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Restrictions on the Trade in Cultural Goods

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Abstract

Restrictions on the trade in cultural goods are of particular importance, constituting a special legal regime focussed to protect the Culture and Memory, aspects that have gained special importance nowadays. The present study intends to focus, above all, on the export, import and restitution of cultural goods, in the light of domestic law, but also under the terms of International Conventions, UNESCO and UNIDROIT, as well as European Directives.

Keywords

Cultural Goods, Memory, Export, Restitution, UNESCO, UNIDROIT, European Directives, Due Diligence, Nationalism and Internationalism, Historical and Archaeological Value, Macron Report

1. Introduction

Regardless of whether we may encounter a guideline underlying the questions around ownership of cultural goods backed up by some ardent cultural nationalism (Note 1), it is nevertheless worth looking in detail at the restrictions in effect on the trade in cultural goods. This primarily arises because commerciality does not represent a characteristic of the exploitation of tangible goods (Note 2) and the apparent conflict between Article 202(2) CC and Article 1304 CC resolves in favour of this principle. Furthermore, should we reject the unity of the public goods regime, we may also understand that the object of reality does not stop at the boundaries of commercial goods but also encompasses other tangible goods which, momentarily or more persistently, fall beyond the scope of commerce (Note 3).

While the scope of right in rem runs wider than the circle in effect for tradable goods, this does not mean we may avoid highlighting those aspects we consider of greatest relevance to illuminating the proposed theme. Therefore, just as there are issues pertaining to non-commerciality, we also encounter points of view, appropriate to commerciality, especially illustrative of the complex restrictiveness applied to the trade in cultural goods, susceptible of bringing about important contributions to the modernisation of rights in rem. Therefore, it makes sense to present, attentively and in great detail,

certain topics that we perceive as structural. We have accordingly selected the following: the pre-emption right, export and shipment, import and admission, due diligence, restitution, the 1970 Convention, the Unidroit Convention and the report commissioned by President Macron, authored by Felwine Sarr and Benedicte Savoy.

2. Export and shipment

In addition to the complex issues surrounding the grounds for restricting the export and shipment of cultural assets (Note 4), we must at this point highlight the essential features of positive law. While export represents an exit of cultural assets outside the borders of the European Union and shipment constitutes an exit to the territory of another European Union member state, they share a common thread. We nevertheless face two ways of removing movable goods and hence the importance of highlighting some of their most striking features.

Let us first of all state that the existence of the internal market implies the establishment of regulations on trade with third countries. This accordingly adopts measures to ensure uniform controls at external borders on the export of cultural assets. Therefore, Regulation no. 116/2009 (Note 5) correspondingly determines that exports of cultural assets outside EU territory is subject to the presentation of an export licence (Note 6) issued by the competent authority of the member state in whose territory the cultural asset was lawfully and definitively located on 1 January 1993 (Note 7), or after that date by the competent authority of any member state in whose territory it is located following either the lawful and definitive shipment from another member state or importation from a third country or re-importation from a third country after lawful shipment from a member state to that country (Note 8).

The export licence, issued by the competent authorities indicated by member states, becomes valid throughout the European Union (Note 9) and is required for presentation in support of the export declaration at the time of the completion of formalities with the competent customs authorities, who shall thereby ensure the details of the declaration correspond to those of the export licence (Note 10). Furthermore, any such export is subject to three different types of authorisation in keeping with the respective Implementing Regulation (Note 11). Accordingly, the duration of authorisation validity cannot exceed twelve months as a normal authorisation while this may also be a specific open authorisation or a general open authorisation in accordance with the provisions of Articles 10 et seq. of the aforementioned Regulation.

The export licence may be refused when the cultural assets in question are covered by legislation protecting national treasures holding artistic, historical or archaeological value to the member states (Note 12). In other words, the Regulation allows for the corresponding inapplicability of its provisions whenever faced by a more restrictive and protectionist national legal regime. Therefore, in addition to the Basic Law articles on the export and shipment of goods classified as in the national interest (Note 13) and the export and shipment of other classified goods (Note 14), we shall have to look to the provisions of Decree-Law no. 148/2015. In fact, this legal instrument establishes several rules

applicable to the export and shipping of movable cultural assets and we will here underline only those which we consider most striking.

As regards goods already classified or under classification as in the national interest, a distinction needs making between temporary export and shipment and definitive export and shipment. Thus, while the temporary departure of classified goods or goods undergoing classification processes may only be authorised by order of a member of the Commission responsible for culture, for cultural or scientific purposes, including temporary exchanges for other goods of equal interest to the cultural heritage (Note 15), the permanent exit of national interest state owned assets or those under such classification processes may only be authorised on an exceptional basis by the Council of Ministers, following consultation with the National Council of Culture and for the purpose of a permanent exchange for other assets existing abroad that are of exceptional interest to Portuguese cultural heritage (Note 16). In any event, permanent or temporary exits, with scope for their sale, of goods classified as in the national interest, or in the process of classification as such, which do not belong to the state, are prohibited (Note 17).

Temporary exports and shipments of movable assets classified as in the public interest, or undergoing classification processes require authorisation from the competent patrimonial management authority (Note 18). Whereas definitive or temporary exports and shipments, with the scope for sale, of movable goods classified as of public interest, or in the process of classification, can only be exceptionally authorised by means of a duly justified order signed by the government member responsible for culture and issued after obtaining the opinion of the National Council of Culture (Note 19). However, as regards the exports and shipments of goods classified as in the municipal interest or undergoing such classification processes, these must be preceded by notification to the competent cultural heritage management entity (Note 20). Additionally, regarding permanent or temporary exits of movable property of municipal interest with the scope for sale, this prior notice must be accompanied by a favourable opinion from the municipal council (Note 21).

In turn, should exports and shipments of inventoried assets depend on the authorisation of the competent patrimonial authorities (Note 22), we cannot affirm that the removal of goods that are not classified or inventoried is free of any onus. In fact, the temporary or definitive departure of movable goods covered by Article 55 of the Framework Law, neither classified as of national or public interest, nor inventoried, must be preceded by notification submitted to the competent cultural heritage entity (Note 23). Subsequently, within fifteen days counting from the prior notification, the competent patrimonial authority will assess the cultural value of the assets and, whenever so justified, may preliminarily prohibit their export or shipment as a provisional measure (Note 24).

3. Import and admission

While export covers the exit of cultural assets outside the borders of the European Union and shipment the exit to the territory of another European Union member state, import and admission are their

antonyms. In other words, import means the entry of a cultural asset originating from a third country into the national territory, while admission means the entry of an asset originating from a fellow EU member state.

Imports and admissions of cultural assets must also be preceded by notification submitted to the competent cultural heritage authority (Note 25). Moreover, the import and admission rules concern the wide range of assets detailed in Article 55, paragraph 3 of the Basic Law regardless of any final assessment of cultural interest (Note 26). This demonstrates that such restrictions cover a very wide range of assets, which reach far beyond the universe of classified assets or assets undergoing classification processes, while also demonstrating how, in the case of cultural asset imports and admissions undertaken by private individuals, the owner benefits from the right to the asset's identification deed, which is equivalent to the status of the inventoried asset. (Note 27) This furthermore assumes the right to exclusion from classification processes leading to declarations of national or public interest for a period of ten years following import or admission (Note 28). This represents quite a unique provision and conveys how the legislative body itself not only understands the restrictive classification regime but even grants an exceptional regime in order to encourage individuals to promote the importation or admission of cultural assets.

