

Chapter 1

Art, Cultural Heritage and the Market: Legal and Ethical Issues

V. Vadi and H. Schneider

Abstract Once the domain of elitist practitioners and scholars, international cultural law has emerged as the new frontier of international law. The rise of international cultural law as a distinct field of study reflects the *Zeitgeist* characterised by increased globalisation and the vitality of international law in governing global phenomena. International cultural law has made headlines and attracted the varied interests of academics and policy-makers, museum curators and collectors, human rights activists and investment lawyers, and artists and economists just to mention a few. International cultural law includes extremely diverse components and constitutes a good example of multilevel governance and legal pluralism. The return of cultural artefacts to their legitimate owners, the recovery of underwater cultural heritage, and the protection and promotion of artistic expressions are just some of the issues regulated by such a field of study.

The book focusses on the particular area of the restitution of cultural property and dispute settlement mechanisms used in international disputes relating to cultural objects within the larger field of international cultural law. This is an area in which public law aspects (e.g., state succession, international conventions etc.) intermingle with procedural and private law aspects (private property rights, statute of limitations, *forum non conveniens* to mention but a few). This book addresses the question of ‘who owns culture?’ by examining recent cases and conflicting interests. The approach is mainly legal, but interdisciplinary approaches have been adopted as well.

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1.1 Introduction

Once the domain of elitist practitioners and scholars, international cultural law has emerged as the new frontier of international law. The rise of international cultural law as a distinct field of study reflects the *Zeitgeist* characterised by increased globalisation¹ and the vitality of international law in governing global phenomena. International cultural law has made headlines and attracted the varied interests of academics and policy-makers, museums' curators and collectors, human rights activists and investment lawyers, artists and economists, just to mention a few. International cultural law aims at governing cultural phenomena in their diversified forms; as such it includes extremely diverse components and constitutes a good example of multilevel governance and legal pluralism. The return of cultural artefacts to their legitimate owners, the recovery of underwater cultural heritage, the governance of sites of outstanding and universal value, the protection and promotion of artistic expressions and the protection of cultural sites in time of war are just some of the issues governed by such a field of study.²

The book focusses on the particular area of the return/restitution of cultural property and related disputes within the larger field of international cultural law. This is an area where public law aspects (e.g. state succession, international treaties, humanitarian law, the law of war, state immunity etc.) intermingle with procedural and private law elements (private property rights, statute of limitations, *forum non conveniens* to mention but a few). This book addresses the question of 'who owns culture?' by examining recent cases and the relevant legal framework. The approach is mainly legal, but interdisciplinary approaches have been adopted as well.

Contemporary intersections between art, cultural heritage and the market are complicated by a variety of ethical and legal issues, which often describe complex global relations. What happens if a work of art, currently exhibited in a museum, turns out to have been looted during WWII? What is the relevant legal framework? Should works of art be treated differently from other looted goods? Analogously, what happens to cultural artefacts taken away from their countries of origin during the colonial period? What should be done with ancient shipwrecks filled with objects from former colonies? Should such objects be kept by the finders? Should they be returned to the country of origin? This book addresses these different questions while highlighting the complex interplay between legal and ethical issues in the context of looted cultural goods and underwater cultural heritage. Although looted art and underwater cultural artefacts clearly present differences, they do still share important common features in that they condense the human experience and

¹ Globalisation refers to both the worldwide process of liberalising state controls on the international movement of goods, services and capital and the social, economic and political consequences of liberalisation. See generally Sassen (1998).

² Vadi (2012), pp. 87–133.

the vicissitudes of those who owned them, in addition to having their own intrinsic value.³

After briefly defining the notions of art and cultural heritage, this chapter enucleates their interplay with the market, and sketches out the structure of the book, and its main arguments and underpinnings. It then concludes by highlighting some key arguments and themes of the book.

1.2 The Essence of a Work of Art

Hamlet: Do you see nothing here?

