both source and market states consider the UNESCO convention as being ineffective in halting to the illicit trafficking of cultural objects. See Hoffman, B., ‘How UNIDROIT Protects Cultural Property’, 213 (46) *New York Law Journal*, (03 March 1995), p. 1.

²⁷ Love Levine, A., ‘The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention’, 36 (2) *Brooklyn Journal of International Law*, (2010- 2011), p. 761; Fox, (1993), p. 251.

²⁸ Droz, (1997), p. 246.

²⁹ Doyal, (2000-2001), p. 666.

³⁰ Fox, (1993), p. 251.

³¹ Love Levine, (2010-2011), p. 761.

³² Love Levine, (2010-2011), pp. 761-762.

³³ Doyal, (2000-2001), p. 666.

³⁴ Doyal, (2000-2001), p. 665.

³⁵ Love Levine, (2010-2011), pp. 762-763.

³⁶ Bengs, (1996), pp. 525-526.

³⁷ Love Levine, (2010-2011), p. 762; when weighing the political considerations that underpin the adoption of the convention, some of these criticisms are justifiable. For example, the language was kept intentionally vague to ensure a higher incidence of ratification. See Fox, (1993), p. 251.

³⁸ Mastalir, (1992), p. 1054.

³⁹ Mastalir, (1992), p. 1054.

⁴⁰ Doyal, (2000-2001), pp. 665-666.

public monument or similar institution” (cf. Article 7 (b) (i));⁴¹ it does not create a concrete procedure to be followed for the restitution of stolen objects;⁴² the prohibition on the acquisition of illegally exported cultural objects is merely directed at museums or similar public institutions;⁴³ it does not take into account stolen or illegally exported cultural property that has been taken from private premises or from countries that do not have a system of inventory or of documentation;⁴⁴ because of the need to designate the protected cultural property (see Article 1 of the 1970 convention), undiscovered archaeological objects or long lost masterpieces are not protected;⁴⁵ furthermore, the payment of just compensation to the innocent acquirer that has to return the property to the dispossessed owner was considered to be insufficient by many states that refrained from adhering to the convention.⁴⁶ Following these states, the principle of *bona fide* acquisition is severely jeopardised due to the payment of compensation mandated;⁴⁷ finally, the convention failed to resolve issues of conflict-of-laws, having repercussions on questions of title and on the proper protection of good faith purchasers.⁴⁸

Irrespective of the legitimacy of these criticisms, it is accepted that the failure of the 1970 convention to introduce a uniform regime of protection of cultural property – thus resulting in the lack of improvement in the said protection – contributed to its disavowal.⁴⁹ Consequently, this dismissal led UNESCO to approach UNIDROIT with a request to further the efforts of the 1970 instrument, notably in relation to its private law implications.⁵⁰ Furthermore, because of the vast participation in the UNESCO convention at the time of commissioning UNIDROIT – and due to the furthering character of its 1995 follow-up –, there was a clear need for compatibility between both treaties.⁵¹ The importance of the said compatibility between the two conventions is implied by Recital 9 to the Preamble of the 1995 convention:

Recital 9 Preamble of the UNIDROIT Convention (1995) – RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector, [...]

The reference to the UNESCO convention in the last Recital of the Preamble is not fortuitous. Its position in the Preamble is the result of a compromise to establish a connection between the 1995 convention and its 1970 predecessor, without including the latter in the operative parts of the former.⁵² Not only does this exclusion constitute the result of compromises but, additionally, it serves to avoid interpretations of the 1995 UNIDROIT convention that could be at odds with the text of its predecessor.⁵³ Furthermore, the recognition of the work of UNESCO and of its 1970 offspring was given in Recital 9 due to the organisation’s important contribution to the work of the institute in elaborating the 1995 convention.⁵⁴ This recognition also demonstrates that the two

⁴¹ Doyal, (2000-2001), p. 666; Lalive d’Epinay, P., ‘Une avancée du droit international: la Convention de Rome d’Unidroit sur les biens culturels volés ou illicitement exportés’, 1 *Uniform Law Review*, (1996), p. 48.

⁴² Doyal, (2000-2001), p. 666.

⁴³ Doyal, (2000-2001), p. 666.

⁴⁴ Doyal, (2000-2001), p. 666.

⁴⁵ Last, (2004), p. 63. It should, nonetheless, be noted that certain state parties have given effect to the provisions of the convention to situations affecting their archaeological materials through the interpretation given to Article 9. See Delepierre, S., Schneider, M., ‘Ratification and Implementation of International Conventions to Fight Illicit Trafficking in Cultural Property’, in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protecting the World’s Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Goods: Paris, 2015), p. 133.

⁴⁶ UNIDROIT, *The Protection of Cultural Property* – Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable in 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (Prepared by Gerte Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law, Study LXX – Doc. 1, Rome, December 1986, p. 41.

⁴⁷ UNIDROIT, (1986), Study LXX – Doc. 1, p. 41

⁴⁸ Papademetriou, (1996), p. 296.

⁴⁹ Love Levine, (2010-2011), p. 762; see also Lehman, J. N., ‘The Continued Struggle With Stolen Cultural Property: the Hague Convention, the Unesco Convention, and the Unidroit Draft Convention’, 14 *Arizona Journal of International and Comparative Law*, (1997), p. 541.

⁵⁰ See also the commentary of the representative of UNESCO in UNIDROIT, *The International Protection of Cultural Property* – Summary report on the third session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 22 to 26 January 1990 (prepared by the Unidroit Secretariat), Study LXX – Doc. 18, Rome, May 1990, p. 6.

⁵¹ See ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/3, December 1994, p. 21.

⁵² Protz, *Commentary on the Unidroit Convention*, (1997), p. 21; it should be noted that during the third session of the Study Group, one of its members deprecated the inclusion of a reference to the 1970 convention in the Preamble of the Preliminary draft Convention because of the usual practice not to refer to other existing instruments. This practice was, generally, used for the purpose of ensuring that states would refrain from ratifying the more recent convention when they were not already party to the older one. See UNIDROIT, (1989), Study LXX – Doc. 18, p. 4.

⁵³ Protz, *Commentary on the Unidroit Convention*, (1997), p. 21.

⁵⁴ UNIDROIT Secretariat, (2001), p. 492.

conventions complement one another and that there is no intention for the 1995 UNIDROIT convention to supersede the regime of its antecessor.⁵⁵ More specifically, the 1970 convention is composed of three pillars⁵⁶ that are operative on three distinct fields of action: a) cooperation between state parties;⁵⁷ b) prevention⁵⁸ – through the use of preventive measures at the domestic level – and c) measures of restitution, as means of ensuring corrective justice.⁵⁹ In other words, an important distinction between the 1995 convention and its 1970 counterpart is that the former is only concerned with the means of recovery – and thus with corrective justice –, whilst the latter deals with the establishment of a framework of cooperation, alongside instating preventive measures and means of recovering illegally appropriated cultural objects.⁶⁰ In fact, it must be noted that since the 1970 convention already contains provisions on restitution and return of cultural objects, it constitutes a prelude

⁵⁵ UNIDROIT Secretariat, (2001), p. 492.

⁵⁶ Delepierre and Schneider, (2015), p. 130.

⁵⁷ Because the 1970 convention establishes an interstate framework, it prescribes the need for cooperation between states in the domain of cultural property (see UNESCO, ‘UNESCO and Unidroit – Cooperation in the Fight Against Illicit Traffic in Cultural Property – Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, 24 June 2005, UNESCO Headquarters, Paris, CLT-2005/Conf/803/2, 16 June 2005, p. 3). Therefore, the convention is embedded with a public character and, as such, it establishes means of cooperation to thwart the illicit traffic through administrative channels (Klein, (1999), p. 266). Provisions that are indicative of the means of cooperation in preventing the illicit import, export and transfer of ownership of cultural property through protecting the cultural property of other state parties include: opposing the illicit practices mentioned by removing their cause, stopping their actual occurrence and contributing towards the reparation of the ensuing damage (cf. Article 2); considering the import, export and transfer of ownership violating the provisions of the convention as illicit (cf. Article 3); adopting measures to prevent museums or similar institutions from acquiring cultural objects that have been illegally exported from another state party after the entry into force of the convention in the said state, adjacent to the obligation to inform this state about the presence of the object in one’s own territory after the entry into force of the convention in both states (cf. Article 7 (a)); prohibiting the import of inventoried cultural objects that have been stolen from a museum, a religious or secular public institution or religious and secular public monument of another state party (cf. Article 7 (b) (i)); adopting appropriate steps to ensure the recovery of these stolen objects on request by the requesting state, subject to the payment of just compensation to an innocent purchaser. As such, the convention primarily favours the use of diplomatic channels (cf. Article 7 (b) (ii)) (see UNESCO, (2005), p. 3); imposing criminal and administrative sanctions for violations of Articles 6 (b) and 7 (b) by citizens with regard to cultural objects originating from another state party (cf. Article 8); participating in concerted international efforts and adopting concerted measures to protect the cultural patrimony, and more specifically the archaeological and ethnological patrimony, of state parties that is susceptible to pillaging, when called upon by the said state. This obligation includes the use of provisional measures when possible (cf. Article 9); considering the forced export and transfer of ownership of cultural objects originating from a state occupied by a foreign power as illicit (cf. Article 11); prohibiting and preventing the illicit import, export and transfer of ownership of cultural objects taking place in territories for which the state party is responsible (cf. Article 12); ensuring cooperation between the competent national services to facilitate the prompt restitution of illicitly exported cultural materials to their rightful owner (cf. Article 13 (b)); allowing private owners of other state parties to introduce claims for the restitution of stolen object through the use of domestic courts, to the extent that this is allowed under the *lex fori* (cf. Article 13 (c)) (see UNESCO, (2005), p. 3) and facilitating the recovery of inalienable cultural property to the state from which it has been illegally exported (cf. Article 13 (d)).

⁵⁸ The preventive measures of the 1970 convention are: instating national authorities competent to deal with the matters covered by the convention (cf. Article 5); introducing export certificates (cf. Article 6 (a)); adopting appropriate administrative and legal measures towards the achievement of the provisions laid down in the convention (e.g. Articles 6 (b), 7 and 8); obliging art dealers to keep a record of the origin of the objects passing through their business (cf. Article 10 (a)) and raising the public’s awareness through education (cf. Article 10) (cf. UNESCO, (2005), p. 3); additionally, the state party undertakes to prevent the transfer of ownership that is likely to promote the illicit import or export of cultural property by all appropriate means (cf. Article 13 (a)).

⁵⁹ The means of recovery prescribed by the 1970 convention include: the admission of claims by the judiciary or the administration for the recovery of lost or stolen objects falling within the ambit of the convention (cf. Article 13 (c) *juncto* Article 7 (b) (i)), when consistent with the laws of other state parties (cf. the chapeau of Article 13); for stolen cultural objects, Article 7 (b) (i) prohibits the import of “cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned”, provided the said cultural property has been registered by the aforementioned institution. Consequently, it mandates the restitution of stolen cultural objects that have been robbed from specific locations, provided these have been inventoried (cf. Article 7 (b) (ii)) (see UNESCO, (2005), p. 3); issues surrounding the illegal export of cultural property are addressed by Article 7 (b) (ii), which regulates the exit of cultural objects that are in violation of the domestic legislation of the country from which the item is taken (see for example ‘Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and Explanatory Report prepared by the Unidroit Secretariat’, in *Presidenza del Consiglio dei Ministri*, (1996), CONF. 8/3, December 1994, p. 21), without laying down specific details. As such, it instates an obligation to return an object that has been illegally exported, subject to the request of the contracting state of origin for the said return (see Sidorsky, E., ‘The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration’, 5 (1) *International Journal of Cultural Property*, (1996), p. 22). In doing so, it ensures cooperation between states in facilitating the return of illegally exported cultural materials (see UNESCO, (2005), p. 3); additionally, Article 7 touches upon the issue of the protection of an ‘innocent purchaser’ or of a person having ‘valid title to that property’. The article foresees a drastic measure of restitution of stolen cultural objects from the possessor to the original owner, provided compensation is paid to the said possessor. As such, Article 7 (b) (ii) laid down the foundation for the 1995 UNIDROIT convention, as it touches upon the problematic of acquisition in good faith, without addressing further technicalities.

⁶⁰ UNESCO, (2005), p. 3.

to the 1995 UNIDROIT convention⁶¹ and the aim of the latter was to substitute the former in relation to the aspects of restitution and return.⁶²

2. THE UNESCO – UNIDROIT NEXUS

The UNIDROIT convention strives towards ensuring complementarity with the last tier of the UNESCO convention and, therefore, it does not derogate from the latter's provisions.⁶³ Instead, it should be emphasised that both conventions complement and reinforce each other⁶⁴ and have even been qualified as 'two sides of the same coin' for several reasons:⁶⁵ firstly, the members of the SG that were entrusted with the drafting of the convention were inclined to ensure that the future instrument would be perfectly compatible with the 1970 convention.⁶⁶ It was understood that creating a new instrument that would be incompatible with its predecessor would be politically incorrect, as this might have consequences for future adherence to the 1970 convention.⁶⁷ What is more, albeit the latter instrument contained few provisions pertaining to private law considerations,

⁶¹ For an in depth comparison between both conventions and in support of the last argument, see Office Fédéral de la Culture (Suisse) (ed), *Transfert International des Biens Culturels. Convention de l'Unesco de 1970 et Convention d'Unidroit de 1995, Rapport du Groupe de Travail*, (l'Office Fédéral de la Culture: Berne, 1998), pp. 22-24. See also UNIDROIT Secretariat, (2001), p. 482; Prott, L. V., "Unesco and Unidroit: A Partnership Against Trafficking in Cultural Objects", in: N. Palmer (ed), *The Recovery of Stolen Art – A Collection of Essays*, (Kluwer law international, 1998), pp. 205 and 206; Carducci, G., 'Complémentarité Entre les Conventions de l'UNESCO de 1970 et d'UNIDROIT de 1995 sur les Biens Culturels', 11 *Revue de Droit Uniforme*, (2006), p. 95; Prott, L. V., "Responding to World War II Art Looting", in: The 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 [et al.]: The Hague [et al.], 2004), p. 128; Prott, *Commentary on the Unidroit Convention*, (1997), p. 15; Renold, M. A., 'Interaction Entre l'Intégration Régionale et l'Harmonisation Mondiale: Quelques Réflexions à Propos des Biens Culturels', 1/2 *Uniform Law Review*, (2003), p. 581; Hoffman, (3 March 1995), p. 6; Merryman, J. H., *Law, Ethics and the Visual Arts*, (Kluwer Law International, 5th edition, 2007), p. 337; UNIDROIT Secretariat, (2001), p. 478; Prott, (1998), pp. 205-206; Cottrell, E. M., 'Keeping the Barbarians Outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property', *Chicago Journal of International Law*, (2008-2009), p. 643; Francioni, F., "La Protección del Patrimonio Cultural a la Luz de los Principios de Derecho Internacional Público", in: C. R. Fernández Liesa and J. Prieto de Pedro (dirs), *La Protección Jurídico Internacional del Patrimonio Cultural. Especial Referencia a España*, (Colex: Madrid, 2009), p. 27; Renold, M. A., "Les Principales Règles de la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés", in: M. A. Renold and C. Breidler, *La Convention d'UNIDROIT du 24 juin 1995 sur les biens culturels volés ou illicitement exportés*. Genève - 2 octobre 1995, (Zürich: Schulthess, 1997), p. 19; Jolles, A., "Un Regard Critique sur la Convention d'Unidroit", in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 53; Dutra, M. L., "Sir, How Much is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China", 5 *Asian-Pacific Law & Policy Journal*, (2004), p. 77; Bergé, (2000), p. 643; Francioni, F., "La Protection du Patrimoine Culturel en Vertu des Instruments de l'UNESCO (1970) et d'UNIDROIT (1995): La Position d'Interpol", 1/2 *Uniform Law Review*, (2003), p. 577-578; Droz, G. A. L., "Mémoire sur le Projet de Convention d'Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés", in: P. J. I. M. de Waart, G. A. L. Droz, F. Rigaux, C. J. H. Brunner, *Kunsthandel (Industrie Antiquiteiten) en de Bescherming van Nationaal Cultureel Erfgoed* (Mededelingen van de Nederlandse Vereniging voor Internationaal Recht, 109), (Kluwer: Deventer, 1994), p. 49; Klein, (1999), p. 265; O'Keefe, P. J., "Development in Cultural Heritage Law: What is Australia's Role?", 36 *Australian International Law Journal*, (1996), p. 39; Calvo Caravaca, A. L., Caamiña Domínguez, C. M., "El Convenio de Unidroit de 24 de Junio 1995" in: C. R. Fernández Liesa and J. Prieto de Pedro (dirs), *La Protección Jurídico Internacional del Patrimonio Cultural. Especial Referencia a España*, (Colex: Madrid, 2009), p. 158; Nafziger, J. A. R., Scovazzi, T., "La Restitution des Biens Culturels Volés ou Illicitement Exportés en Temps de Paix" (section 4), in: J. A. R. Nafziger, T. Scovazzi, *Le Patrimoine Culturel de l'Humanité – The Cultural Heritage of Mankind*, (Martinus Nijhoff Publishers: Leiden / London, 2008), p. 67; Fraoua, R., "La Mise en Oeuvre en Suisse de la Convention d'Unidroit sur les Biens Culturels ou Illicitement Exportés", in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 41; Droz, (1997), p. 275; Crewdson, R., 'Putting Life Into a Cultural Property Convention – UNIDROIT: Still Some Way to Go' 45 *International Legal Practitioner*, (June 1992), p. 45.

⁶² Bergé, (2000), p. 237 and Bergé, (2015), p. 554. See also Lehman, (1997), p. 543.

⁶³ Bergé, (2000), 237; Gambaro, A., "Community, State, Individuals and the Ownership of Cultural Objects", in: J. A. Sánchez Cordero (ed), *La Convención de la UNESCO de 1970 – Sus Nuevos Desafíos*, (Universidad Nacional Autónoma de México: México, 2014), p. 139.

⁶⁴ Droz, (1997), p. 275; their complementarity is also recognised by legal doctrine. See Bergé, (2000), p. 237; Estrella Faria, J. A., 'Welcome Address', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming; Vicien-Milburn, 'International claims for restitution outside the framework of the 1970 and 1995 instruments - genesis of the 1995 Convention', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

⁶⁵ Sánchez-Cordero, J., 'The Unidroit cultural Convention. The unfulfilled tasks', in UNIDROIT, 'Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

⁶⁶ UNIDROIT, The International Protection of Cultural Property – Summary report on the first session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 12 to 15 December 1988 (prepared by the Unidroit Secretariat), Study LXX – Doc. 10, Rome, January 1989, p. 6. See also UNIDROIT, The International Protection of Cultural Property. Preliminary draft Convention on Stolen or Illegally Exported Cultural Objects approved by the UNIDROIT study group on the international protection of cultural property, with Explanatory Report (prepared by the Secretariat), Study LXX – Doc. 19, Rome, August 1990, p. 12.

⁶⁷ UNIDROIT, (1989), Study LXX – Doc. 10, p. 6; UNIDROIT, (1990), Study LXX – Doc. 19, p. 12.

these could be built on so as to complement its regime from a private law perspective.⁶⁸ Secondly, UNESCO – as an observer – closely monitored the work that was carried out by the institute throughout the elaboration of the convention so as to ensure that the result would be fully compatible with the 1970 predecessor.⁶⁹ In fact, UNESCO supervised the process in order to reassure state parties to its 1970 instrument that it would still be applicable. *Ergo*, UNESCO wanted to make sure that its work would not be superseded by the latest initiative, thereby enticing states to participate in the drafting of the 1995 convention as a complementary instrument, and not as a supplanting treaty.⁷⁰ Thirdly, the UNIDROIT convention was adopted to remedy the limitations of its 1970 predecessor.⁷¹ As such, the former treaty is not concerned with most of the public law provisions that are contained in the latter,⁷² as it merely operationalises the principles of restitution and return that are found in Article 7 (b) (ii) of the 1970 convention.⁷³ Thus, whilst the UNESCO offspring provides inter-state solutions in cases of theft or illegal export, the UNIDROIT output constitutes a private law complement⁷⁴ and can, therefore, be considered as a protocol to the former convention.⁷⁵ Thus, the final version of the UNIDROIT convention contains many concepts and objectives that already existed in the preceding document.⁷⁶ Furthermore, the 1995 instrument constitutes an agreement between the various legal systems in existence, even though a similar agreement could not be reached in the drafting of the 1970 convention.⁷⁷ Fourthly, both the UNESCO and the UNIDROIT conventions pursue the same aim of fighting the illicit trade in cultural property, without affecting its licit counterpart.⁷⁸ Fifthly, the two attempts at discarding the private international law difficulties linked to the requests for the return and claims in restitution of cultural objects and the uncertain outcomes resulting from the application of these rules.⁷⁹ *Ergo*, both conventions attempt to secure more legal certainty in regard of the outcomes of the cases, to reduce litigation expenses and to facilitate demands for the return of illegally exported cultural objects.⁸⁰ Sixthly, the two aforementioned documents are not retroactive (with one possible exception through the means given by Article 9 (1) of the UNIDROIT convention).⁸¹ Last, but not least, both instruments constitute sturdy premises for states to develop further initiatives.⁸²

⁶⁸ UNIDROIT, (1989), Study LXX – Doc. 10, p. 6; this was notably explained in section A. 1 of ‘Chapter 1 – Presentation and Applicability of the Convention’ above, where it was noted that the drafters of the 1995 convention chose specifically to base the future instrument on the premises of Article 7 of the 1970 convention.

⁶⁹ Prott, (1998), p. 207.

⁷⁰ Prott, (1998), p. 207.

⁷¹ As was noted by the representative of UNESCO during the first session of the CGE, the future convention was to whet states that did not become party to the 1970 convention because of its nebulous character and of the resulting contradicting interpretations of its provisions by alleviating these concerns. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the first session (Rome, 6 to 10 May 1991), Study LXX – Doc. 23, Rome, July 1991, p. 24; as noted by Prott before the third session of the CGE, the Unidroit Preliminary draft Convention addressed “some of the most difficult issues remaining doubtful or unresolved after the adoption of the 1970 Unesco Convention”. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Commentary on the UNIDROIT preliminary draft Convention on Stolen or Illegally Exported Cultural Objects as revised June 1992 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 36, Rome, February 1993, p. 5.

⁷² Prott, (1998), p. 214.

⁷³ UNIDROIT Secretariat, (2001), p. 564.

⁷⁴ Estrella Faria, in UNIDROIT, (2012), forthcoming.

⁷⁵ *Idem*; Gambaro has also qualified both the 1995 Unidroit convention in conjunction with the 2011 Model Provisions as instruments implementing the 1970 convention. See Gambaro, (2014), p. 136; the idea of creating a protocol to the 1970 UNESCO convention already appeared in the early discussions about the 1995 convention. See UNIDROIT, The Protection of Cultural Property – Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables in 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (Prepared by Gerte Reichelt, Univ. Dozent of the Vienna Institute of Comparative Law, Study LXX – Doc. 1, Rome, December 1986, p. 2; Office Fédéral de la Culture (Suisse), (1998), p. 22; nevertheless, it should be clear that this ‘protocol’ is an instrument *sui generis* that is not to be considered as a treaty executing the 1970 document. See Fraoua, (1997), p. 41; Office Fédéral de la Culture (Suisse), (1998), p. 22.

⁷⁶ Klein, (1999), p. 265.

⁷⁷ Prott, (1998), p. 214.

⁷⁸ UNESCO, (2005), p. 1.

⁷⁹ UNESCO, (2005), p. 2.

⁸⁰ UNESCO, (2005), p. 2.

⁸¹ UNESCO, (2005), p. 1.

⁸² Vicien-Milburn in UNIDROIT, (2012), forthcoming; for these two reasons, the adoption of the two instruments is prescribed by both UNESCO and UNIDROIT as an effective means of tackling the illicit trafficking of cultural property. See Bandarin, F., ‘Opening remarks’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming; Vicien-Milburn, in UNIDROIT, (2012), forthcoming; the institutions of the European Union also support the ratification of the two conventions. See Frigo, M., ‘Round table on the influence of the 1995 Unidroit Convention (good practices, national legislation of states non-parties, case law, international instruments)’, in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the

Despite the many similarities between the two convention – which is testament to their complementarity –, some differences are particularly salient and must be further substantiated to unveil the complex nexus that flows from Article 13 (1) of the UNIDROIT convention. These differences concern the definition of cultural property, the means of corrective justice instated, the time limitations to bringing an action in restitution or return and the treatment of innocent possessors.

(1) Definition cultural property

The 1970 UNESCO convention allows the return and the restitution of the cultural property that has been designated by the contracting state as being – on religious or secular grounds – of relevance for archaeology, prehistory, history, literature, art or science and which pertains to one of the categories listed in points (a)-(k) of its first article. As was explained in Chapter 1 above, contrary to the 1970 instrument, the obligation of designation does not exist for the purpose of the UNIDROIT convention⁸³ and there is no need to designate, to register or to classify a cultural object through an official public service for it to fall within the scope of the UNIDROIT convention.⁸⁴ Additionally, because of the need for designation in Article 1 of the 1970 convention, undiscovered cultural objects are consequently excluded from its scope.⁸⁵ The 1995 convention has specifically remedied this omission through the use of Article 3 (2). This implies that it applies to a wider range of cultural objects because of the lack of any requirement for state parties to designate the protected property.⁸⁶ In other words, compared to the 1970 instrument, the UNIDROIT regime has broadened the categories of cultural objects that are to be protected.⁸⁷ Nevertheless, the definition of the former is broader than the one of the latter in one respect: Article 7 (1) (b) of the UNIDROIT convention discards certain specific contemporary objects from the application of Chapter III, which means that, instead, these objects automatically fall within the regime of the 1970 convention, provided that they have been designated by the contracting state as deserving protection.⁸⁸

Article 7 UNIDROIT Convention (1995) – (1) **The provisions of this Chapter shall not apply** where: [...]

(b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.

Consequently, it can generally be submitted that the class of objects subject to restitution and return is wider in the UNIDROIT convention than under the UNESCO counterpart,⁸⁹ with the exception of Article 7 (1) (b) of the former instrument.⁹⁰ It would thus be possible for a state party to both treaties to broaden the definition of Article 1 of the latter instrument by applying the definition that is contained in Article 2 of the former to matters governed by both instruments by having recourse to Article 13 (1) of the UNIDROIT convention. Nonetheless, in doing so, this choice will only be limited to broadening the definition for the purpose of the tier of the 1970 convention that is concerned with means of corrective justice.

(2) Means of corrective justice

In relation to theft, Article 7 of the 1970 convention does not instate a specific procedure for the restitution of stolen cultural objects.⁹¹ Instead, it limits itself to imposing very specific positive obligations upon contracting states.

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects', UNESCO Headquarters, Paris, 19 June 2012, forthcoming. This was also addressed in the introductory chapter above.

⁸³ Bergé, (2000), p. 237.

⁸⁴ Klein, (1999), p. 266.

⁸⁵ Goldrich, (1999), p. 138.

⁸⁶ Lehman, (1997), p. 545, specifying that, unlike Article 7 (b) of the 1970 convention, the 1995 convention applies to “all stolen cultural objects”. In this regard, see sections B. 2. (1) and B. 2. (3) of Chapter 1 of the present research above.

⁸⁷ Papademetriou, (1996), p. 296.

⁸⁸ Office Fédéral de la Culture (Suisse), (1998), p. 23.

⁸⁹ In this regard, see UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Commentary on the Unidroit Preliminary draft Convention on stolen or illegally exported cultural objects as revised June 1992 (prepared by Ms Lyndel V. Prott, Chief International Standards Section, Division of Physical Heritage, Unesco), Study LXX – Doc. 36, Rome, February 1993, p. 4.

⁹⁰ Prott, (1998), p. 209; this was also the conclusion reached by UNESCO after the first meeting of the CGE with regard to the Preliminary draft Convention, where the committee advanced that the definition of the draft was broader than the definition laid down in Article 7 of the UNESCO convention. See UNIDROIT, (1992), Study LXX – Doc. 25, p. 3.

⁹¹ Droz, (1997), p. 246.

Article 7 UNESCO Convention (1970) – (b) The States Parties to this Convention undertake: [...]

(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;

(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

With regard to cultural property that has been stolen from a museum or a religious or secular public monument or similar institution (cf. Article 7 (b) (i)), Article 7 (b) (ii) obliges the contracting state to “take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned”, without laying down any specific rules as to how this recovery or return must be effectuated. What is more, the same article mandates the use of diplomatic channels to execute the recovery or return. Instead, the 1995 convention lays down specific procedures for the restitution of stolen cultural objects through judicial means. This not only entails that the procedure is not limited to states, but it also means that dispossessed private parties are protected and are given concrete procedures to follow in order to recover a stolen cultural object.⁹² Furthermore, the mechanisms for recovery and return that are instated by the 1970 convention are not compulsory, as it leaves discretion to requested states’ authorities to mandate the said recovery and return.⁹³ This is notably the case because Article 7 of the convention prescribes the use of diplomatic offices for the purpose of organising the recovery or return of the stolen cultural property. The more recent convention does not leave this discretion to state authorities, as it is possible for states to take direct action before courts.⁹⁴ It would thus be possible to apply the regime of Chapter II of the UNIDROIT convention to the restitution of stolen cultural materials falling within the ambit of Article 7 of the 1970 convention. Therefore, it should be noted that the regime of the 1995 convention, insofar as it relates to stolen cultural property, is broader than Article 7 of the 1970 convention.⁹⁵

Regarding illegal export, Article 3 of the 1970 instrument is more progressive than the regime of Chapter III of the 1995 convention.

Article 3 UNESCO Convention (1970) – The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

More conspicuously, Chapter III of the 1995 convention prescribes a narrower – albeit much more specific⁹⁶ – regime of return than what is provided for in the aforementioned article,⁹⁷ but one which is broader than Articles 7⁹⁸ and 9⁹⁹ of the same instrument.¹⁰⁰ As was recently noted by Schneider “While the Convention of 1970 constituted the first serious attempt to respond to the issue at the international level, the obligation of States Parties to ensure the return of cultural property unlawfully exported from its country of origin was extremely limited under Article 7. The UNIDROIT Convention of 1995 took a major step forward by requiring that cultural property be returned to its country of origin in a much larger number of cases”.¹⁰¹ In fact, the regime of return that is imposed by Articles 3 and 7 of the 1970 convention gained little success because state parties

⁹² Office Fédéral de la Culture (Suisse), (1998), p. 23.

⁹³ Fox, (1993), p. 256.

⁹⁴ Fox, (1993), p. 257.

⁹⁵ UNIDROIT, (1993), Study LXX – Doc. 42, p. 7.

⁹⁶ UNIDROIT, (1993), Study LXX – Doc. 42, p. 7.

⁹⁷ See UNIDROIT, (1993), Study LXX – Doc. 36, p. 4 and UNIDROIT, (1993), Study LXX – Doc. 42, p. 7.

⁹⁸ Article 7 (a) of the 1970 document prohibits the acquisition of illegally exported cultural objects by museums or similar institutions.

⁹⁹ Article 9 of the convention prescribes the control of the import or export of the cultural materials originating from certain states whose cultural patrimony is in danger, providing that the state of origin has invited other states to adopt the measures to this effect: “Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State”.

¹⁰⁰ See the commentary of the representative of UNESCO about the PDC in UNIDROIT, (1992), Study LXX – Doc. 25, p. 3; Protz, (1998), p. 209.

¹⁰¹ Delepierre and Schneider, (2015), p. 133.

endowed these provisions with a restrictive interpretation.¹⁰² Additionally, it should be noted that the obligations that are laid down in Chapter III are more specific than the ones laid down in Article 9 of the 1970 convention, thereby making it easier for contracting states to execute.¹⁰³ The UNIDROIT approach remedies this interpretative problem by prescribing specific rules in relation to return.¹⁰⁴ These specific rules could be extrapolated to the application of Article 3 of the UNESCO convention.

What is more, products of archaeological theft where not encapsulated in Article 7 (b) (ii) because these objects could not be designated.¹⁰⁵ Instead, these would fall within the ambit of Article 9 of the UNESCO convention.

Article 9 UNESCO Convention (1970) – Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Nonetheless, Article 9 limits the protection of these objects to situations in which the cultural heritage of the source state is in jeopardy due to the pillage of its archaeological or ethnological materials.¹⁰⁶ It would be possible to apply Chapter II of the UNIDROIT convention – and more particularly Article 3 (2) relating to archaeological materials – in applying Article 9 of the 1970 regime. What is more, Chapter III provides for the return of cultural objects of importance to the requesting state and is not limited to archaeological and ethnographical materials (unlike Article 9 of the 1970 convention).¹⁰⁷ Therefore, Chapter III could be relied upon when applying Article 9 of the UNESCO convention.

(3) Time limitations

Furthermore, Article 7 (b) (ii) of the 1970 UNESCO convention – read in conjunction with Article 13 thereof – does not contain any temporal constraints to the introduction of actions in restitution of the categories of objects that are addressed by the said article.¹⁰⁸ This lack of specificity is notably due to the difficulties that were inherent in reaching an agreement on the inclusion of such limitations in the convention between the negotiating parties.¹⁰⁹ It was, however, possible to overcome these difficulties in the negotiations of the 1995 convention¹¹⁰ (see Articles 3 (3)-(8)). It would thus be possible to apply the temporal limitations of Chapter II to the restitution of cultural objects that fall within the scope of Article 7 (b) (ii) of the 1970 convention. The time limitations that are prescribed by Chapter II of the 1995 convention being the result of a balancing exercise between the need of facilitate the recovery by owners or by the state of origin and predictability,¹¹¹ there seems, therefore, to be no reason not to apply the time limitations of the 1995 convention to Article 7 (b) of the 1970 convention through Article 13 (1) of the 1995 document. *Idem ditto* with regard to the periods applicable in case of illegal export (cf. Article 5 (5) of the 1995 UNIDROIT convention).