Despite the tight restrictions imposed by the import and admission regime, in contrast to the export and shipment regime, it is not clear that a particular asset receives protection whenever located, even temporarily, in Portuguese territory; reflecting how such assets fall under the scarce regime for stipulating administrative offences (Note 29). However, as is accepted in other legal systems, verification of the legality of importation has become increasingly important as the means of protecting cultural assets (Note 30). This derives from how the return of goods, in accordance with the verification of illicit situations, does not have to be solved in its entirety by the restitution activity in keeping with how the respective system presents various imperfections and clear shortcomings as we shall return to below. In any case, the study of restitution helps in clarifying that already achieved and, correspondingly, what still needs improving.

4. Restitution

Questions relating to the restitution of cultural assets are not new nor even contemporary in European Union law. In fact, the problem of restitution of cultural assets came to the fore in the 19th century. During the Napoleonic campaigns, in a letter to General Miranda, the archaeologist Quatremère de Quincy protested against the appropriation of the cultural assets of vanquished peoples. In his opinion, works of art should be preserved in a specific place, because nobody had the right to arbitrarily appropriate that which was held in common ownership, the aforementioned property of the Arts (Note 31). Consequently, no leader or chief could attribute himself a position of supremacy even when holding some momentary strength or success in a battle or a conquest (Note 32).

Canova, drawing on the writings of Quatremère de Quincy, expressed disagreement with Napoleon

firstly about the transfer of works of art (Note 33) and, on a later occasion, when representing the claims of the Papal State over recovering works transferred by Napoleonic troops, he maintained that the Republic of Arts should place itself above the laws of war (Note 34). Thus, he not only refuted the concept of plunder, which provided the scope for victorious parties to appropriate the property of vanquished peoples, but he also sought to enunciate another rule according to which a state might recover its works of art even when located in foreign territories (Note 35). In this context, while not managing to recover all the works of art (Note 36), Canova, demonstrating coherence, maintained the same position when, following a request addressed to the Pope for the return of books belonging to the Palatine Library of Heidelberg, he invoked the principle of asset nationality (Note 37). This proved a position that would henceforth gain increasing acceptance. Indeed, it was Canova who, when visiting London, advised the British government to acquire the friezes from the Parthenon (Note 38). Thus, the acceptance of the national value of works of art must be accepted to the detriment of local or merely territorial connections (Note 39).

However, although this paradigm shift deserves highlighting, we should nevertheless observe that this did not represent the terminus nor even a restraint on the non-consensual appropriation of cultural assets. In addition to the enormity of the acts of warfare during the 20th century, with its two global conflicts, it is important not to overlook the other transfers also displaying flagrant illegality. The Parthenon friezes were allegedly acquired by Lord Elgin from the Turkish authorities (Note 40) in a transaction that motivated, in view of the doubtful and circumstantial acquisition, heated debate in the British Parliament about the subsequent custody of assets (Note 41), as well as intermittent controversy over returning the friezes to their place of origin (Note 42).

Within the scope of the global conflicts, let us remember the consequences of the First World War and the Russian Revolution (Note 43) or the massive displacements of populations brought about by the Second World War. It is indeed worth noting not only the immense amount of assets plundered by the Nazi troops (Note 44) but also how, at the end of that period, the assets plundered and stolen in those terrible and unfortunate circumstances were never returned in full (Note 45). A similar case prevailed with the thousands of cultural assets transported by the Soviets from areas occupied by the former USSR (Note 46). The restitution of German works of art was also extremely slow and silent, a factor that triggered repeated recourse to legal actions taken in third party countries (Note 47).

Alongside these events and the dire consequences of seizures of movable cultural assets by belligerent nations (Note 48), by authoritarian state authorities or even by dubious deals agreed with occupying powers, there are other aspects for clarification. Thus, starting from cultural identity as a category of right (Note 49), we nevertheless have the non-acquisition *a non domino* and the protection of *bona fide* third parties. Furthermore, while the acquisition of ownership by a non-owner was, in terms of movable assets, rather rare (Note 50) or even exogenous to Roman law (Note 51), the same does not hold for several legal systems in the Roman-Germanic system.

We may first indicate German customary law that contains relevant protection for purchasers and to the

detriment of third party claims, (Note 52) as well as limiting any demand to payment of compensation by the possessor when acting in good faith (Note 53). In a second approach, following the consolidation of *Gewere (Note 54)* as a means of ensuring social peace and easing conflicts (Note 55), the emergence of the *Hand wahre Hand* rule (Note 56) according to which owners who entrusted movable properties to custodians or lessees could not claim them from third parties (Note 57). Finally, in a third phase, such claims would be exempted in case of *bona fide* purchases by third parties from traders, the tax authorities or at public auctions (Note 58).

We may also point to the model of possession equalling ownership adopted by the French CC (Note 59) in order to ensure legal trade (Note 60) and later replicated in other civil codifications; specifically, in the Italian, German and Spanish codes. Indeed, regarding the Italian codes, we would duly note that the 1865 Code mentions good faith (Note 61) while that of 1942 does not even mention stolen or lost assets (Note 62). Thus, this prioritises the defence of trade (Note 63) and, therefore, lends protection to bona fide third parties, according to requirements justifying an autonomous cause of acquisition (Note 64) that, however, does not reach any limit as it requires onerosity with the corresponding rejection of free transfer (Note 65).

The BGB provides for acquisition by bona fide third parties whenever there is delivery of the asset to which the right corresponds (Note 66). Whenever lacking any knowledge about the seller not being the real owner, implying conduct without any intention or serious fault, the third party may acquire ownership over the asset (Note 67) provided such has not been stolen or lost (Note 68). Another facet arises from the Spanish Code in determining how possession of movable property, acquired in good faith, is equivalent to a deed (Note 69), thus not only emphasising legal certainty for bona fide sub-purchasers and thereby also striving to enhance the credibility and security of legal commerce (Note 70).

Finally, the model which prefigures possession not as an acquisitive cause but as a presumption of ownership of an undeniable, or juris tantum, nature. Therefore, possession does not automatically confer ownership as the presumption may be rebutted by the holder's claim even when the asset has been sold to a bona fide third party (Note 71). In short, as we have sought to demonstrate on another occasion, the Portuguese Civil Code adopted this model through Article 1268 that determines how the possessor enjoys a presumption of ownership of the right unless there is a presumption in favour of someone else based on a registration made prior to the taking of possession (Note 72). Moreover, any interpretation of the provisions of Article 1301 CC only serves to reinforce the exclusion of the possession equals ownership model in Portuguese Law (Note 73).

5. The UNESCO Convention

In view of the domestic legal status quo in the main legal systems of the Roman-Germanic system, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) set out to emphasise the importance of restitution. Accordingly, at its 16th session, held in Paris on 14

November 1970, the Conference approved the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Thus, unlike the 1954 Convention, aimed at protecting cultural assets in the event of armed conflict (Note 74), the 1970 Convention intended to cover a very broad range of goods. In addition to times of peace and war, this seeks to safeguard cultural assets irrespective of their location or origin.