The Queen: Nothing at all; yet all that is, I see.⁴

What is art? When Brancusi, a modern sculptor, began working on the group of sculptures that are known as *Bird in Space*, he “d[id] not want to represent a bird, but its very essence, its flight, its élan . . .”.⁵ When one of the birds was shipped to the United States, the customs officers did not consider the ‘bird’ as a work of art, and placed a 40 % value duty upon its import under the classification of industrial items. They applied the high tax placed upon raw metals instead of not taxing the sculpture at all, as would have been the case for works of art. At trial, the question as to whether or not the sculpture was art was strongly contested. Did it look like a bird? Not really. Was it a useful object? Certainly it was not. In 1928, however, Judges Young and Waite found in favour of the artist, concluding that the object was “beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it [wa]s nevertheless pleasing to look at and highly ornamental [. . .]” Therefore, the bird was deemed to be a work of art and entitled to free entry.⁶

In other cases, judges have been required to deal with art and to ascertain the quality of a collection of objects, for instance to decide whether a charitable trust for setting up a museum was properly established.⁷ Harcourt J. in *Re Pinon* held that the given collection was “worthless” as a means of education; affirming that “there is an accepted canon of taste on which the court must rely”.⁸

However, artistic expressions vary and, despite several attempts, no single definition exists. Art has different meanings to different people and its appreciation varies depending on time and space. Ultimately, ascertaining the essence of art is a

³ In its cohesive approach, highlighting the linkage and commonalities between looted artefacts and underwater heritage the proposed book follows the steps of other influential books. See e.g. Nafziger and Nicgorski (2007), Nafziger et al. (2010), Borelli and Lenzerini (2012).

⁴ Shakespeare, *Hamlet*, Act III, Scene IV quoted by Danto (1964), p. 571.

⁵ Brezianu (1965), p. 15.

⁶ *Brancusi v. U.S.*, 54 Treas. Dec. 428 (Cust. Ct. 1928). For commentary, see Giry (2002).

⁷ See Paterson (2014).

⁸ *Re Pinon* [1965] 1 Ch 85, 106. For commentary, see Paterson (2014).

matter of perspective and comes down to the question of how one should, and should not, look at paintings. As a philosopher pointed out:

telling artworks from other things is not so simple a matter. . . and these days one might not be aware he was on artistic terrain without an artistic theory to tell him so. And part of the reason for this lies in the fact that terrain is constituted artistic in virtue of artistic theories, so that one use of theories, in addition to helping us discriminate art from the rest, consists in making art possible.⁹

Three examples may clarify the difficulty in discerning art. For instance, the 1863 Paris *Salon de Refusés*, an art exhibition of paintings which were excluded from the more formal setting of the *Salon de Paris*, included iconic Impressionist works, including Manet's *Le déjeuner sur l'herbe*.¹⁰ During his lifetime, Van Gogh's revolutionary paintings did not sell. These works of art are worth millions today¹¹; and their deaccession by some museums has raised criticism and concern.¹² Almost 30 years ago, on the occasion of the centenary of Modigliani's birth the director of the Museum in Leghorn demanded the dredging of a canal into which, according to a legend, Modigliani had supposedly tossed his sculptures, allegedly convinced that such works would never be as good as his paintings. After having sculpted three stones with a drill, four high-school students and a dock-worker threw them into a canal. The next day, workers found the sculpted heads; and art critics acclaimed the recovery of the artefacts. A few days later, the students and the artists revealed the joke.¹³ In sum, art presents degrees of incommensurability which defies legal labels and taxonomies.

While it is difficult to define art,¹⁴ different legal disciplines treat it differently: Customs law distinguishes works of arts from other objects; copyright law protects artists' rights¹⁵; international trade law recognises that states can legitimately limit the trade of artworks¹⁶; international law regards art as a new frontier, due to emerging claims of restitution of artefacts looted during World War II (WWII) or the colonial period. Adjudicators have increasingly confronted the challenge of settling art-related claims.¹⁷ They waver between applying strict legal standards and/or recognising upfront the complex ethical issues involved.