(4) Treatment of innocent purchasers

Under the 1970 UNESCO convention, Article 7 (b) (ii) prescribes that the claimant must pay just compensation to an innocent purchaser or to the party that acquired a valid title over the property.¹¹² Nonetheless, this provision is given no further clarification, as no definition of the concepts of ‘just compensation’ and of ‘innocent purchaser’ has been laid down in the text thereof. Consequently, the concept of diligence is absent from the 1970 convention.¹¹³ The 1970 convention has no provisions on diligence in acquisition, which is

¹⁰² Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), p. 208.

¹⁰³ UNIDROIT, (1993), Study LXX – Doc. 42, p. 7.

¹⁰⁴ Forrest, (2010), p. 208.

¹⁰⁵ Prot, (1998), p. 210.

¹⁰⁶ Prot, (1998), p. 210.

¹⁰⁷ UNIDROIT, (1993), Study LXX – Doc. 42, p. 7.

¹⁰⁸ UNIDROIT, (1986), Study LXX – Doc. 1, pp. 41-42; UNIDROIT, (1990), Study LXX – Doc. 19, p. 12; Prot, (1998), p. 211.

¹⁰⁹ Prot, L. V., ‘Strength and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption (Background paper)’, in UNESCO, ‘The fight against the illicit trafficking of cultural objects, The 1970 convention: past and future’, UNESCO Headquarters, Paris, 15-16 March 2011, p. 4.; nonetheless, contracting states are to implement the convention and can, therefore, include procedural limitations when doing so. Prot, (1998), p. 211.

¹¹⁰ Prot, (1998), p. 214.

¹¹¹ UNESCO, (2005), p. 5.

¹¹² UNESCO, (2005), p. 5.

¹¹³ UNIDROIT, (1992), Study LXX – Doc. 25, p. 3.

considered as a key mechanism in appropriately addressing the illicit traffic in cultural property.¹¹⁴ This posed considerable difficulties for certain states – such as Finland and The Netherlands – which found the provision to be incompatible with the protection of good faith purchasers that was at the core of their respective private law regimes.¹¹⁵ By way of contrast, these aspects are dealt with in greater details in the 1995 convention.¹¹⁶ Despite this clear lack of specificity, there seems to be no prohibition against using the concept of due diligence that is posited in Article 4 (4) of the UNIDROIT regime to determine the innocence of the purchaser for the purpose of the 1970 instrument.

3. INTERACTIONS BETWEEN THE 1970 AND 1995 CONVENTIONS

Taking Article 13 (1) into consideration, the UNIDROIT convention does not affect other existing multilateral instruments; this is because of the lack of cohesion between its provisions and those of other international treaties that are effective in the realm of cultural property / cultural heritage law. Whilst it has clear ties with its 1970 predecessor in relation to the provisions relating to corrective justice, it is difficult to conclude that the convention has substituted the correlating provisions of the 1970 treaty.¹¹⁷ In fact, the regime of the UNIDROIT convention does not conflict with the majority of the provisions contained in the aforementioned convention.¹¹⁸ It cannot, therefore, be excluded that states might apply the two conventions to the same situation:¹¹⁹ the 1970 UNESCO convention is applicable to situations that predate the adoption of the 1995 convention, after which both conventions will run in parallel (notably because the latter has no retroactive effect in theory, as prescribed in Recital 8 of its Preamble and as is set forth in its Article 10).¹²⁰ If the two sets of rules were applied to the same situation, the use of these two legal regimes would not be without problems.¹²¹ As such, discrepancies between the regimes of these two instruments could be corrected by issuing a declaration on the basis of Article 13 (1) giving either precedence to the provisions of the UNIDROIT convention to certain correlating articles of the 1970 UNESCO convention – as was explained in detail above –, or alternatively no to issue any declaration, thus not giving any precedence at all.

¹¹⁴ UNIDROIT, (1993), Study LXX – Doc. 42, p. 7; see also Presidenza del Consiglio dei Ministri, (1996), p. 86.

¹¹⁵ UNIDROIT, (1990), Study LXX – Doc. 19, p. 12.

¹¹⁶ Protz, (1998), p. 214.

¹¹⁷ Bergé, (2000), p. 237.

¹¹⁸ Droz, (1997), pp. 274-275.

¹¹⁹ Bergé, (2000), p. 237.

¹²⁰ Forrest, (2010), p. 199.

¹²¹ Bergé has, nonetheless, argued that the regime of restitution and return of the UNIDROIT convention is to supersede the regime of restitution and return of the UNESCO convention. Therefore, he argues that the Unidroit convention is meant to take the regime of the 1970 convention a step further and should, thus, be applied in case on concurring claims irrespective of the formulation of Article 13 (1) of the UNIDROIT convention. Bergé, (2015), p. 554.

B. Improved application of the Convention

Article 13 UNIDROIT Convention (1995) – (2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary.

In accordance with Article 13 (2), read in conjunction with Article 9 (1), it is possible for two or more states to make use of a more favourable regime in their mutual relations.¹²² Article 13 (2) is specifically designed to take enhanced regimes of application of the convention between certain states into account or, when no such relations exist, to entice states into creating these relationships when this is deemed appropriate.¹²³ In order to become effective, these special agreements must be communicated to the depositary of the convention, subject to the sanction of non-recognition.¹²⁴ Hitherto, the states parties to the convention have not made use of this provision.

¹²² Protz, *Commentary on the Unidroit Convention*, (1997), p. 83.

¹²³ UNIDROIT Secretariat, (2001), p. 554.

¹²⁴ UNIDROIT Secretariat, (2001), p. 554.

C. Clause de déconnexion

Article 13 (3) makes it possible for adhering states that are members of organisations of economic integration or regional bodies to set the convention's provisions aside for the purpose of applying a set of different rules in their mutual relations.¹²⁵

Article 13 UNIDROIT Convention (1995) – (3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.

This article thus entitles contracting states to declare the convention inapplicable in their legal order¹²⁶ in instances where there are competing competences,¹²⁷ and thus to give precedence to another existing set of rules. Nevertheless, this set of rules needs to be a set of internal rules of an organisation that has economic integration as its aim, or the set of internal rules of a regional body.¹²⁸ This mechanism is known as the *clause de déconnexion* and it constitutes an important exception to the territorial application of the convention.¹²⁹ The *rationale* behind the inclusion of this mechanism in the convention relates to the enactment of Directive 93/7/EEC of 15 March 1993 *on the return of cultural objects unlawfully removed from the territory of a Member State* within the European Economic Community – hereinafter EEC –, which predated the adoption of the convention.¹³⁰ In fact, concerns were raised by fourteen Member States of the EEC participating in the DC that the future instrument would interfere with the obligations of Member States of the European Communities.¹³¹ Furthermore, the same states emphasised that it was “customary for international private law Conventions to contain a provision safeguarding existing agreements, often of a regional character, dealing with the same or similar subject-matter”.¹³² Therefore, the *clause de déconnexion* was requested by the representatives of the state holding the Presidency of the Council of the EEC¹³³ and was tailored to be compatible with the work that was being done at that time within the Community.¹³⁴ Although the provision was added so as to respond to the concerns raised by EEC Member States, Article 13 (3) is not limited to the EEC and can be used by any other organisation of economic integration or any other regional body.¹³⁵ Consequently, these organisations or bodies can decide whether they want their rules to be preferred in the relations between their members by merely issuing a declaration to this effect.¹³⁶

Because Article 13 (3) *in fine* explicitly excludes the application of the convention's provisions “the scope of application of which coincides with that of those [internal] rules” to the benefit of the internal rules of these organisations or regional bodies, the present section will take a closer look at the application of the *clause de déconnexion* in respect of both former Directive 93/7/EEC and its recast, Directive 2014/60/EU. This comparison is undertaken in order to appreciate the relationship between these two instruments and the convention. In doing so, subsection 1. will, firstly, introduce former Directive 93/7/EEC and it will point out the prominent distinctions that used to exist between its regime and the regime of the 1995 convention; Nevertheless, it must be stressed that subsection 1 does not attempt to compare the two instruments meticulously, but it merely aims to explain how different these regimes were for the purpose of understanding the implications of the *clause de déconnexion* for Member States of the European Community before the adoption of Directive 2014/60/EU; secondly, subsection 2. will introduce Directive 2014/60/EU – the recast of Directive 93/7/EEC – and will explain how this new regime differs from the former Directive for the purpose

¹²⁵ Renold, (1997), p. 32.

¹²⁶ Jolles, (1997), p. 60; Bergé, (2000), p. 241.

¹²⁷ Bergé, (2000), p. 241.

¹²⁸ Klein, (1999), p. 267.

¹²⁹ Calvo Caravaca and Caamiña Domínguez, (2009), p. 159; Bergé, (2000), pp. 238-239; for an analysis of the territorial scope of the convention, see section B. 2. (2) of ‘Chapter 1 – Presentation and Applicability of the Convention’ above.

¹³⁰ Bergé, (2000), p. 239; Droz, (1997), p. 275.

¹³¹ See ‘Proposal by the delegations of Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom’, in ‘Working Papers Submitted to the Final Clauses Committee’, in *Presidenza del Consiglio dei Ministri*, (1996), Conf. 8/C.2/W.P. 15, 15 June 1995, p. 322.

¹³² *Ibidem*, p. 321.

¹³³ UNIDROIT Secretariat, (2001), p. 556.

¹³⁴ The EU's involvement was not without consequences for the development of the convention itself: the creation of Directive 93/7/EEC at the time of preparation of the UNIDROIT convention diverted the attention of EU Member States away from the negotiations of the convention to focus solely upon the forthcoming Directive, ultimately slowing down the finalisation of the convention. See Renold, (2003), p. 583.

¹³⁵ UNIDROIT Secretariat, (2001), p. 556.

¹³⁶ UNIDROIT Secretariat, (2001), p. 556.

of understanding the operation of the *clause de déconnexion* in relation to this instrument. As a subsidiary matter, because the latest Directive has been brought more in line with the regime of the convention, the comparison between both former Directive 93/7/EEC and actual Directive 2014/60/EU will serve to demonstrate the increased influence exercised by the UNIDROIT convention on the European Union instruments.

1. DIRECTIVE 93/7/EEC (REPEALED BY DIRECTIVE 2014/60/EU)

Directive 93/7/EEC of 15 March 1993 *on the return of cultural objects unlawfully removed from the territory of a Member State* was adopted in order to regulate the movement of national treasures within the EEC. The introduction of the Directive was considered important in the context of the creation of the Single Market and, thus, of the free movement of cultural objects:¹³⁷ although at the time of adopting the Single European Act, Member States had formulated reservations to ensure the protection of cultural materials¹³⁸ and despite the fact that Article 36 of the Treaty establishing the European Economic Community – hereinafter TEEC – allowed derogations to the free movement of goods in order to protect national treasures, there were no specifications with regard to the measures that had to be adopted to secure the said protection.¹³⁹ Instead, two competing values underlined the consolidation of the Internal Market in the context of protecting national cultural heritage: Member States of the EEC were set to achieve the completion of the Internal Market whilst, at the same time, they were entitled to “actively pursue their cultural policy, since it falls within their responsibility [...]”.¹⁴⁰ What is more, the completion of the Internal Market was also synonymous with the abolition of import and export restrictions on all goods, including cultural materials. Consequently, whilst the EEC strived for the free movement of goods within its internal boundaries – to be achieved no later than 31 December 1992 –, Article 30 TEEC established a regime whereby the licensing of the import and export of any good would, in principle, be unlawful.¹⁴¹ Subsequently, the physical removal of border controls¹⁴² – appearing together with the disappearance of the EEC’s internal borders¹⁴³ – raised concerns as to a possible increase in the theft of cultural objects.¹⁴⁴ Contemplating a response to these concerns, it was – on the one hand – clear that the EEC lacked the competence to enact legislation that would be capable of harmonising domestic private law.¹⁴⁵ Nonetheless, this harmonisation would have helped to deter the theft of cultural property.¹⁴⁶ On the other hand, whilst in theory it was possible for Member States to retain their own export legislation¹⁴⁷ – provided that these measures were within the fringes of Article 36 TEEC by 31 December 1992¹⁴⁸ –, attitudes towards the limitations of the export

¹³⁷ Renold, (2003), p. 581; see also Recital 5 of the Preamble of Directive 93/7/EEC referring to Article 8a of the Treaty establishing the European Economic Community; Hughes, V., Wright, L., ‘International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?’, 32 *The Canadian Yearbook of International Law*, (1994), p. 228.

¹³⁸ A General Declaration was added to the Act by which Member States submitted that “Nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to control terrorism, crime, the traffic in drugs and illegal trading in works of art and antiquities”. See UNIDROIT, *The International Protection of Cultural Property*. Summary of the statement of Mr Pieter Van Nuffel (observer representative of the Commission of the European Communities) at the first session of the UNIDROIT study group on the international protection of cultural property, Study LXX – Doc. 12, Rome, March 1989, p. 1; see also UNIDROIT, *The International Protection of Cultural Property*. Communication from the Commission of the European Communities to the Council on the protection of national treasures possessing artistic, historic or archaeological value: needs arising from the abolition of frontiers in 1992, Study LXX – Doc. 17, Rome, December 1989, p. 4.

¹³⁹ UNIDROIT, (1989), Study LXX – Doc. 12, p. 1.

¹⁴⁰ UNIDROIT, (1989), Study LXX – Doc. 17, p. 1.

¹⁴¹ UNIDROIT, (1989), Study LXX – Doc. 12, p. 1.

¹⁴² UNIDROIT, (1989), Study LXX – Doc. 12, p. 2; see also Commission of the European Communities, ‘White Paper on completion of the Internal Market’, COM (85) 310 final, Brussels, 14.06.1985, cited in UNIDROIT, (1989), Study LXX – Doc. 17, pp. 4-5.

¹⁴³ Papademetriou, (1996), pp. 280-281.

¹⁴⁴ See Commission of the European Communities, ‘Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992’, COM (89) 594 final, Brussels, 22 November 1989, in UNIDROIT, (1989), Study LXX – Doc. 17, p. 1.

¹⁴⁵ UNIDROIT, (1989), Study LXX – Doc. 12, p. 2; as was explained in 1989 by the Commission of the European Communities: “The question of stolen property (and of whether or not there is a right to demand its return) is governed by the normal rules laid down by civil law in respect of all movable property which may vary from one Member State to another”. See Commission of the European Communities, ‘Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992’, COM (89) 594 Final, Brussels, 22 November 1989, reproduced in UNIDROIT, (1989), Study LXX – Doc. 17.

¹⁴⁶ UNIDROIT, (1989), Study LXX – Doc. 12, p. 2.

¹⁴⁷ The Commission of the European Communities submitted in 1989: “In other words, irrespective of completion of the Internal Market, current Community law authorizes national measures prohibiting or restricting the export of cultural objects, provided that they comply with the limits it lays down”. See UNIDROIT, (1989), Study LXX – Doc. 17, pp. 13-14.

¹⁴⁸ UNIDROIT, (1989), Study LXX – Doc. 12, p. 2; See also UNIDROIT, (1989), Study LXX – Doc. 17, p. 5.

of cultural materials outside of their territory differed considerably between Member States.¹⁴⁹ Concomitantly, despite the maintenance of domestic export laws, Member States were unable to ensure compliance with these measures within the Community because of the abolition of border controls on goods and persons.¹⁵⁰ Hence, the Commission of the European Communities recognised the preposterousness of applying the principles of the Internal Market to cultural objects that were considered to be national treasures¹⁵¹ and, *ergo*, decided to legislate in order to remedy this particular intra-Community problem. Directive 93/7/EEC was the ensuing product that was finalised at the time of adopting the Treaty establishing the European Community, hereinafter TEC.¹⁵² The Directive was not only meant to give mutual recognition to Member State's domestic laws but it was primarily adopted as a means of fighting the illicit trafficking of cultural goods within the EEC.¹⁵³

As such, the UNIDROIT Convention considerably influenced Directive 93/7/EEC as the former had prominently inspired the latter.¹⁵⁴ In fact, the EC adopted its Directive during the convention's drafting process.¹⁵⁵ The European instrument had thus mainly been influenced by the conclusions of the CGE's meetings, the committee that had been entrusted with the task of drafting the convention.¹⁵⁶ Furthermore, it had been adopted two years before the work relating to the convention was concluded.¹⁵⁷ As such, the construction of both instruments is similar, most notably in respect of the goals that they strive to achieve.¹⁵⁸ Moreover, both instruments prescribe more or less similar conditions relating to the protection of innocent acquirers, including the payment of compensation to a *bona fide* purchaser that is obliged to return the item and the reversal of the burden of proving the good faith on the possessor.¹⁵⁹ Nevertheless, the EC secondary legislation distinguished itself from the convention by only addressing the protection of Member States' national treasures and not by tackling the illicit traffic in cultural property as a whole.¹⁶⁰ Directive 93/7/EEC was only concerned with return in case of illicit export of EC Member States' national treasures – resembling, in many ways, the mechanism of Chapter III of the 1995 UNIDROIT convention¹⁶¹ – and it neither dealt with the problem of cultural property

¹⁴⁹ Papademetriou, (1996), p. 281 pointing at the fact that Italy, France, Greece and Spain – all being Member States with a rich cultural heritage – were proponents of strict rules on the export of cultural materials whilst Member States such as Belgium, Germany and The Netherlands were less inclined to adopt strict rules.

¹⁵⁰ UNIDROIT, (1989), Study LXX – Doc. 17, p. 5.

¹⁵¹ UNIDROIT, (1989), Study LXX – Doc. 17, p. 1: “The ideal long-term solution would be to develop the idea of a common European heritage. As far as the immediate future is concerned, however, completion of the Internal Market has to be reconciled with the Member States' desire to protect their national treasures, the legitimacy of which is recognized by the EEC Treaty. It would be inconceivable to apply unrestrictively the logic of the internal market and the principle of the free movement of goods in respect of objects that constitute national treasures: account must be taken of the special nature of cultural items, which cannot be treated as mere goods. The fact remains, however, that completion of the internal market could be rendered difficult by the implementation of national measures aimed at protecting national treasures”.

¹⁵² It should be remarked that the Directive and the 1995 convention were adopted in two particularly distinct situations: whilst the convention was to be used in an international setting in which contracting states could control the export of cultural goods from their territory, the same conclusion could not be reached with regard to contracting states that were members of the European Community. These states could not control the export of cultural objects from their domestic borders because of the removal of the Community's internal borders, provided that the goods were to move within the Community. In response to this loss of control, the Union adopted Directive 93/7/EEC, which allowed Member States to protect one another's cultural heritage within the Community as of 1 January 1993. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the third session (Rome, 22 to 26 February 1993) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 39, Rome, May 1993, p. 27.

¹⁵³ European Parliament, European Parliamentary Research Service, ‘Cross-border restitution claims of looted works of art and cultural goods – European Added Value Assessment Accompanying the European Parliament's legislative initiative report’, PE 610.988, (November 2017), p. 8, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU\(2017\)610988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf), last retrieved on 01.03.2018.

¹⁵⁴ Renold, (2003), p. 581; Frigo, in UNIDROIT, (2012), forthcoming; Lalive D'Épinay, (1996), p. 50; Office Fédéral de la Culture (Suisse), (1998), p. 30; Prott, L.V., ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On’, 14 (1-2) *Uniform Law Review*, (2009), p. 223. Prott notes that the Directive is based on an early draft of the convention.

¹⁵⁵ Renold, (1997), pp. 32-33; Frigo, (2012), forthcoming.

¹⁵⁶ It must be remarked that a representative of the European Economic Community participated in these meetings, a reason why Directive 93/7/EEC was remarkably influenced by the discussion of the CGE. See Frigo, in UNIDROIT, (2012), forthcoming; see also ‘Summary Records of the Meetings of the Conference (Plenum) – First Meeting’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/S.R. 1, 10 June 1995, p. 349.

¹⁵⁷ This is even more striking considering that the negotiations about the convention began long before the elaboration of the Directive. The belated finalisation of the convention as against the Directive was notably due to the difficulties in compromising about the content of its provisions. See Frigo, (2012), forthcoming.

¹⁵⁸ Frigo, (2012), forthcoming; see also Recital 17 of the Preamble of Directive 2014/60/EU specifying that the European Union has as objectives “preventing and combatting unlawful trafficking in cultural objects”, similar to the aim of the convention.

¹⁵⁹ Frigo, (2012), forthcoming.

¹⁶⁰ Commission of the European Communities, ‘Report from the commission to the council, the european parliament and the european economic and social committee, Second report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State’, COM (2005), 675 final, Brussels, 21.12.2005, pp. 3, 8.

¹⁶¹ Siehr, K., “Les Points de Vue des Personnes et Institutions Concernées par la Convention d'Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)”, in: C. Breiter, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24*

theft,¹⁶² nor of archaeological theft.¹⁶³ In fact, the Directive introduced a system of extraterritorial recognition and enforcement of EC Member States' domestic laws that was designed to protect national treasures within the European Community.¹⁶⁴ This system was to be applied without disrupting the free movement of goods and it was considered to be the first step towards the mutual recognition of these domestic laws within the Community.¹⁶⁵⁻¹⁶⁶ In implementing this mutual recognition, the Directive instated mechanisms of administrative cooperation between the Member States of the European Community – hereinafter EC –, and created means of justiciability of claims for the return of unlawfully removed national treasures.¹⁶⁷ Consequently, it established a framework entitling these Member States to impose restrictions to the free movement of goods for “national treasures possessing artistic, historic or archeological value”, in accordance with Article 36 TEC.¹⁶⁸

Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 65; Renold, (2003), p. 581.

¹⁶² Renold, (2003); Bergé, (2000), p. 241; this distinction seems, nonetheless, to be overlooked at times: for example, Jolles advanced in 1997 that the regime of the convention was not applicable within the European Union as Article 13 (3) gives precedence to the European Directive (see Jolles, (1997), p. 60). This submission is clearly inaccurate because Directive 93/7/EEC was never intended to regulate cultural property theft (see the commentary of Prott specifying that Directive 93/7/EEC does not affect Chapter II of the convention and does, therefore, not address the situation of cultural property theft in UNIDROIT, (1993), Study LXX – Doc. 36, p. 3; see also ‘Summary Records of the Meetings of the Conference (Plenum) – First Meeting’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/S.R. 1, 10 June 1995, p. 349). Additionally, it should be noted that the German delegation that took part in the CGE submitted in a working paper issued for the committee's first session that Article 222 of the EEC Treaty did not confer competence to the EEC with regard to property law matters. Instead, – the EEC being exclusively competent with regard to trade between Member States – only Chapter III of the then Preliminary draft Convention would fall within the fringes of the EEC's competences. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the first session of the committee (Rome, 6 to 10 May 1991), Study LXX – Doc. 22, Rome, July 1991, p. 26. The fact that the Directive was not concerned with situations of cultural property theft is further corroborated by the object thereof – notably the “return of cultural objects that have been unlawfully removed from the territory of a Member State” –, but is also confirmed in the Preamble to the Directive (See Recital 7 of the Preamble to Directive 93/7/EEC specifying that: “[...] arrangements should therefore be introduced enabling Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of the said Article 36 and have been removed from their territory in breach of the abovementioned national measures or of Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods [...]”) and reasserted throughout its provisions (see for instance the first paragraph of Article 5 of the Directive: “The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory”); nevertheless, theft is not completely ignored by the Directive as Recital 9 of the Preamble calls for the creation of administrative cooperation between Member States with regard to stolen, lost and illegally exported national treasures, including objects of public collections.

¹⁶³ Note that this affirmation is not completely accurate as it was remarked during the DC that illegal excavations could fall within the qualification ‘unlawfully removed from the territory of a Member State’ (as defined by Article 1 (2) of Directive 93/7/EEC) and, therefore, that the Member States of the European Community must consider carefully the relations between the 1995 convention and the European Community Directive in this respect: “The European Directive on the return of cultural objects unlawfully removed from the territory of a Member State covers goods “unlawfully removed from the territory of a Member State in breach of its rules on the protection of national treasures . . .”. This would appear to cover objects resulting from illegal excavations. Article 15 of the European Directive provides: “This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen”. States of the European Community will need to study carefully the relationship between the two texts where illegally excavated goods are concerned.” See ‘Comments by International Organisations on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – UNESCO’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/6, April 1995, p. 90.

¹⁶⁴ Siehr, K., ‘The Protection of Cultural Heritage and International Commerce’, 6 (2) *International Journal of Cultural Property*, (1997), p. 313; see also Recital 6 of the Preamble to Directive 93/7/EEC, referring to Article 36 of the Treaty establishing the European Economic Community giving the right of states to define and adopt measures to ensure the protection of national treasures. Furthermore, Recital 10 of the Preamble to the Directive speaks of mutual recognition of Member States relevant national laws.

¹⁶⁵ See Recital 6 of the Preamble of Directive 2014/60/EU; the first proposal to introduce a system of mutual recognition that would secure the return of an illegally dispatched object was formulated in the ‘Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992’ (COM(89) 594 final). See UNIDROIT, (1989), Study LXX – Doc. 17, p. 13. Proposals that have not been retained can be found at pages 12, 15 and 17 of the same document.

¹⁶⁶ It is important to note that the mechanism instated was not only limited to the territory of EC Member States, but also to the territory of the Member State of the European Free Trade Association parties to the Agreement on the European Economic Area (cf. Annex II, Chapter 28 (1) of the Agreement). See Commission of the European Communities, ‘Report from the commission to the council, the european parliament and the economic and social committee on the implementation of Council Regulation (EEC) no 3911/92 (First report – 1993-1998) on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State’, COM (2000) 325 final, Brussels, 25.05.2000, p. 12.

¹⁶⁷ European Commission, ‘Report from the commission to the european parliament, the council and the european economic and social committee – Fourth report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State’ (COM 2013) 310 final, Brussels, 30.05.2013, p. 3.

¹⁶⁸ As was noted by a participant to the third session of the CGE, the scope of Directive 93/7/EEC was restricted by Article 36 TEC and the case law of the Court of Justice of the European Communities. See UNIDROIT, (1993), Study LXX – Doc. 39, p. 27.

Article 36 TEC – The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds [...]; the protection of national treasures possessing artistic, historic or archaeological value; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Since the protection of national treasures is a prerogative of the Member States of the EC, national protective measures were permitted so long as these measures did not conflict with the regime of the EEC Treaty.¹⁶⁹⁻¹⁷⁰ Hence, the Directive attempted to reconcile the free movement of goods with predicated restrictions that are aimed at the protection of national treasures.¹⁷¹

Although Renold has raised four main differences between the two instruments, many other distinctive features are noticeable,¹⁷² which will be discussed below. From the outset of the present comparison, it should nonetheless be stressed that the interaction between the convention and the Directive created by Article 13 (3) is only relative, as the article makes it possible to give priority to the internal rules of an organisation of economic integration or of a regional body in respect of coinciding rules: the *clause de déconnexion* has no automatic application, as the contracting states either belonging to an organisation of economic integration or to a regional body *may* decide to apply the predicated internal rules. Therefore, when a Member State had used this clause to the benefit of the Directive, the latter instrument was to replace the application of Chapter III for illegal exports of national treasures between these Member States. This further entailed that Member states of the EC that were party to the UNIDROIT convention were to apply Chapter II thereof in case of cultural property theft¹⁷³ with regard to stolen cultural objects that are not national treasures unlawfully removed from the territory of a Member State of the European Union,¹⁷⁴ provided the situation was governed by the convention. In regard of illegal exports, the 1995 convention was to be applied to situations that did not fall within the fringes of the European Union Directive.¹⁷⁵ Hence, Chapter III was to be applied when dealing with cultural objects illegally exported outside of the European Community,¹⁷⁶ or illegally exported from a third country and imported therein.¹⁷⁷ For Member States that did not issue a declaration on the basis of Article 13 (3) of the convention, it was technically possible to base their claim on the regime of both instruments. Nonetheless, the application of Chapter III would be limited to the fringes established by Directive 93/7/EEC, as this instrument posited a regime of maximum harmonisation within the European Community.¹⁷⁸ Irrespective of the issuance of a

¹⁶⁹ Commission of the European Communities, (2000), p. 3; in this regard, it must be remarked that Article 36 TEC made specific reference to the prohibitions to adopt quantitative restrictions and measures having equivalent effect to quantitative restrictions for imports and for exports, both to be respectively found in Articles 30 and 34 TEC.

¹⁷⁰ Nevertheless, because of the derogatory character of Article 36 TEC to the free movement of goods, exceptions for national treasures were thus to be interpreted restrictively. See Commission of the European Communities, 'Communication from the commission to the Council on the protection of national treasures possessing artistic, historic or archaeological value: needs arising from the abolition of frontiers in 1992', COM (89), 594 final, Brussels, 22.09.1989, p. 3.

¹⁷¹ Commission of the European Communities, (2000), p. 3.

¹⁷² The four differences mentioned by Renold concern the following points: the definition of cultural objects; the definition of public collection; the length of the relative and absolute periods and the conditionality of the return. See Renold, (2003), p. 581.

¹⁷³ Bergé, (2000), p. 242; Protz notes that it is possible for alternation procedures to run concurrently. If the object has been stolen and unlawfully removed, it is then possible for the owner (including a private party) to make use of Chapter II whilst the Member State can use the Directive to request the return of the object because of the unlawfulness of the removal. See UNIDROIT, (1993), Study LXX – Doc. 36, p. 3.

¹⁷⁴ UNIDROIT, (1992), Study LXX – Doc. 25, p. 7; this point is discussed in more details below.

¹⁷⁵ See the clarification given with regard to the interactions between the draft convention and Directive 93/7/EEC in UNIDROIT, (1992), Study LXX – Doc. 25, p. 7: "The new EEC directive will therefore apply in principle only to national cultural treasures exported illegally from one EEC member (*sic*) State to another and deal with the return to that State. It does not deal with stolen cultural treasures at the suit of the owner; these are covered by the Unidroit draft. It does not deal with stolen objects of cultural significance which are not "national treasures"; these are covered by the Unidroit draft. It does not deal with stolen or illegally exported cultural objects coming from States outside the EEC; these are covered by the Unidroit draft. There is nothing to prevent States members of the EEC becoming Parties to the Unidroit draft, since it covers matters other than those dealt with in the EEC Directive; e.g. the rules as to stolen objects are presently provided by the private law of the national States, which have the power to change those rules if they so wish."; Office Fédéral de la Culture (Suisse), (1998), p. 34.

¹⁷⁶ As was noted by the Commission of the European Communities, "[...] the presence of an object in the territory of another Member State can still prevent it being lost for ever, since as long as it has not been exported to a non-member country, it remains within the Internal Market and subject to Community law." (see UNIDROIT, (1989), Study LXX – Doc. 17, p. 10). It can be remarked that this commentary submitting that the object would be 'lost for ever' if taken outside of the territory of Member States of the European Community was particularly undiplomatic. This lack of finesse stems from the fact that this submission was formulated in a communication that was submitted to the Study Group that was tasked with working out a solution to this problem.

¹⁷⁷ This observation was made by the representative of UNESCO after the first session of the CGE. See UNIDROIT, (1992), Study LXX – Doc. 25, p. 7.

¹⁷⁸ During the first and second sessions of the CGE, concerns as to the compatibility between Article 30 TEC and Article 5 (3) of the future UNIDROIT convention were expressed by several representatives: these concerns were directed at the degree of harmonisation in each of the two instruments. The representatives that raised their concerns emphasised that the future convention in its draft form foresaw a broader spectrum of return than the regime of the Directive, which was considered undesirable since the Directive laid down a

declaration, Directive 93/7/EEC differed from the regime of Chapter III of the UNIDROIT convention on several points.

(1) Scope of application

A first important distinction between the former Directive and the convention concerns the differences in the scope of application of the two regimes. The Directive's scope differed considerably from that of the convention in two respects, i.e. its material and its personal scope. Regarding the material scope, Article 2 of the Directive posited that its regime was directed at the return of cultural objects that had been unlawfully removed from the territory of a Member State of the European Economic Community.

Article 2 Directive 93/7/EEC – **Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive.**

In order to understand the ambit of the former instrument, the notions of 'cultural object' and of 'unlawful removal' require further clarification.

Contrary to the 1995 convention, the Directive was only concerned with national treasures, as defined in the respective domestic laws of the respective Member States. Whilst defining these national treasures was a task incumbent upon Member States, this qualification is constrained by two cumulative requirements: national treasures were to be limited to the fringes of the definition of 'cultural object' provided in Article 1 of the Directive, and they had to belong to one of the categories listed in the Annex attached to the Directive.¹⁷⁹ With regard to the first condition, Article 1 of the Directive merely provided a general definition of what constitutes a cultural object for the purpose of applying the Directive, thereby serving as a guideline for Member States in determining which cultural objects could be assimilated to national treasures.

Article 1 Directive 93/7/EEC – (1) For the purposes of this Directive: 1. 'Cultural object' shall mean an object which:

- is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty, and
- belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of:
 - public collections listed in the inventories of museums, archives or libraries' conservation collection.

For the purposes of this Directive, 'public collections' shall mean collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority;

- the inventories of ecclesiastical institutions.