However, the Convention does not present any notion of cultural asset with this issue left to the internal laws of states (Note 75). Moreover, while declaring it is indispensable for any state to be aware of the moral obligations inherent to respecting its own cultural heritage, the heritage belongs to all nations as does the undeniable duty of protecting the cultural asset heritage existing on its territory against the dangers of theft, clandestine excavation and/or illicit exportation, it enshrines a precept concerning the return of cultural assets. Thus, following the undertaking by state parties to endeavour to prevent museums and other similar institutions on its territory from acquiring cultural assets from another state party which have been unlawfully exported subsequent to the entry into effect of the Convention, Article 7 establishes the need for the state to implement appropriate measures to seize and return, at the request of the state of origin, any asset stolen from museums, civil or religious public monuments or similar institutions, located on the territory of another state party whenever there is evidence documenting the inclusion of such assets in the respective inventory. Thus, we here encounter state obligations in relation to subsequent material norms and neither directly applicable nor executable (Note 76). Furthermore, the return of stolen or imported assets is subject to the requesting state paying fair compensation to persons acquiring assets in good faith or holding them as their lawful possessor.

However, the range of assets eligible for return would seem extremely limited. According to the Convention's wording, this only covers assets stolen from museums, public, civil or religious monuments or similar institutions located in the territory of another state following due demonstration the assets are included in the respective inventory. Logically, these assumptions did not cover circumstances reported in important legal cases which request the restitution of stolen or illicitly exported cultural assets (Note 77). Thus, should export controls be unbalanced and inefficient (Note 78), bona fide possession also poses problems, taking into account the diversity of national regimes as regards the moment of verification of this important subjective characteristic (Note 79).

The UNESCO Convention, imbued with a certain cultural nationalism (Note 80), introduces a system for monitoring and limiting cross-border trade in cultural assets but does not establish any system for keeping goods in a particular place (Note 81). Indeed, the Convention's rules are not directed at the cultural assets of one state located in one territory but rather seek to promote the protection of cultural assets located in another state that, under certain circumstances, must return the asset (Note 82). However, as we are dealing with conventional norms, the adoption of measures by the state party in order to promote the confiscation and restitution of stolen or illicitly exported cultural goods implies the adoption of norms designed to transpose the UNESCO guidelines. Therefore, as these are not directly applicable, they require effective transposition and implementation through the internal legal

systems of states. However, as this represents a framework Convention (Note 83), this firstly ensures state parties gain a wide margin of choice regarding the provisions for implementation and secondly, according to other opinions, even implies a real and proper obligation for transposition.

Any given state only needs to declare that, at the time of ratification, its normative order appears adequate and compatible with the determinations of the UNESCO Convention. Such was the case with the Portuguese ratification process. In fact, as ratification took place in 1985 (Note 84), when the previous Basic Law, Law no. 13/85 of 6 July, was still in effect, there were thus no means of enforcement by any of the prevailing legal instruments. Indeed, a status quo symptomatic of the legislator's distressing inertia, deserving of deep reaching repairs and somewhat blunt criticism (Note 85). However, while the need to develop legal instruments was clearly understandable as a result of the entry into effect of another Framework Law, coupled with the ratification of an important international convention, this does not mean that any legal transposition instrument for the Convention was automatically and indispensably required. In fact, this is what happened in Italy or in Spain, unlike in Germany. In the latter case, reform of the law dated 18 May 2007 on the return of cultural assets was an important step towards transposing the UNESCO Convention (Note 86). Hence, the Convention did not enter into effect in the German legal regime until afterwards, more precisely on 29 February 2008.

6. The UNIDROIT Convention

In view of the failures (Note 87) and shortcomings (Note 88) of the UNESCO Convention, the International Institute for the Unification of Private Law (UNIDROIT) has made an attempt to unify this complex regime in an area known to be sensitive, multifaceted and interdisciplinary (Note 89). To this end, the UNIDROIT Convention on Stolen and Illicitly Exported Goods was approved in Rome on 24 June 1995 with the objective of protecting not only the interests of states but also those of individuals subject to the theft of their cultural assets. However, the Convention, contrary to that expected, did not constitute a uniform law or even a minimum set of substantive legal rules despite this being seemingly suggested by the content of Article 9(1) (Note 90). Indeed, if the UNIDROIT Convention, which entered into effect on 1 July 1998, refers to rules of a national nature and establishes the jurisdiction of state courts to examine applications for restitution or return, we nevertheless face aspects of utter incompleteness, which places the Convention outside the scope of uniform substantive rules (Note 91).

In any case, despite not achieving its stated aim (Note 92), there is acknowledgement of how the UNIDROIT Convention has contributed towards more effectively protecting cultural assets as its articles do contain some positive aspects. Thus, they not only put forward a specific notion of cultural assets, unlike the UNESCO Convention, but they also attempt, and with a view to the illicit trafficking of assets and the plundering of archaeological sites, to implement a broad scope for returns while distinguishing between the restitution of stolen goods and the return of illicitly exported goods.

In highlighting objects which are of major archaeological, prehistoric, historical, literary, artistic or

scientific value, whether for religious or secular reasons in one of the categories listed in the Convention Annexes, this adopts an autonomous concept which is distinct from the domestic law of contracting states. Logically, in adopting a concept, this seeks to devalue the contributions made by state law and even the circumstantial fact that the asst has been qualified, registered or classified in accordance with the provisions of a particular national law (Note 93).

As regards return, the UNIDROIT Convention contains a chapter on the return of cultural assets and another on the return of unlawfully exported cultural assets. Accordingly, bearing in mind the shortcomings pointed out in the UNESCO text (Note 94), a *stolen asset* is that obtained through illicit excavations or, in the case of lawful excavations, one which has been unlawfully withheld, in accordance with the laws of the state hosting the excavations (Note 95). This also establishes a series of deadlines designed to reconcile the interests at stake (Note 96). Correspondingly, any restitution action must be brought within three years counting from the point in time when the claimant became aware either of the place where the cultural asset is located or of the identity of the possessor and, in any case, within a maximum period of fifty years from the time of theft (Note 97). Furthermore, the possessors of stolen cultural assets who are required to return them are entitled, at the time of return, to fair compensation provided that they did not know, or could not reasonably have known, that the asset had been stolen (Note 98).

Cultural assets are deemed unlawfully exported whenever temporarily exported from the territory of the requesting state, in particular for exhibitions, research or restoration purposes, and then not returned in accordance with the authorisation issued under the applicable provisions of national law (Note 99). Nevertheless, the return of exported assets, whenever requested, may be conditioned by significant impairment of any of the following interests: material conservation of the asset or the context of its location; the integrity of a complex asset; preservation of information relating to the asset, in particular of a scientific or historical nature, and usage by an indigenous or tribal community (Note 100). Thus, the mere illicit exportation of cultural assets does not in the least justify their return. This becomes especially the case, as Merryman explains in some detail, because export controls are not even designed to protect ownership (Note 101).

Any return requests must be submitted within three years from the time the requesting state became aware of the location and identity of the possessor and, in any case, within a maximum period of 50 years from the date on which they should have been returned in keeping with the authorisation issued (Note 102). However, owners who acquire assets subsequent to their illegal exportation shall be entitled, at the time of return, to fair compensation from the requesting state provided that, at the time of acquisition, the owner did not know or could not reasonably have known the asset had been unlawfully exported (Note 103).