⁹ Danto (1964), p. 572.

¹⁰ Leiboff (2009).

¹¹ Pesando and Shum (1999) (recalling that "In March 1987 Van Gogh's "Sunflowers" sold at auction for \$39.9 million, to be topped by the sale in November of his "Irises" for \$53.9 million. . . In May 1990, Van Gogh's "Portrait of Dr. Gachet" sold for \$82.5 million. . .").

¹² Montias (1995).

¹³ Simi (2009), Cecchi (2009).

¹⁴ See e.g. Duboff (1990), p. 351 (defining art as "an original expression of the creator").

¹⁵ On the interplay between copyright protection and freedom of expression in the so-called appropriation art, see e.g. Butt (2010).

¹⁶ See General Agreement on Tariffs and Trade, Article XX(f). General Agreement on Tariffs and Trade 1994 (GATT 1994), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

¹⁷ Bohe (2011).

1.3 The Shift from Cultural Property to Cultural Heritage

This is not money. This is historical heritage.¹⁸

A number of international law instruments provide slightly different definitions of cultural property. For instance, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict defines cultural property as:

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites...; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest...¹⁹

In parallel, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)²⁰ defines cultural property as property which is “of importance for archaeology, prehistory, history, literature, art or science” and which belongs to a number of listed categories and include, *inter alia*, archaeological objects, antiquities, objects of ethnological interest, sculptures, and paintings.²¹ Other international law instruments protecting cultural property followed, including Protocol for the Protection of Cultural Property in the Event of Armed Conflict,²² and the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict,²³ whose respective Articles 1 remand to the definition of cultural property provided by Article 1 of the Hague Convention.²⁴

However, recent shifts in international law highlight that the cultural property protection paradigm has increasingly been perceived as inadequate and that other approaches are gaining pre-eminence.²⁵ Admittedly, cultural property embodies “several layers of incompatibility from within”.²⁶ First, the cultural property

¹⁸ Spain’s ambassador to the U.S. watching military planes taking off from Florida towards Spain carrying 17 tons of gold and silver coins. BBC News (2012).

¹⁹ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 240, Article 1.

²⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (1970 UNESCO Convention).

²¹ 1970 UNESCO Convention, Article 1.

²² Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 358.

²³ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 38 ILM 769.

²⁴ Protocol for the Protection of Cultural Property in the Event of Armed Conflict, Article 1; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Article 1(b).

²⁵ See, e.g., Frigo (2004), pp. 367–378.

²⁶ Carpenter et al. (2009), p. 1038.

paradigm is based upon two potentially conflicting elements: “culture” which encapsulates collective values; and “property” which is an individual right.²⁷ The cultural property model has been perceived as not entirely satisfying as it tends to prioritise the interests of the right holder vis-à-vis those of society despite the fact that ‘the fate of some objects is momentous for the community at large.’²⁸

Second, the property model also presents a formalistic and rigid structure which may be inadequate to address incommensurable and inalienable aspects of culture.²⁹ For instance, the Lakota refuse to accept monetary compensation for the loss of the Black Hills—a sacred place which was removed from their ownership in the late nineteenth century.³⁰ Furthermore, some authors contend that “[w]ithin cultural property discourse, the idea of property has so colonized the idea of culture that there is not much culture left in cultural property”.³¹ In this sense, the expansive character of the notion of property has even led some scholars to deem cultural property as not sufficiently dissimilar from ordinary property to justify its distinct regulation.³²

Third, questions have arisen as to whether intangible forms of cultural heritage are adequately protected by intellectual property. The notion of cultural property is rooted in the Western intellectual tradition³³; and “Western societies prize material possession over process.”³⁴ However other societies, for instance indigenous peoples, refuse a compartmentalised vision of culture; rather they adopt a holistic approach to nature and culture. Therefore, intellectual property is unable to capture the importance of cultural processes such as rituals and folklore and the anthropological meaning of culture as a way of life.³⁵