Following Article 1 (1) of the Directive, cultural objects were, firstly, objects that were classified as "national treasures possessing artistic, historic or archaeological value" as per the national legislation or administrative procedures before or after an object's unlawful removal from the territory of a Member State; and, secondly, they had to belong to one of the categories that was stipulated in the Annex; or, alternatively – instead of belonging to one of the said categories – they had to form an integral part of a public collection that had been inventorised by museums, archives or the conservation collection of libraries, or that had been inventorised by ecclesiastical institutions. These conditions are analysed separately below.

1. [...] is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty.

The classification of cultural objects as national treasures was left to the discretion of each Member State.¹⁸⁰ With this direct reference to national classifications, the Directive avoided having to decide on a harmonised European definition of what constituted cultural objects (notably with regard to the subjective nature of the 'cultural' element). This choice made it possible to avoid experiencing similar difficulties than the ones that the

maximum harmonisation for the Member States of the European Community. See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Report on the second session (Rome, 20 to 29 January 1992) (prepared by the UNIDROIT Secretariat), Study LXX – Doc. 30, Rome, June 1992, p. 27.

¹⁷⁹ Renold, (2003), p. 582.

¹⁸⁰ See Recital 6 of the Preamble to Directive 93/7/EEC, reiterated in Recital 3 of Directive 2014/60/EU, discussed below.

drafters of the 1995 convention had encountered in negotiating the definition of Article 2 of the convention.¹⁸¹ It is important to note that the competence of the Member States was key to the protection that was afforded by the Directive.¹⁸² Without the classification of the object under one of the protected categories that was listed in Article 1, no return was possible.¹⁸³

2.a. [...] belongs to one of the categories listed in the Annex, or [...]

The categories listed in the Annex are reproduced below:

Annex Directive 93/7/EEC – Categories referred to in the second indent of Article 1 (1) to which objects classified as 'national treasures' within the meaning of Article 36 of the Treaty must belong in order to qualify for return under this Directive A.

1. Archaeological objects more than 100 years old which are the products of:
 - land or underwater excavations and finds,
 - archaeological sites,
 - archaeological collections.
2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old.
3. Pictures and paintings executed entirely by hand, on any medium and in any material (1).
4. Mosaics other than those in category 1 or category 2 and drawings executed entirely by hand, on any medium and in any material (1).
5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters (1).
6. Original sculptures or statuary and copies produced by the same process as the original (1) other than those in category 1.
7. Photographs, films and negatives thereof (1).
8. Incunabula and manuscripts, including maps and musical scores, singly or in collections (1).
9. Books more than 100 years old, singly or in collections.
10. Printed maps more than 200 years old.
11. Archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old.
12. (a) Collections (2) and specimens from zoological, botanical, mineralogical or anatomical collections;
(b) Collections (2) of historical, palaeontological, ethnographic or numismatic interest.
13. Means of transport more than 75 years old.
14. Any other antique item not included in categories A 1 to A 13, more than 50 years old.

The cultural objects in categories A 1 to A 14 are covered by this Directive only if their value corresponds to, or exceeds, the financial thresholds under B.

Additionally, financial thresholds were applied to these categories. These were listed under point B in the Annex to the Directive.

¹⁸¹ Cf. section B. 1. (1) of 'Chapter 1 – Presentation and Applicability of the Convention' above for more details in this regard.

¹⁸² Stamatoudi, I., *Cultural Property law and Restitution. A Commentary to International Conventions and European Union Law* (Edward Elgar Publishing, 2011), p. 14.

¹⁸³ Stamatoudi, (2011), p. 14.

B. Financial thresholds applicable to certain categories under A (in ecus)

VALUE:

0 (Zero)

- 1 (Archaeological objects) - 2 (Dismembered monuments) - 8 (Incunabula and manuscripts) - 11 (Archives)

15 000

- 4 (Mosaics and drawings) - 5 (Engravings) - 7 (Photographs) - 10 (Printed maps)

50 000

- 6 (Statuary) - 9 (Books) - 12 (Collections) - 13 (Means of transport) - 14 (Any other item)

150 000

- 3 (Pictures)

The assessment of whether or not the conditions relating to financial value are fulfilled must be made when return is requested. The financial value is that of the object in the requested Member State.

The date for the conversion of the values expressed in ecus in the Annex into national currencies shall be 1 January 1993.

(1) Which are more than fifty years old and do not belong to their originators.

(2) As defined by the Court of Justice in its Judgment in Case 252/84, as follows: 'Collectors' pieces within the meaning of Heading No 99.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.'

The categories provided in the Annex to the Directive did not indicate which objects were to be considered as the national treasures of Member States, but they were merely indicative of the categories of cultural objects that states could designate as national treasures for the purpose of applying the Directive.¹⁸⁴ It should be remarked that the Annex of the Directive reproduced – although not faithfully – the categories of cultural objects that are listed in Article 1 of the 1970 convention and in the Annex to the 1995 convention.¹⁸⁵ Nonetheless, the Annex of the Directive subjected the cultural objects concerned to age limitations and monetary value thresholds;¹⁸⁶ these elements being entirely absent from both the 1970 and 1995 conventions. For goods that did not fall under the Annex of the Directive, Article 1 (1) specified that the Directive was also applicable to goods that were registered in inventories of public collections or of ecclesiastic institutions.¹⁸⁷

2.b. [...] does not belong to one of these categories but forms an integral part of: public collections listed in the inventories of museums, archives or libraries' conservation collection. [...] - the inventories of ecclesiastical institutions.

For the purpose of the regime of Directive 93/7/EEC, public collections were either owned by the state, by a local or regional authority within the state or by a public institution that was either owned by the state or significantly financed by it (cf. Article 1 (1)).¹⁸⁸

Article 1 Directive 93/7/EEC – (1) For the purposes of this Directive, 'public collections' shall mean collections which are the **property of a Member State, local or regional authority within a Member State or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority;**

The definition of what constituted a public collection in the convention is prescribed in Article 3 (7) as follows:

¹⁸⁴ See Recital 7 of the Preamble of Directive 93/7/EEC.

¹⁸⁵ For a comparison between the Annex of the Directive and the Annex of the UNIDROIT convention, see the tables of correspondence provided below.

¹⁸⁶ Renold, (2003), p. 582.

¹⁸⁷ Renold, (2003), p. 582.

¹⁸⁸ Renold, (2003), p. 582.

Article 3 (7) UNIDROIT Convention (1995) – For the purposes of this Convention, a "public collection" consists of a **group of inventoried or otherwise identified cultural objects owned by:**

- (a) a Contracting State
- (b) a regional or local authority of a Contracting State;
- (c) a religious institution in a Contracting State; or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

Whilst Article 1 (1) of the Directive differentiated between objects belonging to public collections and objects inventoried as being owned by ecclesiastical institutions, Article 3 (7) of the convention incorporates these two categories into one provision.¹⁸⁹ Despite this distinction, the two definitions of public collections are almost identical and only differed in one respect: the definition of the Directive required in fact that the object belonged to a public entity that was either owned or significantly financed by the state, whilst the definition of the convention requires that this institution be established for either a cultural, educational or scientific purpose and it imposes an element of public interest which must be embedded in the public institution concerned.¹⁹⁰ This distinction means that the Directive differentiated between the types of public institutions that were not owned by the state, making the demarcation dependent upon whether the institution received significant financing by the Member State. The convention does not take this financial aspect into consideration and favours the purpose of establishment of the public institution instead.

Comparing the definition of cultural object that was posited by the Directive with the regime of the convention, some apparent similarities become noticeable: firstly, the cumulative requirement is similar. Much like Article 1 (1) of the Directive, Article 2 of the convention also requires the cultural object to comply with two cumulative conditions: a) the object has to be of importance for archaeology, prehistory, history, literature, art or science (on religious or secular grounds) and, b) it must belong to one of the categories provided in the Annex. These similarities are merely apparent because, despite the cumulative nature of the requirement, the substantive conditions differ slightly: Article 1 (1) of the Directive required Member States to adopt legislation addressed at “national treasures possessing artistic, historic or archaeological value”, whilst Article 2 of the convention addresses objects that must be of importance for archaeology, prehistory, history, art or science. Hence, the scientific requirement of Article 2 is not to be found in the definition of cultural object that was used by the Directive. What is more, the definition of cultural object that was found in the Directive does not include objects of ethnological, spiritual or ritual value, categories that are particularly important for states that have traditional communities within their territories.¹⁹¹ Additionally, the categories given in the annexes of both the Directive and the convention differ.¹⁹² Consequently, the definition that was given by Article 1 of the Directive emphatically departed from the definition of Article 2 of the convention: the definition laid down in the Directive was more restrictive¹⁹³ because it targeted the national treasures of Member States and, therefore, cultural objects that had some importance to these states’ cultural heritage. An additional and important difference to note is that there is no minimum pecuniary value threshold stipulated in the convention,¹⁹⁴ while

¹⁸⁹ It should be noted that point (c) of Article 3 (7) matches the inventory of ecclesiastical institutions that is mentioned in Article 1 (1) *in fine* of the Directive.

¹⁹⁰ Renold, (2003), p. 582.

¹⁹¹ UNIDROIT, (1993), Study LXX – Doc. 42, p. 28.

¹⁹² For more details about these differences, see the table of correspondence relating to the annexes of both the Directive and of the convention provided below.

¹⁹³ Van Gaalen, M.S., Verheij, A. J., “De Gevolgen van het Unidroit-Verdrag Inzake Gestolen of Onrechtmatig Uitgevoerde Cultuurobjecten voor Nederland”, 5 *Nederlandse Juristen Blad (NJB)*, (31 januari 1997), p. 199.

¹⁹⁴ Whilst a financial threshold had been included in a Preliminary draft Convention, making it impossible to request the return of cultural objects of a pecuniary value lower than 25.000 Special Drawing Rights (a currency created by the International Monetary Fund) (see Articles 5 and 7 of the Preliminary draft Convention on the restitution and return of cultural objects, in UNIDROIT, The International Protection of Cultural Property – Preliminary draft Convention on the restitution and return of cultural objects (prepared by the Unidroit Secretariat in the light of the discussions of the study group on the international protection of cultural property at its second session held in Rome from 13 to 17 April 1989), Study LXX – Doc. 15, Rome, July 1989, pp. 5 and 8), this condition was qualified as inappropriate by Fraoua. In his opinion, cultural objects can be embedded with other values which would justify their return. Furthermore, it can be particularly difficult for the authority seized to establish the pecuniary value of a cultural object. See UNIDROIT, The International Protection of Cultural Property – Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX – Doc. 15), Study LXX – Doc. 16, p. 11. What is more, it had been advanced that attaching a pecuniary valuation to a ritual object might be offensive to the cultures using this object (see Unidroit, (1990), Study LXX – Doc. 19, p. 27). Consequently, the pecuniary threshold was removed from the Preliminary draft Convention during the third session of the Study Group. See UNIDROIT, (1990), Study LXX – Doc. 18, p. 21.

there was such a requirement in the Directive.¹⁹⁵ This financial condition further narrowed the definition of cultural object for the purpose of the Directive.

After it was established that an object fell under the classification of cultural object given by Article 1 (1), the Directive further required that the object be “unlawfully removed from the territory of a Member State”. The terminological choice reflected the idea that since the European Economic Community had abolished internal borders by the end of 1992, it was not possible to speak of ‘export’ between Member States any longer¹⁹⁶ and the wording ‘unlawfully removed’ was deemed more appropriate. The exact meaning that was given to this terminology was to be found in Article 1 (2) of the Directive.

Article 1 Directive 93/7/EEC – (2) Unlawfully removed from the territory of a Member State' shall mean:

- removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EEC) No 3911/92, or
- not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

For the purpose of the Directive, the notion of ‘unlawfully removed from the territory of a Member State’ had three significant implications. A cultural object was considered to have been unlawfully removed when it was removed from the territory of a Member State: 1) in breach of the state’s domestic rules on the protection of national treasures; 2) in breach of Council Regulation (EEC) No 3911/92 of 9 December 1992 *on the export of cultural goods*; and 3) when the object was not returned after a lawful temporal removal, or when the lawful removal violated the terms relating to its lawfulness.

1. [...] in breach of its rules on the protection of national treasures

The very wording of Article 1 (2) of Directive 93/7/EEC shared similarities with Article 1 (b) of the convention:

Article 1 UNIDROIT Convention (1995) – This Convention applies to claims of an international character for: [...]

(b) the return of cultural objects removed from the territory of a Contracting State **contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage** (hereinafter “illegally exported cultural objects”).

Nonetheless, some differences were noticeable, such as the reference to the ‘national treasures’ in Article 1 (2), which does not match the words ‘cultural heritage’ used in Article 1 (b) of the convention. This terminological choice was understandable, considering the clear limitations to the free movement of goods laid down in Article 36 of the TEC. In fact, conspicuous similarities existed between the specific derogations to the free movement of goods to protect national treasures possessing artistic, historic or archaeological value of Article 36 TEC and Article XX (f) of the *General Agreement on Tariffs and Trade* (hereinafter GATT).¹⁹⁷

Article XX General Agreement on Tariffs and Trade – Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, **nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:**

[...] (f) imposed for the protection of national treasures of artistic, historic or archaeological value;

Article 36 TEC respected thus the wording that is prescribed by the explicit derogations to international trade that is authorised by Article XX of the GATT. The wording of Article 1 (b) of the convention was less constrained by this international economic dimension.

2. [...] in breach of Regulation (EEC) No 3911/92

Article 1 (2) of Directive 93/7/EEC made a cross-reference to Council Regulation (EEC) No. 3911/92 of 9 December 1992 *on the export of cultural goods*. This Regulation was concerned with the issuance of export licenses for the cultural objects that were defined in the Regulation’s Annex¹⁹⁸ and that left the territory of the European

¹⁹⁵ Van Gaalen and Verheij, (1997), pp. 194, 200.

¹⁹⁶ UNIDROIT, (1989), Study LXX – Doc. 12, p. 2.

¹⁹⁷ As side note, it should be remarked that problems of compatibility between the 1995 convention with Article 30 TEC *juncto* to Article XX GATT were raised during the first session of the CGE. See UNIDROIT, (1991), Study LXX – Doc. 23, p. 32.

¹⁹⁸ See Article 1 *juncto* the Annex of Regulation 3911/92. The definition of cultural object matches the definition of the Directive 93/7/EEC, albeit the last category is further subdivided in two age categories: objects between fifty and one hundred years, and objects older than one hundred years. This subdivision did not exist in the Directive.

Community.¹⁹⁹ Because the Regulation prescribed the mandatory use of an export licence to export the cultural object outside of the territory of the European Community,²⁰⁰ the export that did not comply with this requirement was to be considered as unlawful removal. This did in turn trigger the application of the rules of the Directive when the object returned to the territory of one of the Member States of the EC. Council Regulation (EEC) No. 3911/92 was subsequently replaced by EC Regulation No. 116/2009 of 18 December 2008 *on the export of cultural goods*.²⁰¹ A table of correspondence of the articles of the two Regulations is available in the third Annex to the latest Regulation. The latest regulation repealed Regulation 3911/92 and entered into force on 2 March 2009.²⁰²

3. [...] not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

This third scenario mirrored – to a certain extent – Article 5 (2) of the 1995 UNIDROIT convention, which provides:

Article 5 UNIDROIT Convention (1995) – (2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

Although less specific than Article 5 (2) of the convention, Article 1 (2) of the Directive similarly assimilated the non-return of an object lawfully exported or the violation of the terms of this export to an unlawful removal. Both the violation of the terms of the lawful temporary removal or of the deadline for returning the lawfully removed cultural object were assimilated to an unlawful removal, similarly to the regime of the 1995 UNIDROIT convention laid down by Article 5 (2) and (5) *in fine*.

Finally, another difference in the material scope of application of the two instruments can be noted. The scope of application of the convention is universal, while the scope of application of the Directive was regional, hence limited to the territorial fringes of the European (Economic) Community / European Union. Thenceforth, the material scope of application of the former is broader than the material scope of application of the Directive was.²⁰³

(2) Conceptualisation

Not only does the material scope of the two instruments differ but the Directive diverged in another respect from the convention. Contrary to the regime of the convention, the Directive had further nuanced the conceptualisation of the convention by defining the notions of ‘return’, ‘possession’, ‘requested state’, and ‘requesting state’ – concepts that have been left undefined in the 1995 instrument: ‘return’ was defined in Article 1 (5) as the “[...] physical return of the cultural object to the territory of the requesting Member State”. Article 1 (6) defined ‘possessor’ as “[...] the person physically holding the cultural object on his own account” and it differentiated the possessor from the holder, the latter concept was defined in Article 1 (7) as “[...] the person physically holding the cultural object for third parties”.²⁰⁴ Thenceforth, the Directive specifically allowed individuals to bring proceedings for the return of the object against the physical holder of the property that had been entrusted with it by the possessor (e.g. auction house or art dealer). Furthermore, the Directive went a step further than the convention in defining the two concepts of ‘requesting’ and ‘requested’ Member States, respectively in Article 1 (3) and (4) of the Directive. Following these provisions, on the one hand, a requesting Member State was “[...] the Member State from whose territory the cultural object has been unlawfully removed”. On the other hand, a requested Member State was defined as “[...] the Member State in whose territory a cultural object unlawfully removed from the territory of another Member State is located”.

¹⁹⁹ See Title 1 (articles 2-5) of Regulation 3911/92.

²⁰⁰ Cf. Article 2 (1) of Regulation 3911/92.

²⁰¹ Council Regulation (EC) No 116/2009 of 18 December 2008 *on the export of cultural goods* (Codified version), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0116>, last retrieved on 01.03.2018.

²⁰² Cf. Article 12 of Regulation 112/2009.

²⁰³ Van Gaalen and Verheij, (1997), p. 199.

²⁰⁴ This differentiation is not found in the UNIDROIT convention, as it merely refers to possessors and not to holders. Nonetheless, the convention addresses both holders and possessors despite the fact that it has borrowed the common law notion of possession to refer to both (for more details in this regard, see ‘Chapter 4 – Cultural Property Theft – The Unidroit Solution’ above). The use of this conceptualisation of possession within the European Community would not have been appropriate, a reason as to why the Directive differentiated between possessor and holder.

(3) Time limitations

A third difference between the Directive and the convention concerns the relative and absolute periods of limitation.²⁰⁵ Similarly to the convention, the first paragraph of Article 7 (1) of the Directive prescribed that the relative period was to start running from the moment when the claimant discovered the identity of the possessor or holder and the whereabouts of the object.

Article 7 Directive 93/7/EEC – (1) Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder.

The second sentence of Article 7 (1) foresaw that the absolute period of thirty years started to run from the moment the object had been unlawfully removed.

Article 7 Directive 93/7/EEC – (1) Such proceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. [...]

Notwithstanding the similarity in the use of two periods of limitations and in the accrual of the cause of action for the purpose of the relative period, the difference in relation to the time limitations stemmed in the length of the periods: in the Directive, both the relative and absolute periods were considerably shorter than in the regime of the convention. The Directive prescribed a relative period of one year and an absolute period of thirty years,²⁰⁶ compared to a three-years relative period and fifty-year absolute period that is laid down in the convention (cf. Article 5 (5) of the convention).

Article 5 UNIDROIT Convention (1995) – (5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

Furthermore, the Directive subjected demands for the return of an object that formed part of an inventoried public collection or of an ecclesiastical inventory that had been unlawfully removed from the territory of a Member State to a maximum period of seventy-five years, whenever these objects enjoyed a special protection in the requesting state (cf. the second paragraph of Article 7 (1) of the Directive). This limitation of seventy-five years was not applicable when proceedings for the return of these specific cultural objects was not subject to time limitations in national law, or when the requesting Member State had instated a longer absolute period through the conclusion of a bilateral agreement with the requested Member State (cf. the second paragraph of Article 7 (1)).²⁰⁷

Article 7 (1), Directive 93/7/EEC – [...]§2 However, in the case of objects forming part of public collections, referred to in Article 1 (1), and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States laying down a period exceeding 75 years.

Consequently, compared to the periods that were contained in the Directive, the length of the absolute period of Article 5 (5) of the convention is longer, except for protected public collections or protected ecclesiastical cultural objects, which enjoyed a longer absolute period under the regime of the Directive.²⁰⁸

(4) Obligation of return

A fourth difference can be found in the obligation of return itself: contrary to the provisions of the 1995 convention, Directive 93/7/EEC defined the concept of return in its Article 1 (5) thereof as meaning “[...] the physical return of the cultural object to the territory of the requesting Member State”. Whilst the convention prescribes the return of cultural objects that have been illegally exported under certain international (cultural) interests-based conditions (as listed in Article 5 (3) thereof), Article 2 of the Directive prescribed the automatic and unconditional return of the cultural object that has been unlawfully removed from the territory of a Member State.²⁰⁹

²⁰⁵ Frigo, (2012), forthcoming.

²⁰⁶ Renold, (2003), p. 582.

²⁰⁷ Renold, (2003), p. 583.

²⁰⁸ Renold, (2003), p. 583.

²⁰⁹ Renold, (2003), p. 583.

Article 2 Directive 93/7/EEC – Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive.

The obligation of Article 2 of the Directive was supplemented by Article 8 of the same instrument.

Article 8 Directive 93/7/EEC – Save as otherwise provided in Articles 7 and 13, the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1 (1) and to have been removed unlawfully from national territory.

The fact that the Directive did not – unlike Article 5 (3) of the convention – impose any conditions on the return of the unlawfully removed cultural object (as defined in its first article) – with the exception of the requirement of unlawful removal – was probably due to the already particularly restrictive categories of cultural objects falling under the classification of national treasures given by Member States. When the Commission of the European Communities envisaged the creation of Directive 93/7/EEC, it submitted that the return could be subjected to conditions by which the importance of the object that was unlawfully removed to the requesting state would first have to be ascertained.²¹⁰ This proposition was, nonetheless, omitted from the final version of the Directive and there was no need for the court seized with the demand in return to review the importance of the property, the return of which was requested. Instead, the categories of national treasures protected were constrained by the fringes of the definition of cultural objects laid down in the Directive.

(5) Standard of care during the acquisition

A fifth difference is to be found in the standard of care incumbent upon the acquirer at the time of the acquisition of the disputed object.²¹¹ Article 9 of Directive 93/7/EEC required the possessor to exercise ‘due care and attention’ during the acquisition of a cultural object. When this due care and attention had been exercised, he was then entitled to the payment of ‘fair compensation’.²¹²

Article 9 Directive 93/7/EEC – §1 Where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object.

The requirement of ‘due care and attention’ was left unexplained in Directive 93/7/EEC and had not been further defined by the Court of Justice of the European (Economic) Community / European Union. Consequently, this notion remained somewhat nebulous for the purpose of applying Directive 93/7/EEC.²¹³ In the convention, Article 4 (1) lays down an obligation to prove ‘due diligence’ during the acquisition of the cultural object. Due diligence is further defined in Article 4 (4) of the same instrument.

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

Nonetheless, this requirement is only salient in Chapter II of the convention and due diligence is not required when acquiring a cultural object for the purpose of Chapter III. Instead, the possessor of an illegally exported cultural object that neither knew, nor ought to have known that the object had been illegally exported is entitled to the payment of fair and reasonable compensation. This condition is further refined in Article 6 (2) of the convention.

Article 6 UNIDROIT Convention (1995) – (2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

The reference to the circumstances of the acquisition of Article 6 (2) could be interpreted as referring to due diligence itself, although because the circumstances of acquisition of a stolen or of an illegally exported cultural object differ considerably it might be easier to comply with Article 6 (2) of the convention than proving due

²¹⁰ Commission of the European Communities, (1989), pp. 13-14.

²¹¹ Frigo, (2012), forthcoming.

²¹² The Directive specifically required that a fair compensation be paid to the possessor of the unlawfully removed national treasure that had exercised due care and attention during the acquisition of it. As such, the Directive specifically required payment to the possessor (as of right), and not to the mere physical holder of the property. The approach used in the Directive confirms our reading of Article 4 (1) of the UNIDROIT convention that was proposed in ‘Chapter 4 – Cultural Property Theft – The Unidroit Solution’ above.

²¹³ Frigo, (2012), forthcoming.

diligence for the purpose of Article 4 (4) of the convention. Similarly, proving the compliance with due diligence might prove to be more difficult under the convention than under the EU Directives.²¹⁴ This is in part due to the limited application of the Directives to the territory of the Member States – limiting researches to national treasures of the EEC / EC / EU Member States and to domestic export laws – and due to the availability of lists that have been published by national authorities garnering the national treasures of Member States²¹⁵ and of the availability of databases gathering export laws protecting the cultural heritage of these Member States.²¹⁶

(6) Burden of proof

Under the second paragraph of Article 9 of the Directive, the rules of imputability of the burden of proof of the requested state were to be applied to the issue of due care and attention. This solution might have differed from the convention depending on the domestic procedural law of the requested state.

Article 9 Directive 93/7/EEC – §2 The burden of proof shall be governed by the legislation of the requested Member State.

In fact, the imputability of the burden of proof is less clear in the convention than it was in the Directive.

Article 6 UNIDROIT Convention (1995) – (1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

Article 6 (1) of the convention does not specifically point to the applicable law of one of the two states concerned, but instead it is expected that the judge will apply its conflict-of-law rules to determine the allocation of the burden of proof.²¹⁷ Consequently, the allocation of the burden of proof is less predictable under the convention than it was under the Directive.

(7) Compensation

Furthermore, if the possessor exercised ‘due care and attention’ at the time of acquisition, the court seized with the demand in return ought to have awarded fair compensation to this possessor, the fairness of which depended upon the circumstances of the situation.

Article 9 Directive 93/7/EEC – §1 Where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case [...]

Similar to the convention, which prescribes the payment of fair and reasonable compensation to a possessor that neither knew, nor ought to have known that the object had been illegally exported at the time of the acquisition (cf. Article 6 (2) thereof), the Directive did not specifically explain what ‘fair compensation’ entailed. Additionally, the Directive had no correlating requirement of reasonableness, and prescribed a one-tier assessment (i.e. fair compensation) instead of the two-tier test prescribed by the convention (i.e. fair and reasonable compensation). There was thus not test of reasonableness that could be applied in determining the amount of compensation payable in the Directive. Regarding the amount of compensation, the European Commission remarked: “The amount of compensation will not necessarily be equivalent to the purchase price paid by the acquirer. According to the case in point, it may be more or less than the purchase price because the court also has to take other factors into account, e.g. the objective value of the object, its sentimental value for the acquirer, the costs he has incurred in preserving it and above, whether or not he remains - under the law of the requesting Member State (see Article 12) - owner of the cultural object once returned.”²¹⁸ Although merely based on conjecture, it is possible that the lack of requirement of reasonableness stems from the fact that none of the Member States of the European Economic Community were to be considered as developing states. Henceforth, there was no need for the domestic judge seized with a request for the return of an unlawfully removed national treasure to assess the value of the compensation in light of what the requesting state could reasonably afford to pay.

²¹⁴ Van Gaalen and Verheij, (1997), p. 200.

²¹⁵ Van Gaalen and Verheij, (1997), p. 200.

²¹⁶ See for example the UNESCO Database of National Cultural Heritage Laws, available at <http://www.unesco.org/culture/natlaws/>, last retrieved on 01.03.2018.

²¹⁷ Nonetheless, it has been submitted that the burden of proof is imputed upon the requesting state. See Office fédéral de la culture, (1998), p. 33.

²¹⁸ Papademetriou, (1996), p. 286, citing Nicholas II, T. J., ‘EEC Measures on the Treatment of National Treasures’ 16 *Loyola of Los Angeles International & Commercial Law Journal*, (1993), pp. 162-163, referring to the document COM(91)447, final-SYN 382

(8) Ownership returned object

The Directive tackled an important aspect that is not addressed by the convention: unlike the convention, the Directive regulated the question of ownership of a cultural object that had to be returned in Article 12 thereof.

Article 12 Directive 93/7/EEC – Ownership of the cultural object after return shall be governed by that law of the requesting Member State.

In order to regulate the question of ownership after return, Article 12 of the Directive constituted a *renvoi special* to the *lex originis*,²¹⁹ which in fact established a reference to the substantive law of the requesting state. This reference allowed for inalienability restrictions to be taken into consideration in deciding about the ownership post-return. Nonetheless, if the purchase agreement was seen as legally valid by the law of the requesting state,²²⁰ it could have been concluded that the acquirer – irrespective of whether he had exercised due care and attention at the time of the acquisition – that was asked to return the object remained the legal owner thereof. Consequently, his right of ownership was then constrained by both the law and the territorial boundaries of the requesting state. This did not exclude the possibility for the requesting state to use the mechanism of expropriation through confiscation or forfeiture in order to acquire ownership of the object, which in the EEC was conducive to payment of compensation to the owner, in accordance with Article 1 of Protocol 1 of the *European Convention on Human Rights* (ECHR).²²¹ The provision must be contrasted with the solution that is posited by Article 6 (3) of the convention.

Article 6 UNIDROIT Convention (1995) – (3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:

- (a) to retain ownership of the object; or
- (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.

The convention's solution differs from that of the Directive in several respects: firstly, contrary to the Directive, the question of ownership seems to be settled by the payment of fair and reasonable compensation in the regime of the convention. Alternatively, whilst expropriation will take place through the payment of this compensation, it is possible for the possessor to dismiss the expropriation by retaining ownership or by deciding to transfer the object to another person residing in the requesting state (gratuitously or for payment), provided that the possessor rejects the payment of compensation. These alternative options are, nonetheless, only available when the requesting state so consents, as is foreseen in the wording “[...] and in agreement with the requesting state, [...]” in the chapeau of Article 6 (3) of the convention. In other words, the purchaser that was genuinely unaware of the illegal export can agree with the requesting state to exchange fair and reasonable compensation for either retaining ownership of the object (although this ownership will then be constrained to the territorial boundaries of the requesting state, which could amount to a *de facto* (partial) expropriation), or for transferring this right of ownership by means of sale or donation to a person residing in the requesting state. Consequently, under Article 6 (3) of the convention, it is not possible to take inalienability provisions of the law of the requesting state into consideration when settling the question of ownership after return. The difference between the regimes of the Directive and of the convention is thus considerable here, since the *renvoi special* of Article 12 would have resulted in enuring the right of ownership back to the transferor when the object could not have been alienated and thus deprived the possessor of this right, even though he had exercised due care and attention at the time of the acquisition. Instead, under the regime of the convention, a possessor that was unaware of the illegal export of the object might opt to retain ownership of the object irrespective of whether the transfer was authorised under the *lex originis*.

(9) Modulation of the Directive's provisions

Similarly to Article 9 of the 1995 convention, Article 14 of the European Directive made it possible to modulate the regime of the Directive. Nonetheless, unlike the convention, it was limited to a broadening of the categories

²¹⁹ Armbrüster, C., ‘La Revendication de Biens Culturels du Point de Vue du Droit International Privé’, *Revue Critique du Droit International Privé*, (2004), p. 725.

²²⁰ Note that in many situations relating to illegal export, the owner of the object often exports illegally the object to sell it abroad, or the acquirer that has legally purchased the object from the seller exports the object illegally. In these scenarios, the transfer of ownership must be considered as legally valid and, therefore, the purchaser remains the owner.

²²¹ With regard to the application of Article 1 of Protocol 1 to the ECHR, see Carss-Frisk, M., ‘A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights’, in: Council of Europe – Directorate General of Human Rights, *Human rights handbooks*, No. 4, (Strasbourg, 2001). Text available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4a>, last retrieved on 01.03.2018.

of national treasures that were to be protected under the Directive (cf. the first paragraph of Article 14) and to the possible retrospective application of the Directive to unlawful removals that took place before 1 January 1993 (cf. the second paragraph of Article 14).

(10) Cooperation between Member States

Furthermore, the Directive created obligations of cooperation between Member States, whilst the convention does not impose similar obligations on its states parties. Alongside the obligation to create an administrative body to deal with the demands of return that was prescribed by the Directive,²²² this cooperation implied the following obligations on these national authorities: the duty to research the whereabouts and the identity of the possessor / holder of an unlawfully removed cultural object that had been requested by a requesting state within the requested states' territorial confinements;²²³ the duty of notification to another Member State of the presence of a cultural object suspected (on the basis of reasonable grounds) to have been unlawfully removed from the territory of the said Member State;²²⁴ the duty to allow the requesting state informed on the basis of Article 4 (2) to enquire about the cultural nature of the object within a period of two months following the said notification;²²⁵ to allow the requesting state to adopt measures to ensure the physical preservation of the cultural object jointly with the requested state,²²⁶ and to prevent evasion from return proceedings through means of interim measures,²²⁷ provided the enquiries prescribed by Article 4 (3) had been undertaken within the period of two months;²²⁸ lastly, the requested state was required to act as an intermediary between the requesting state and the possessor or the holder to facilitate the return. This facilitation may have included the use of arbitration, provided that the national law of the requested state prescribed this alternative dispute mechanism and that the parties formally approved of it. Nonetheless, the eventual use of arbitration did not prejudice the possibility to instate return proceedings on the basis of Article 5 of the Directive.

2. DIRECTIVE 2014/60/EU (RECAST OF DIRECTIVE 93/7/EEC)

Despite minor amendments to Directive 93/7/EEC's Annex headings A and B through Directive 96/100/EC²²⁹ and to Annex heading B in Directive 2001/38/EC,²³⁰ Directive 93/7/EEC remained applicable for more than twenty years without incurring any major change.²³¹ Four reports on the application of Directive 93/7/EEC (hereinafter referred to as the former Directive) were issued during this period, reports that were published respectively in 2000,²³² 2005,²³³ 2009²³⁴ and 2013.²³⁵ The reports pointed out certain specific flaws with the

²²² Cf. Article 3 of Directive 93/7/EEC.