After accepting the UNIDROIT Convention does not apply uniform material rules, it remains to be seen what the consequences of its ratification will be. In effect, as there is no need for any transposition, it also seems clear that, as the Interim Report on the Basic Law recognises, the restitution and return of

cultural assets depends on national legislation (Note 104). However, a certain doctrinal sector defends the growing restrictiveness over bona fide acquisitions by third party (Note 105). Furthermore, at a second level, especially following the ratification of the UNIDROIT Convention by the Italian Republic, the inapplicability of the fee-paying ownership model, consecrated in Article 1153 CC, to cultural assets (Note 106). Conversely, Siehr advocates the urgent need to review the domestic legislation protecting the bona fide purchaser by states ratifying the UNIDROIT Convention (Note 107). While Prott also allows for the direct and healthy influence of the Convention's content, the author also points to the legislative reforms of the domestic order necessary to implementing some of the main restitutive guidelines of the Convention (Note 108).

Furthermore, whenever domestic legislation provides more favourable rules regarding the return or restitution of stolen or unlawfully exported cultural assets, the Convention prevents the application of those rules by the contracting state (Note 109). This makes every sense from the point of view of protecting cultural assets, as it allows certain states to retain the most favourable rules and encourages others that lack such rules to amend them accordingly (Note 110). Additionally, this even encourages more daring stances in order to defend the scope for private individuals directly requesting the restitution of cultural assets (Note 111).

Regardless of the respective position adopted in relation to the immediate effect of the Convention’s provisions on the internal legal order, and while the content is not perfect and displays ambiguities (Note 112), it nevertheless makes some highly impressive contributions to the modernisation of property law. We need only consider, for example, the basic rule enshrined in Convention Article 3 that stipulates owners must return stolen cultural assets. Any owner is under an absolute obligation to return a cultural asset that has been stolen even when personally unaware of the theft, the robbery or even the person committing such acts. Therefore, while this provision attributes extreme prevalence to the claims of the original owners, adopting the position advocated by some of the prevailing doctrine (Note 113), it also remains true this does not account for the main option applied in the domestic law of several states. Moreover, as we shall return to when considering the problems around bona fide third parties, we need only consider the precepts relating to extinctive prescription and how these contrast with the legal entitlement of the right of ownership. While this does allow for restitution actions to be filed within three years from the date of owners receiving knowledge about their assets, and even providing a maximum time-limit of fifty years or even longer, seventy-five years in particular cases, this nevertheless prompts various other reflections.

Accordingly, we must question the important dissimilarities both in relation to the domestic laws of different countries and to the legislation applicable to any given circumstance of restitution of stolen cultural assets. However, should the restitution request be made before a court or other authority of the state where the cultural asset is located, according to the provisions of Article 8, the Convention does not indicate the national law applicable to such legal actions (Note 113). Furthermore, in view of the content of Article 10, which is restricted to thefts occurring within state territories following the

Convention entering into effect there, and to the circumstantial fact that the assets are now located in the territory of another signatory state, this reduces the respective scope of applicability very significantly.

Although the UNIDROIT Convention represents a commitment between exporting and importing states, it only provides for the future in accordance with its Article 12(1). Logically, this constitutes exactly the reason some authors stress the Convention's objectives do not involve promoting the restitution or return of goods previously stolen or illicitly exported but rather seek to reduce illicit trafficking by fostering progressive change in the behaviours of those acting in the art market (Note 114). Moreover, in order to extend its range of protection, others have proposed that the Convention could, over a more or less extended period of time, apply real retroactive effects so as to make it more binding in terms of restitution (Note 115).

7. The EU Directive

To better understand the content of Directive 2014/60/EU of the European Parliament and of the Council (Note 116), we should outline certain aspects of its preceding version, Directive 93/7/EEC (Note 117), which also deals with the return of cultural assets unlawfully removed from the territory of a member state. As we know, this Directive arose within the context of the abolition of internal borders as from 1 January 1993, with the aim of adapting the rules in effect for the return of assets in the event of their unlawful exportation from a member state. Understandably, there is some resemblance between one section of the UNIDROIT Convention, Chapter III, and the objectives pursued by this Directive. Moreover, the Convention had also included a provision to avoid conflicts between rules with the same scope of application (Note 118).

This Directive arose not only from the existing UNESCO Convention but also from the preparatory work for the UNIDROIT Convention (Note 119). Moreover, we should recall that this Directive only covers cultural goods classified as national treasures or national treasures of artistic, historical or archaeological value under national legislation and administrative procedures, before or after they were unlawfully removed from the territory of a member state (Note 120). Moreover, such goods needed to meet the criteria for one of the categories in the Annex, particularly as regards the minimum value stipulated for different categories of assets (Note 121), a facet that naturally conflicts with a notion, however imprecise, of national treasure (Note 122). This also fails to mention the obvious difficulties in assessing assets potentially covered by the 1993 Directive (Note 123).

In these terms, *restitution* means the physical return of the cultural asset to the territory of the requesting state from whichever territory it was unlawfully transported to (Note 124). Thus, this does not even distinguish between stolen assets and non-stolen assets. Moreover, in order to identify the feasible grounds for supporting restitution, while Ferrer Correia mentions six cases of connection between the work of art and the culture of a state (Note 125), the Directive opted to highlight assets as national treasures. (Note 126). However, the meaning was also not without doubt or controversy (Note

127). Furthermore, while the Directive attributed member states the right to initiate legal proceedings against the owner or holder (Note 128), the same right was not extended to the legitimate owners of stolen assets. Furthermore, cultural assets in private ownership might be subject to legal restitution actions only when the said assets were classified as national treasures.

In any event, the comparison between the UNIDROIT Convention and the Directive only extends to the context of returning unlawfully exported cultural assets in breach of the legislation of the member state or of (EEC) Regulation no. 311/92. There was no parallel in the 1993 Directive providing for the restitution of stolen cultural assets. There are also other aspects that indicate how this Directive is less protective than the UNIDROIT Convention (Note 129). In this context, we should highlight the one-year period of limitation and the maximum period of thirty years in contrast to the aforementioned three-year limitation period and the fifty-year limit.

Considering the lesser ambitions of the 1993 Directive and the need to introduce other amendments, it was later deemed convenient to approve a new Directive, Directive 2014/60/EU of the European Parliament and of the Council. Not only does the scope of applicability appear to be wider but this also seeks to eliminate constraints on the return of cultural assets. This Directive defines a cultural asset as any asset protected or defined by a member state before or after it was unlawfully removed from its territory (Note 130). It may furthermore cover assets of historical, paleontological, ethnographic, numismatic interest or scientific value, whether or not they form part of public or private collections or are single assets, and whether they originate from authorised or unauthorised excavations. Consequently, member states may ensure the restitution of cultural assets that are neither protected nor defined as national treasures and, furthermore, need not belong to categories or comply with limits relating to any given antiquity or financial value. In short, the cultural asset is characterised separately from any gradation of economic value in contrast to the previous Directive, which has since been twice amended, in 1996 (Note 132) and 2001 (Note 133).

Furthermore, under the 2014 Directive, member states must provide in their legislation for restitution action to lapse within three years from the date on which the competent central authority of the requesting state became aware of the location of the cultural asset and the identity of its owner or holder (Note 134). In every case, restitution proceedings lapse after a period of thirty years from the date on which the cultural asset was unlawfully removed from the territory of the requesting state. However, in the case of public collections of assets belonging to the inventories of state religious institutions which are subject to special protection under national legislation, restitution actions lapse after a period of 75 years (Note 135).