Finally, as Blake pointed out, “Implicit [...] in the use of the term ‘cultural property’ is the idea of assigning to it a market value, in other words the ‘commodification’ of cultural artefacts and related elements by treating them as commodities to be bought and sold.”³⁶ While classic economic theories of property are based on the assumption of fungibility, cultural phenomena may present unique features that cannot be replaced.³⁷

Against this background, in the past decades, the concept of cultural heritage has emerged.³⁸ The shift to cultural property as world “heritage” occurred with the

²⁷ Gerstenblith (1995), p. 567.

²⁸ Sax (1999), p. 4.

²⁹ Mezey (2007, 2005).

³⁰ Tsosie (2001), pp. 185–187.

³¹ Tsosie (2001), pp. 185–187.

³² See Posner (2007), p. 213.

³³ Last (2004), p. 55.

³⁴ Harding (1999), p. 309.

³⁵ See *inter alia* Coombe and Turcotte (2012), pp. 272–305.

³⁶ Blake (2001), p. 66.

³⁷ Carpenter et al. (2009), p. 1038.

³⁸ See e.g. Prott and O’Keefe (1992), p. 307.

World Heritage Convention.³⁹ While respecting the national sovereignty and the property rights provided by national legislations,⁴⁰ the state parties recognised that “world heritage” or natural and cultural sites of “outstanding universal value” should be protected in the interest of humanity as a whole.⁴¹ Earlier treaties did not use the term “heritage” but rather the narrower concept of “cultural property”.⁴² The change determined a conceptual shift: Cultural heritage does not merely overlap with the notion of property, but it also expresses a public interest to be protected irrespective of ownership.⁴³

In general terms, cultural heritage may be defined as “the totality of cultural objects, traditions, knowledge and skills that a given nation or community has inherited by way of learning processes from previous generations and which provides its sense of identity to be transmitted to subsequent generations”.⁴⁴ The more recent UNESCO instruments also refer to cultural heritage rather than cultural property.⁴⁵ However, the two concepts are related; for instance, the 1954 Hague Convention states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”.⁴⁶

In particular, underwater cultural heritage is a species of cultural heritage which has been increasingly regulated at national, regional and international law levels. From a cultural perspective, shipwrecks are perhaps the most characteristic component of underwater cultural heritage, representing an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples and their relations with each other. From a historical perspective, shipwrecks provide additional evidence above and beyond the documented records of historic events, which may lead to new interpretations of such events. In addition, they offer the possibility of discovering unknown or little known historical events.

The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (CPUCH)⁴⁷ aims at strengthening the international protection of underwater cultural

³⁹ Convention Concerning the Protection of the World Cultural and Natural Heritage (WHC), Paris, 16 November 1972, 1037 UNTS 151, 11 ILM 1358.

⁴⁰ WHC, Article 6.

⁴¹ WHC, Articles 1 and 2.

⁴² See, e.g., Frigo (2004), pp. 367–378.

⁴³ Francioni (2008a), p. 5.

⁴⁴ Francioni (2008a), p. 6.

⁴⁵ See e.g. UNESCO Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, 16 November 1972, available at http://portal.unesco.org/en/ev.php-URL_ID=13087&URL_DO=DO_TOPIC&URL_SECTION=201.html Accessed on 14 June 2013; Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.

⁴⁶ 1954 Hague Convention, preamble.