²²³ Cf. Article 4 (1) of Directive 93/7/EEC.

²²⁴ Cf. Article 4 (2) of Directive 93/7/EEC.

²²⁵ Cf. Article 4 (3) of Directive 93/7/EEC.

²²⁶ Cf. Article 4 (4) of Directive 93/7/EEC.

²²⁷ Cf. Article 4 (5) of Directive 93/7/EEC.

²²⁸ Cf. Article 4 (3) *in fine* of Directive 93/7/EEC.

²²⁹ Article 1 of the Directive is the only article that made substantial changes to Directive 93/7/EEC and read as follows:

"Article 1 – The Annex to Directive No 93/7/EEC shall be amended as follows:

1 in heading A:

(a) point 3 shall be replaced by: '3. Pictures and paintings, other than those included in Category 3A or 4, executed entirely by hand on any material and in any medium (1)';

(b) the following point shall be inserted: '3A. Water-colours, gouaches and pastels executed entirely by hand on any material (1)';

(c) point 4 shall be replaced by the following: '4. Mosaics in any material executed entirely by hand, other than those falling in Categories 1 or 2, and drawings in any medium executed entirely by hand on any material (1)';

2 in heading B:

The following Category shall be inserted:^{30 000}

- 3A. (Water colours, gouaches and pastels)".

²³⁰ Article 1 of Directive 2001/38/EC, being the only article that amended the substance of Directive 93/7/EEC, read as follows:

"Article 1 – In the Annex to Directive 93/7/EEC, the text under heading B is hereby amended as follows:

1. The title "VALUE: 0 (zero)" shall be replaced by: "VALUE: Whatever the value"

2. The last subparagraph, relating to the conversion into national currencies of the values expressed in ecus, shall be replaced by the following: "For the Member States which do not have the euro as their currency, the values expressed in euro in the Annex shall be converted and expressed in national currencies at the rate of exchange on 31 December 2001 published in the Official Journal of the European Communities. This countervalue in national currencies shall be reviewed every two years with effect from 31 December 2001. Calculation of this countervalue shall be based on the average daily value of those currencies, expressed in euro, during the 24 months ending on the last day of August preceding the revision which takes effect on 31 December. The Advisory Committee on Cultural Goods shall review this method of calculation, on a proposal from the Commission, in principle two years after the first application. For each revision, the values expressed in euro and their countervalues in national currency shall be published periodically in the Official Journal of the European Communities in the first days of the month of November preceding the date on which the revision takes effect.""

²³¹ A consolidated version of Directive 93/7/EEC can be found at the following url: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01993L0007-20010730&from=EN>, last retrieved on 01.03.2018.

²³² COM (2000), 325 final.

regime of the former Directive and recommended that it be reformed and updated. The former Directive was considered to be problematic because of difficulties linked to the definition of cultural objects in Article 1 (1) thereof,²³⁶ of the too strict temporal limitations found in Article 7,²³⁷ of the presence of ambiguous and inconsistent conditions relating to the return,²³⁸ and of problems adjoined to the notion of ‘due care and attention’ that was contained in Article 9.²³⁹ Furthermore, the application of the Directive was further constrained due to its limited scope of application resulting from the categories in the Annex, due to the short relative period and the high costs of having an object returned,²⁴⁰ which contributed to the decision to review the former instrument.²⁴¹ The first concrete calls for amending Directive 93/7/EEC were brought forward in the third report that reviewed the application of Directive 93/7/EEC, whereby Member States urged the European Commission to revise certain aspects of the Directive.²⁴² One year after the issuance of the fourth report, the European Commission finally decided to recast Directive 93/7/EEC. In 2014, the former Directive was recasted into Directive 2014/60/EU (hereinafter referred to as the new Directive) 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*. A recast of the entire former Directive was considered appropriate for the sake of clarity.²⁴³ This Directive is, therefore, not applicable any longer.

Similar to its predecessor, Directive 2014/60/EU serves as a middle-way between the free movement of goods and the protection of national treasures.²⁴⁴ Nonetheless, the legal bases upon which the former Directive was established have evolved through treaty amendments and the most recent Directive is now premised on Article 36 of the Treaty on the Functioning of the European Union (hereinafter TFEU). In a similar spirit to Article 36 TEC, Article 36 TFEU specifies that:

Article 36 TFEU – The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] the protection of national treasures possessing artistic, historic or archaeological value; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The cross-reference to Articles 34 and 35 TFEU refers to the prohibition to impose quantitative restrictions or measures having equivalent effect to quantitative restrictions on the import of goods (cf. Article 34 TFEU) and on the export of goods (cf. Article 35 TFEU); both articles mirror former Articles 30 and 34 TEC that were discussed above.

Article 34 TFEU – Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35 TFEU – Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

This means that the present Article 36 TFEU provides certain specific exceptions to the free movement of goods within the European Union and, more specifically, that – in the present context – only measures that are adopted to ensure the protection of national treasures embedded with artistic, historic or archaeological value can derogate from the prohibitions that are laid down in Articles 34 and 35 TFEU. Article 36 TFEU constitutes thus the legal basis upon which the most recent Directive was adopted.

For the sake of understanding the actual interaction between the 1995 convention and the latest Directive through the means of the *clause de déconnexion*, the analysis will now vet the differences between the

²³³ COM (2005), 675 final.

²³⁴ COM (2009), 408 final.

²³⁵ COM (2013), 310 final.

²³⁶ Frigo, (2012), forthcoming; Cornu, M., ‘Recasting restitution: interactions between EU and international law’, 20 *Uniform Law Review*, (2015), p. 639.

²³⁷ Frigo, (2012), forthcoming; Cornu, (2015), p. 639.

²³⁸ Cornu, (2015), p. 639.

²³⁹ Frigo, (2012), forthcoming.

²⁴⁰ See Recital 8 of the Preamble to Directive 2014/60/EU.

²⁴¹ Cornu, additionally, notes that other external causes were contributory to the recasting of Directive 93/7/EEC. As such, the lack of popularity of this instrument mirrored in the limited instances of return on the basis of the Directive’s regime, in the use of either the 1970 UNESCO or the 1995 UNIDROIT conventions instead, or in the increase of voluntary returns, witnessed of the disinterest in the use of Directive 93/7/EEC. See Cornu, (2015), p. 638.

²⁴² Commission of the European Communities, (2009), pp. 5-6; Frigo, (2012), forthcoming.

²⁴³ See Recital 1 of 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).

²⁴⁴ Nevertheless, Cornu notes that the most recent Directive’s objective was to “achieve a better compromise between the principle of the free movement of cultural goods and the need to provide better protection for cultural heritage”. See Cornu, (2015), p. 642.

old EEC Directive 93/7/EC and the new EU Directive 2014/60/EU: recalling the above, by comparing the two European instruments, it is possible to build upon the analysis on former Directive 93/7/EEC and explain how the new Directive derogates from this analysis for the purpose of Article 13 (3), whilst at the same time it is possible to demonstrate how the 1995 UNIDROIT convention has considerably influenced the latest instrument.

(1) Scopes of application

The material scope of application of the newest Directive is different in two respects: firstly, whilst no such provision was to be found in the former Directive, Article 1 of Directive 2014/60/EU specifically posits the material scope of application of the newest Directive.

Article 1 Directive 2014/60/EU – This Directive applies to the return of cultural objects classified or defined by a Member State as being among national treasures, as referred to in point (1) of Article 2, which have been unlawfully removed from the territory of that Member State.

Directive 93/7/EEC contained no similar provision and left the appreciation of its material scope to the reading of its second article. This novelty mirrors Article 1 of the UNIDROIT convention insofar as it explicitly prescribes its material scope in its very first article. A second difference in relation to the material scope of both Directives concerns the revision of the definition of cultural object. Recitals 9 and 10 of the Preamble to the new Directive address the need for refining the notion of cultural objects.

Recital 9 Preamble Directive 2014/60/EU – The scope of this Directive should be extended to any cultural object classified or defined by a Member State under national legislation or administrative procedures as a national treasure possessing artistic, historic or archaeological value within the meaning of Article 36 TFEU. This Directive should thus cover objects of historical, paleontological, ethnographic, numismatic interest or scientific value, whether or not they form part of public or other collections or are single items, and whether they originate from regular or clandestine excavations, provided that they are classified or defined as national treasures. Furthermore, cultural objects classified or defined as national treasures should no longer have to belong to categories or comply with thresholds related to their age and/or financial value in order to qualify for return under this Directive.

Recital 10 Preamble Directive 2014/60/EU – [...] It should be possible for Member States to return cultural objects other than those classified or defined as national treasures provided that they respect the relevant provisions of the TFEU, as well as cultural objects unlawfully removed before 1 January 1993.

These two recitals call for the clarification of the notion of national treasures within the framework of Article 36 TFEU.²⁴⁵ Consequently, considerable changes have been brought to the definition of cultural objects in the new Directive. A first difference stems from the fact that the categories listed in the Annex have been jettisoned from the definition of cultural object. As such, the financial and age thresholds have been removed,²⁴⁶ because this would disrupt the classification of national treasures provided by Member States.²⁴⁷ Furthermore, the newest Directive does not distinguish between cultural objects falling within the categories annexed to the Directive and cultural objects stemming from an inventoried public collection or ecclesiastical inventory. Instead, it is sufficient for the object to have been classified by the Member State as belonging to its “national treasures possessing artistic, historic or archaeological value” (cf. Article 36 TFEU) before or after the unlawful removal,²⁴⁸ for the object to be considered as a cultural object for the purpose of the new Directive:

Article 2 Directive 2014/60/EU – (1) For the purposes of this Directive, the following definitions apply:

‘cultural object’ means an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures within the meaning of Article 36 TFEU.

Similarly to Article 1 of Directive 93/7/EEC, Article 2 (1) further specifies that the classification must be done by means of legislation or administrative procedure.

²⁴⁵ Recital 10 of the Preamble of Directive 2014/60/EU.

²⁴⁶ See Cornu, (2015), pp. 642-643. Cornu notes that the financial value of the cultural object was a difficult condition to apply since this value was to change depending on the place where it was sold.

²⁴⁷ This is notably recognized in Recital 9 of the Preamble of Directive 2014/60/EU; Cornu, (2015), p. 642: “[...] the Directive no longer tries to limit the right to return to certain national treasures, rather it attempts to capture the object of this right—the national treasures of States as a whole. Hence, it suggests the disappearance of financial or historical thresholds”.

²⁴⁸ Cornu, (2015), p. 644: “In the definition that was kept in 2014, it may be observed that it concerns objects that have already been identified as national treasures as well as those that the States have classified as national treasures once they have already been illegally exported from their territory. This measure is fully understandable, considering that some objects are exported invisibly, escaping State control. [...] Otherwise, the system would only apply to objects that have already been identified as protected objects and not those that ought to be. More importantly, the idea of cleaning up the market and fighting illicit traffic (*sic*) imposes this solution”.

Another change to the definition of cultural objects can be found in the second paragraph of Article 8 (1) of the latest Directive. This article extends the categories of cultural objects from public collections and inventoried ecclesiastical cultural objects that do not fall within the Annex to the Directive 93/7/EEC and which are embedded with special protection so as to also include inventoried cultural objects of other religious institutions. This extension stems from the fact that the former Directive would only assimilate inventoried ‘ecclesiastic objects’ to cultural objects and prescribe special limitation periods for this category of goods in the first paragraph of Article 7 (1), thereby limiting the protection to cultural objects of the Christian Church. Recital 15 of the Preamble to Directive 2014/60/EU calls for the broadening of this qualification in order to incorporate religious cultural objects that are protected under the domestic laws of the Member States, and not only to limit the protection to ecclesiastical cultural objects.

Recital 15 Preamble Directive 2014/60/EU – [...] Due to the fact that Member States may have special protection arrangements under national law with religious institutions other than ecclesiastical ones, this Directive should also extend to those other religious institutions.

The ideology behind Recital 15 of the Preamble is operationalised in the third paragraph of Article 8 (1) of the new Directive.

Article 8 (1) Directive 2014/60/EU – §3 However, in the case of objects forming part of public collections, defined in point (8) of Article 2, and objects belonging to inventories of ecclesiastical or other religious institutions in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States providing for a period exceeding 75 years.

This broadening is more in line with the definition of cultural objects that is provided for in Article 2 of the convention, which covers all religious objects “of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention”.

The temporal scope of the Directive has also been indirectly affected by the recast of the former Directive. Recital 10 *in fine* of the Preamble to Directive 2014/60/EU advances that cultural objects that have been unlawfully removed before the entry into force of the former Directive should also be returned.

Recital 10 Preamble Directive 2014/60/EU – [...] **It should be possible for Member States to return cultural objects other than those classified or defined as national treasures provided that they respect the relevant provisions of the TFEU, as well as cultural objects unlawfully removed before 1 January 1993.**

This recital promotes the use of Article 15 (2) of the new Directive, which allows Member States to apply the provisions of the Directive to unlawful removals that have taken place before the entry into force of the Directive in the European Economic Community (thus mirroring Article 14 (2) of the old Directive). Furthermore, Recital 10 of the Preamble to the latest Directive establishes that Member States should facilitate the return of cultural objects that have been unlawfully removed, irrespective of when these Member States have acceded to the European Union,²⁴⁹ further extending the temporal scope of the Directive insofar as it relates to the new Member States.

Recital 10 Preamble Directive 2014/60/EU – Member States should also facilitate the return of cultural objects to the Member State from whose territory those objects have been unlawfully removed regardless of the date of accession of that Member State, [...]

(2) Time limitations

In order to facilitate the return of unlawfully removed cultural objects and as a means of deterring unlawful removals, Recital 14 of the Preamble to the new Directive calls for the extension of the relative period from one year to three years. This call is operationalised in the first paragraph of Article 8 (1), which extends the relative period from one year to three years.

Article 8 Directive 2014/60/EU – (1) Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder. [...]

Another hardly needed clarification in relation to the running of the relative period that was brought by the recast of the former Directive concerns the national authority that must take cognition of the cumulative elements required: whilst both former Directive 93/7/EEC and the convention are silent as to the authority that had to be aware of the cumulative requirements of Article 7 (1) of the Directive and Article 5 (5) of the

²⁴⁹ Recital 10 of the Preamble to Directive 2014/60/EU.

convention for the purpose of calculating the length of the relative period, Recital 14 of the Preamble to Directive 2014/60/EU and Article 8 (1) clarify this point in regard of the new Directive. Following its provisions, the knowledge required for the running of the relative period is thus imputed to the central authority that is designated by the Member State from which the unlawful removal has taken place.

(3) Standard of care during the acquisition

Recital 19 of the Preamble to Directive 2014/60/EU recognises the need to provide non-exhaustive criteria in assessing the meaning of the notion of due care and attention so as to ensure its uniform interpretation.

Recital 19 Preamble Directive 2014/60/EU – In order to facilitate a uniform interpretation of the concept of due care and attention, this Directive should set out non-exhaustive criteria to be taken into account to determine whether the possessor exercised due care and attention when acquiring the cultural object.

Putting Recital 19 into effect, paragraph 2 of Article 10 defines due care and attention in almost the same manner that due diligence is defined under Article 4 (4) of the convention:

Article 10 Directive 2014/60/EU – §2 In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.

This definition of due care and attention must be contrasted with the definition of due diligence under Chapter II of the convention, which is defined in its article 4 (4) thereof as follows:

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

Although very similar to Article 4 (4) of the convention,²⁵⁰ the definition provided in Article 10 of the new Directive differs from the definition that is contained in the convention in two respects: firstly, it omits one of the last requirements of consultation of accessible agencies. Secondly, it adds two requirements to the definition of the convention, notably that the possessor should give consideration to the documented provenance of the object and to verify the authorisation of the state of export for the removal of the object. These two additional conditions are not present in either Articles 4 (4) or 6 (2), although the latter article explicitly states that the lack of an export certificate is a factor that is capable of affecting the assessment of the cognition of the illegal export by the possessor. Henceforth, Article 10 §2 of the Directive is more specific as to what due care and attention is expected from the possessor of an unlawfully removed cultural object, compared to that which is preconised by a possessor under the regime of Chapter III of the convention. This is not to suggest, however, that these additional conditions should be ignored when applying Chapter III of the convention.

(4) Burden of proof

Another important change in the new Directive is the imputability of the burden of proof of due care and attention to the possessor of the unlawfully removed cultural object. Recital 17 of the Preamble to the new Directive submits that it is desirable that market operators exercise due care and attention in transactions relating to cultural objects:²⁵¹

²⁵⁰ Cornu, (2015), p. 645: "In the juridification of due diligence, Council Directive 2014/60 follows the same pragmatic approach of the UNIDROIT Convention, listing the criteria that assist in determining whether the possessor has been diligent or not. Article 10 of the Directive is very much inspired by Article 4 (4) of the Convention".

²⁵¹ Cornu, (2015), p. 645.

Recital 17 Preamble Directive 2014/60/EU – It is desirable to ensure that all those involved in the market exercise due care and attention in transactions involving cultural objects. The consequences of acquiring a cultural object of unlawful origin will only be genuinely dissuasive if the payment of compensation is coupled with an obligation on the possessor to prove the exercise of due care and attention. Therefore, in order to achieve the Union's objectives of preventing and combating unlawful trafficking in cultural objects, this Directive should stipulate that the possessor must provide proof that he exercised due care and attention in acquiring the object, for the purpose of compensation.

The same recital recognises that the non-payment of the compensation when due care and attention was not exercised during the said acquisition has a dissuasive effect in the acquisition of cultural objects of a dubious origin. Thenceforth, this recital advances that imputing the burden of proof of due care and attention during the acquisition on the possessor is essential in preventing and fighting against the unlawful trafficking of cultural objects. The imputability of the burden of proof upon the possessor follows the same lines as the imputability that is prescribed in Chapter III of the convention. Instead of leaving this issue to the legislation of the requested Member State (a solution that was posited by Article 9 §2 of Directive 93/7/EEC),²⁵² Article 10 §1 of Directive 2014/60/EU requires from the possessor to demonstrate that he exercised due care and attention at the time of the acquisition of the cultural object for the purpose of being entitled to the payment of fair compensation.

Article 10 of Directive 2014/60/EU – §1 Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object.

(5) Cooperation between Member States

In order to enhance cooperation between EU Member States, Recital 11 of the Preamble to Directive 2014/60/EU prescribes for the use of the Internal Market Information System – hereinafter IMI – to enhance the exchange of information about unlawfully removed cultural objects between Member States.

Recital 11 Preamble Directive 2014/60/EU – The administrative cooperation between Member States needs to be increased so that this Directive can be applied more effectively and uniformly. Therefore, the **central authorities should be required to cooperate efficiently with each other and to exchange information relating to unlawfully removed cultural objects through the use of the Internal Market Information System ('IMI') provided for by Regulation (EU) No 1024/2012 of the European Parliament and of the Council**. In order to improve the implementation of this Directive, **a module of the IMI system specifically customised for cultural objects should be established**. It is also desirable for other competent authorities of the Member States to use the same system, where appropriate.

The use of the IMI is further elaborated upon in the last paragraph of both Articles 5 and 7 of Directive 2014/60/EU.

Article 5 Directive 2014/60/EU (*in fine*) – In order to cooperate and consult with each other, the central authorities of the Member States shall use a module of the Internal Market Information System ('IMI') established by Regulation (EU) No 1024/2012 specifically customised for cultural objects. They may also use the IMI to disseminate relevant case-related information concerning cultural objects which have been stolen or unlawfully removed from their territory. The Member States shall decide on the use of the IMI by other competent authorities for the purposes of this Directive.

Article 7 §3 Directive 2014/60/EU – The exchange of information shall be conducted using the IMI in accordance with the applicable legal provisions on the protection of personal data and privacy, without prejudice to the possibility for the competent central authorities to use other means of communication in addition to the IMI.

Alongside the introduction of the use of the IMI for unlawfully removed cultural objects, the period of inquiries laid out in Article 4 (3) of former Directive 93/7/EEC has been extended from two to six months.²⁵³ As explained in Recital 13 of the Preamble to Directive 2014/60/EU, the two-month period were considered to be too short to undertake the necessary inquiries, and also to adopt preservation and preventive measures.

Recital 13 Preamble Directive 2014/60/EU – The time-limit for checking whether the cultural object found in another Member State is a cultural object within the meaning of Directive 93/7/EEC was identified as being too short in practice. Therefore, it should be extended to six months. A longer period should allow Member States to take the necessary measures to preserve the cultural object and, where appropriate, prevent any action to evade the return procedure.

²⁵² Cornu, (2015), p. 644: “[...] the burden of proof was regulated by the legislation of the requested State, and, consequently, the greatest disparity existed in the solutions and conditions of the action for restitution, which were more or less favourable to the owner depending on the legal system in question. This discrepancy was identified as one of the dominant factors of the Directive's ineffectiveness”.

²⁵³ Cf. Article 5 (3) of Directive 2014/60/EU.

Summary

UNIDROIT in the international norm-setting – Article 13 (1) of the 1995 convention regulates its interaction with other international norms. In case of conflict, the first sentence of this article gives precedence to other international instruments that contracting states are bound by and which contain provisions on matters that are governed by the 1995 convention. This rule is not absolute, however, as Article 13 (1) *in fine* makes it possible for an adhering state to derogate from it by means of issuing a declaration to this effect. Hence, it is possible to give precedence to the provisions of the 1995 convention over any other legally binding treaty or provisions of any future treaty that deals with the same subject matter. The declaration can be introduced at any time on the basis of Article 15 (3) of the 1995 convention. This has, hitherto, not been done by any of the contracting states.²⁵⁴

The UNESCO – UNIDROIT Nexus – Article 13 (1) might appear superficial when one considers that the 1995 UNIDROIT convention is the first multilateral instrument to regulate the private law aspects of the acquisition of stolen or illegally exported cultural objects meticulously. As such, it does not supplant any other multilateral convention, with the exception of Article 7 (b) (ii) of the 1970 UNESCO convention. This provision is embedded with many flaws, which lead UNESCO to approach UNIDROIT with the request to establish a treaty that would remedy many of these shortcomings within the field of private law. Therefore, it was important that both conventions complemented each other. Furthermore, the 1995 UNIDROIT convention was to substitute the 1970 instrument on the restitution and return aspects stipulated in Article 7 (b) (ii). With regard to the application of Article 13 (1) of the 1995 instrument, both conventions are complementary and share many common traits. Nevertheless, they differ in four respects: 1. regarding the definition of ‘cultural property’, 2. the means of corrective justice instated, 3. the time limitations to lodging an action for the restitution or the return of the item and 4. the treatment of innocent possessors.²⁵⁵ Contracting states that are also party to the 1970 convention will have to determine whether they want to give precedence to the provisions of the 1995 convention on the basis of Article 13 (1), or whether they will subordinate the UNIDROIT regime to the rules of the 1970 UNESCO convention.²⁵⁶

Improved application of the Convention – Article 13 (2) of the UNIDROIT convention enables contracting states to adopt further agreements in their mutual relations in order to improve the application of the convention. Any such agreement must be communicated to the Depositary of the convention, subject to the sanction of non-recognition. However, this mechanism has not been hitherto.²⁵⁷

Clause de déconnexion – Article 13 (3) of the convention, also known as the *clause de déconnexion*, enables members of economic integration organisations or regional bodies to apply the internal rules of these organisations or bodies in their mutual relations. This *clause*, inspired by the enactment of former Directive 93/7/EEC, constitutes an important exception to the territorial scope of the convention. Moreover, Article 13 (3) only creates a relative system by which a contracting state may opt for the application of the internal rules of an organisation of economic integration or of a regional body. When it was so used, former Directive 93/7/EEC was to supersede the regime of Chapter III of the UNIDROIT convention for national treasures within the European (Economic) Community / European Union prior to the adoption of Directive 2014/60/EU. *Ergo*, the Member States making use of the *clause de déconnexion* were to apply Chapter II of the convention to situations of cultural property theft, the Directive for the illegal export of national treasures within the European (Economic) Community / European Union and Chapter III of the convention for illegally exported cultural objects taken outside of the European (Economic) Community / European Union or illegally exported from a third country and imported into the Community. Member States that did not make use of the *clause de déconnexion* may have, theoretically, relied on both the convention and the former Directive simultaneously. Nonetheless, as this former Directive created a maximum threshold of harmonisation within the EEC / EC / EU, the application of Chapter III of the convention was limited to the fringes of the Directive.²⁵⁸

Directive 93/7/EEC (repealed by Directive 2014/60/EU) – Former Directive 93/7/EEC differed from the convention in its material scope of application; in the conceptualisation of terms such as ‘return’, ‘possession’, ‘holder’ ‘requested state’ and ‘requesting state’; in the time limitations that were applicable to the prescribed legal

²⁵⁴ Cf. section A. 1. above.

²⁵⁵ Cf. section A. 2. above.

²⁵⁶ Cf. section A. 3. above.

²⁵⁷ Cf. section B. above.

²⁵⁸ Cf. section C. above.

proceedings; in the obligation of return; in the standard of care that was imposed during the acquisition; in the burden of proof and in the payment of compensation. The former Directive also allowed Member States to modulate its provisions, but only with respect to the categories of national treasures that were protected and by enabling a retrospective application of the Directive to removals that took place before 1 January 1993. Additionally, it created cooperation obligations for the Member States, whilst such obligations do not exist within the context of the convention.²⁵⁹

Directive 2014/60/EU (recasting of Directive 93/7/EEC) – Directive 2014/60/EU has been brought more in line with the regime of the convention, but it differs from the latter in the following respects: in its material scope of application; the definition of cultural object has been broadened; in the time limitations; in the standard of care during the acquisition; in the imputability of the burden of proof and in the cooperation between Member States.²⁶⁰

After having highlighted the main differences between former Directive 93/7/EEC and Directive 2014/60/EU for the purpose of using the *clause de déconnexion* that is laid down in Article 13 (3) of the 1995 UNIDROIT convention, the present conclusion provides a table of correspondence of the provisions of the three instruments. This table ensures better guidance in assessing the similarities and differences between these various instruments and is, thus, particularly helpful in completing the analysis provided above. Consequently, the first table of correspondence compares the provisions of former Directive 93/7/EEC with the provisions of Directive 2014/60/EU and of the 1995 Convention. This comparative analysis is conducted per article. The second table of correspondence compares the Annex of Directive 93/7/EEC with the Annex to the convention by categories and is followed by a comparison between the same annexes by financial threshold. It is important to note that the categorisation and the financial thresholds have been removed from the new Directive 2014/60/EU; this is why the second and third table of correspondence only compare the annexes of both the old Directive 93/7/EEC and of the convention.

²⁵⁹ Cf. section C. 1. above.

²⁶⁰ Cf. section C. 2. above.

Table of correspondence D. 93/7/EEC, D. 2014/60/EU and Unidroit Convention (1995) [by article]

Directive 93/7/EEC		Directive 2014/60/EU		UNIDROIT Convention (Chapter III)	
Article	Subject matter	Article	Correlated notion	Article	Correlated notion
Material scope					
(Art. 2)	Material scope (derived from the obligation of return)	Art. 1	Material scope Directive	Art. 1	Material scope convention
Definitions					
Art. 1 (1)	Cultural object	Art. 2 (1)	Cultural object	Art. 2	Cultural object
(1)	Public collections [§4]	(8)	Public collections	-	-
(2)	Unlawful removal	(2)	Unlawful removal	Art. 1 (b)	Illegal export
(3)	Requesting M.S.	(3)	Requesting M.S.	-	Requesting state (undefined)
(4)	Requested M.S.	(4)	Requested M.S.	-	Requested State (undefined)
(5)	Return	(5)	Return	-	Return (undefined)
(6)	Possessor	(6)	Possessor	-	Possessor (undefined)
(7)	Holder	(7)	Holder	-	-
Return					
Art. 2	Mandatory return	Art. 3	Mandatory return	Art. 5 (1)	Conditional return (cf. article 5 (3) below)
Central authority					
Art. 3	Appointment authority [§1]	Art. 4	Appointment authority [§1]	-	-
	Duty to inform the European Commission (EC) [§2]		Duty to inform the European Commission (EC) [§2]	-	-
	Publication list central authorities by EC [§3]		Publication list central authorities by EC [§3]	-	-
Cooperation and consultation					
Art. 4 (1)	Obligation for the requested state to search for the object in its territorial boundaries	Art. 5 (1)	Obligation for the requested state to search for the object in its territorial boundaries	-	-
(2)	Obligation for M.S. to notify the presence of a	(2)	Obligation for M.S. to notify the presence of a	-	-

	cultural object upon which there are reasonable grounds for believing it has been unlawfully removed to the M.S. concerned		cultural object upon which there are reasonable grounds for believing it has been unlawfully removed to the M.S. concerned		
(3)	Obligation to allow the requesting M.S. concerned to verify whether the object is one falling within its classification of national treasure (2 months limitation)	(3)	Obligation to allow the requesting M.S. concerned to verify whether the object is one falling within its classification of national treasure (6 months limitation)	-	-
(4)	Adoption measures of physical preservation object (2 months limitation)	(4)	Adoption measures of physical preservation object (6 months limitation)	-	-
(5)	Adoption interim measures to avoid evasion of return proceedings (2 months limitation)	(5)	Adoption interim measures to avoid evasion of return proceedings (6 months limitation)	-	-
(6)	Negotiation role requested M.S. between requesting M.S. and possessor/holder.	(6)	Negotiation role requested M.S. between requesting M.S. and possessor/holder.	-	-
	Promotion use of arbitration (conditional)		Promotion use of arbitration (conditional)	-	-
-	-		Use of special module on the IMI for cultural objects [§7]	-	-

Return proceedings			
Art. 5	Right of initiation legal proceedings for the return in front of the court of the requested state [§1]	Art. 6	Right of initiation legal proceedings for the return in front of the court of the requested state [§1]
	Formalities [§2]		Formalities [§2]
			Art. 5 (1) Right to request the return before a court of the requested state
		(4)	Formalities

Duty to inform about the return proceedings			
Art. 6	Central authority requesting M.S. must inform central authority requested M.S. initiation legal proceedings for the return [§1]	Art. 7	Central authority requesting M.S. must inform central authority requested M.S. initiation legal proceedings for the return [§1]
			-

	Central authority requested M.S. must inform central authorities of other M.S. [§2]		Central authority requested M.S. must inform central authorities of other M.S. [§2]	-	-
-	-	-	Exchange of information through the IMI [§3]	-	-

Time limitations introduction return proceedings					
Art. 7 (1)	Relative period [§1]	Art. 8 (1)	Relative period [§1]	Art. 5 (5)	Relative period
	Absolute period Exception for objects belonging to public collections and cultural objects of ecclesiastical nature protected under domestic law Exception to the exception when no limitation in time in requesting M.S. law, or on the basis of bilateral agreement between requesting and requested M.S. [§2]		Absolute period [§2] Exception for objects belonging to public collections and cultural objects of ecclesiastical nature and from other religious institutions protected under domestic law [§2] Exception to the exception when no limitation in time in requesting M.S. law, or on the basis of bilateral agreement between requesting and requested M.S. [§2]	-	Absolute period -

Limitation legal proceedings					
Art. 7 (2)	Limitation to legal proceedings: Removal no longer unlawful	Art. 8 (2)	Limitation to legal proceedings: Removal no longer unlawful	Art. 7 (1) (4)	Discarding application Chapter III: Export no longer illegal

Obligation to order the return					
Art. 8	Almost automatic return	Art. 9	Almost automatic return	Art. 5 (3)	Conditional return (interest-based)

Diligence and compensation					
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Art. 9	Payment fair compensation when possessor acquired in due care and attention [§1]	Art. 10	Payment fair compensation when possessor demonstrates that he acquired in due care and attention [§1]	Art. 6 (1)	Payment fair and reasonable compensation when possessor neither knew, nor ought to have known that the cultural object was illegally exported.
-	-	Art. 10	Clarification 'due care and attention' [§2]	Art. 6 (2)	Clarification 'neither knew, nor ought to have known'
	Burden of proof due care and attention: depending on domestic law requested M.S. [§2]		Burden of proof due care and attention: imposed upon acquirer [§1]	Art. 6 (1)	Burden of proof neither knew, nor ought to have known: depending on applicable law used by the court seized.
	Donation and successions do not confer a more favourable position to the possessor [§3]		Donation and successions do not confer a more favourable position to the possessor [§3]	Art. 6 (5)	Donation and successions do not confer a more favourable position to the possessor
	Timing payment compensation: time of return [§4]		Timing payment compensation: time of return [§4]	Art. 6 (1)	Timing payment compensation: time of return

Expenses incurred for the procedure of return	
Art. 10	Expenses return and for measures of physical protection
Art. 11	Expenses return and for measures of physical protection
Art. 6 (4)	Expenses return

Right of pecuniary recovery from third party	
Art. 11	Right of recovery compensation and return expenses from person responsible for illegal export
Art. 12	Right of recovery compensation and return expenses from person responsible for illegal export
Art. 6 (4)	Right of recovery return expenses from any other person

Ownership returned cultural object	
Art. 12	Regulated by law of the requested M.S.
Art. 13	Regulated by law of the requested M.S.
Art. 6 (5)	Instead of compensation, duly diligent possessor can decide to keep ownership or to transfer it gratuitously or for payment to a person of his choice residing in the requesting state (in common accord with the requesting state).

Timing unlawful removal / illegal export	
Art. 13	Cultural objects unlawfully removed on or after 1 January 1993
Art. 14	Cultural objects unlawfully removed on or after 1 January 1993
Art. 10 (2)	Illegal export taking place after the convention has entered into force in both the requesting and requested states (cf. art. 12 for the entry into force).