Well aware that the methodologies applied to transposing the Directive differ across the various states (Note 136), we must pay particular attention to the content of Law 30/2016 (Note 137), intended to transpose the Directive into Portuguese domestic law and, accordingly, to highlight particular aspects of relevance to the theme of this Lesson. One derives from the enshrinement of a principle of protection to cultural assets that imposes the duty on the Portuguese state to endeavour to recover cultural assets

from the territories of other member states to that from where the assets were unlawfully removed, whenever protected or defined by any member state as national treasures of artistic, historic or archaeological value and subject to unlawful removal from the national territory in breach of both the respective national protective legislation and (EC) Regulation no. 116/2009 or in violation of any other condition applied to temporary transfers (Note 138). Finally, among the presuppositions of any action for the return of cultural assets, whenever there is no decision resolving the conflict through arbitration, we would point out that the claimant is the member state from which the cultural asset has been unlawfully removed and the defendant is the possessor or, failing that, the holder (Note 39).

Despite the progress achieved by Directive 2014/60/EU, there are still weaknesses that need addressing. In this sense, Weller warns of the lack of any single and harmonised definition of cultural heritage, leading to clear regulatory fragmentation (Note 140). Additionally, the same author highlights the scattered nature of the legislation determining seizures of assets and the unclear linkage between member state laws and the Directive (Note 141). Furthermore, there is a plurality of substantive rules in domestic laws, insufficient measures concerning future transactions of cultural assets stolen by the Nazis and contradictory recommendations in the case of complaints over the transactions of assets plundered during the height of the National Socialist regime (Note 142). In a rather critical sense, Schönberger also emphasises how the Directive does not impose its own substantive system of illegal export protection, leaving member states a broad margin of appreciation (Note 142). Moreover, on the restitution of assets looted by the Nazis (Note 143), this understands that much remains to be done as stated in the Washington Declaration (Note 144) and detailed in the subsequent nominal list of important Jewish collectors (Note 145), taking into account the non-retroactivity of the UNESCO and UNIDROIT Convention provisions alongside those of the European Union and even of the domestic legislation of most member states.

8. Due Diligence

Due diligence extends far beyond the issues at stake here (Note 146). However, the topic is of acute importance to the field of cultural assets (Note 147) and, most especially to the acquisition regime for movable cultural goods, directed to the third party in good faith. However, this does not revolve around the susceptibility of the third party to acquiring stolen assets, as the adopted model excludes any such pretension, but rather in the sense of ascertaining whether the third party is entitled to compensation, hence, to receive an indemnity payment. In other words, we must approach the potential acquisition not of a tangible asset, thus a cultural asset, but rather an indemnity generated by a claim for restitution by the legitimate owner. In this way, we are faced with due restitution and a claim for indemnity corresponding to the presumed bona fide acquisition by a third party, reflecting the irrelevance and shortcomings of the possession equals ownership model and other models of movable asset ownership protection (Note 148). Nevertheless, the use of the expression due diligence has been criticised in the specific context of the law on movable cultural assets (Note 149) even if it is no less true that this has

gradually become consolidated.

While the term due diligence represents no factor of novelty (Note 150), the meaning has been adopted for movable cultural assets by the doctrine and International Conventions dedicated to the subject. In truth, taking into account the exegesis of the UNESCO and UNIDROIT Conventions, the issue of due diligence was necessarily highlighted in these Conventions. Correspondingly, in UNESCO Convention Article 7(b), we encounter the obligation to confiscate cultural assets, even from bona fide third parties, and to ensure their restitution on request by the state of origin. UNIDROIT Convention Article 4 extends further. Not only do bona fide possessors also hold the duty to return assets but they would only be entitled to compensation when not knowing, or could not reasonably have known, that the respective asset was stolen and when demonstrating they exercised due care and attention at the time of acquisition (Note 151). What is more, in determining whether the possessor exercised due diligence, account shall be taken of all the circumstances of the acquisition, in particular the capacity in which the parties thereto were involved, the price, consultation of registers or other documents, access to bodies, and any other steps which any reasonable person should take in similar circumstances (Note 152).

As the UNIDROIT Convention also imposes restitution of stolen goods, ruling out the claims of the bona fide purchaser without any further ado, this obviously does not accept the possession equals ownership models, *Hand wahre Hand* or rebuttable presumption. This only admits a right to compensation on behalf of the third party provided that they should not reasonably have known the good was stolen and prove they acted with due diligence. In any case, such requires analysis of an extensive series of acquisition circumstances. All the more so as the precept does not allude to the totality of the causes and rendering it clear that the enumeration is merely exemplificative. Therefore, doctrine and jurisprudence allude to various different reasons, in particular, to negative conjunctures, very unusual places or times for the transfer of ownership as well as at a considerably reduced price (Note 153). Conversely, they place emphasis on contexts which might instil confidence in the purchaser. For example, consulting databases of stolen assets (Note 154), transactions carried out by prestigious auction companies or certified by antiques specialists (Note 155). Indeed, on these facets, and when approaching due diligence, Reichelt defends the need to expand the responsibilities held by the different experts across the artistic fields (Note 156).

Nonetheless, due diligence, regarding cultural assets, extends beyond the aforementioned Conventions. In fact, the subject has played a leading role in European Union law as well as in international jurisprudence. Thus, while under the previous Directive, courts may grant compensation whenever convinced that possessors acted with due diligence when making their acquisitions (Note 157), Directive 2014/60/EU reaches still further. This not only refers to the due diligence undertaken by the possessor at the time of acquiring the goods. The Directive requires establishing all the circumstances of the acquisition in order to certify due diligence, in particular documentation on the asset's provenance, the authorisations to remove the asset required under the law of the requesting member state, the status of the parties, the price paid, consultation by the possessor of any records of stolen

cultural assets that are normally accessible or of any relevant information they may reasonably have obtained or any other steps a reasonable person might take in similar circumstances (Note 158). Moreover, regarding international jurisprudence, this understands that due diligence deserves added importance as it has evolved and emerged as a structuring legal principle (Note 159).

Portuguese domestic law also takes this issue into consideration. Law no. 30/2016 (Note 160), transposing Directive 2014/60/EU, approaches this subject in symmetrical terms to those of the Directive. In addition, in the precept on the trade and restitution of cultural assets, the Basic Law not only declares null, under the terms of reciprocity, any transactions carried out on Portuguese territory involving the cultural heritage of another state and that happen to be in the national territory as a result of the respective protective law while also determining the assets eligible for restitution under the terms of the European or international laws binding the Portuguese state (Note 161). Furthermore, in addition to transposing this Directive, Portuguese ratification of the UNESCO Convention and the UNIDROIT Convention also need taking into account.

In sum, this topic may also contribute to modernising Rights in Rem. Indeed, the regime of restitution of a stolen asset may rule out the acquisition of ownership, even of possession, by bona fide purchasers. Due diligence appears as a possible compensation to be attributed to certain purchasers. To those who act in more diligent ways than the scope prefigured by ethical good faith. Therefore, should we set aside the idea that seeks to reconcile good faith with mere effective ignorance of whoever harmed the rights of other people (Note 162), understanding the arguments of those adopting different perspectives, as the law does not expressly stipulated excusability or reprehensibility of ignorance (Note 163), we then find that the differences become self-evident. Indeed, there are greater requirements than psychological good faith or ethical good faith. In fact, it is not enough for possessors not to be aware about fault but rather for them to actively ignore such even when having followed long, demanding and time-consuming paths in order to ascertain very relevant aspects connected with the ownership of a given cultural asset. Therefore, International Conventions, European Law and the domestic law of some countries (Note 164) do not expressly waive the buyer's due diligence. There is a great contrast, regarding the regime for the utilisation of movable cultural assets, in the legal systems across the European system, particularly among those integrating the Roman-Germanic system.