⁴⁷ Convention on the Protection of Underwater Cultural Heritage, 2 November 2001, in force 2 January 2009, 41 ILM 40.

heritage.⁴⁸ The elaboration of the convention reflects the increasing awareness among the international community of the importance of protecting underwater cultural heritage.⁴⁹ Nonetheless, the adoption of this convention has not quelled the debate concerning the ownership of the related artefacts. The convention does not regulate property rights and, furthermore, it leaves several other issues unresolved. Should finders be keepers and losers weepers? The negotiations leading up to the convention were highly contentious and polarised between source countries (those countries whose wrecks are dispersed all around the world—i.e., maritime powers) and former colonies, with interests diverging and at times conflicting.

The conflict between different stakeholders—former colonial powers, former colonies, heirs, museum curators and collectors—could not be more acute. In addition to these proprietary aspects, one should not neglect the crucial impact that the conservation of art and cultural heritage may have on economic, social and cultural development. Cultural heritage is presented as an effective global development tool.⁵⁰ It can be viewed as integral to the achievement of sustainable growth, as well as to enabling communities and individuals to respond to major economic and social changes. As development is seen “as less like the construction business and more like education in the broad and comprehensive sense that covers knowledge, institutions and culture,”⁵¹ cultural heritage is an essential component part of development.⁵²

1.4 The Regulation of the Art Market and Cultural Heritage

The global art market is as big as ever. According to a report from the European Fine Art Foundation, released in March 2012, the total size of the global art market was €46.1 billion for 2011.⁵³ This figure includes both public auction data and an estimate of art gallery and private art dealer sales.⁵⁴ Even in the present times of

⁴⁸ See Forrest (2002), p. 10. For commentary on the CPUCH, see e.g. Scovazzi (2007), p. 287, Dromgoole (2003), p. 59, and Momtaz (2007). For a look at the *travaux préparatoires*, see generally Blake (1996), p. 819 (discussing negotiations of the CPUCH).

⁴⁹ Carducci (2006), pp. 20–22.

⁵⁰ Telesetsky (2009), p. 339 (deeming culture as “a powerful qualitative tool for furthering the quantitative goals of development.”)

⁵¹ World Bank (2000), p. XXIII.

⁵² Throsby (2001).

⁵³ Mc Andrew (2012).

⁵⁴ Corbett (2012). Reportedly, China has overtaken the United States as the world’s biggest market for art and antiques ending decades of American domination. China’s share of the global art market rose from 23 % in 2010 to 30 % in 2011, pushing the United States, with 29 %, into second place. The United Kingdom remained third with a 22 % market share while France was a distant fourth with 6 %.

global economic crisis, art and cultural heritage are considered as a valuable investment and the art market is climbing high.⁵⁵

The art market has been increasingly subject to regulation. This may seem to be a countertrend in light of current deregulation in other areas of the law. Nonetheless, this particular market is now increasingly regulated because cultural goods cannot easily be served by the “invisible hand” of the market. While private markets financed by admission revenue, sponsorship and donations can foster the recovery and protection of cultural goods, market forces alone may not efficiently supply such goods.⁵⁶ As a seminal study has highlighted, “there will be cases where the market can work reasonably and efficiently and cases where it may not. . .”.⁵⁷ In some cases, cultural goods are characterised by market failures, as their value is mainly historical or archaeological rather than economic. For instance, even historically important shipwrecks have been completely dismantled to recover scrap metal.⁵⁸

In case of market failures, “government intervention is not only necessary, but desirable, to improve the market mechanism”,⁵⁹ and regulate and/or finance cultural goods for the common weal.⁶⁰ In turn, international regulation allows states to address the shortcomings of national regulation.⁶¹ Finally, international regulation is needed because states may not fully, or sufficiently, appreciate the value of cultural goods.⁶²

While the art market and cultural heritage have been regulated in various ways, in the past two decades certain ethical issues have induced a radical rethinking of the art market. This change has been spurred by the end of the Cold War. Historical episodes that had been neglected for decades for political reasons were suddenly brought to the forefront of public attention. The increased availability of information and the declassification of government records relating to WWII have made possible a number of looted art disputes which were unthinkable in earlier decades.⁶³ In parallel, technological developments have made it possible to locate and recover shipwrecks which were lost centuries ago in the most remote areas of the oceans. These parallel developments have led scholars to investigate these emerging matters. In turn, the increased public awareness has prompted cases to take on much higher profiles which have attracted media attention and scholarly analysis.⁶⁴

⁵⁵ The Economist (2011).