Rules more favourable to return					
Art. 14 (1)	Extension regime of return to objects not falling within the annex	Art. 15 (1)	Extension regime of return to objects not falling within the definition of article 2 (1)	Art. 9 (1)	Adoption of rules more favourable to the return.
Art. 14 (2)	Use of the regime of the Directive for unlawful removals that took place before 1 January 1993	Art. 15 (2)	Use of the regime of the Directive for unlawful removals that took place before 1 January 1993	Art. 9 (1)	Adoption of rules more favourable to the return.
Alternative legal means					
Art. 15	Civil and criminal suits that could be brought on the basis of M.S. domestic laws by the requesting state or a dispossessed owner victim of theft	Art. 16	Civil and criminal suits that could be brought on the basis of M.S. domestic laws by the requesting state or a dispossessed owner victim of theft	Art. 10(3)	Possibility to use remedies available outside of the framework of the convention for illegal exports that took place before the entry into force of the convention (<i>in fine</i>).

N.B.: Articles 16-19 of Directive 93/7/EEC and Articles 17-22 of Directive 2014/60/EU are peculiar to the interactions between Member States and the institutions of the European Economic Community/European Union. Consequently, these articles have no corresponding article in the 1995 UNIDROIT Convention and are excluded from the present analysis because of their inter-institutional character.

**Table of correspondence Annex Directive 93/7/EEC (consolidated version) and Annex 1995
Unidroit Convention [by category]**

Directive 93/7/EEC	Category	UNIDROIT Convention	Correlated category
Annexes			
A. 1	Archaeological objects more than 100 years old which are the products of: - land or underwater excavations and finds, - archaeological sites, - archaeological collections.	(c) (d)	Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries. Elements of artistic or historical monuments or archaeological sites which have been dismembered.
A. 2	Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old.	(d)	Elements of artistic or historical monuments or archaeological sites which have been dismembered.
A. 3	Pictures and paintings, other than those included in Category 3A or 4, executed entirely by hand on any material and in any medium ⁽¹⁾	(g)	Property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand).
	A. Water-colours, gouaches and pastels executed entirely by hand on any material ⁽¹⁾		
A. 4	Mosaics in any material executed entirely by hand, other than those falling in Categories 1 or 2, and drawings in any medium executed entirely by hand on any material ⁽¹⁾	(g)	Property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand).
A. 5	Original engravings, prints, serigraphs and lithographs with their respective plates and original posters ⁽¹⁾ .	(g)	Property of artistic interest, such as: (iii) original engravings, prints and lithographs.
A. 6	Original sculptures or statuary and copies produced by the same process as the original ⁽¹⁾ other than those in category 1.	(g)	Property of artistic interest, such as: (ii) original works of statuary art and sculpture in any material;
A. 7	Photographs, films and negatives thereof ⁽¹⁾ .	(j)	Archives, including sound, photographic and cinematographic archives.
A. 8	Incunabula and manuscripts, including maps and musical scores, singly or in collections ⁽¹⁾ .	(h)	Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections.
A. 9	Books more than 100 years old, singly or in collections.	(h)	Rare manuscripts and incunabula, old books, documents and publications of

			special interest (historical, artistic, scientific, literary, etc.) singly or in collections.
A. 10	Printed maps more than 200 years old.	(h)	Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections.
A. 11	Archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old.	(j)	Archives, including sound, photographic and cinematographic archives.
A. 12	(a) Collections (?) and specimens from zoological, botanical, mineralogical or anatomical collections; (b) Collections (?) of historical, palaeontological, ethnographic or numismatic interest.	(a) (b) (f)	Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest. Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance. Objects of ethnological interest.
A. 13	Means of transport more than 75 years old.	-	-
A. 14	Any other antique item not included in categories A 1 to A 13, more than 50 years old.*	(c) (g) (i) (k)	Antiquities more than one hundred years old, such as inscriptions, coins and engraved seals. Property of artistic interest, such as: (iv) original artistic assemblages and montages in any material. Postage, revenue and similar stamps, singly or in collections. Articles of furniture more than one hundred years old and old musical instruments.
<p>(l) Which are more than fifty years old and do not belong to their originators. (?) As defined by the Court of Justice in its Judgment in Case 252/84, as follows: 'Collectors' pieces within the meaning of Heading No 99.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.'</p>		<p>* Directive 93/7/EEC imposes an age requirement of more than fifty years that is not required by the annex of the convention. It should, nonetheless, be recalled that article 7 of the convention excludes the application of Chapter III to objects that have been exported "during the lifetime of the person who created it or within a period of fifty years following the death of that person." (see Office Fédéral de la Culture (Suisse), (1998), p. 33).</p>	

**Table of correspondence Annex Directive 93/7/EEC (consolidated version) and Annex 1995
Unidroit Convention [by financial threshold]**

Directive 93/7/EEC	Financial threshold	UNIDROIT Convention	Correlating threshold
Annex			
B – Financial thresholds applicable to certain categories under A (in ecus)		-	
VALUE: Whatever the value	- 1 (Archaeological objects) - 2 (Dismembered monuments) - 8 (Incunabula and manuscripts) - 11 (Archives)	-	-
VALUE: 15 000	- 4 (Mosaics and drawings) - 5 (Engravings) - 7 (Photographs) - 10 (Printed maps)	-	-
VALUE: 30 000	- 3A. (Water colours, gouaches and pastels)		
VALUE: 50 000	- 6 (Statuary) - 9 (Books) - 12 (Collections) - 13 (Means of transport) - 14 (Any other item)	-	-
VALUE: 150 000	- 3 (Pictures)	-	-
<p>N.B.: The assessment of whether or not the conditions relating to financial value are fulfilled must be made when return is requested.</p> <p>The financial value is that of the object in the requested Member State.</p> <p>For the Member States which do not have the euro as their currency, the values expressed in euro in the Annex shall be converted and expressed in national currencies at the rate of exchange on 31 December 2001 published in the Official Journal of the European Communities. This countervalue in national currencies shall be reviewed every two years with effect from 31 December 2001. Calculation of this countervalue shall be based on the average daily value of those currencies, expressed in euro, during the 24 months ending on the last day of August preceding the revision which takes effect on 31 December. The Advisory Committee on Cultural Goods shall review this method of calculation, on a proposal from the Commission, in principle two years after the first application. For each revision, the values expressed in euro and their countervalues in national currency shall be published periodically in the Official Journal of the European Communities in the first days of the month of November preceding the date on which the revision takes effect.</p>		-	

CONCLUDING CHAPTER

Concluding chapter

- A. OVERVIEW.....511**
- B. PURPOSE OF THE RESEARCH..... 512**
 - 1. Object and purpose512
 - 2. Research questions.....512
- C. FINDINGS OF THE RESEARCH..... 513**
 - 1. Merits of the regime of restitution in addressing cultural property theft.....513
 - 2. Weaknesses of the regime of restitution in addressing cultural property theft.....518
- D. RECOMMENDATIONS 521**
- E. CONCLUSION..... 527**
- F. SUGGESTIONS FOR FURTHER RESEARCH 529**

A. Overview

Throughout the present disquisition, we have introduced the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* and put it in context;¹ discussed its applicability by addressing its scope of application;² compared the regime of Chapter II with the rules governing the acquisition *a non domino* of stolen cultural objects in six jurisdictions;³ clarified the working of Chapter II in detail;⁴ reviewed the mechanism of Chapter II applicable for cultural objects stemming from archaeological theft;⁵ vetted the application of the convention⁶ and, at last, positioned it in the international norm-setting.⁷ In doing so, it has been possible to explain the convention in order to review its appropriateness to cultural property theft, including archaeological theft. To conclude our research, this final chapter will recall the object and purpose of the disquisition; reproduce the research questions underlying the analysis; list the findings of the research; issue recommendations to improve the regime of Chapter II of the 1995 UNIDROIT convention; draw a general conclusion to the present study and issue suggestions for further research.

¹ Cf. section A. of 'Chapter 1 – Presentation and Applicability of the Convention' above.

² Cf. section B. of 'Chapter 1 – Presentation and Applicability of the Convention' above.

³ Cf. chapters 2, 3 and 4 above.

⁴ Cf. 'Chapter 4 – Cultural Property Theft – The Unidroit Solution' above.

⁵ Cf. 'Chapter 5 – Archaeological Theft' above.

⁶ Cf. 'Chapter 6 – Application of the Convention' above.

⁷ Cf. 'Chapter 7 – Unidroit and the World' above.

B. Purpose of the research

1. OBJECT AND PURPOSE

The present contribution has attempted to evaluate the appropriateness of Chapter II of the 1995 UNIDROIT convention as a tool in the fight against the illicit trafficking of cultural property. In doing so, it aimed to assess the added-value of the said chapter in tackling cultural property theft – including archaeological theft – from a private law perspective. It should be recalled that because little data is publicly available with regard to this illegal activity and, because the available information might not prove reliable, the present dissertation has analysed the regime of Chapter II of the convention by employing a qualitative method of analysis. Therefore, it undertook to study the added-value of its regime dealing with cultural property theft by comparing it to the rules that it was designed to supplant. With regard to archaeological theft, the present contribution firstly identified and analysed the tools available to source states in recovering stolen artefacts. Subsequently, it scrutinised the added-value of the convention in assisting these states in recovering antiquities.

This research was conducted in order to clarify uncertainties relating to the regime of Chapter II; to prescribe guidelines that could be of avail in its application; to further the studies of Prott and Thorn; and to provide a constructive reflection of the vetted regime in order to fine-tune its provisions, with the ultimate objective of fostering greater participation in its regime. Alongside the scientific interest of the study, its societal relevance has also been given consideration. In this regard, the recent apparition of blood antiquities on the art market has created a window of opportunity to address the role of the 1995 UNIDROIT convention in tackling the exploitation of the illicit traffic in cultural property for the purpose of financing terrorism. What is more, the convention has, hitherto, not been received enthusiastically by market and source states alike. In fact, difficulties experienced with the convention and misunderstandings relating to its provisions constitute further impediments to its ratification, making alternative solutions such as the UNESCO Plus option more enticing to many states. Hence, the disparity of opinion about its regime thus called for alleviating ambiguities that are present in its provisions. Finally, this research was, ultimately, designed to determine whether the convention contributes to the improvement of society as a whole.

2. RESEARCH QUESTIONS

In order to implement the object and purpose of the present research, the following question was posited as a keystone to the dissertation: *what merits of Chapter II of the 1995 UNIDROIT convention contribute to the achievement of its objective of becoming an appropriate tool against cultural property theft?* Furthermore, two sub-questions were added so as to provide a comprehensive assessment of the regime of Chapter II and to help improve its letter in order to secure a higher degree of participation in the convention: *what pitfalls of the convention thwart it in the said enterprise?* and *how can the scrutinised regime be improved to foster adherence to the convention?* The answers to these three questions are given in sections C and D below: based on the main research question and the first sub-question, section C respectively addresses both the merits of Chapter II in the said endeavour (cf. section C. 1.) and the pitfalls of the convention that thwart the chapter in the said enterprise (cf. section C. 2.). Answering to the second sub-question, section D formulates recommendations aimed at improving the regime of Chapter II as an appropriate tool against cultural property theft, with the ultimate purpose of fostering adherence to the convention. *Ergo*, these recommendations are formulated so as to help fine-tune the regime of the convention. As such, they are issued for further consideration by, *inter alia*, UNIDROIT or the recently established 1995 UNIDROIT Convention Academic Project. From a practical perspective, the answers to the research questions are given following the order of the chapters to this work. This pragmatic approach is particularly sensible considering the extent of the research as it establishes cross-references between these answers and the relevant sections in the present work, thus making the conclusions more accessible to readers.

C. Findings of the research

1. MERITS OF THE REGIME OF RESTITUTION IN ADDRESSING CULTURAL PROPERTY THEFT

What merits of Chapter II of the 1995 UNIDROIT convention contribute to the achievement of its objective of becoming an appropriate tool against cultural property theft? To answer to the research question at the core of the present study, it is important to lay down the elements of Chapter II that contribute to making it an appropriate tool for obviating cultural property theft. From the outset, it should be emphasised that this chapter posits a simple, although particularly astute, mechanism to moralise the demand for cultural property. In fact, it creates an effective regime for tackling cultural property theft by regulating the demand for cultural materials and it aptly addresses the end-of-the-chain-of-transactions by thoroughly regulating the acquisition phase. More specifically, the following elements contribute towards its success in the said undertaking:

Chapter 1| Presentation and Applicability of the Convention

Conceptualization – cultural objects (section B. 1. (1))

Although often advanced to its disfavour,⁸ a major *forte* of Chapter II in tackling cultural property theft stems from the fact that it foresees an all-encompassing definition of cultural objects in its second article, which aptly makes it possible to apply the convention to all instances of cultural property theft,⁹ even for cultural objects of lesser value.¹⁰ This broad ambit is appropriate in regulating kaleidoscopic scenarios of theft. It should thus not be seen as a weakness but, instead, as an advantage to address this illegal activity as a whole.

Conceptualization – international character of the claims (section B. 1. (2))

The regime of Chapter II was designed to prevent thieves from benefiting from disparities existing between domestic private laws in resolving the eternal triangle of property law. By prescribing the application of the regime of Chapter II for claims in restitution with an international character,¹¹ Chapter II appropriately corrects the private law loophole that fuels cultural property theft. Furthermore, it was established in Chapter 1 above that adherence to the convention may result in the creation of a discriminatory regime by which domestic claims might be subject to less favourable rules of restitution compared to claims that are embedded with an international character. Nevertheless, since there is no possibility to determine beforehand whether a cultural object that could be stolen ought to be subject to a domestic claim based on national private law or to a claim of an international character based on the convention, the practical effect of adherence to the convention is that all acquirers of cultural objects will act in accordance with the stringent standard of due diligence posited by Article 4 (1) and (4) of the 1995 UNIDROIT convention. Therefore, adherence to the regime of Chapter II has the beneficial effect of creating a spill-over effect that helps to ensure the highest standards in acquisitions for transactions that involve cultural objects, indirectly increasing the influence of the regime of Chapter II and thus making it more appropriate in dealing with cultural property theft as an international problem.

Scope of application – temporal scope (section B. 2. (3))

Although it is subject to much debate, a broad interpretation of Article 10 (1) – i.e. one that is not constrained to thefts of cultural objects that took place in contracting states – allows any stolen cultural object to be reclaimed on the basis of Chapter II, provided that the theft took place after the subjective entry into force of the convention in the contracting state where the claim in restitution is introduced and that the situation is one described by paragraphs a or b. Subjecting all stolen cultural objects to the regime of Chapter II ensures a higher degree of cautiousness from acquirers of cultural objects, thereby fostering compliance with the rules on due diligence that are laid down in the chapter and, *ergo*, giving the regime of Chapter II a deeper breadth.

⁸ The definition of cultural objects that is prescribed in Article 2 of the 1995 convention is often criticised for being too broad. Nonetheless, concerns were raised during the Diplomatic Conference that limiting this definition might affect the mechanism regulating acquisitions in due diligence instated to fight the illicit traffic. See UNIDROIT Secretariat, 'Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', 3 *Uniform Law Review*, (2001), p. 498.

⁹ Even though the breadth of the definition is often criticised as being to the convention's detriment, it should be recalled that this breadth is a necessary precondition to adopting any instrument against the illicit trafficking of cultural materials. For more details in this regard, see section B. 1. (1) of 'Chapter 1 – Presentation and Applicability of the Convention' above.

¹⁰ One criticism formulated against narrowing the definition is that less important cultural objects would fall outside of the ambit of the convention if the definition was to include further qualifications for cultural objects, such as 'outstanding' or of 'exceptional' importance. See UNIDROIT Secretariat, (2001), p. 498.

¹¹ Cf. Articles 1 and 10 (1) of the 1995 convention.

Scope of application – personal scope (section B. 2. (4))

The convention allows any person that has been dispossessed by means of theft to introduce a claim in restitution so as to recover the said item, provided that the situation falls within the ambit of the convention. An important innovation of Chapter II is that it enables individuals to rely on its provisions to claim the restitution of a stolen cultural object. Additionally, engaging members of indigenous and tribal communities in the application of Chapter II makes it possible to take sub-national interests into consideration. As such, minorities can also secure the recovery of items that have been stolen from their communities without necessitating any form of state intervention. Individuals are thus given a prominent role in remedying the theft of cultural materials.¹² In involving these actors, the convention broadens the spectrum of potential claimants, leading to a long-term reduction in thefts and ultimately giving more leverage to the international community in fighting this facet of the illicit traffic.¹³ Therefore, allowing both states and individuals to participate in the fight against illicit trafficking constitutes an important contributory factor to the success of the regime of Chapter II in its undertaking.¹⁴

Chapter 4 | Cultural Property Theft – The Unidroit Solution

Prerequisites to lodging a claim in restitution – claimant (section A. 1.)

The convention has purposely left the concept of ‘claimant’ undefined in order to make it possible for many different types of claimants to introduce claims in restitution for the purpose of recovering stolen cultural objects. As was just specified, allowing a plurality of claimants to rely on the regime of Chapter II gives teeth to the principle of restitution and thus serves as leverage in ensuring compliance with the strict standards of due diligence that should be observed during the acquisition of cultural objects.

Prerequisites to lodging a claim in restitution – superior right of possession (section A. 2.)

Article 3 (8) of the convention has simplified the burden of proof that a tribal or indigenous community from a contracting state must bear in order for its members to show a superior right to the stolen cultural property for the purpose of the claim in restitution. As such, it is sufficient for the said community to demonstrate that the item belonged to it or that it was used by it as part of its traditional or ritual use. This makes it easier for these groupings to recover a cultural object belonging to them and, thus, it renders Chapter II more appropriate in achieving the convention’s set objectives.¹⁵

Timeliness of the claim in restitution – general rule (section B. 1.)

Postponing the accrual of the relative period up until to the actual cognition of both the identity of the possessor of the stolen property and of the item’s whereabouts ensures that claimants are given a fair and genuine chance to reclaim their stolen property. Considering that cultural objects are often moved to other states because of their unique characteristics – making their recognition more probable if sold in the same country –, allowing the right of action to be deferred in accordance with the discovery rule constitutes a particularly astute use of limitations to resolve the transnational problem targeted, as this deferral secures more claims in restitution. Furthermore, requiring that both elements be known before the relative period starts running facilitates recovery. Hence, taken together, both the use of the discovery rule and the cumulative cognition of the two elements required contribute to fighting cultural property theft appropriately. What is more, the use of an actual notice is beneficial to the claimant, thus increasing the chances of timely lodging claims in restitution. Nonetheless, the possibility for domestic courts to apply their rules on dilatoriness might entail that the claimant is held to a New-Jersey-type of due diligence in searching for the stolen property, thus increasing controls through means of restitution. This increased control renders the regime of Chapter II more effective, as both the claimant and the possessor can be held to a standard of due diligence in searching for the stolen property and inquiring about the provenance of the transaction cultural object respectively. Moreover, the length of the three-year period is also appropriate in offering sufficient time to the claimant to initiate the restitution proceedings and is, consequently, also appropriate to the objectives that are pursued by the convention.

What is more, an absolute period of fifty years is an appropriate period of time to constrain any prospects of benefiting from a stolen cultural object during a person’s lifetime. For example, a long absolute period helps to

¹² Love Levine, A., ‘The Need for Uniform Legal Protection against Cultural Property Theft: A Final Cry for the 1995 Unidroit Convention’, 36 (2) *Brooklyn Journal of International Law*, (2010-2011), p. 776.

¹³ Love Levine, (2010-2011), p. 776.

¹⁴ Love Levine, (2010-2011), p. 775.

¹⁵ In this regard, Prott noted in 1989: “If we want to enhance the protection of the cultural heritage by improving the chances of recovery when an object in illicit trade has been found in another country, we should, in any event, seek to have as wide a range of entities as possible which can bring suit, so that if some are disabled or unwilling to act, there will still be a capable plaintiff”. In Prott, L. V., ‘Problems of Private International Law for the Protection of the Cultural Heritage’, in: *Académie de Droit International de La Haye / Hague Academy of International Law, Recueil des cours de l’Académie de droit international de La Haye*, V, Tome 217, (1989), pp. 253-254.

decrease the practice of fencing cultural objects.¹⁶ Moreover, this period is also appropriate considering that stolen cultural materials often resurface on the licit market after several decades. As such, it thus constitutes a proper balance in the interests at stake and is appropriate to the problem that is being dealt with in Chapter II of the convention. The equilibrium achieved between the relative and absolute periods is also well pondered, as the short relative period is tempered by the long absolute period and vice versa.¹⁷ This tempering therefore takes legal certainty into consideration,¹⁸ which makes the present solution acceptable to achieve the objective strived for.

Timeliness of the claim in restitution – exceptions (section B. 2.)

The exception to the absolute period that is laid down in Article 3 (4), and the exception to this rule that is posited in Article 3 (5), constitute appropriate rules for protecting the cultural materials that are of importance to contracting states. The incorporation of cultural objects that form an integral part of an identified monument or archaeological site or from a public collection afford to these states the possibility to enhance the protection of cultural objects that they deem to be of importance. By discarding the absolute period¹⁹ or instating an absolute period of seventy-five years or longer²⁰ – depending on the domestic law of the contracting state that opts for Article 3 (5) over Article 3 (4) –, Chapter II subjects the acquisition of important cultural objects to a regime that is more conducive to restitution, which will put more pressure on acquirers of cultural objects, commanding them to proceed with the utmost caution in acquiring items that are embedded with cultural importance.

Timeliness of the claim in restitution – legal effects (section B. 3.)

As was explained above, it remains unclear whether the expiration of the relative period extinguishes the remedy once and for all only against the current possessor of the stolen object (and could thus run anew afterwards), or whether it creates a right of ownership for the current possessor, who will then be able to transfer the object to another without further ramifications. Provided that the legal effect of the expiration operates on the remedy against the current possessor and not on the right (in accordance with California law), the mere expiry of the relative period does not make it impossible to recover a stolen cultural object. Instead, any subsequent transfer of possession of the stolen property to another possessor as of right could be constructed in accordance with California case law, meaning that it would constitute a new conversion for which a new cause of action materialises and for which a new relative period starts to run. Therefore, any transfer of the item to another possessor as of right would result in the possibility to initiate a new claim in restitution on the basis of Chapter II, which would render a stolen cultural object unmarketable in the long run. This would oblige the possessor as of right to negotiate with the claimant and to try to reach an outcome that is workable for both parties. The two could, for example, agree to co-own the stolen property or that it ought to be returned but that it could stay on loan with the possessor as of right for an agreed period of time. The possibility to organise joint custody between the original owner and the purchaser constitutes a workable solution in this regard. A regime of joint custody exists, for example, in relation to murals from Teotihuacán between the Young Museum of San Francisco and the government of Mexico.²¹ Co-ownership is possible when the parties can identify a common cultural interest.²² In the case of *Union of India v. The Norton Simon Foundation*,²³ the Siva Nataraja statue at the heart of the contention was to be kept by the purchaser in good faith for a loan period of ten years, instead of compensation.²⁴ This agreement, as well as additional arrangements, was reached out-of court, mainly through diplomatic means.²⁵ Alternatively, the two parties could also have resort to mediation so as to find a middle ground. The proposed interpretation is particularly effective in fighting cultural property theft as it would entail that a stolen cultural good remains stolen – irrespective of how many years have transpired since the misappropriation –, although for a maximum period of fifty years. This, in turn, affirms the principle of *caveat emptor* that the drafters of the

¹⁶ Département Fédéral de l'Intérieur (Suisse), 'Résultat de la Procédure de Consultation Portant sur la Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés', (Office Fédéral de la Culture, mai 1996), p. 11.

¹⁷ Office Fédéral de la Culture (Suisse) (ed), *Transfert International des Biens Culturels. Convention de l'Unesco de 1970 et Convention d'Unidroit de 1995*, Rapport du Groupe de Travail, (l'Office Fédéral de la Culture: Berne, 1998), p. 69.

¹⁸ Office fédéral de la culture, (1998), p. 69.

¹⁹ Cf. Article 3 (4) of the convention.

²⁰ Cf. Article 3 (5) of the convention.

²¹ Mastalir, R. W., 'A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law', 16 (4) *Fordham International Law Journal*, (1992), p. 1070.

²² As reported by Justine Ferland during her presentation entitled 'Fair and Just Solutions in Alternative Means of Dispute Resolution relating to Cultural Heritage' delivered during the MACCH Annual Conference 'Just Practices: Art and heritage worlds from the perspectives of markets and law' organised in Maastricht on 19 March 2016.

²³ United States District Court, Southern District Court of New York, 74 Circ. 5331 (SDNY 1976); United States District Court, Central District of California, Case No. CV74-3581-RJK (CD Cal. 1976).

²⁴ Prott, *Commentary on the Unidroit Convention*, (Institute of Art & Law: Leicester, 1997), p. 44, notably footnote 24 referring to *Union of India v. The Norton Simon Foundation*, (1976).

²⁵ For a summary of the case and further comments, see <https://plone.unige.ch/art-adr/cases-affaires/nataraja-idol-2013-india-and-norton-simon-foundation-1>, last retrieved on 01.03.2018.

convention had in mind when negotiating Chapter II and it ensures that possessors of cultural objects act with the utmost cautiousness in acquiring cultural items.

Principle of mandatory restitution (section C. 1.)

Article 3 (1) of the convention prescribes the automatic restitution of a stolen cultural object to the claimant, ensuring that stolen cultural property cannot be laundered through means of third-party protection. *Ergo*, it discards the forms of third-party protection that were discussed in the comparative analysis above, such as acquisitive prescription,²⁶ correction of the title transferring the stolen property,²⁷ market overt²⁸ or consumer market overt.²⁹ This discards the process of laundering stolen cultural property through means of third-party acquisition. Instead, Article 3 (1) obliges any possessor to return the stolen cultural object, thereby securing the principle of restitution in all instances. This approach is in accordance with the rules applied in New Jersey, California and New York, which require any stolen personal property to be returned to a dispossessed person. The choice for automatic restitution – based on the *caveat emptor* ideology – is key in ensuring that acquirers of cultural objects thoroughly vet the provenance of the cultural goods they want to acquire to ensure that these are not stolen. By not undertaking extensive efforts to retrieve the said provenance through due diligence, an acquirer would, hence, run the risk of having to return the item without any entitlement to compensation. Article 3 (1) is, thus, imperative in tackling cultural property theft as it removes any incentives to acquire cultural materials with a dubious origin. Coupled with the broad definition of cultural objects that is given by Article 2 of the convention, this combination has an effective deterrent effect on acquiring potentially stolen cultural objects.

Entitlement to compensation (section D.).

As a *quid pro quo* to accepting the automatic restitution of a stolen cultural object in combination with the broad definition of cultural objects, the drafters of the convention decided to prescribe the payment of fair and reasonable compensation to acquirers that acted in good faith at the time of the acquisition. Article 4 (1) thus only entitles acquirers that acted in good faith to fair and reasonable compensation. It, therefore, punishes acquirers that have not acted with due diligence during the acquisition of a cultural object, as they will have to return the stolen property and will not be entitled to the payment of any compensation. This results in constraining the demand for cultural objects with dubious provenance and thus it diminishes the demand for stolen cultural materials. Cultural property theft is thus stifled insofar as stolen cultural materials become unmarketable. This result is of the utmost importance in tackling this illegal activity from a private law perspective and it gives more teeth to the regime of Chapter II in achieving the set objective. What is more, although the payment of said compensation could be detrimental to restitution, this ramification is tempered in three ways: firstly, the amount of compensation is limited to the payment of a fair and reasonable amount that can be considerably below the purchase price or the market value of the property. Constraining the amount of compensation to a fair and reasonable amount makes it possible for states with little financial resources to recover their stolen property, therefore fostering restitution; secondly, the convention has not specifically given a right of retention to the duly diligent possessor that is entitled to the payment of fair and reasonable compensation. Although this aspect has been left to be decided on by the applicable domestic law, the lack of automatic retention facilitates restitution; thirdly, Article 4 (2) and (3) of the convention make it possible to have a party responsible for the transfer of the stolen cultural object to the possessor as of right pay the fair and reasonable compensation to the said possessor,³⁰ or when this is not possible, to enable the person that has paid the compensation to the possessor as of right to recover the said compensation from any other person.³¹ As such, the payment of fair and reasonable compensation does not impair the principle of restitution.

For value and gratuitous acquisitions (section D. 1. (2))

An important innovation that has been brought about by the regime of Chapter II stems from the fact that it imposes an equal standard of cautiousness to both gratuitous and for value acquisitions of cultural objects. This means that acquisitions for value and for free are subject to the exact same regime of diligence. The incorporation of gratuitous acquisitions into the regime of Chapter II is important considering that many cultural objects are regularly donated to museums or other public collections. Similar to Article 3 (1), Article 4 (5) makes it impossible to launder title to stolen cultural objects, although in this case with regard to donations. This contributes to making the regime of Chapter II more appropriate in the fight against the illicit trafficking of stolen cultural property from a private law perspective.

²⁶ E.g. Articles 2279 BCC, 2276 FCC, 3:99 and 3:105 DCC.

²⁷ E.g. Article 3:86 (1) DCC.

²⁸ E.g. Articles 2280 BCC and 2277 FCC.

²⁹ E.g. Article 3:86 (3) a. DCC.

³⁰ Cf. Article 4 (2) of the convention.

³¹ Cf. Article 4 (3) of the convention.

Burden of proof (section D. 2.)

In order to be entitled to the payment of fair and reasonable compensation, the possessor as of right that neither knew, nor ought reasonably to have known that the cultural object was stolen must prove that he exercised due diligence throughout the acquisition of the cultural object.³² The burden of proof in demonstrating that the acquisition was innocent is thus imputed upon the possessor. As such, Chapter II does not instate a presumption of good faith to his benefit, hence derogating from the rule that are found in Articles 2268 BCC, 2274 FCC and 3:118 (3) DCC. Instead, the possessor must demonstrate that he cautiously vetted the provenance of the cultural object and that he could not have known that it was stolen. This construction ensures cautiousness in acquiring a cultural object and it also requires from the acquirer to document meticulously the acquisition in order to demonstrate that it was innocent for the purpose of obtaining the payment of fair and reasonable compensation. These two results are instrumental in rendering the opacity of the art market more transparent and are, therefore, particularly appropriate to tackle cultural property theft.

Due diligence (section D. 3. (2))

The obligation to prove due diligence obliges acquirers to exercise the utmost cautiousness in their acquisitions and to disrupt the secrecy and opacity that used to characterise the art market. In doing so, it forces sellers to disclose the origins of the transacted items and it obliges acquirers to question and verify the information that has been provided to them by the seller. This makes it particularly difficult to dispose of stolen cultural materials on the licit art market and it makes the laundering of tainted items impossible. Furthermore, making the payment of compensation conditional on due diligence is conducive to achieving a higher rate of restitution, which is instrumental in tackling the targeted illegal activity. Requiring the systematic payment of compensation instead would have affected restitution and would have run contrary to the objective that Chapter II was designed to achieve.

Fair and reasonable compensation (section E.)

By allowing the domestic courts seized with the contention to determine the amount of the fair and reasonable compensation and by leaving the concept undefined, the convention makes it possible to take a panoply of factors – including the financial resources of the claimant or any resort that the possessor has against the transferor of the stolen property – into consideration in the computation of the amount of compensation. This enables these courts to facilitate restitution from a good faith possessor, thereby securing more instances of restitution. What is more, because the fair and reasonable compensation can be substantially below market value and even considerably lower than the purchase price, this gives even more incentive to acquirers to vet the provenance of the cultural object properly. Failing to do so could result in a considerable financial loss that could have been avoided had they carried out more inquiries into the object's origin.

Chapter 5| Archaeological Theft

Assimilation to theft (Chapter II) (section C. 1.)

The assimilation to theft makes it possible to subsume the products of archaeological theft under the regime of Chapter II. More particularly, the cross-reference to the domestic law of the source state makes it possible for the said state to decide which materials it wants to protect specifically and what will be considered as stolen for the purpose of Article 3 (2). To assist in this assimilation, the adoption of the UNESCO-UNIDROIT *Model Provisions on State Ownership of Undiscovered Cultural Objects* in 2011 helps contracting states to develop effective domestic patrimonial laws that are necessary for the purpose of Article 3 (2) of the 1995 convention. What is more, by addressing both unlawful excavations and lawful excavations followed by unlawful retentions, Article 3 (2) addresses situations of both illicit excavation but also of unauthorised retention post licit excavation, which could result, for example, from scenarios of treasure trove or chance-finds. *Ergo*, the solution adopted by Article 3 (2) to deal with archaeological theft is tailor-made and comprehensive to check the demand for artefacts.

Assimilation to illegal export (Chapter III) (section C. 2.)

The assimilation to illegal export functions as a safety-net to Article 3 (2) when it is not possible to prove that the artefact was owned by the claiming state or when the situation does not fall within the ambit of the provision. Furthermore, provided that the preconditions to the application of Chapter III have been complied with,³³ the interests listed in Article 5 (3) (a)-(c) of the convention ensure the almost automatic return of stolen artefacts. This is notably because the removal of an artefact will always significantly impair the physical preservation of the object

³² Cf. Article 4 (1) of the convention.

³³ See notably sections B. 1. (1) and B. 2. (1) and (3) of 'Chapter 1 – Presentation and Applicability of the Convention'.

or of its context or the preservation of information of, for example, a scientific or historical character. Article 5 (3) (a)-(c) thus contributes appropriately to the return of stolen artefacts.

Interactions between Chapter II and Chapter III (section C. 3.)