9. Other Restitutions

Bearing in mind the provisions of the UNESCO and UNIDROIT Conventions, there is general acceptance that the provisions apply to cultural goods unlawfully appropriated after the entry into effect of these international legal instruments. However, the issue of retroactivity was neither ignored in the preparatory works nor totally omitted in the respective articles. Nevertheless, the UNIDROIT Convention determines that the provisions of Chapter II, under the title restitution of stolen cultural assets, apply from a time subsequent to the entry into effect of the Convention in the respective signatory state (Note 165). As regards the UNESCO Convention, despite the rule embodied in the

Vienna Convention and international custom in favour of non-retroactivity, the matter was considered by the Committee of Experts.

Faced with the opportunity of including an article clarifying that the Convention's provisions were not retroactive, this was deemed superfluous (Note 166). However, in the face of the insistence by some states over inserting an explicit non-retroactivity clause, this was later introduced only to be definitively deleted at a later phase (Note 167). Regarding the UNIDROIT Convention, although the text states that it applies to future situations of theft or illicit export (Note 168), it is no less true that the text states it does not legitimise any unlawful act which occurred before its entry into effect or to which it does not apply by virtue of Article 10(1) and (2) nor does it limit the right of any state or other person to make a request, outside of the scope of the Convention, for the return or restitution of cultural assets stolen or unlawfully exported before this entered into effect (Note 169).

Without prejudice to relevant decisions by the courts (Note 170), we also need to emphasise how certain states did not legitimise theft and other misappropriations that occurred in previous historical periods even when supported by special legislation for those troubled times or even by subsequent third party acquisitions in good faith. Accordingly, we should note how, in 1968, the German Constitutional Court declared that the legal prescriptions corresponding to the Nazi period, in particular those which legitimated the confiscation of the properties of enemies of the people and the state (Note 171), ceased to hold any legal validity because they contradicted essential legal values and principles (Note 172). In turn, the British Parliament, in order to encourage the return of looted or illegally appropriated assets from the Nazi period, passed the Return of Cultural Property Bill in 2009 (Note 173). Conversely, regarding assets owned by criminal organisations, the Italian legislation on the confiscation of Mafia assets particularly stands out (Note 174).

Another historical period that deserves special attention is the colonial period. Indeed, while this period has come in reflection (Note 175) for some time, it gained relevance and sharp topicality following the Report on the Restitution of African Cultural Heritage (Note 176) by the Senegalese academic Felwine Sarr and French historian Bénédicte Savoy. The Report, presented on 23 November 2018, under the high patronage of President Emmanuel Macron who, approximately a year earlier, had delivered an impassioned speech in Ouagadougou, seeks to reflect on the problematic issues around African cultural assets. Indeed, Macron had declared at Ouaga I University that it was the French Republic's ambition to promote access to the cultural assets of humanity. Consequently, and to this end, he had highlighted strengthening the protection and the circulation of cultural assets as priorities of his international cultural policy (Note 177). He went on to explain that this circulation had to take on various forms and with the scope for making changes to national inventories and temporary or definitive restitutions of African heritage.

Following these impressive public statements and the subsequent invitation issued to Felwine Sarr and Bénédicte Savoy, the report published by these intellectuals caused heated controversy both in France and elsewhere. Therefore, as we are here dealing with the restitution of assets, considering the

fundamental features of this report holds relevance. Thus, after emphasising the guidelines of the speech and the invitation by President Macron, the report highlights setting a five-year deadline for establishing conditions conducive to the temporary or definitive restitution of cultural goods of African origin as well as the need to promote new ethics for relationships. Subsequently, after a historical period in which heritage acquisitions were framed by an era replete with violence (Note 178) and the transfer of goods in keeping with colonial guidelines, the report recognises how the French Republic had acted in a context of international competition to collect a large number of objects intended to enrich the collections of national museums (Note 179).

The report then highlights the attitude of the Republic of Zaire when, in 1960, it requested the return of the collections of the Museum of the Belgian Congo (today the Tervuren Museum). This action is qualified as year zero in a new era (Note 180). Next, it emphasises Nigeria's 1968 request to ICOM to ask Western museums for the return of a list of pieces from the Kingdom of Benin to the collection of the National Museum in Lagos, as well as the 1978 speech by the UNESCO Director-General, Amadou-Mahtar M'Bow, when he defended the restitution of cultural heritage considered irreplaceable by most African countries (Note 181). The Report also highlights the request, addressed to the French Republic, on 26 August 2016, by the Minister of Foreign Affairs of Benin for the restitution of royal statues and symbols, illicitly appropriated by French Colonel Alfred Dodds following the plunder of the Abomey palace, which occurred in 1892, and their subsequent delivery to the Trocadéro ethnographic museum, located in Paris (Note 182).

As regards these returns, the report expresses serious and well-founded concerns over the scope of any *temporary restitution*. It not only considers this ambiguous but even describes it as a veritable oxymoron (Note 183). The rapporteurs maintain that any non-final restitution is likely to give rise to disputes over interpretation and tensions of various kinds, and hence emphasising the permanent restitution and related transfer of property (Note 184). Based on the idea that the word *restitute* means to reinstate the legitimate owner with usage and enjoyment, and this inherently implying recognition of the ownership of the assets, the report stresses the need to promote the reconstruction of memories and the re-socialisation of these assets with contemporary African communities (Note 185). In short, the return to the communities of origin would reactivate their hidden memories and thus enable them to perform functions of an integrative and mediating nature within current African societies (Note 186).

Legitimising the protection and conservation of objects, the report notes that safeguarding can be ensured by African museums. Consequently, because the current status quo is not disastrous, the findings nevertheless accept that restitution be conditional on the carrying out of works and other developments deemed indispensable (Note 187). Moreover, and to understand the complexity of these issues, the report declared there were over eighty thousand assets from Sub-Saharan Africa, deposited in the collections of French museums (Note 188). Accordingly, while some derive from private donations, many others came from looting, exploration missions, ethnographic or scientific campaigns (Note 189). Furthermore, it should be noted that important acquisitions have been made since the 1990s

to enrich the Branly-Chirac Museum's very rich collection (Note 190).

After eminently descriptive analysis, the report sets out the criteria for mass restitution alongside a timetable for such a transfer. This thereby recommends the rapid restitution of objects originating from military activities; from the functional workings of military or administrative officials during the colonial period (1885-1960); from work promoted by scientific missions prior to 1960 and as a result of restorations or loans that have dragged on over time (Note 191). Simultaneously, this calls for further research into objects incorporated into the collections of French museums after 1960, while accepting, even when the circumstances of the acquisition are not especially clear, restitution should the interest of the requesting country be considered relevant. Finally, the report suggests that the French collections should continue to include either assets legitimately acquired with documentation or those purchased on the art market in strict compliance with the guidelines of the 1970 UNESCO Convention.

In terms of a timeline, the report sets out a first stage (from November 2018 to November 2019) incorporating, among other aspects, the following initiatives: restitution of the most symbolic pieces, long since claimed by states or other African communities (Note 192); the adoption of legislative measures to make these returns irrevocable; transfers to the country of origin after completion of works and other refurbishments of host infrastructures (Note 193). A second phase (from spring 2019 to November 2022), focuses on the inventory and proposes data sharing and an intensive transcontinental concertation process (Note 194). Finally, in a third stage (from November 2022 onwards), the report lists a series of measures designed to dispel the impression that the window opened in the President’s Ouagadougou speech would swiftly close with the provision to accept other future requests for restitution beyond the aforementioned five-year period (Note 195).