⁵⁶ UNIDO (2008), p. 6.

⁵⁷ Peacock (1978), p. 2.

⁵⁸ BBC News (2011).

⁵⁹ Hale (1978), p. 47.

⁶⁰ UNIDO (2008), p. 1.

⁶¹ Efrat (2008–2009), p. 1467.

⁶² Frey and Steiner (2011), p. 567.

⁶³ The literature is extensive. See e.g. Falconer (2000), p. 386.

⁶⁴ Shanayeva (2008), pp. 259–288. For an earlier account, see Gattini (1996), pp. 67–88.

1.5 Art, Cultural Heritage and the Market: Who Owns Art and Heritage?

Contemporary intersections between art, cultural heritage and the market are complicated by a variety of ethical and legal issues, which often reflect complex global relations. What happens if a work of art, currently exhibited in a museum, turns out to have been looted during WWII? What is the relevant legal framework? Why should works of art be treated differently from other looted goods? Analogously, what happens to cultural artefacts taken away from their countries of origin during the colonial period? What should be done with ancient shipwrecks filled with objects from former colonies? Should the objects be kept by the finders? Should these artefacts be returned to the country of origin?

The destruction and looting of cultural property has been conducted throughout history⁶⁵ and remains a severe problem in terms of war crimes,⁶⁶ illicit trade, and the removal of cultural objects during the colonial era.⁶⁷ As the debate about ownership and commercial use of cultural property involves both culture-related and property-related issues, there are several questions which challenge governments, courts and museums alike.

The wide appeal of these issues is proven by the impressive literature which has emerged in the past two decades. This book focusses on the destiny of cultural artefacts that were looted in times of war or lost at sea. In particular, the proposed book fits well within different streams of legal analysis: (1) international cultural law⁶⁸; (2) cultural human rights⁶⁹; (3) underwater heritage⁷⁰; (4) the restitution of looted artefacts⁷¹; and (5) indigenous culture.⁷²

Against this background, the book aims to offer a fresh approach to the dilemmas posed by looted artefacts and the recovery of underwater heritage; while the authors refer to previous literature, they add fresh perspectives analysing emerging cases and legal frameworks which have not been studied before, thus contributing to the expanding area of international cultural law.

⁶⁵ Miles (2008).

⁶⁶ See generally Frulli (2011), van Woudenberg and Lijnzaad (2010), Frulli (2005), pp. 195–216.

⁶⁷ See generally Vrdoljak (2006).

⁶⁸ Nafziger et al. (2010), Hoffmann (2006), Langfield et al. (2010), Bandelj and Wherry (2011), Cornu (1996), Frier (1997), Jote (1994), Siehr (1993).

⁶⁹ See e.g. UNESCO (1998), Francioni and Scheinin (2008), Stamatopoulou (2007), Donders and Volodin (2007), Donders (2002).

⁷⁰ Vrdoljak and Francioni (2009), Prott (2003), Garabello and Scovazzi (2003), Droomgole (2012).

⁷¹ Greenfield (2007), Merryman (2006), Fitz Gibbon (2005), Cuno (2009), Cuno (2008), Cuno (2004), Lubina (2009), Renold and Gabus (2004). Earlier works include: Nicholas (1994), Palmer (2000), E. Simpson (1997), Kurtz (2006), Kowalski (1998), Feliciano (1997).

⁷² See e.g. Brown (2003), Vrdoljak (2006).

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Vadi, V.; Schneider, H.E.G.S. (Eds.)

2014, XVIII, 342 p., Hardcover

ISBN: 978-3-642-45093-8