The possibility to apply both chapters II and III to misappropriated artefacts appropriately contributes to the fight against archaeological theft from a private law perspective. This is notably because it increases the rate of restitution and of return of these materials, subjecting the acquisitions of artefacts to very stringent standards of cautiousness. Reliance on Chapter III as a subsidiary to the use of Chapter II also allows to obtain the return of the artefact when it is impossible to prove that the item was owned by the source state or that it was stolen on the territory of the source state, thereby giving more leverage to the regime of recovery prescribed by the convention.

Chapter 6| Application of the Convention

Interaction between Chapter II and Chapter III (section A. 1.)

By enabling contracting states to rely on both chapters II and III when the cultural object was both stolen and illegally exported, the convention provides more means of recovery to stolen cultural materials. As such, it increases the chances of recovery and puts further pressure on the art market to ferret out the origin of transacted items.

Reservations (section A. 2.)

The package deal proposed by the convention was adopted to secure both the adoption of a progressive regime against the illicit traffic in cultural materials and for the sake of ensuring true reciprocity. The impossibility to formulate reservations to the regime of the convention that is posited by Article 18 ensures its appropriateness in tackling the illicit trafficking of cultural property. In fact, the duality theft / illegal export is considered key in addressing the said illicit trafficking as it instates a minimum set of rules addressing this traffic as a whole.

Modulation (section A. 4.)

The possibility introduced by Article 9 (1) of the convention to allow contracting states to modulate the provisions of the convention so as to apply rules that are more favourable to restitution makes it possible for contracting states to further the regime of Chapter II. The broad language that is used by Article 9 (1) gives a lot of discretion to contracting states in deciding what is more favourable to restitution: the possibility to apply the convention to thefts that pre-date its entry into force in the contracting state where the claim in restitution is introduced, the broadening of the definition of theft to other types of illegal acts, the application of the regime of Chapter II to claims of a national character, or extending the length of the relative period constitute a handful of examples of how the regime of Chapter II could be modulated. This gives additional strength to the principle of restitution, as the convention posits a minimum threshold and the possibility to go further for the purpose of securing restitution increases the appropriateness of Chapter II in its endeavour.

Monitoring (sections B. 1. and B. 2.)

The monitoring of the convention allows reviewing the appropriateness of its provisions from both a pragmatic or theoretical perspective. As such, both the mechanism of convening a special committee to review the practical operation of the convention and the 1995 Unidroit Convention Academic Project offer appropriate means of reviewing the working of the convention, ultimately ensuring a more tailor-made application of its provisions, when so needed.

Chapter 7| Unidroit and the World

Improved application of the convention (section B.)

Article 13 (2) makes it possible for two or more contracting states to adopt a regime that is more favourable to restitution in their mutual relations. Unlike Article 9 (2), this provision makes it possible to give more teeth to the regime of restitution as between contracting states.

2. WEAKNESSES OF THE REGIME OF RESTITUTION IN ADDRESSING CULTURAL PROPERTY THEFT

After having reviewed the aspects of the convention that contribute to ensure its appropriateness to tackling cultural property theft, this section now turns to the weaknesses of the regime of restitution in dealing with the contemplated issue. Hence, it will answer the first sub-question to the *present research: what pitfalls of the convention thwart it in the said enterprise?*

Chapter 1| Presentation and Applicability of the Convention

Scope of application – temporal scope (section B. 2. (1))

Unfortunately, the convention has not clarified the meaning of ‘stolen’ for the purpose of applying Chapter II. Although the drafters preferred to leave this aspect to be settled by the court seized with the contention, it remains particularly unclear whether domestic courts ought to apply an autonomous definition of theft or whether it suffices to rely on domestic interpretations of the notion. This lack of clarity results in creating a tension between applying domestic qualifications of theft or a harmonised interpretation of this concept, a tension that could impair the understanding and the coherent application of Chapter II.

What is more, it remains unclear whether participation in the regime of the convention is mandatory in order for a stolen cultural object to fall within the ambit of Chapter II, as was discussed at length above. Two interpretations of Article 10 (1) – opposing participation to no participation – are possible and doctrine seems to be divided in determining which of these approaches is correct. Whilst the drafters of the convention put their trust in domestic courts to come up with a uniform application, it is most likely that two interpretations will follow: on the one hand, market states will most probably require participation to the regime of the convention, thus placing the focus on paragraph a of Article 10 (1). On the other hand, source states might instead interpret the provision as not requiring participation in the convention, thus focusing on paragraph b of Article 10 (1). Without clarification by either UNIDROIT or by the members of the informal Working Group that adopted the text of the convention, Article 10 (1) constitutes a considerable challenge to the applicability of the convention, making it difficult to appreciate the exact implications of Chapter II. This, in turn, affects the understanding and appreciation of Chapter II in its undertaking.

Chapter 4| Cultural property theft – The Unidroit Solution

Prerequisites to lodging a claim in restitution – claimant (section A. 1.)

An impairment to Chapter II stems from the fact that only ‘the claimant’ is able to introduce a claim in restitution, leaving communities acting as a whole outside of its scope. This choice of terminology is notably due to the property aspect that is inherent to the notion of cultural property, which presupposes individual instead of communal property rights.³⁴ Because the convention protects dispossessed persons, it does not serve the means of ensuring the rights of living communities over their cultural assets.³⁵ Nonetheless, the failure to recognise the communal interest of these communities constitutes an incongruity with the notion of cultural objects itself, as the cultural importance of these items is recognised by communities and not by individuals.³⁶

Timeliness of the claim in restitution – general rule (section B. 1.)

With regard to the relative period, two points of attention can be raised. Firstly, it is unclear which possessor’s identity needs to be cognised for the purpose of the running of the relative period. The lack of specificity stemming from this provision could result in rejecting claims in restitution based on belatedness when the claimant directs the claim in restitution against the wrong possessor. This entails that this lack of clarity could affect the principle of restitution. Secondly, a possible constructive notice – depending on the domestic rules on dilatoriness of the court seized with the claim in restitution – creates uncertainty for claimants, as it is unclear whether they are subjected to a requirement of due diligence in searching for their property. This is primarily due to the difficulties that are inherent in determining where the claim in restitution will have to be introduced when it is unclear where the stolen cultural object might reappear. Hence, the uncertainty could create barriers to restitution, thus affecting the mechanism posited by Chapter II to tackle cultural property theft.

With regard to the absolute period, it is unclear whether the period of fifty years is to be computed from the day of the theft or whether it is to be counted in full days. In the latter case, this would mean that the period of fifty years is to be computed from the day after the theft.

Timeliness of the claim in restitution – exceptions (section B. 2.)

As was correctly noted by the Japanese delegation during the Diplomatic Conference, there is no control over the meaning of public collections that is given by contracting states.³⁷ This enables these states to give a broad ambit

³⁴ Last, K., “The Resolution of Cultural Property Disputes: Some Issues of Definition”, in: The 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 [et al.]: The Hague [et al.], 2004), p. 83.

³⁵ Last, (2004), p. 83.

³⁶ Last, (2004), p. 83.

³⁷ See ‘Comments by Governments on the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (People’s Republic of China, Japan and New Zealand)’, in Presidenza del Consiglio dei Ministri, Dipartimento per l’Informazione e l’Editoria, *Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings*, Rome, June 1995 (1996), CONF. 8/5 Add. 1, April 1995, p. 73.

to Article 3 (4) and (5), thereby allowing to stretch the exceptions of Article 3 (4) and (5) considerably. Although a broad understanding of public collections is better suited for achieving the targeted objective, it might be received with some degree of scepticism by other states. This will most likely render the regime of Chapter II less appealing to market states.

Timeliness of the claim in restitution – legal effects (section B. 3.)

With respect to the absolute period, it remains particularly unclear whether it ought to be assimilated to either a statute of repose, a prefix period, or a period of acquisitive or extinctive prescription. Although Article 3 (3) *in fine* seems to prescribe finality, this particular point could prove problematic if left to the discretion of domestic courts. *Ergo*, the period of fifty years could be suspended or renewed if interrupted when constructed in line with, for example, periods of prescription, whilst no such suspension or renewal would be possible where the courts would assimilate this period to a statute of repose or to a prefix period. Such a discrepancy in application is undesirable and, due to the importance of the question of limitations, could affect adherence to the convention.

Fair and reasonable compensation (section E.)

The lack of clear criteria in the determination of the element of ‘fair and reasonable’ compensation is obviously an important drawback for states that want to adhere to the regime of the convention. In fact, it is understandable that states would refrain from becoming a party to the convention if one considers the considerable prices paid for cultural objects and the probability that the compensation will only constitute a portion of the purchase price, which some commentators consider to be a partial expropriation without just compensation.³⁸ Another aspect that affects the popularity of the convention is the rather uncertain test that domestic courts will apply in calculating the amount of compensation. Clear rules for calculating this amount should have been drafted in order to provide some guidance to domestic courts as how to proceed in making this particular determination. Both aspects impair the popularity of the convention.

Chapter 6| Application of the Convention

Interpretation (section A. 5.)

As was explained above, a wide discretion has been left to domestic judges in interpreting the convention. It is conceived that in the realm of the harmonisation of private law, domestic courts play a primordial role in stipulating the details of these international measures of harmonisation.³⁹ As such, it is expected that national judges will interpret these measures coherently, thereby resulting in a harmonised application of the instruments.⁴⁰ Nonetheless, this assumption fails to take into account the different methods of interpretation and the different conceptions that are embedded in the domestic legal orders that oblige judges in applying or interpreting the general provisions of the said international instruments.⁴¹ Hence, the lack of specificity of many concepts of the convention will render its interpretation heterogeneous and the end result might thus not reflect the degree of harmonisation that was envisaged by the drafters of the international instrument.⁴² This might in turn affect the working of Chapter II.

Chapter 7| Unidroit and the World

Compatibility with other multilateral treaties / Clause de déconnexion (sections A and C)

The subordination created by Article 13 (1) and (3) works to the detriment of the convention and may impact the effectiveness of Chapter II in tackling cultural property theft. It might, therefore, have been advisable only to subordinate the regime of the convention when the provisions coinciding with the regime of the convention are more favourable to restitution, similar to the construction that is made possible by Article 9 (1) of the convention.

³⁸ See for example Bengs, B., ‘Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law,’ 6 *Transnational Law & Contemporary Problems*, (1996), p. 529.

³⁹ Voulgaris, I., ‘Les Principaux Problèmes Soulevés par l’Unification du Droit Régissant les Biens Culturels’, 8 *Uniform Law Review* (2003-1/2), p. 547.

⁴⁰ Voulgaris, (2003), pp. 547-548.

⁴¹ Voulgaris, (2003), p. 547-548.

⁴² Voulgaris, (2003), p. 548.

D. Recommendations

Perfectio propter imperfectionem. Although the regime of Chapter II proves already particularly appropriate in its undertaking, some further refinements are necessary to fully deploy its potential and perfect its suitability in the endeavour to address cultural property theft adequately. Consequently, the present section will answer to the second sub-question to the present research: *how can the scrutinised regime be improved to foster adherence to the convention?* To respond to this last question, the present section provides clear and concise recommendations for further consideration.

Chapter 1| Presentation and Applicability of the Convention

1. Clarify the definition of cultural objects

Insofar the broad character of the definition laid down in Article 2 of the 1995 UNIDROIT convention is considered as a weakness, it is recommended to establish interpretation guidelines for domestic courts where this is deemed desirable. This could be done through the issuance of an explanatory report on the meaning of cultural objects. Furthermore, clarification of whether the list in Annex to the convention is exhaustive or not should be sought. If it is, contracting states need to be able to anticipate this limitation and add categories of cultural objects that will be protected by the convention through the means that have been made available by Article 9 (1).

2. Clarify the concept of international character

Clarify what is to be understood by the international character of the claim in restitution. Although this aspect was discussed at length in Chapter 1 above, it remains unclear whether the given interpretation is correct in ascertaining the meaning of what constitutes an international character.

3. Clarify how the concept 'stolen' should be interpreted

Clarify how the tension between the adoption of an autonomous interpretation of 'stolen' and of an interpretation in accordance with its meaning in domestic laws can be appeased.

4. Clarify how Article 10 (1) ought to be interpreted

In order to understand the exact ambit of the convention, it is important to specify which stolen cultural objects fall within its scope. Article 10 (1) must, therefore, be given further elucidation.

Chapter 4| Cultural property theft – the unidroit solution

5. Address communal rights in light of the notion of claimant

Although this dimension was not discussed by its drafters, the convention should have taken into account the fact that communities could also act as a whole in reclaiming cultural objects that are of value to it. Reconsidering the notion of 'claimant' in light of communal rights might broaden the scope of the principle of restitution so as to include more participants to the regime of Chapter II and, therefore, give it more weigh.

6. Ascertain the identity of the possessor (relative period)

Clarify whose possessor's identity needs to be ascertained for the purpose of the accrual of the relative period. Both Directives 93/7/EEC and 2014/60/EU specify that it can either be the identity of the possessor – physically holding the object on his own account⁴³ – or of the physical holder – physically holding the object for a third party^{44,45}. For the purpose of the running of the short period of limitation, both these two instruments seem to focus on the actual physical holding of the cultural object. The convention is not as explicit as the Directives, as it remains unclear to which possessor Article 3 (3) refers to, which could be more than one person, or if it refers to the possessor that physically holds the cultural object at the time the claim in restitution is introduced (similar to the EU Directives). This clarification is much needed so as to safeguard the principle of restitution.

7. Clarify that reliance on a constructive notice is possible (relative period)

Although the possibility for domestic courts to apply their rules on dilatoriness – which could work as a constructive notice – would have the effect of pressing claimants to pursue their claim diligently in all circumstances, it should be made explicit that claimants could be subject to these rules. This is important considering that the use of a constructive discovery was discarded for the purpose of Chapter II as this would

⁴³ Cf. Article 1 (6) of Directive 93/7/EEC and Article 2 (6) of Directive 2014/60/EU.

⁴⁴ Cf. Article 1 (7) of Directive 93/7/EEC and Article 2 (7) of Directive 2014/60/EU.

⁴⁵ Cf. Articles 7 (1) of Directive 93/7/EEC and Article 8 (1) of Directive 2014/60/EU respectively.

have affected the principle of automatic restitution and, therefore, would have tampered with the appropriateness of the chapter in fighting cultural property theft. It is, therefore, recommended to specify that claimants ought to pursue their claim for the restitution of a stolen cultural object diligently in all instances. This will force both claimants and possessors to act cautiously and will enhance the regime of Chapter II, as an obligation of due diligence imposed on the claimant will result in more publicity of the theft.

8. Clarify the legal effect of the expiration of the relative period

In order to determine whether it is possible to initiate a new claim in restitution against a new possessor as of right, the legal effect flowing from the expiration of the relative period should be elucidated. Will this expiration affect the remedy against the current possessor, the remedy in general or does it establish a prescriptive right which affects the right of the dispossessed owner? These considerations should be further analysed.

9. Consider the use of an obligation of disclosure

Supposing that the expiration of the relative period extinguishes the right and, therefore, bars further proceedings by the claimant – an interpretation that would grossly flout the objective of tackling the illicit market in stolen cultural objects and which thus seems undesirable – the introduction of an obligation of disclosure similar to the *wegrijzverplichting* that exists in Article 3:87 DCC might have proved astute in enhancing the instated regime. As such, the possessor against whom a claim in restitution has stalled could be deprived of the protection that is afforded by the expiration of the relative period if he fails to disclose the information that is necessary to retrieve the identity of the transferor. *Ergo*, this would force the possessor to disclose the information he has about the transferor, even though the claim in restitution against him has stalled, thereby enabling the claimant to hold the transferor liable for his loss. Put differently, the non-disclosure of this information could entail that the possessor is deprived of the technicality of the expiration of the relative period and that he is still obliged to return the stolen property.

10. Clarify the accrual of the absolute period

Clarify when the absolute period starts to run. It could either start running on the day of the theft, or be computed in full days, thus starting to run on the day after the theft. Furthermore, there exist another complication concerning the running of the absolute period: although it is clear that the period of fifty years will start to run from the moment of the theft, in certain circumstances specific to cultural objects, it is particularly difficult to establish with exactitude when the theft occurred. This is notably relevant to situations when the owner is not able to determine the moment at which the object was stolen, as is often the case with objects taken from museums collections that are stored in their basements or in other external depots, including freeports. This is even more problematic when dealing with objects taken through means of clandestine excavations, since it is virtually impossible to prove when the theft has taken place. This aspect deserves, therefore, some further consideration.

11. Rules on interruption and suspension

Clarify the statement made by the Chairman of the CGE about the general principles of law governing the interruption and the suspension of periods of limitation that ought to apply to the convention.

12. Clarify the discrepancy between Article 3 (4) and (5)

As explained above, the wording of paragraph 4 of Article 3 differs from the wording of paragraph 5 with regard to the identification of the monument or archaeological site from which the reclaimed cultural object forms an integral part. Vrellis has argued that the discrepancy between the formulation of both provisions means that it does not matter whether the object stems from an identified or non-identified monument or archaeological site. The implications of this assertion are particularly important to the application of the exceptions laid down in Article 3 (4) and (5) and require, therefore, further clarification.

13. Specify what 'identified' entails for the purpose of Article 3 (4) and (5)

Article 3 (4) and (5) establish exceptions to the time limitations that are contained in Article 3 (3) with respect to a claim in restitution of a cultural object forming an integral part of an identified monument or archaeological site. It remains unclear from the provision whether the monument or archaeological site ought to have been identified by the contracting state before the theft – as the wording of Article 3 (4) seems to suggest – or whether it is sufficient to identify that monument or site before the claim in restitution for the stolen object is introduced. The difference, although a subtle one, has considerable implications for a claim in recovery of artefacts.

14. Refine the definition of public collections

In order to address properly the problem that was raised by the Japanese delegation in respect of the possibility for contracting states to stretch the definition of what constitutes a public collection, a similar interest-based

system as the one prescribed by Article 5 (3) could be used in order to limit the definition of a public collection. This could limit any blank cheque application of Article 3 (4) and (5) for cultural objects that ought not to be classified as belonging to a public collection.

15. Define concepts relating to Article 3 (8)

Clarify the undefined concepts that are used by Article 3 (8), such as ‘sacred’, ‘communally important’ and ‘traditional or ritual use’.

16. Consider the introduction of a mechanism that takes fraudulent concealment into consideration for the purpose of the absolute period

In Chapter 4 above, it was established that the absolute period of fifty years could lead thieves to consider hiding the stolen property for as long as the absolute period is set to run in order to cash out once this period has expired.⁴⁶ Concealment is notably exacerbated by the increase in value that cultural materials benefit from, making it acceptable for a thief or a fencer to hide the object for long periods of time.⁴⁷ As was submitted by the Turkish delegation after the second session of the CGE, “the absolute time limitation serves only the interest of illegal possessors and opens the door for legal ownership for them and furthermore encourages illegal practices in this field”.⁴⁸ Introducing the doctrine of fraudulent concealment for the purpose of the running of the absolute period would be key to avoiding long term-targeted thefts. By introducing the doctrine of fraudulent concealment into the regime of Chapter II, it is possible to thwart any concealment plans. Nonetheless, the burden of proof would have to be imputed on the claimant. Therefore, a mechanism against fraudulent concealment should be incorporated into the regime of the convention and ought not to depend on the domestic law of the state parties, as was proposed during the negotiations towards the adoption of the convention.⁴⁹ Since fraudulent concealment can only be invoked against one that intentionally hides the property, the proposed mechanism ought not to run against innocent possessors.

17. Tolling the limitation periods

After the second session of the CGE, the Israeli delegation reiterated a proposal that it had previously advanced, namely to have certain circumstances toll the time limitations.⁵⁰ In the delegation’s opinion, war or the lack of diplomatic relations between the two contracting states concerned should be taken into consideration in the running of the periods of limitation.⁵¹ The delegation of the Republic of Korea also proposed introducing a mechanism to ensure the possibility to toll the limitation period when a possessor in bad faith actively conceals the whereabouts of the object or the identity of the possessor from parties that are entitled to the restitution of the object.⁵² Both aspects should be given further thought.

18. Clarify the form to give to the absolute period and its ensuing legal effect

In order to ensure coherent application of the absolute period, it is advisable to determine how the absolute period is to be constructed (e.g. as a statute of repose, a prefix period or a period of prescription). This will also allow understanding which legal effect flows from the expiration of the fifty-years period.

19. Consider alternative solutions to restitution that could be used by the claimant

Unlike in case of return of an illegally exported cultural object (Chapter III of the Convention), the convention does not foresee of alternatives to the payment of the fair and reasonable compensation in case of restitution of a stolen cultural object. Nonetheless, alternative scenarios could have been made available in cases where the

⁴⁶ See, for example, the commentary of the American delegation in UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Working papers submitted during the second session of the committee (Rome, 20 to 29 January 1992), Study LXX – Doc. 29, Rome, February 1992, p. 21: “It is noted that we have recently witnessed the surfacing of certain stolen treasures forty-five years after the theft occurred. Further, whatever term is in the repose provision if it remains unqualified, it means that it can be satisfied in the case where a possessor hides the cultural object away in a basement or a vault for the whole repose period”; see also Fox, (1993), p. 258; Lehman, J. N., ‘The Continued Struggle With Stolen Cultural Property: the Hague Convention, the Unesco Convention, and the Unidroit Draft Convention’, 14 *Arizona Journal of International and Comparative Law*, (1997), p. 546.

⁴⁷ Fox, (1993), p. 258, notably footnote 233; Lehman, (1997), p. 546.

⁴⁸ UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property – Observations of Governmental Delegations on the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Object (Finland, Netherlands, Sweden, Turkey and Venezuela), Study LXX – Doc. 32, Rome, November 1992, p. 17.

⁴⁹ See in this respect Fox, (1993), p. 259.

⁵⁰ See UNIDROIT, Committee of Governmental Experts on the International Protection of Cultural Property. Observations of Governmental delegations on the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Israel), Study LXX – Doc. 35, Rome, February 1993, p. 6.

⁵¹ UNIDROIT, (1993), Study LXX – Doc. 35, p. 6.

⁵² See ‘Working Papers submitted to the Committee of the Whole’, in Presidenza del Consiglio dei Ministri, (1996), CONF. 8/C.1/W.P. 8, 8 June 1995, p. 121.

claimant encounters difficulties in collecting the necessary money to pay the fair and reasonable compensation or when he does not find it appropriate to pay the said compensation to the duly diligent possessor.⁵³ This would further facilitate restitution.

20. Draft guidelines or best practices on due diligence

In Chapter 4 above, it was established that due diligence concerns the need for the possessor to demonstrate that no red flags were present, or conclusive, in determining that the cultural object was or could have been stolen during the acquisition phase. Article 4 (4) of the convention assists courts in determining whether the possessor as of right acted diligently at the time of the acquisition. This explanation says little about the standard of cautiousness that is required by acquirers of cultural objects. *Ergo*, the adoption of guidelines or of a best practices on due diligence proves necessary to help acquirers of cultural objects determine how to prove the exercise of due diligence. For example, the adoption of the proposed guidelines are desirable with respect to the requirement of consultation of any reasonably accessible register on stolen cultural objects for the following reasons: 1) having an overview of 'who does what', short descriptions about the manifold databases in existence and the different levels of restriction to these databases might facilitate the consultation of these tools. After all, in her 1997 commentary on the 1995 convention, Prott submitted that due diligence might require an intelligent research in existing databases.⁵⁴ The said overview would broaden the spectrum of research for market participants and give them a plethora of options, leading to more smart checks and to a higher rate of detection; 2) such an overview already exists for illegally exported cultural objects – as the UNESCO Database on National Cultural Heritage Laws does already help detecting illegal exports for the purpose of Chapter III – but is missing for the purpose of Chapter II; 3) much like the 2011 Model Provisions and the forms for adhesion and ratification that have been provided by the UNIDROIT Secretariat, said overview would complement the provisions of the convention and help to increase its popularity (by giving the appropriate tools to market participants); additionally, it might be a good idea to provide some further information about the modus operandi of the consultations of databases (registration of date and time of consultation, keeping an overview of the steps undertaken, e.g. registration of / use of alternative queries, etc.), which would help acquirers demonstrate that they have proper proof of their exercised diligence.

Although several initiatives to adopt the proposed guidelines already exist,⁵⁵ it would be appropriate for UNIDROIT to come up with official guidelines or best practices in order to facilitate for acquirers of cultural materials determine how best prove due diligence for the purpose of Chapter II. In this respect, it should be noted that the UNIDROIT Foundation is currently gathering funds to finance a study on a best practice guide for art market participants that is related to acquisition, sale and transaction transparency.⁵⁶

21. Clarify what ought to be compensated by Article 4 (1) and the meaning of fair and reasonable

Article 4 (1) of the convention does not specify what the fair and reasonable compensation is set to compensate. Nonetheless, the amount of the compensation might depend on what the compensation is aimed to make up for and should, therefore, be clarified. Furthermore, although the meaning of fair and reasonable has been purposely left unavowed in order to leave domestic courts with a sufficient margin of discretion in deciding about what constitutes the most fair and reasonable amount of compensation in the given circumstances, it is recommended to further the meaning of fair and reasonable by means of illustrations. As was noted in Chapter 4 above, the terminology 'fair and reasonable' is already used in other fields of law, such as in the case of compensation for nationalisation of privately owned assets. A study of the case law in this field could help elucidate how fair and reasonable compensation ought to be computed for the purpose of Article 4 (1) of the convention. This would in turn provide a better understanding of the implications of this provision and could lead to the establishment of material criteria that would guide courts in deciding upon the question of compensation.

22. Consider the obligation to register the object as stolen

The convention does neither impose an obligation to inform a particular authority, nor to register the stolen property in a particular database.⁵⁷ The lack of obligations to register stolen items by the dispossessed person

⁵³ Prott, *Commentary on the Unidroit Convention*, (1997), p. 44.

⁵⁴ Prott, *Commentary on the Unidroit Convention*, (1997), p. 51.

⁵⁵ For example, the Responsible Art Market (hereinafter RAM) has developed an Art Due Diligence toolkit that was presented in February 2018 in Geneva. More information about this initiative can be found at <http://responsibleartmarket.org/save-date-building-art-market-2-0/>, last retrieved on 01.03.2018.

⁵⁶ For more details with regard to this study (cf. Study No 2), see <http://unidroitfoundation.org/protection-of-cultural-property/>, last retrieved on 01.03.2018.

⁵⁷ Jolles, A., "Un Regard Critique sur la Convention d'Unidroit", in: C. Breitter, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d'Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d'une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), pp. 56, 62; This lack is notably deplored by the Swiss Département Fédéral de l'Intérieur. See Département Fédéral de l'Intérieur (Suisse), (1996), p. 15.

could have the negative effect of rendering the research necessary for the exercise of due diligence inconclusive,⁵⁸ thus sustaining the sale of stolen cultural objects. During the drafting process of the convention, it was assumed that the non-registration of stolen property by the original owner would involve the forfeiture of the protection that he would otherwise have acquired under the convention.⁵⁹ This assumption was not retained and no obligation of registration imputed upon the dispossessed owner flows from the final version of the convention.⁶⁰ Following Marina Schneider, this omission is partly justified by the fact that, in 1995, there were no databases for stolen cultural objects available to the public. Furthermore, it is believed that reporting a theft would bring the dispossessed owner's collection into jeopardy by disclosing vulnerabilities, lessen the chances for the thief to launder the object on the licit market and thus push the object further down in the abysses of the black market.⁶¹ Whilst there is some merit to this contention, these arguments do not stand here. Following this line of reasoning defeats the very purpose of the 1995 convention, as stolen cultural objects can still be sold to innocent acquirers.⁶² In other words, not registering the object in these specialised databases leads to a lower rate of detection, ultimately resulting in a correlated long-term lack of deterrence on the illicit traffic.⁶³ The introduction of an obligation to register stolen cultural objects should, hence, be considered.

Chapter 5 | Archaeological theft

23. Further the work undertaken in respect of artefacts

As was illustrated above, the situation of archaeological theft is a problem *sui generis* that deserves further consideration and the adoption of tailor-made solutions. As was pointed out by the Greek Delegation during the special committee to review the practical operation of the 1995 convention, there are many issues connected to reclaiming stolen artefacts – such as the identification of the time and place of the theft – that make reliance on existing legal provisions to reclaim stolen archaeological materials complicated.⁶⁴ Hence, due to the special nature of archaeological theft, the suitability of the assimilation of Article 3 (2) to theft has been questioned.⁶⁵ Contrary to other cultural materials, artefacts need national and international tailored-made solutions designed at ensuring their physical preservation and the protection of their significance *in situ*. As Prott submitted in 1983 “all countries share a concern for the prevention of damaging exploitation of archaeological resources”.⁶⁶ This statement constitutes a truism as society as a whole suffers from the destruction of the underlying information that is embedded in the provenience of artefacts, therefore identifying the victim of this so-called ‘victimless crime’.⁶⁷ It

⁵⁸ Jolles, (1997), p. 56; Burke has submitted that owners should be entitled to rely on national law to protect their interests only if they had registered their stolen property beforehand. See Burke, K. T., ‘International Transfer of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?’, 13 *Loyola of Los Angeles International and Comparative Law Journal*, (1990-1991), p. 465.

⁵⁹ Crewdson, R., ‘Putting Life into a Cultural Property Convention: UNIDROIT ; Still Some Way to Go’, 17 *International Legal Practitioner*, (1992), p. 47.

⁶⁰ A prompt declaration of the theft is advocated by Interpol, see Grosse, L., Jouanny, J. P., ‘La Protection du Patrimoine Culturel en Vertu des Instruments de l’UNESCO (1970) et d’UNIDROIT (1995): La Position d’Interpol’, 8 (1-2) *Uniform Law Review*, (2003), p. 580.

⁶¹ This argumentation was borrowed by the Court of Appeals of the Second District of California in *Naftzger v. American Numismatic Society*, 1999 WL 1074009 (Cal.App.2 Dist.), at 9 (quoting Note, *Applying a Strict Discovery Rule to Art Stolen in the Past* (1997) 49 *Hastings Law Journal*, 225, at 231). In *Naftzger*, the court rejected the defence of unclean hands on which Naftzger was relying against the ANS. The court did not consider the lack of reporting of the theft as demonstrating unclean hands on ANS’ part, basing its reasoning on the aforementioned rationale; See also Grover, S. F., ‘Note – The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study’, 70 *Texas Law Review*, (1991-1992), pp. 1435-1436; other considerations have a deterring effect on the registration of the theft of cultural objects for owners. As such, the fear of having to disclose the ownership of an expensive cultural object to the government is one of the main reasons that contributes towards not reporting a theft. See Grover, (1991-1992), p. 1435.

⁶² The Court of Appeals in *Naftzger* recognised that reporting a theft would have the effect of preventing purchasers from acquiring stolen cultural objects. See *Naftzger v. American Numismatic Society*, 1999 WL 1074009 (Cal.App. 2 Dist.), at 9.

⁶³ Grover, (1991-1992), p. 1436.

⁶⁴ Greek Delegation, ‘Observations / Questions of participants / Discussions’, in ‘Part II – Addressing the Practical Operation and the Effectiveness of the Convention, II. Observations / Questions of participants / Discussions’ in UNIDROIT, ‘Report on the First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects’, UNESCO Headquarters, Paris, 19 June 2012, forthcoming.

⁶⁵ Renold, M. A., ‘Les Principales Règles de la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés’, in: M. A. Renold and C. Breidler, *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 27; as Byrne-Sutton specified two years after the adoption of the convention, archaeological objects require specific tailor-made solutions and the assimilation to theft created by the convention might not be desirable for these types of items. See Byrne-Sutton, Q., ‘Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)’ in: C. Breidler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 73.

⁶⁶ Prott, L. V., ‘International Control of the Illicit Movement of the Cultural Heritage: the 1970 UNESCO Convention and Some Possible Alternatives’, 10 *Syracuse Journal of International Law and Commerce*, (1983), p. 337.

⁶⁷ O’Keefe, P. J., ‘Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level’, 10 *Syracuse Journal of International Law and Commerce*, (1983), p. 357.

should not be forgotten that humanity's archaeological heritage is finite⁶⁸ and its protection calls for rapid and steadfast solutions. Whilst states have been particularly proactive in adopting domestic remedies, this has not been *per se* true at the international level. Thenceforth, the protection of archaeological objects is of such a peculiar nature that these objects must be distinguished from other cultural objects and a *lex specialis* addressing archaeological theft is desirable.⁶⁹ Therefore, it has been advanced that artefacts deserve their own regulation, which ought to be formalised in an international convention.⁷⁰ Furthermore, as the loss of information suffered through these excavations results in the loss of both the item's scientific relevancy and of humanity's memory, any international effort ought to take this loss into consideration in prescribing new solutions.⁷¹

Chapter 6 | Application of the convention

24. Clarify the concept of 'rules more favourable to the restitution of a stolen cultural object'

Article 9 (1) of the convention allows contracting states to adopt rules that are more favourable to the restitution of a stolen cultural object without specifying what these rules could be. Although Article 11 of the PDC listed these different scenarios, this provision was drastically simplified into what is now Article 9 (1) so as to keep the provisions of the convention balanced. It is, therefore, recommended to adopt model provisions on rules more favourable to the restitution of a cultural object in order to assist states in modulating the provisions of the convention in the way they see fit. This would further increase understanding about the regime of restitution of Chapter II even further.

25. Adopt guidelines for courts in the interpretation of the convention

In order to avoid a disparate application of the convention, it would be advisable to issue guidelines to domestic courts for the interpretation of the convention that explains some of the ambiguities of the convention.