The Report also warns that restitution would entail amending the Heritage Code and the General Code on the Property of Public Persons (CGPPP or CG3P), with obvious consequences for the principle of the inalienability of public collections (Note 196). To this end, there is the proposal to introduce a new chapter on restitution based on the prior bilateral cultural cooperation agreement with former colonies, protectorates or other territories administered by the French Republic (Note 197). Moreover, this also notes how the works looted during the Nazi occupation were never integrated into public collections so they might be returned to their rightful owners (Note 198).

As would be expected, the report was received with enormous scepticism and some incredulity in French cultural circles. Without any claim at being exhaustive, we will mention, in logical, chronological order, some of the more paradigmatic positions. Thus, firstly, there was the statement by the historian Hélène Leloup, contesting the assumptions of the report following its publication in its consideration that restitution supposes fraudulent acquisition (Note 199). As she had participated in many acquisitions of African art from Guinea, Ivory Coast and Mali since the 1950s, she testified to having never seen or even being aware of any looting or subterfuge. (Note 200). In turn, adopting a different approach, the jurist Yves-Bernard Debie, in a speech given at a conference organised on the subject (Note 201), expressed well-founded reservations about the report’s directives in the light of

current French law, particularly regarding the inalienability of cultural assets held by public museums.

Stéphane Martin, director of the Quai Branly-Chirac Museum, when appearing before the Parliamentary Committee on Education on 19 February 2020, confirmed museums in the West did possess numerous African goods (Note 202). He further agreed that the seizure of goods, as a consequence of prevailing in warfare, should not be immutable or even ascribed as a natural right (Note 203). Having stated all this, he stressed his surprise at how the report was requested from two persons, Sarr and Savoy, without any professional background in museologic property (Note 204). He also declared extraordinary the perception that the museum was a Western invention and a house of crime as the report seemed to be based entirely on the assumption that such goods had only ever been acquired violently in an attempt to cast global opprobrium over all assets acquired before 1962.

Martin then explained that it was first essential to urgently establish the ethical and legal principles appropriate to identifying the objects that should be incorporated into museum collections. As he exemplified regarding the statue of the god Gou, claimed by the Republic of Benin, this piece was supposedly sculpted by a prisoner from a neighbouring kingdom and abandoned on a beach before its only later recovery by a French captain. Thus, he concluded there was as much to be clarified about the nationality of that statue as about the nationality of the Gioconda on display in the Louvre. Martin furthermore pointed how museums did not own their collections but the state held them under the auspices of public property subject to strict principles of inalienability and unseizability (Note 205).

He also argued for the need to look at practices in other countries. As regards the first part of the report, he said the European Parliament would have "no objection" to the Commission's proposal before also highlighting the harmful consequences of the entry into force of NAGPRA (the Native American Graves Protection and Repatriation Act) with the consequent destruction and subsequent disappearance of funerary items of undeniable artistic and cultural value. On the other hand, while alluding to the lack of staff in African museums, especially regarding the need to train conservators and offer them decent and appealing careers, he highlighted the success of the Louvre-Abu Dhabi project, arguing that this was the model for replication elsewhere (Note 206).

Despite these criticisms, Macron has expressed how he has not given up on the direction outlined in his famous speech in November 2017. Indeed, he pushed through a Draft Law on the Return of Cultural Property to Benin and Senegal at the Council of Ministers on 15 July 2020 (Note 207). Hence, this Draft Law derogates the principle of inalienability of public assets to enable the transfer and consequent authorisation for the release of twenty-six works from the Abomey treasure, resulting from the donation of General Alfred Dodds (1842-1922) to the Republic of Benin, and a sabre and its scabbard, attributed to El Hadj Oumar Tall, resulting from the donation of General Louis Archinard (1850-1932), to the Republic of Senegal (Note 208).

However, criticism did not wane in the wake of this presidential and governmental initiative. In fact, on the very next day, Rykner stepped up to underline the historical mystification surrounding the objects subject to the recent draft law. Accordingly, in the case of the works donated by Dodds, he recalled they

had been saved from a fire set by Béhanzi following a battle for the liberation of slaves imprisoned by the slave-owning monarch of Dahomey (Note 209). Therefore, he considers any restitution as strange as the state, at the time of the event, did not even exist (Note 210). In addition, regarding the return of the sabre, Hadj Oumar Tall is perceived as a jihadist and he considered it odd for President Macron to pay homage to a model revered by the current enemies of French soldiers (Note 211). Furthermore, on this subject, a few months earlier, Yves-Bernard Debie had written that Oumar Tall had been the spiritual guide of the first of the Islamic holy wars that West Africa was to experience over the course of the 19th century (Note 212). Indeed, Oumar Tall had deployed terror as a weapon, massacring men, enslaving women, repeatedly using robbery and plunder, especially against animist populations (Note 213). Logically, Debie declared it paradoxical that the French government on one day wants to restore the symbol of Jihadist repression and, on the next day, to participate in a forum aimed at implementing peace and security in Africa (Note 214).

As might be expected, the controversy stirred by the Macron Report also arrived in Portugal, with the appearance of both favourable and unfavourable opinions on the restitution of African cultural heritage. By way of example, we may contrast the opinion pieces by António Sousa Ribeiro, Professor at the University of Coimbra, and Luís Raposo, ICOM President published in the *O Expresso* newspaper (Note 215). Correspondingly, Sousa Ribeiro pointed out that many of the African objects and artefacts on exhibition in European museums were acquired within the scope of a violent colonial relationship. He added that museums should certainly demonstrate the legitimate provenance of the objects in their collections before negotiating the return of the rest. In turn, Luís Raposo described how most African countries have not yet ratified the conventions on the restitution of cultural property as their political elites preferred to keep their hands free to supply the international art market. Moreover, he questioned the true meaning of the restitution of assets, both in terms of the mode of appropriation and the identity affection generated by the assets. On this topic, he particularly questioned the validity of the Germanic controversy about the restitution, requested by Namibia, of a standard erected by Diogo Cão in 1485. Thus, the questions arising here also extend to whether restitution to Namibia or to the standard's country of origin, in this case Portugal, would be more appropriate.

Understandably, this controversy has since deepened, motivating reflections from academics, museum directors and even policymakers. As far as the latter are concerned, we would highlight the statements by Leopoldo Amado, the ECOWAS (Economic Community of West African States) Education Commissioner, who described how this issue was more advanced in the Francophone or Anglophone contexts than in Lusophone countries (Note 216). There were also proposals from LIVRE and PAN for the devolution of cultural heritage from the former colonies, promptly contradicted by the CHEGA leader through ironic and allegedly racist remarks. From another perspective, commenting on the return proposals, Paulo Costa, the director of the National Museum of Ethnology, defended the need to distinguish between works removed by theft, robbery or plundering and pieces brought back as part of legal acquisitions and research in order to illustrate the habits and ways of life of other countries and

other cultures (Note 217).