⁶⁸ Tubb, K. W., "Thoughts in Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 113; Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), p. 5.

⁶⁹ Tubb, (1996), p. 113.

⁷⁰ Renold, (1997), p. 27.

⁷¹ Ardouin, C. D., "Vers un Trafic Licite des Biens Culturels? Quelques Réflexions et Questions à Partir d'une Perspective Anthropologique", in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (ICC Publishing: Paris / New York, 1996), p. 82.

E. Conclusion

From a general standpoint, the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* is a very well designed instrument for tackling cultural property theft through the regulation of the demand side of the art market, without affecting the licit trade. By creating a uniform regime that harmonises domestic private laws, it corrects, on the one hand, the *Winkworth / Ellicofon* paradigm. This paradigm – characterised by different results for similar situations – which constituted a premise to our analysis demonstrates the legal uncertainty resulting from the existence of discrepant rules that the convention was set to correct. On the other hand, by uniformly regulating the demand for cultural materials –, the convention constitutes an important instrument to protect cultural property from entering the art market legally by being laundered through means of third-party protection. More importantly, the solution to cultural property theft adopted by the convention moralises the said market by prescribing the exercise of due diligence during the acquisition of a cultural item. Relying on the caveat emptor principle, this solution exhorts acquirers of cultural objects to ascertain the provenance of the transacted item thoroughly, subject to the penalty of losing both the property and any entitlement to fair and reasonable compensation. As was noted by Prott: “The UNIDROIT Convention on Stolen and (sic) Illegally Exported Cultural Objects 1995 is a major international instrument and has a real possibility of deterring illicit trade. [...] Its impact is more likely to be on the practice of collectors and other acquirers in making them more careful in inquiring into the origins of cultural objects offered for sale”.⁷² The convention therefore creates a shift in both the mindset and in the practices of acquirers of cultural objects.⁷³ This change is meant to render stolen cultural objects unmarketable, tempering with the offer of these materials and, ultimately, cancelling any prospects of profitability from cultural property theft. Put differently, by thoroughly regulating the demand for cultural materials the convention controls the offer of stolen cultural objects. Alongside its control effect, this instrument constitutes an equitable solution to the illicit trafficking of stolen cultural materials;⁷⁴ the regime of mandatory restitution coupled with the possibility for the possessor to obtain fair and reasonable compensation when the acquisition was made in good faith constitute an appropriate balancing of the interests of claimants and possessors that has the effect of deterring cultural property theft.⁷⁵ As such, the convention has significantly bridged the gap between common and civil law legal systems by protecting both a dispossessed person and an acquirer in good faith.⁷⁶ Adjacent to it, it has been lauded as constituting the expression of an existing – or upcoming – international order that tackles the illicit traffic in cultural property adequately,⁷⁷ whilst securing the right of good faith acquirers at the same time.⁷⁸ Furthermore, the said instrument has adopted concrete steps towards reconciling the conflicting interests between source and market nations, notably by prescribing for the payment of fair and reasonable compensation.⁷⁹ What is more, it builds on many of the provisions of its 1970 predecessor, whilst discarding its most problematic articles,⁸⁰ thus enhancing the regime of protection of cultural materials. All in all, UNIDROIT achieved a well-balanced solution to cultural property theft and kept it concise, practical and simple,⁸¹ ultimately creating legal certainty and foreseeability.⁸² This in turn clearly benefits to society as it establishes an intelligible and appropriate solution to fighting cultural property theft.

Many of the reservations formulated against the regime of restitution of the convention all have in common the fact that they tend to oversee its purpose: some of the given criticisms – such as the disapproval of the use of a

⁷² Prott, *Commentary on the Unidroit Convention*, (1997), p. 87.

⁷³ As pointed by the Secretariat of Unidroit, “The Convention’s very existence signals that the time is ripe for an improvement in ethical standards in the art trade”. See UNIDROIT Secretariat, (2001), p. 564. In the same line of reasoning, Droz advanced that, from the moment that the convention was negotiated and signed, its very existence was a sign to art professionals and to collectors that new standards were the upcoming norm. See Droz, G. A. L., ‘La Convention d’UNIDROIT sur le Retour International des Biens Culturels Volés ou Illicitement Exportés (Rome, 24 juin 1995)’, 86 (2) *Revue Critique de Droit International Privé*, p. 273.

⁷⁴ Love Levine, (2010-2011), p. 778, citing Fox, C., ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property’, 9 (1) *American University International Law Review*, (1993), p. 266 and p. 780.

⁷⁵ Love Levine, (2010-2011), p. 777; Fox, (1993), p. 266.

⁷⁶ Love Levine, (2010-2011), p. 779.

⁷⁷ In fact, the convention must be seen in the amalgam of international instruments in existence in the field. The establishment of registers, combined to the adoption of measures protecting archaeological searches and the cooperation in sharing technical expertise contribute towards a movement of international cooperation in the protection of cultural protection. See Streiff, D., ‘Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débat)’: in: C. Breider, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag; Zurich, 1997), p. 63.

⁷⁸ Prott, *Commentary on the Unidroit Convention*, (1997), p. 87.

⁷⁹ Love Levine, (2010-2011), p. 779.

⁸⁰ Love Levine, (2010-2011), p. 775.

⁸¹ Lalive d’Epinay, P., ‘Une avancée du droit international: la Convention de Rome d’Unidroit sur les biens culturels volés ou illicitement exportés’, 1 *Uniform Law Review*, (1996), pp. 56-57; Lalive, P., ‘La Convention d’UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)’, 1 *Revue Suisse de Droit International et de Droit Européen*, (1997), p. 28.

⁸² Lalive d’Epinay, (1996), p. 57.

broad definition of the notion of ‘cultural objects’, of the adoption of an improper balance between protecting dispossessed persons and acquirers in good faith, of the intricate character of the obligation of due diligence, of the fact that the convention creates obstacles in acquisition by art dealers, collectors and museums⁸³ – are misplaced when considering the aim of fighting the illicit trafficking of cultural objects that the convention was set to achieve.⁸⁴ Furthermore, as was argued by Love Levine and as was established above, the shortcomings of the 1995 UNIDROIT Convention are no match to the potential that the instrument has in fighting the illicit traffic in cultural property.⁸⁵ Therefore, its flaws cannot outweigh the advantages that flow from becoming a party to its regime. *Ergo*, despite the weaknesses highlighted above and despite the many criticisms formulated against the convention’s equivocality, it undisputedly constitutes progress in the protection of cultural materials in the international regulatory regime;⁸⁶ it is not only the best but also the only concrete international effort that commits to tackle the illicit traffic in cultural property from a private law perspective.⁸⁷ Therefore, more than two decades after the introduction of the convention, it appears sufficient to the present author to recall what Prott declared in 1997 with regard to the convention regime: “We should all be willing to adopt the solution that will most hinder the illicit trade”⁸⁸ and “By ratifying these conventions, States send a warning signal to traffickers, of increased vigilance in terms of legal safeguards for cultural property on the one hand, and on the other, stricter monitoring of the itineraries and hubs criminals employ to circulate these cultural objects”.⁸⁹ It appears thus difficult, at the present stage, to advocate the introduction of new rules. Nevertheless, this does not mean to say that the convention might not need some further fine-tuning: to ensure its success, the details of certain of its points might deserve further consideration.⁹⁰ As was noted by the British Advisory Panel on Illicit Trade in Cultural Objects in its December 2000 Report: “We agree with the Select Committee that the UNIDROIT Convention is (in general) efficiently drafted, most of its ambiguities and lacunae being remediable by resort to local legal doctrine, or by resourceful redrafting or interpretation in keeping with the spirit of the Convention”.⁹¹ In this regard, Prott has advanced that it could be possible to ponder recasting the 1970 and 1995 conventions into a new instrument that would follow the good drafting of the 1995 convention and include improved public law provisions inspired from the regime of the 1970 convention.⁹² What is more, it could be possible to include additional measures that deal with mutual assistance between states in criminal matters, as inspired by the 1985 *European Convention on Offences relating to Cultural Property*, or to improve the actual regimes of the two conventions.⁹³ Alternatively – and within the confinements of the present research –, it might be sufficient for the time being to formulate recommendations in order to fine-tune and promote the convention: as recently noted by Shyllon acting in his capacity of rapporteur for the ICPRCP: “In view of the fact that after forty years there are just one hundred and twenty members of the 1970 Convention, and after fifteen years only thirty States have joined the UNIDROIT Convention we can say that the priority should not be working towards a new instrument but giving efficacy to the 1970 and 1995 Conventions. Efforts should be concentrated on getting more countries to become members of both Conventions. More work remains to be done to convince market States that it is in the interest of the comity of nations that they subscribe to the 1995 Convention”.⁹⁴ Furthermore, following Voulgaris, the convention has reached an optimum level in relation to the harmonisation of rules on theft and illicit export.⁹⁵ For now, it appears thus appropriate to formulate recommendations in order to improve the regime of Chapter II in reaching its objective of tackling cultural property theft appropriately.

⁸³ Forrest, (2010), pp. 218-219.

⁸⁴ Forrest, (2010), p. 219.

⁸⁵ Love Levine, (2010-2011), p. 775.

⁸⁶ Lalive d’Epinay, (1996), p. 48.

⁸⁷ Lalive d’Epinay, (1996), p. 49.

⁸⁸ Prott, L.V., ‘Les Points de Vue des Personnes et Institutions Concernées par la Convention d’Unidroit sur les Biens Culturels Volés ou Illicitement Exportés (débats)’ in: C. Breitler, Q. Byrne-Sutton, F. Geisinger-Mariéthoz, M. A. Renold (eds), *La Convention d’Unidroit du 24 Juin 1995 sur les Biens Culturels Volés. Actes d’une Table Ronde Organisée le 2 Octobre 1995*, (Schulthess Polygraphischer Verlag: Zurich, 1997), p. 84.

⁸⁹ Delepierre, S., Schneider, M., ‘Ratification and Implementation of International Conventions to Fight Illicit Trafficking in Cultural Property’, in: F. Desmarais (ed), *Countering Illicit Traffic in Cultural Goods – The Global Challenge of Protecting the World’s Cultural Heritage*, (ICOM International Observatory on Illicit Traffic in Cultural Good: Paris, 2015), p. 135.

⁹⁰ Voulgaris, (2003), p. 549.

⁹¹ Prott, L.V., ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On’, 14 (1-2) *Uniform Law Review*, (2009), p. 233.

⁹² Prott, (2009), p. 237.

⁹³ Prott, (2009), p. 237.

⁹⁴ Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Sixteenth Session, Oral Report of the Rapporteur (Professor Folarin Shyllon), Paris, UNESCO Headquarters, 21-23 September 2010, 4, <http://unesdoc.unesco.org/images/0019/001925/192535E.pdf>, last retrieved on 01.03.2018.

⁹⁵ Voulgaris, (2003), p. 549.

F. Suggestions for further research

In order to further the work that has been undertaken in the present dissertation, the author of this contribution is of the opinion that further research ought to be pursued with regard to three specific aspects:

- More research should be conducted on the points that were deemed peripheral to the present overview, such as the legal remedies available to the possessor that has to return a stolen cultural object, the domestic regimes applicable to fixtures, studies on fair and reasonable compensation, on eventual partial expropriation, etc. Although these different aspects were left out for the sake of simplifying the analysis of the convention, they are equally important to appreciate the application thereof.
- Furthermore, since Chapter III of the 1995 UNIDROIT convention was omitted in this research, a thorough study of this chapter could further the understanding as to the role of the provisions thereof in tackling the illegal export / import conundrum.
- Ultimately, additional quantitative research ought to be conducted on the illicit trafficking in cultural property for two reasons: firstly, the information available about this traffic often proves to be incomplete or inaccurate; secondly, on-site investigations could help to understand with more exactitude the role played by the 1995 UNIDROIT Convention in constraining the targeted illicit traffic.

These next steps will help to determine whether the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* found the appropriate solution to the contemplated problems or whether it merely initiated a process that will enhance international co-operation in tackling the illicit trafficking of cultural property.

SUMMARY

Praised by some writers as an appropriate instrument to tackle the illicit trafficking of cultural property and criticized by other commentators as a stillborn project, the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* has, since its adoption, been – and still is – much debated. In an attempt to clarify the on-going debate, the present study posits three key questions: what merits of Chapter II of the 1995 UNIDROIT convention contribute to the achievement of its objective of becoming an appropriate tool against cultural property theft? What pitfalls of the convention thwart it in the said enterprise? And, finally, how can the scrutinised regime be improved to foster adherence to the convention? To answer these questions, this contribution investigates the inner workings of this instrument in addressing cultural property theft and the plunder of archaeological materials.

In doing so, the research firstly presents the convention in its context, discusses the preparatory work towards its adoption, assesses its objectives and sketches out its structure. It finds, *inter alia*, that the 1995 UNIDROIT convention is the successor to the 1970 UNESCO convention in fighting the illicit trafficking of cultural property in times of peace and constitutes a private law complement to Article 7 (b) (ii) of the latter. Furthermore, it unveils that the 1995 convention is set to regulate the demand side of the art and antiquities markets by addressing the scenario of good faith acquisitions of cultural objects. As such, the treaty attempts to alter the practices of market stakeholders and to create a gradual change of mentality by making the sale of cultural objects of dubious origins more difficult.

Secondly, the study delimits the convention's scope of application and, thus, analyses the instances within which its regime applies. It determines that the treaty is exclusively concerned with claims for the restitution and the return of stolen or illegally exported cultural objects that have crossed a border. What is more, it establishes that the convention is not retroactive and only applies to acts that have taken place after 1 July 1998. Importantly, the research clarifies the implications of Article 10, which explains more specifically when the theft or illegal export must have taken place to fall within the convention's ambit.

Thirdly, the dissertation analyses the applicable rules on restitution and third-party protection in six different states: Belgium, France, The Netherlands, New Jersey, California and New York. In the first place, it introduces the basic concepts and principles that underlie these rules. Subsequently, it operationalises these concepts and principles by explaining how the restitutionary and third-party protection rules operate. Finally, it considers the legal implications flowing from those rules.

Fourthly, the restitutionary regime for stolen cultural objects laid down in Chapter II of the convention is elucidated. A sequential order is given by which the prerequisites for lodging a claim in restitution, the timeliness of the claim, the rules on restitution, as well as the entitlement to and amount of fair and reasonable compensation are discussed. To further explain these rules, the findings of the comparative analysis of the afore-mentioned jurisdictions are extrapolated to the regime of Chapter II. The main observations distilled from this exercise are that:

- A. Chapter II mandates the automatic return of a stolen cultural object when a claim in restitution is timely introduced. In accordance with the six jurisdictions discussed, the convention abides by the *nemo dat quod non habet* principle by mandating the restitution of a stolen cultural object. Nevertheless, much like New Jersey, California and New York law, the convention subjects a claim for the restitution to specific time restrictions. Therefore, Article 3 (3) requires a claim to be brought in accordance with a relative and an absolute period. The relative period is construed in accordance with the discovery rule as laid down in New Jersey and California law. Furthermore, the absolute period of fifty years makes it impossible to bring a claim for restitution more than fifty years after the theft took place.

- B. Next to the regime of Article 3 (3), the research addresses the exceptions applicable for cultural objects embedded with a certain importance to the cultural heritage of contracting states: Article 3 (4) and (5) provide two exceptions applicable to cultural objects forming an integral part of an identified monument, of an identified archaeological site or stemming from a public collection, as described in Article 3 (4)-(8). Sacred or communally important cultural objects belonging to and used by a tribal or indigenous communities in a contracting state as part of that community's traditional or ritual use are subjected to the same rules as the ones applicable to public collections.
- C. The study further found that the legal effect flowing from the expiration of both the relative and absolute periods remain unclear. As the relative period was inspired by the New Jersey and California Discovery Rule, its expiration ought to be embedded with similar traits. Nonetheless, both jurisdictions differ in the legal effect flowing from this expiration, as the New Jersey approach operates upon the right and the Californian approach affects the remedy. With regard to the expiration of the absolute period, it is unquestionable that the owner loses his right of ownership and that the possessor becomes the owner of the stolen property.
- D. Provided the claim is timely introduced, the merits of the case are dealt with by Articles 3 (1) and 4 of the convention. Article 3 (1) prescribes the unconditional return of a stolen cultural object. Article 4 (1) entitles an acquirer as of right to receive fair and reasonable compensation, subject to specific conditions. Compensation is not automatic, but will only have to be paid when this possessor did not know, nor ought to have known, during the acquisition that the cultural object was stolen, and can prove that he exercised due diligence at the time of the acquisition (as defined in Article 4 (4)). Put differently, the possessor must prove that he acquired the cultural object in good faith. The protection of good faith acquirers is a main tenet of the rules on third-party protection found in Belgian, French and Dutch law. Therefore, good faith for the purpose of the convention is compared with domestic articulations of this notion. Nevertheless, unlike the three jurisdictions just referred to, good faith is not presumed by the convention. Hence, the burden of proof is shifted to the possessor by requiring him to demonstrate his good faith through the exercise of due diligence.
- E. Although Article 4 primarily targets acquisitions for value, gratuitous acquisitions are also incorporated within the regime of Chapter II, ensuring that cultural objects cannot be laundered through means of donation or bequeathals.
- F. By obliging the possessor of a stolen cultural object to return it and lose the right to fair and reasonable compensation when he was not sufficiently diligent during the acquisition, it is assumed that this will give the acquirer sufficient incentive to be cautious throughout the acquisition. Subsequently, this will lead to a diminution of transactions involving cultural objects with a dubious origin, tackling the secrecy and connivance of the art market and deterring cultural property theft in the long run. Therefore, the research finds that both Articles 3 (1) and 4 (1) are key to the fight against the illicit traffic in stolen cultural property.
- G. To set the amount of fair and reasonable compensation, the research establishes that account may be taken of a panoply of facts, including for example: the market value of the object; the price paid; the financial resources of the claimant; the amount that the possessor is willing to accept as compensation; the solvability of the claimant; the possibility for the purchaser to recover money from the seller; etc. The study also lists the elements that ought not to be computed in the fair and reasonable compensation and further discusses some limitations to the interpretation of this notion. Finally, attention is devoted to the modalities of payment.

Fifthly, the manuscript discusses the causes and effects of archaeological theft as well as the response of source states in dealing with this problem and elaborates on the solutions instated by the UNIDROIT

convention. It establishes that the convention prescribes for the return of a cultural object, respectively in Chapters II (cf. Article 3 (2)) and III (cf. Article 5 (3)). As such, it finds that the *Model Provisions on State Ownership of Undiscovered Cultural Objects* is well suited to assist contracting states in benefiting from Article 3 (2) to its fullest. Moreover, although the drafters have not foreseen of a hierarchy between Chapters II and III of the convention, the research observes that Article 5 (3) constitutes a safety net for contracting states that encounter difficulties in reclaiming the artefact on the basis of Article 3 (2).

Sixthly, the dissertation addresses matters relating to the application of the instated regime such as reservations; the convention's self-executing nature; the adoption of rules more favourable to restitution and / or return; and the interpretation of the convention. Additionally, it touches upon the means of monitoring the convention's application. With regard to the rules more favourable to restitution or return, the research finds that Article 9 (1) makes it possible for contracting states to modify the regime of the convention in many ways. It is thus possible to apply the convention to claims of a purely national character; to retract the payment of compensation to an acquirer in good faith (only when the domestic law of the contracting state already foresees that no compensation is to be paid); to extend the period of time for recovering the stolen property; to adopt longer periods for introducing the demand in return; etc. Additionally, it is possible for a contracting state to extend the temporal scope of the convention by applying it to thefts or illegal exports that have taken place before the adoption of, or the adhesion to, the convention. Nevertheless, the research further explains how Article 9 (2) limits the legal effect of the choice operated.

Seventhly, this work positions the convention in the existing international legal framework: the interaction of the convention with other international norms, as regulated by Article 13 (1), is discussed in detail in relation the 1970 UNESCO convention. What is more, the possibility for contracting parties to adopt agreements in order to improve the application of the convention in their mutual relations (Article 13 (2)) is also considered. Additionally, the relative system instated by Article 13 (3), which enables members of economic integration organisations or regional bodies to apply internal rules in their mutual relations, is scrutinised. For the purpose of the research, this scheme is studied in the context of the relationship between the UNIDROIT convention and both former Directive 93/7/EEC and its recast, Directive 2014/60/EU.

Finally, the research concludes that the regime of restitution laid down in Chapter II is appropriate to tackling both cultural property theft and archaeological theft. More specifically, it observes that the regime is conducive to moralising the art market and to rendering cultural objects of dubious origins unmarketable. As such, it appropriately tackles the secrecy and connivance that often characterizes the art market. Furthermore, the compromise achieved within the convention is deemed well balanced as this instrument borrows the restitutionary rules of New Jersey and California in combination with rules on third party protection, in accordance with Belgian, French and Dutch law. It also finds that any potential drawbacks encountered in the studied regime cannot outweigh the advantages brought by the convention. Instead, it opines that further fine-tuning by UNIDROIT or its 1995 UNIDROIT Convention Academic Project (UCAP) could help alleviate certain concerns raised about the convention. The research concludes by formulating recommendations for the consideration of both UNIDROIT and the UCAP.

SAMENVATTING

Het UNIDROIT-Verdrag van 1995 inzake gestolen of illegaal uitgevoerde cultuurgoederen wordt door sommige schrijvers geprezen als een geschikt instrument om de illegale handel in cultuurgoederen aan te pakken, maar wordt door andere commentatoren als een doodgeboren project bekritiseerd. In een poging het lopende debat te verhelderen, worden in deze studie drie belangrijke vragen gesteld: Welke verdiensten van hoofdstuk II van het UNIDROIT-verdrag van 1995 dragen bij aan het bereiken van de doelstelling van het verdrag om een geschikt instrument tegen diefstal van cultureel eigendom te worden? Welke valkuilen van de conventie dwarsbomen deze onderneming? En ten slotte, hoe kan dit stelsel worden verbeterd om toetreding tot het verdrag te bevorderen? Om deze vragen te beantwoorden, onderzoekt dit proefschrift de werking van dit instrument in de strijd tegen de diefstal van cultureel eigendom en de plundering van archeologische objecten.

In dit onderzoek wordt allereerst het verdrag besproken door het te contextualiseren, de voorbereidende werken te bediscussieren, de nagestreefde doelstellingen te beoordelen en de structuur ervan te schetsen. Het onderzoek stelt onder meer vast dat het UNIDROIT-verdrag van 1995 de opvolger is van het UNESCO-verdrag van 1970 ter bestrijding van de illegale handel in culturele goederen in vreedstijd en dat het een privaatrechtelijke aanvulling vormt op Artikel 7 onder b) ii) van dit laatste instrument. Voorts wordt aangetoond dat het verdrag van 1995 de vraagzijde van de kunst- en antiekmarkt reguleert: Dit door de praktijk van het te goeder trouw verwerven van cultuurgoederen te herzien. Het verdrag probeert de handelwijze van marktpartijen te veranderen en een geleidelijke mentaliteitsverandering te bewerkstelligen door de verkoop van cultuurgoederen van dubieuze herkomst te bemoeilijken.

Ten tweede wordt in dit proefschrift het toepassingsgebied van het verdrag afgebakend en worden meerdere gevallen geanalyseerd waarbij het stelsel van toepassing is. Het verdrag heeft uitsluitend betrekking op vorderingen tot teruggave van gestolen cultuurgoederen en teruggave van gestolen of illegaal uitgevoerde cultuurgoederen die een grens gepasseerd zijn. Bovendien wordt bepaald dat het verdrag geen terugwerkende kracht heeft en van toepassing is op transacties die plaatsvinden na 1 juli 1998. Belangrijk is dat het onderzoek de implicaties van Artikel 10 verduidelijkt, waarbij specifiek wordt uitgelegd wanneer en waar de diefstal of illegale uitvoer moet hebben plaatsgevonden om binnen de werkingssfeer van het verdrag te vallen.

Ten derde wordt in het onderzoek een analyse gemaakt van het restitutiestelsel en de regels inzake de bescherming van derden welke in zes verschillende staten van toepassing zijn: België, Frankrijk, Nederland, New Jersey, Californië en New York. In eerste instantie worden de basisbegrippen en beginselen die aan de beoogde regels ten grondslag liggen geïntroduceerd. Vervolgens operationaliseert het deze begrippen door uit te leggen hoe de regels die betrekking hebben op restitutie en de derdenbescherming functioneren. Tot slot wordt ingegaan op de juridische gevolgen van deze regels.

Ten vierde wordt het in Hoofdstuk II van het verdrag besproken restitutiestelsel voor gestolen cultuurgoederen toegelicht. Er wordt een volgorde gegeven waarin de voorwaarden voor het indienen van een vordering tot teruggave, de tijdigheid van de vordering, de regels inzake teruggave, alsmede het recht op en de hoogte van een billijke en redelijke vergoeding worden besproken. Om deze regels verder toe te lichten, worden de bevindingen van de vergelijkende analyse van eerdergenoemde jurisdicties geëxtrapoleerd naar het stelsel van Hoofdstuk II. De belangrijkste opmerkingen die uit deze vergelijking zijn gedistilleerd zijn als volgt:

- A. Hoofdstuk II schrijft in alle gevallen de teruggave van een gestolen cultuurgoed voor wanneer een vordering tot teruggave tijdig wordt ingediend. In overeenstemming met de zes besproken jurisdicties houdt het verdrag zich aan het *nemo dat quod non habet* beginsel door de teruggave van een gestolen cultuurgoed verplicht te stellen. Echter, het verdrag stelt een vordering tot teruggave in die, net als de wet van New Jersey, Californië en New York, afhangt van specifieke tijdsbepalingen. Artikel 3, lid 3, schrijft derhalve voor dat een vordering moet worden ingesteld in overeenstemming met zowel een relatieve als een absolute termijn. De relatieve periode wordt geïnterpreteerd in overeenstemming met de ontdekkingsregel zoals vastgelegd in de wet van New Jersey en Californië. Bovendien is het door de absolute termijn van vijftig jaar onmogelijk om meer dan vijftig jaar na de diefstal een vordering tot teruggave in te stellen.

- B. Naast het regime van Artikel 3, lid 3, richt het onderzoek zich ook op de uitzonderingen die van toepassing zijn op cultuuroederen die van belang zijn voor het cultureel erfgoed van verdragsluitende staten: Artikel 3, leden 4 en 5, voorziet in twee uitzonderingen die van toepassing zijn op cultuuroederen die integraal deel uitmaken van een geïdentificeerd monument, van een geïdentificeerde archeologische site of afkomstig zijn uit een openbare collectie, zoals beschreven in Artikel 3, leden 4 tot en met 8. Voor heilige of gemeenschappelijk belangrijke cultuuroederen die toebehoren aan en gebruikt worden door stammen of inheemse gemeenschappen in een verdragsluitende staat in het kader van het traditionele of rituele gebruik van die gemeenschap gelden dezelfde regels als die welke van toepassing zijn op openbare collecties.
- C. Verder wordt in de studie vastgesteld dat het rechtsgevolg van het verstrijken van zowel de relatieve als de absolute periode onduidelijk blijft. Aangezien de relatieve periode werd gebaseerd op de *discovery rule* van New Jersey en Californië, zou het verstrijken van deze periode vergelijkbare eigenschappen moeten omvatten. Niettemin verschillen beide jurisdicties van elkaar inzake het rechtseffect van dit verval, aangezien de New Jersey-benadering op dit recht inwerkt en de Californische benadering het rechtsmiddel beïnvloedt. Wat het verstrijken van de absolute termijn betreft, is het vrijwel zeker dat de eigenaar zijn eigendomsrecht verliest en dat de bezitter eigenaar wordt van het gestolen goed.
- D. Mits de vordering tijdig wordt ingesteld, wordt de grond van de zaak behandeld in Artikel 3, lid 1, en Artikel 4 van het verdrag. Artikel 3, lid 1, schrijft de *unconditional return* van een gestolen cultuuroed voor. Artikel 4, lid 1, geeft een *acquirer as of right* onder specifieke voorwaarden recht op een billijke en redelijke vergoeding. Deze vergoeding is niet vanzelfsprekend, maar hoeft alleen te worden betaald wanneer de bezitter tijdens de verkrijging niet wist of had moeten weten dat het cultuuroed was gestolen, en kan aantonen dat hij op het moment van de verkrijging de nodige zorgvuldigheid in acht had genomen (zoals gedefinieerd in Artikel 4, lid 4). Anders gezegd, de bezitter moet bewijzen dat hij het cultuuroed te goeder trouw heeft verworven. De bescherming van verkrijgers die te goeder trouw zijn, is een basisbeginsel van de regels inzake de bescherming van derden in het Belgische, Franse en Nederlandse recht. Daarom wordt goede trouw, zoals besproken in het verdrag, vergeleken met binnenlandse verwoordingen van dit begrip. In tegenstelling tot de drie bovengenoemde jurisdicties, wordt goede trouw door het verdrag niet verondersteld. De bewijslast ligt dus bij de bezitter door hem te verplichten de nodige zorgvuldigheid toe te passen bij het bewijzen van zijn goede trouw.
- E. Hoewel Artikel 4 in de eerste plaats betrekking heeft op verkrijgingen van waarde, zijn verkrijgingen om niets ook in hoofdstuk II van het verdrag opgenomen, zodat cultuuroederen niet via schenking of nalatenschap kunnen worden wigewassen.
- F. Door de bezitter van een gestolen cultuuroed te verplichten tot teruggave en het recht op een billijke en redelijke vergoeding te ontnemen wanneer hij tijdens de verwerving niet de noodzakelijke zorgvuldigheid toepast, wordt ervan uit gegaan dat dit de verkrijger voldoende zal stimuleren om gedurende de verwerving voorzichtig te zijn. Dit zal niet alleen leiden tot een vermindering van transacties die betrekking hebben op cultuuroederen van twijfelachtige herkomst, maar ook de geheimhouding en het stilzwijgend medeweten van de kunstmarkt aanpakken en de diefstal van cultuuroederen ontmoedigen. Uit het onderzoek blijkt dan ook dat zowel Artikel 3, lid 1, als Artikel 4, lid 1, van essentieel belang zijn voor de bestrijding van de illegale handel in gestolen cultuuroederen.
- G. Om het bedrag van de billijke en redelijke vergoeding vast te stellen, blijkt uit het onderzoek dat rekening kan worden gehouden met een hele reeks feiten, waaronder bijvoorbeeld: De marktwaarde van het object; de prijs die werd betaald; de financiële middelen van de eiser; het bedrag dat de bezitter bereid is als vergoeding te aanvaarden; de solvabiliteit van de eiser; de mogelijkheid voor de koper om geld bij de verkoper te verhalen, enz. Ook geeft de studie een opsomming van de elementen die niet mogen worden meegewogen in de berekening van de billijke en redelijke vergoeding. Verder bespreekt het enkele beperkingen die aan de interpretatie van dit begrip gebonden zijn. Ten slotte wordt aandacht besteed aan alle aspecten die betrekking hebben op de betaling.

Ten vijfde gaat de studie in op de oorzaken en gevolgen van archeologische diefstal; de respons van bronstaten bij de aanpak van dit probleem; en bespreekt het de oplossingen die het UNIDROIT-verdrag biedt. Het onderzoek bevestigt dat het verdrag de teruggave voorschrijft van een cultuuroed welke uit archeologische diefstal voortvloeit. Dit wordt besproken in hoofdstuk II (zie Artikel 3, lid 2) en hoofdstuk III (zie Artikel 5, lid

3). Uit het onderzoek blijkt dan ook dat de *Model Provisions on State Ownership of Undiscovered Cultural Objects* zeer geschikt zijn om verdragsluitende staten te ondersteunen in de toepassing van Artikel 3, lid 2. Hoewel de opstellers van het verdrag hoofdstuk II en hoofdstuk III niet van een hiërarchie hebben voorzien, wordt in het onderzoek opgemerkt dat Artikel 5, lid 3, een vangnet vormt voor verdragsluitende staten die moeilijkheden ondervinden bij het terughalen van een artefact op basis van Artikel 3, lid 2.

Ten zesde gaat het proefschrift in op zaken die te maken hebben met de toepassing van het verdrag, zoals voorbehouden; de rechtstreekse werking van het verdrag; het vaststellen van regels die gunstiger zijn voor restitutie en/of terugkeer en de interpretatie van het verdrag. Daarnaast worden de toezichtsmiddelen van het verdrag besproken. Wat betreft de regels die gunstiger zijn voor teruggave of terugkeer, is uit het onderzoek gebleken dat Artikel 9, lid 1, de verdragsluitende staten in staat stelt de regeling van het verdrag op vele manieren te wijzigen. Zo is het mogelijk het verdrag toe te passen op vorderingen van louter nationale aard; de betaling van schadevergoeding aan een te goeder trouw wervende koper in te trekken (alleen wanneer het nationale recht van het verdragsland reeds bepaalt dat geen schadevergoeding hoeft te worden betaald); de termijn voor het teruggeisen van de gestolen goederen te verlengen; langere termijnen vast te stellen voor het indienen van het verzoek tot teruggave; enz. Bovendien kan een verdragsluitende staat het toepassingsgebied van het verdrag verlengen door het toe te passen op diefstallen of illegale uitvoer die vóór de inwerkingstreding van of de toetreding tot het verdrag hebben plaatsgevonden. Niettemin wordt in het onderzoek nader toegelicht hoe Artikel 9, lid 2, de rechtsgevolgen van de gemaakte keuze beperkt.

Ten zevende plaatst dit werk het verdrag in het bestaande internationale juridische kader: De interactie van het UNIDROIT-verdrag met andere internationale normen (zoals geregeld in Artikel 13, lid 1) wordt in detail besproken in relatie tot het UNESCO-verdrag van 1970. Verder wordt de mogelijkheid voor verdragsluitende partijen bestudeerd om overeenkomsten te sluiten voor het bevorderen van de toepassing van het verdrag in hun onderlinge betrekkingen (Artikel 13, lid 2). Zo ook wordt het door Artikel 13, lid 3, ingevoerde relatieve mechanisme, dat leden van organisaties voor economische integratie of regionale organen in staat stelt in hun onderlinge betrekkingen interne regels toe te passen, onder de loep genomen. In het kader van het onderzoek wordt deze regeling bestudeerd in de context van de relatie tussen het UNIDROIT-verdrag en zowel de vroegere Richtlijn 93/7/EEG als de herschikking ervan, Richtlijn 2014/60/EU.

Tot slot concludeert het onderzoek dat de restitutieregeling van hoofdstuk II geschikt is om zowel diefstal van cultuuroederen als archeologische diefstal aan te pakken. Meer specifiek merkt het op dat het regime bijdraagt aan het moraliseren van de kunstmarkt en het ontmaskeren van cultuuroederen van dubieuze herkomst. Zo pakt het op gepaste wijze de geheimzinnigheid en het stilzwijgend medeweten aan die vaak typerend zijn voor de kunstmarkt. Bovendien wordt het binnen het verdrag bereikte compromis evenwichtig bevonden, aangezien het verdrag is ontleend aan de restitutieregels van New Jersey en Californië en deze combineert met de regels inzake de bescherming van derden, overeenkomstig met de Belgische, Franse en Nederlandse wetgeving. Tevens concludeert het onderzoek dat de eventuele nadelen niet opwegen tegen de voordelen van het verdrag. In plaats daarvan betoogt het proefschrift dat een aantal verfijningen door UNIDROIT of het 1995 *UNIDROIT Convention Academic Project* (UCAP) aan het verdrag dienen te worden aangebracht, omdat dit bepaalde bezwaren tegen het verdrag zou kunnen wegnemen. Het onderzoek sluit af met het formuleren van aanbevelingen ter overweging van zowel UNIDROIT als de UCAP.

VALORISATION ADDENDUM

Knowledge valorisation can be defined as “the process of creating value from knowledge, by making knowledge suitable and/or available for social (and/or economic) use and by making knowledge suitable for translation into competitive products, services, processes and new commercial activities” (definition derived from the *Waardevol: Indicatoren voor Valorisatie* report by the National Valorisation Committee (2011), The Hague: Rathenau Institute, p. 8). The valorisation of the present research can, *inter alia*, be explored in discussing the results of this study in relation to both its scientific and societal relevance.

In respect of the scientific relevance of the present work: the lack of specificity of some of the provisions of the convention – alongside the on-going disagreement as to its understanding – has often contributed to its dismissal. This haphazard debate called for the adoption of overarching guidelines relating to the convention’s applicability. The present contribution has explored the regime of Chapter II of the convention in greater detail. Therefore, it has provided a clear overview of the functioning of the convention in addressing cultural property and archaeological theft, despite the convention’s complexity. This further enables disregarding fallacious or superficial arguments and inspires future debates as to the convention. Furthermore, it is important to note that two earlier publications about the UNIDROIT convention have tried to explain the inner workings of its regime. Nonetheless, their reach in understanding Chapter II is limited: on the one hand, the first research entitled *Commentary on the Unidroit Convention on Stolen or Illegally Exported Cultural Objects* – published by Lyndel Prott in 1997 and conducted in English – has limited itself to explaining the convention as a result of the work undertaken by UNESCO and UNIDROIT. On the other hand, a second – although less accessible – German publication entitled *Internationaler Kulturgüterschutz nach der UNIDROIT-Konvention* undertaken in 2005 by Bettina Thorn has compared the regime of Chapter II of the convention with the rules applicable in Austrian, English, French, German, Italian, Portuguese, Spanish and Swiss law, despite clear indications in Prott’s 1997 contribution that the regime of Chapter II has its roots in American law. In accordance with Prott’s observations, the present research finds that the treaty is prominently inspired by American law. Therefore, part of the scientific relevance of this research is to further the work undertaken in these previous contributions. This is notably done by discussing the convention in light of the manifold sources – including the preparatory work, doctrine or even domestic case law – and by providing a bottom-up analysis of the regime of Chapter II in the light of, *inter alia*, California, New Jersey and New York law. The final results of the research establish that New Jersey and California law served as a blueprint for the regime of restitution of Chapter II and that the regime of good faith acquisitions laid down in Article 4 of the convention bears considerable similarities to Belgian, French and Dutch law. This contribution confirms that an in-depth study of New Jersey and California law proved significant in understanding the regime of Chapter II, thus giving a limited role to the impact of Thorn’s findings. Additionally, the present exercise differs from earlier research as it frames the discussion about the convention in terms of fighting the illicit trafficking of cultural property instead of putting the emphasis on the convention as a means of restitution and / or return. Finally, it attempts at providing a constructive reflection of the convention to seek further fine-tuning of its regime. The potential for improvement is tabled with the intention of securing a higher incidence of participation. In this context, it is strongly believed that this contribution will be helpful to assist UNIDROIT or its UCAP in rendering the convention more accessible.

Concurrently, this dissertation is embedded with a multifaceted societal relevance: firstly, the international community has recently been faced with pervasive acts of terrorism worldwide and with a notable increase of terrorist attacks occurring within the Western hemisphere. In this context, the looting of cultural property has been identified as a potential source of income used by terrorists to finance their activities. With the recent rise of the so-called Islamic State and the spoliation of artefacts originating from Iraq, Syria and Libya, this has provided the art market with ‘blood antiques’; the international community is now facing an unprecedented challenge. Thenceforth, the process of looting artefacts in politically unstable territories to generate means of subsistence has become a reality that

states cannot leave unaddressed. Therefore, means to disincentivize the art market from acquiring blood antiques are needed, which, in turn, calls into question the role that the UNIDROIT convention could play in this regard. This work concludes that its ability of moralizing the art market may provide the necessary deterrence. Secondly, due to the lackadaisical participation of the international community in the convention's regime, determining its added value is of the utmost importance to countries that are considering ratification. As specified within the research, the convention has thus far been received with mixed feelings and – since its success depends primarily on broad participation – it is important to ferret out the grievances formulated against it for the purpose of alleviating ungrounded concerns. The present contribution allows elucidating debates surrounding the convention, thus assisting non-contracting states in taking a well-informed decision with regard to the treaty. Thirdly, at the time of concluding the research, the European Parliament is scrutinizing the possibility to make the convention – or parts of it – legally binding within the European Union. This contribution can be of avail to the Parliament in setting its course of action. Fourthly, the UNIDROIT regime seems to grow more influential through parallel tracks but adhesion. This growth in the indirect influence of the convention corroborates the presence of mixed-feelings surrounding its acceptance. To encourage direct participation in its regime, emphatic conclusions as to its virtues are sought. This research has provided the reader with a comprehensive overview of the convention's regime dealing with cultural property and archaeological theft, thus allowing to appreciate its face value in both respects. Finally, this dissertation enables touching upon the question of whether the 1995 instrument contributes to the improvement of society, a question that has been pending since its adoption. This study has demonstrated that the regime analysed, if adhered to, is beneficial to society. This is notably due to its deterrent effect on the trafficking of stolen cultural objects and of its non-interference with the licit trade.

The results of this research are not only meant for the consideration of both UNIDROIT and its UCAP, but it is also meant to guide legal practitioners, art market stakeholders, academics and students alike in understanding the functioning of Chapter II of the 1995 instrument. Furthermore, it allows understanding what due diligence in the acquisition of cultural objects – a key component of Chapter II – entails. This is particularly important to the art market, where due diligence and provenance research is becoming an inevitable aspect of dealers' daily activities. As such, this work could contribute to the future drafting of guidelines and / or best practices on due diligence. Such guidelines / best practices have not been undertaken extensively hitherto.

GLOSSARY

Acta iure imperii	Concept describing transactions by state bodies or representatives, such as diplomats. In international law the state maintains immunity for such transactions. ¹
Acta iure gestionis	Concept describing commercial transactions by bodies that are owned by the state but are not regarded as organs of the state. In international law the state accepts responsibility for such transactions and does not claim immunity. ²
Actual notice	Knowledge that a person has of rights adverse to his own. ³
Antiquities	Archaeological remain or trace of human manifestation from ages and civilizations that, on the one hand, have a certain age; that originate from a past more or less distant. An age of at least one hundred years appears in various legal instruments and appears also in the Annex to the UNIDROIT <i>Convention on Stolen or Illegally Exported Cultural Objects</i> (1995). On the other hand, the principal sources of information relating to antiquities stem from excavations or from discoveries and from archaeological sites. ⁴
Archaeological excavation	Any research aimed at the discovery of objects of archaeological character, whether such research involves digging of the ground or systematic exploration of its surface or is carried out on the bed or in the sub-soil of inlands or territorial waters of a [Member] State [to UNESCO]. ⁵
Archaeological good	See Antiquities .
Archaeological material	See Antiquities .
Archaeological site	Complex of ancient artefacts and other material remains of the past preserved in a contextual relationship. ⁶
Artefact	See Antiquities .
Art laundering	Process by which a seller of stolen art makes it clean by selling it in a country in which legislation conveys good title to a bona fide purchaser of stolen art. ⁷
Chance find	Fortuitous discovery of antiquities.
Communal property	Property shared and used by a collectivity.
Complex object	Cultural object whose composites are intricately linked to one another. Due to the interconnectivity between its parts, the removal of any of these composites results in fully or partially depriving the cultural object from the meaning it was embedded with when analysed as a whole or from its original integrity. During the Diplomatic Conference towards the adoption of the 1995 UNIDROIT convention, several examples of dismemberment of complex objects were given. As such, the beheading of Khmer sculptures, the removal of a façade of a Mayan temple, the dispersion of frescoes, the division of triptychs and the stripping of interiors from historic buildings were all considering as dismemberment of complex objects. ⁸

¹ Law, J., *A Dictionary of Law* (8th edition, Oxford University Press: Oxford, 2015), keyword: **jure imperii**.

² Law, (2015), keyword: **jure gestionis**.

³ Law, (2015), keyword: **actual notice**.

⁴ Vrellis, S., 'Les biens archéologiques et la Convention d'UNIDROIT (1995) sur les biens culturels volés ou illicitement exportés', 20 *Uniform Law Review*, pp. 570-571: "On est probablement justifié de retenir de telles mentions deux éléments caractéristiques du concept du bien archéologique: il s'agit d'un vestige ou d'une trace de manifestations humaine d'époques et de civilisations qui, *en premier lieu*, a une certaine ancienneté; qui vient d'un passé plus ou moins lointain. Un âge d'au moins cent ans apparaît dans divers instruments législatifs, et figure également dans l'Annexe de notre Convention". *Le second élément* consiste en ce que les principales sources d'information concernant un bien archéologique viennent de fouilles ou de découvertes et de sites archéologiques."

⁵ Cf. point I. 1 of the 1956 UNESCO Recommendation on the International Principles Applicable to Archaeological Excavations.

⁶ Gerstenblith, P., "Chapter 15 – Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage", in: J. A. R. Nafziger and A. M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, (Martinus Nijhoff Publishers: Leiden, 2009), p. 305

⁷ Papademetriou, T., 'International Aspects of Cultural Property – An Overview of Basic Instruments and Issues', 24 *International Journal of Legal Information*, (1996), p. 289.

⁸ See Presidenza del Consiglio dei Ministri, Dipartimento per l'Informazione e l'Editoria, Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects – Acts and Proceedings, Rome,

Constructive notice	Knowledge that the law presumes a person to have even if he is actually ignorant of the facts. ⁹
Corrective justice	Corrective justice serves to rectify wrongs and constitutes a modus operandi prescribing the handing back of an object to a wronged party. ¹⁰
Country of origin	Country with which the property concerned is most closely linked from the cultural point of view. ¹¹
Cultural nationalism	Ideology supporting the retention of cultural objects with the cultural heritage to which it belongs. Cultural nationalism considers cultural materials to belong to the cultural heritage of either the country of origin, or of the country where the cultural descendants of the creator(s) are to be found. It insists on respecting the affinity between the cultural objects and the people, grouping or state it belongs to. ¹² It is because of the existence of a connection between the site, the object and the cultural identity of a state that the object has to remain in the territory of the country of origin: ¹³ cultural property should remain confined to the territory from which it originates because of its defining capacity of the identity of a people and of the society, linked both to their past. ¹⁴ Source states often embrace the cultural nationalism ideology and base their cultural policies upon this theory, rejecting any merchantability of their cultural material resources (to the exception of similar materials). ¹⁵ In the realm of public international law, this ideology is closely linked to the principle of sovereignty, as states are the only actors that have the authority to claim sovereign rights upon objects within their territorial boundaries. This theory is often used to justify the adoption of retentionist measures such as patrimonial laws or rules on the prohibitions to export cultural materials. ¹⁶ The focus is thus on the cultural aspect instead of the property aspect. ¹⁷ Contrary to cultural internationalism, cultural nationalism does not consider that cultural materials can be assimilated to fungible goods and that they can be subjected to the art market. ¹⁸ To cultural nationalists, the art market is no proper place to protect cultural objects and the arguments submitted by the proponents of cultural internationalism are sophistic in nature, and thus flawed. ¹⁹ Furthermore, cultural nationalism consider that the cultural significance of an object needs to be protected, discarding submissions favouring the property aspects or even the application of any property right at all. ²⁰ In fact, proponents of cultural nationalism believe that the possessor of a cultural object that fails to understand that the value of the object is determined by the culture to which it belongs is not worthy of possessing the said object. ²¹ Further arguments about the failure to protect and preserve cultural objects submitted by proponents of cultural internationalism are misguided considering the difficulties that source states encounter: most source states lack the financial means to protect effectively their cultural resources. It is because of this lack of means that these states cannot protect their materials, not because of negligence. ²²

June 1995, (1996), p. 100. See also the commentary of Prott: “The same applied to “the integrity of a complex object”. This provision addressed in particular the serious threats to vast monumental complexes” (idem, p. 195).

⁹ Law, (2015), keyword: **constructive notice**.

¹⁰ Gold, A. S., ‘A Theory of Redressive Justice’, (unpublished document, on file with author), (4 February 2011), pp. 6-7

¹¹ Institute of International Law, ‘The international sale of works of art from the point of view of protection of cultural heritage’, Basel sessions, 1991 (cited in Cornu, M., ‘Fighting Illicit Trafficking in Cultural Objects, Searching for Provenance and Exercising Due Diligence in the European Union’, Joint European Commission-UNESCO Project, “Engaging the European Art Market in the fight against the illicit trafficking of cultural property”, Study for the capacity-building conference, 20-21 March 2018, p. 6).

¹² Mastalir, R. W., ‘A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law’, 16 (4) *Fordham International Law Journal*, (1992), p. 1062.

¹³ Mastalir, (1992), p. 1062.

¹⁴ Papademetriou, T., ‘International Aspects of Cultural Property – An Overview of Basic Instruments and Issues’, 24 *International Journal of Legal Information*, (1996), p. 292.

¹⁵ Warring, (2005), p. 271-272.

¹⁶ Warring, J., ‘Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property’, 19 *Emory International Law Review*, (2005), p. 247; “Retentive cultural nationalists” view cultural property “as part of national cultural heritage. . . [which] gives nations a special interest, implies the attribution of national character to objects independently of their location or ownership, and legitimizes national export controls and demands for the ‘repatriation’ of cultural property.”

¹⁷ Merryman, J. H., *Two Ways of Thinking About Cultural Property*, 80 *American Journal of International Law*, (1986), at 832.

¹⁸ Mastalir, (1992), p. 1064.

¹⁹ Mastalir, (1992), p. 1063.

²⁰ Mastalir, (1992), p. 1063.

²¹ Mastalir, (1992), p. 1064.

²² Mastalir, (1992), p. 1065.

Cultural internationalism	<p>Ideology supporting the sharing of cultural materials throughout all people. Cultural internationalism considers cultural materials to be <i>erga omnes</i>²³ and this assimilation has, therefore, the effect of overshadowing claims by source nations upon these materials with the ultimate goal to achieve the common good. Cultural internationalism supports the exchange of cultural materials and denies any right for a state to exclude foreign states or foreign natural and legal persons from owning these materials. This theory is mainly supported by market states as these states are art poor and mainly acquire their collections through acquisitions of materials stemming legally or illegally from source states.²⁴ Therefore, the emphasis is put on the property aspect instead of the cultural aspect.²⁵ Cultural internationalists consider that leaving cultural objects to the art market is the best way to ensure its protection and conservation: following Merryman, three principles stem from cultural internationalism: ‘Preservation, integrity and distribution/access’.²⁶ Preservation through the exchange of cultural property allows for the improvement of cultural understanding between nations.²⁷ By allowing art-purchasing states to acquire cultural materials originating from source states, it is possible to preserve effectively cultural assets that might be left unprotected and uncared for by the source state.²⁸ This is notably due to the fact that, contrary to source states, collectors and museums in market states have the resources necessary to care for the cultural objects.²⁹ Cultural internationalists, although they do acknowledge the importance that the cultural property has for a people, advance that cultural property belongs to the common heritage of Mankind.³⁰ Therefore, art should flow towards places where it is appreciated so as to ensure its conservation.³¹ What is more, the movement of cultural materials to states where it is appreciated makes it possible to better care for the object, display it properly or store it adequately.³²</p> <p>Merryman has retraced the influence of both cultural nationalism and cultural internationalism from the appearance of the “internationalist” viewpoint in the Hague in 1954 to that of the “nationalist” viewpoint in UNESCO 1970: “Hague 1954 seeks to preserve cultural property by source nations. These different emphases—one cosmopolitan, the other nationalistic; one protective, the other retentive—characterize two ways of thinking about cultural property.” <i>Id.</i> at 846. Since 1970, cultural nationalism has dominated the debate on cultural property. <i>See generally</i> John Henry Merryman, <i>Thinking About the Elgin Marbles</i>, 83 Mich. L. Rev. 1871 (1985); John Henry Merryman, <i>The Nation and the Object</i>, 3 Int’l J. Cult. Prop. 61 (1994).”³³</p>
Cultural heritage	See Chapter 1, section B. 1. (1) of the present research.
Cultural property	See Chapter 1, section B. 1. (1) of the present research.
Cultural object	See Chapter 1, section B. 1. (1) of the present research.
Cultural material	See Cultural object .
Item-oriented classification	Means of classification by which a list of items divided in categories is used as reference.
Illegally exported	In general, the terms “illegally exported” refer to the export of an item that is undertaken in violation of domestic export legislation. In the 1995 UNIDROIT convention (and for the purpose of the convention), illegally exported has been defined as the removal “from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage” (cf. Article 1 (b) of the 1995 UNIDROIT convention).
Indigenous communities	See Tribal and Indigenous groups .

²³ “‘Cultural internationalists’ view cultural property ‘as components of a common human culture whatever their places of origin or present location, independent of property rights or national jurisdiction.’ Merryman, (1986), p. 831.

²⁴ Warring, (2005), p. 248.

²⁵ Mastalir, (1992), p. 1062.

²⁶ Mastalir, (1992), p. 1060.

²⁷ Mastalir, (1992), p. 1061.

²⁸ Mastalir, (1992), p. 1061.

²⁹ Gerstenblith, P., *Art, Cultural Heritage, and the Law: Cases and Materials*, (Carolina Academic Press: Durnham, Fourth Edition, 2008), p. 595.

³⁰ Papademetriou, (1996), p. 294.

³¹ Olivier, M., ‘The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property’, 26 *Golden Gate University Law Review*, (1996), p. 641.

³² Olivier, (1996), p. 641.

³³ Cuno, J., ‘Museums and the Acquisition of Antiquities’, 19 *Cardozo Arts & Entertainment Law Journal*, (2001), p. 87, footnote 12.

International character	See Chapter 1, section B. 1. (2) of the present research.
Involuntary loss of possession	Loss of the right to vindicate that is not the result of a voluntary transfer of the property by the owner to another.
Illicit trafficking of cultural property	See Introduction, section A. 1.
Interest-oriented classification	Means of classification by which interests vested in cultural objects are used as reference.
Lawfully excavated but unlawfully retained	Refers to artefacts that have been excavated in accordance with the legislation of the source state, but that are subsequently held in violation of the legislation of the said state.
Licit traffic	Trade in cultural objects that is legal, and that is not morally or ethically wrong. ³⁴
Market state	Concept referring to states with scarce resources in cultural objects. ³⁵ These states advocate the free trade in cultural property and promote acquisition of cultural goods through private ownership. As such, they support an unfettered market in cultural materials, advocate for a common cultural heritage of Mankind ³⁶ and are against repatriation. ³⁷ Market states want to tackle the illicit trade by adopting solutions as to thefts without affecting the trade in cultural goods. ³⁸ The term ‘market state’ at one end of the spectrum and is to be contrasted with the term ‘source state’ at the other end of the same spectrum. ³⁹ Nonetheless, nowadays the traditional distinction between market and source nations is blurred since this distinction fails to take into consideration the fact that the same state can be both at the same time. ⁴⁰

Synonym: importing state, market nation.⁴¹

Patrimonial claim	Claim that is based on a state’s assertion of ownership – expressed through means of a patrimonial law – that is formulated in capacity as the protector of the public property of its nation. ⁴²
Patrimonial law	National law vesting ownership of the valued things passed down from prior generations in the State in which these things have been discovered.
Possessor as of right	Person who has the intention to hold property as his own and who, therefore, behaves like an owner even if he is not the owner and is not being authorised to hold the said property by the owner.
Provenance / provenience	Provenance refers to the collection of genuine evidences tracing back the chain of ownership of a cultural object ⁴³ from the moment of its creation or unearthing, up until its last owner puts the object for sale. Put differently, it is the body of information relating to the origin of a work and serving to identify it. ⁴⁴ Being able to provide a complete provenance with a cultural object serves to legitimize the licit origin of the object and makes it merchantable. Without complete

³⁴ This reference to morality and ethics is supported by UNESCO. See Warring, (2005), p. 274.

³⁵ Gerstenblith, (2008), p. 609.

³⁶ Fox, C., ‘The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property’, 9 (1) *American University International Law Review*, (1993), p. 254.

³⁷ Fox, (1993), p. 253.

³⁸ Warring, (2005), p. 302.

³⁹ Forrest, C., *International Law and the Protection of Cultural Heritage*, (Routledge: London and New York, 2010), p. 137.

⁴⁰ Gerstenblith, (2008), pp. 609-610.

⁴¹ Although Professor Merryman considers this term as imperfect because market nations can also be source nations and vice versa. See Merryman, J. H., ‘A Licit International Trade in Cultural Objects’, in: M. Briat and J. A. Freedberg (eds), *International Sales of Works of Art – vol. V, Legal Aspects of International Trade in Art*, (ICC Publishing: Paris – New York; Kluwer Law International: The Hague – London – Boston, 1996), p. 3, footnote 2.

⁴² Melachlan, C., *Foreign Relations Law*, (Cambridge University Press: Cambridge, 2014), p. 446; Mastalir, (1992), p. 1051.

⁴³ Gerstenblith, (2008), p. 605.

⁴⁴ Cornu, M., ‘Fighting Illicit Trafficking in Cultural Objects, Searching for Provenance and Exercising Due Diligence in the European Union’, Joint European Commission-UNESCO Project, “Engaging the European Art Market in the fight against the illicit trafficking of cultural property”, Study for the capacity-building conference, 20-21 March 2018, p. 5.

provenance, an object can be subject to claims of restitution or of return to its entitled owner(s). The website of the International Foundation for Art Research (IFAR) describes provenance in the following terms: “The word provenance derives from the French *provenir* meaning “to originate”. Although the term is sometimes used synonymously with “provenience,” the latter is an archaeological term referring to an artifact’s excavation site or findspot. The provenance of a work of art is a historical record of its ownership, although a work’s provenance comprehends far more than its pedigree. The provenance is also an account of changing artistic tastes and collecting priorities, a record of social and political alliances, and an indicator of economic and market conditions influencing the sale or transfer of the work of art. An ideal provenance history would provide a documentary record of owners’ names; dates of ownership, and means of transference, ie. inheritance, or sale through a dealer or auction; and locations where the work was kept, from the time of its creation by the artist until the present day. Unfortunately, such complete, unbroken records of ownership are rare, and most works of art contain gaps in provenance.”⁴⁵

Return	See Chapter 1, section B. 2. (1) of the present research.
Rightful owner	Person recognised by law as having the legal ownership over a good.
Source state	Concept referring to states with abundant resources in cultural objects. ⁴⁶ These states are against free trade in cultural property and thus aim at protecting the aforementioned resources from alienation: because they understand very well the importance of their cultural resources, they try to keep as many cultural objects within their territorial boundaries. ⁴⁷ Since these states possess an abundance of cultural heritage, they are often victims of archaeological theft and generally experience difficulties in fighting the plundering of their heritage. ⁴⁸ The term ‘source state’, at one end of the spectrum, is to be contrasted with the term ‘market state’ at the other end of the same spectrum. ⁴⁹ Furthermore, this concept has been criticised as contemptuous as it indicates that these states serve as reserves for cultural objects to market states, which is not the case. ⁵⁰
	Synonym: exporting state, art rich nation, source nation. ⁵¹
State of origin	The notion ‘state of origin’ is a term of utmost difficulty to define. ⁵² Nevertheless, it has been referred to as the place of discovery or excavation in modern times. ⁵³ Another definition is given by Article 1.1.b of the International Law Commission Resolution “The International Sale of Works of Art from the Angle of the Protection of Cultural Heritage”, adopted in 1991 in Basel (Switzerland), which defines the country of origin of a work of art as “the country with which the property concerned is most closely linked from the cultural point of view”. ⁵⁴

⁴⁵ For more information about provenance, see https://www.ifar.org/provenance_guide.php, last retrieved on 01.03.2018.

⁴⁶ Gerstenblith, (2008), p. 609

⁴⁷ Warring, (2005), p. 302.

⁴⁸ Calvo Caravaca, A. L., “Private International Law and the Unidroit Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects”, in: H. -P. Mansel, *Festschrift für Erik Jayme*, (European Law Publishers, Sellier: München, 2004), p. 88; Hughes, V., Wright, L., ‘International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?’, 32 *The Canadian Yearbook of International Law*, (1994), p. 223.

⁴⁹ Forrest, (2010), p. 137.

⁵⁰ Gerstenblith, (2008), p. 609.

⁵¹ Although Professor Merryman considers this term as an imperfect term because source nations can also be market nations and vice versa. See Merryman, (1996), p. 3, footnote 2.

⁵² Frigo, M., ‘Model Provisions on State Ownership of Undiscovered Cultural Objects – Introduction’, *Uniform Law Review*, (2011), p. 1034.

⁵³ Gerstenblith, (2008), p. 642.

⁵⁴ Text available at http://www.idi-iiil.org/app/uploads/2017/06/1991_bal_04_en.pdf, last retrieved on 01.03.2018.

Tribal and
Indigenous groups

To date, no definition has been adopted to define the concept of ‘tribal and indigenous peoples’. Nevertheless, reference is often made to the definition of ‘indigenous peoples’ elaborated by UN Special Rapporteur Jose Martinez Cobo in his *Study of the Problem of Discrimination against Indigenous Populations*: “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors: (a) Occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); (d) Language (whether used as the only language, as mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred or habitual, general or normal language); (e) Residence in certain parts of the country, or in certain regions of the world; (f) other relevant factors.” (E/CN.4/Sub.2/1986/7/Add.4).

Furthermore, reference is additionally made to Article 1 of the International Labour Organisation (ILO) Convention No. 169: “1. This Convention applies to: (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or in part by their own customs or traditions or by special laws or regulations; (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some of all or their own social, economic, cultural or political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regard the rights which may attach to the term under international law.”⁵⁵

“Tribal groups” is a term residual to ‘indigenous’ and encapsulates all remaining groups that are organised in tribes.⁵⁶

Voluntary loss
of possession

Loss of the right to vindicate a good that is the result of a voluntary transfer of the property by the owner to another.

Unlawful excavation

Any excavation without specific governmental authorisation or without the authorization of the owner of the land to dig in his land when such permission is legally required.

⁵⁵ See Prot, *Commentary on the Unidroit Convention*, (1997), pp. 111-112. See also Secretariat of the Permanent Forum on Indigenous Issues, ‘Workshop on Data Collection and Disaggregation for Indigenous Peoples – The Concept of Indigenous Peoples’, (New York, 19-21 January 2004), PFII/2004/WS.1/3 and Department of Economic and Social Affairs, ‘State of the World’s Indigenous Peoples’, (United Nations: New York, 2009), ST/ESA/328, pp. 4-7, http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf, last retrieved on 01.03.2018.

⁵⁶ Prot, *Commentary on the Unidroit Convention*, (1997), p. 40; see also ‘Chapter 1 – Presentation and Applicability of the Convention’, section B. 2. (4).

BIBLIOGRAPHY, LEGISLATION AND CASE LAW

BIBLIOGRAPHY	548
Books / sections / articles.....	548
Official reports / communications / announcements.....	568
Preparatory work.....	574
Digital sources	581
Miscellaneous sources.....	585
LEGISLATION.....	586
International instruments.....	586
European Union Law.....	587
National Legislation.....	588
Soft Law instruments.....	588
CASE LAW.....	589
Belgium.....	589
France.....	589
Ireland.....	593
Italy.....	593
Switzerland.....	593
The Netherlands.....	593
United Kingdom.....	594
United States of America – Federal cases.....	595
United States of America – State cases.....	597

Books / sections / articles**A**

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Case law

Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, (May 5, 1982).
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Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, (May 5, 1982).
Kunstsammlungen zu Weimar v. Elicofon, 536 F.Supp. 829, (June 15, 1981).
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UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY (1970)



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JAN BRUEGHEL, *EBENE MIT WINDMÜHLEN*, (1611)



Case law

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Case law

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GUSTAVE KLIMT, *THE ERFÜLLUNG* (1905-1909)



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BARTOLOMÉ ESTEBAN MURILLO, *PORTRAIT OF THE DUQUE DE FRÍAS* (CIRCA 1658)



Case Law

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FRANS HALS, *PORTRAIT D'ADRIANUS TEGULARIUS, PASTEUR* (1666)



Case law

Cour de Cassation, Chambre criminelle, N. de pourvoi 96-85871, 4 juin 1998.

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VIRGIN OF SAINT-GERVASY (XII CENTURY)



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KANAKARIA MOSAICS, BYZANTINE (SIXTH CENTURY)

Case law

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VINCENT VAN GOGH, *VUE DE L'ASILE ET DE CHAPELLE DE SAINT-REMY* (1889)Case law

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SHIVA NATARAJA, 12TH CENTURY

Case law

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Bumper Development Corporation Ltd v. Commissioner of Police of the Metropolis, 1991 WL 839377.

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STELA NR. 2



Case law

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HYBERABAD COINS



An example of Hyberabad coins (silver)

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MAORI TATARO WOODEN DOOR



Case law

Attorney General of New Zealand v. Ortiz & Sotheby's, [1984] AC 1.

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CURRICULUM VITAE

Amoury C. C. Groenen was born in Ettelbrück (LU) on the 3rd October 1984. He graduated from high school in Belgium in 2003 and started studying law in 2005 at the Université de Liège (BE). Aiming at an international career, Amoury pursued his legal education at the law faculty of Maastricht University in 2006. He first studied European and comparative law through the *European Law School – English Language Track* bachelor program (2006-2009). Subsequently, he specialized in public international law at the same university through completing the *Globalization and Law – Human Rights Track* master program (2009-2011). After graduating, Amoury taught a multitude of courses in European and public international law at both Maastricht University (NL) and at the Universiteit Hasselt (BE). These courses were given in three different languages – namely English, French and Dutch – and were mainly taught at bachelor level. Next to his full time teaching obligations, Amoury started working on his PhD in September 2012 as an external candidate. In 2015, Amoury was given the opportunity by the University of Hasselt to work on his research on a full-time basis. He spent the following three years completing it. In 2018, Amoury advised the Belgian Senate about the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* together with Marina Schneider (Senior Legal Officer and Treaty Depositary at UNIDROIT, responsible for the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) and other matters related to international protection of cultural property within UNIDROIT's Secretariat). He has now been offered the position of policy officer within the Transversal and International branch of the department of Knowledge and Policy of the Flemish Department of Culture, Youth and Media in Brussels. Amoury is to undertake his duties within the department by mid September 2018.



Since its adoption in 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects has been a subject of contention between states, art market stakeholders and academics alike. Criticised by some as a too theoretical instrument with little practical relevancy, the convention has – at the same time – been praised by others as an important instrument in tackling the illicit trafficking of cultural property. The present research aims at clarifying the on-going debate on the convention by evaluating the appropriateness of its regime to cultural property theft. In doing so, it investigates the inner workings of this instrument – and, more specifically, of its Chapter II – in addressing cultural property theft and the plunder of archaeological materials. To do so, the research delimits the scope of application of the convention; analyses the restitutionary regime of Chapter II and compares it to existing regimes applicable in six different states: Belgium, France, The Netherlands, New Jersey, California and New York; discusses the relevancy of Article 3 (2) in retrieving stolen artefacts; addresses matters relating to the application of the instated regime; and positions the convention in the existing international legal framework. As a matter of conclusion, this study finds that the convention is appropriate in tackling cultural property theft. Nonetheless, several recommendations are formulated for UNIDROIT or the UCAP's consideration to further refine the regime laid down in Chapter II.