10. Conclusions

In summary and in conclusion, we would like to reinforce the perspective that the aim of this Lesson is not, nor could it ever be, to set out any exhaustive study of the legal regime for movable cultural assets. Rather, within an approach committed to the modernisation of Property Rights, this strives to refute the alleged crisis and supposed underdevelopment of this sub-branch of Civil Law. Accordingly, we have highlighted aspects of enormous value and topicality capable of contributing to more modern and more appropriate applications of movable tangible assets that are, concomitantly, cultural assets.

After highlighting the importance of the category of movable goods, as well as the impossibility of coincidence or overlap between intangible cultural heritage and material cultural heritage, as opposed to some more aprioristic and inconsequential radicalism, we sought to emphasise the importance of exploiting archaeological assets coupled with the special protection endowed to national treasures in the face of the outdated and simplistic civil regime for finds. Furthermore, should the declaratory theory demonstrate the existence of a vast multitude of cultural goods that remain unclassified or are undergoing classification processes, inventory and registration raise issues related to security in the transmission of ownership of movable goods.

While reiterating that marketability is not a characteristic of reality, it is nonetheless important to clarify the quality and scope of restrictions on the trade in cultural goods. Therefore, cultural preference, export, import and restitution constitute core aspects of this theme. As regards restitution, we can see how enriching the reflections on the UNESCO and UNIDROIT Conventions, the EU Directive, Due Diligence and the Macron Report are, and all oriented towards a path that devalues the scope of acquisition for third parties even acting in good faith and that may even compromise acquisitions by adverse possession, safeguarding the original ownership or, at the least, that which precedes theft, robbery, plundering or any other circumstance that failed to take into account the will of the owner or holder of another right in rem to enjoy a particular cultural asset.

Finally, aware that the chosen themes reflect the modernity of this reality and denying any crisis or minor development, we may understand these issues still require further study on a subsequent occasion when the regulatory constraints of the present Lesson, especially of a temporal nature, do not exist. Nevertheless, we believe this opportunity served not only to refute an alleged underdevelopment of this reality but also attained considerable progress in the study of highly relevant and extremely current aspects to the usage of movable cultural assets. This makes perfect sense as cultural assets do not only affirm memory and the past but also confront daily life and announce the future. Furthermore, in times of pandemics, the importance of tangible assets in the face of the vulnerability of human life is undeniably highlighted. Among these objects, material cultural goods stand out as objects that, in addition to their undeniable structural durability, they convey authentic and indelible testimony of civilisational and cultural value.

Notes

Note 1. Reaffirming this opinion, John Merrymann, "The Public Interest in Cultural Property, California Law Review, 1989, pp. 339 et seq.; Sophie Lenski, "Der uneingestandene Nationalismus des deutschen Kulturgüterschutzes" in Die Öffentliche Verwaltung, Year 68, 2015, pp. 677 et seq.

Note 2. Cf. Oliveira Ascensão, Direito Civil: Teoria Geral…op. cit., p. 345.

Note 3. See our Manual…op. cit., pp. 34-5.

Note 4. On the historical development of the grounds for prohibiting or severely restricting the export of cultural assets, see Sophie Schönberger, "Der Entwurf des neuen Kulturgutschutzgesetzes" in Kultur im Recht: Recht als Kultur, Baden-Baden, 2016, pp. 60 et seq..

Note 5. Regulation no. 116/2009 of 18 December 2008, on the export of cultural assets, repealed Regulation no. 3911/92 of 31 December.

Note 6. Cf. Article 2(1) of the Regulation.

Note 7. Cf. Article 2(2)(a) of the Regulation.

Note 8. Cf. Article 2(2)(b) of the Regulation.

Note 9. Cf. Article 2(3) of the Regulation.

Note 10. Cf. Article 4 of the Regulation.

Note 11. Cf. Implementing Regulation no. 1081/2012 of 9 November 2012.

Note 12. Cf. Article 2(2) of the Regulation.

Note 13. Cf. Article 65 of the Basic Law.

Note 14. Cf. Article 66 of the Basic Law.

Note 15. Cf. Article 49(1) of Decree-Law no. 148/2015.

Note 16. Cf. Article 49(3) of Decree-Law no. 148/2015.

Note 17. Cf. Article 49(4) of Decree-Law no. 148/2015.

Note 18. Cf. Article 50(1) of Decree-Law no. 148/2015.

Note 19. Cf. Article 50(3) of Decree-Law no. 148/2015.

Note 20. Cf. Article 51(1) of Decree-Law no. 148/2015.

Note 21. Cf. Article 51(3) of Decree-Law no. 148/2015.

Note 22. Cf. Article 55(1) of Decree-Law no. 148/2015.

Note 23. Cf. Article 57(1) of Decree-Law no. 148/2015.

Note 24. Cf. Article 58(1) of Decree-Law no. 148/2015.

Note 25. According to Article 68(1) of the Basic Law, Article 64(1) of the same law is directly applicable.

Note 26. Also according to Article 68 (1) of the Basic Law, Article 64 (2) is applicable.

Note 27. Cf. Article 68(2)(a) of the Basic Law.

Note 28. Article 68(2)(b) of the Basic Law and Article 60(2) of Decree-Law no. 148/2015.

Note 29. Cf. Article 62(b)(iv) of Decree-Law no. 148/2015.

Note 31. In this sense, regarding German law, Sophie Schönberger, "Der Entwurf…" in op. cit., pp.

65 et seq..

Note 32. Cf. Quatremère de Quincy, Lettres sur le préjudice qu' occasioneraient aux Arts et à la Science le déplacement des monuments de l' art de l' Italie, de démembrent de ses Écoles et la spoliation de ses Colections, Galeries, Musées, Paris, 1796, pp. 2 et seq..

Note 33. Ibidem.

Note 32. According to Erik Jayme, when Canova was in Paris in 1810 to sculpt a bust of the Empress Marie Louise, he talked to Napoleon about transferring of works of art, alluding in particular to the antiquities of the Roman Prince Borghese, who was said to possess a sacred right over his historic possessions. Cf. Kunstwerk und Nation, Heidelberg, 1991, pp. 22-3.

Note 33. Cf. Erik Jayme, Kunstwerk…op. cit., pp. 25 et seq..

Note 34. Cf. Erik Jayme, "Antonio Canova, La Reppublica delle Arti ed il Diritto Internazionale " in Rivista di Diritto Internazionale, no. 4, 1992, p. 892.

Note 36. On this matter, Tullio Scovazzi sets out a list of assets that have been returned, such as the restitution to Venice of the horses of Saint Mark while also recalling how Tintoretto's Paradise and Tiziano's Christ Crowned with Thorns, among others, still remained in the Louvre. Cf. "Analisi e Significato della Pratica Italiana" in La Restituzione dei Beni Culturali Rimossi com Particolare Riguardo alla Pratica Italiana, Milan, 2014, pp. 39 et seq..

Note 37. Although the Pope argued, as Erik Jayme explains, that the Heidelberg Codices had been donated to him and that the works of art taken to Paris had been subject to violent looting and theft, he eventually agreed to return a significant proportion of the Codices to the Heidelberg library. Cf. Kunstwerk…op. cit., pp. 26-7.

Note 38. On this topic, Tullio Scovazzi, "Evolutionary Trends as Regards the Return of Removed Cultural Property" in El Tráfico de Bienes Culturales, Valencia, 2015, p. 36.

Note 39. Cf. Erik Jayme, "Die Nationalität des Kunstwerks als Rechtsfrage" in Internationaler Kulturgüterschutz, Vienna, 1992, p. 17

Note 40. On the circumstances surrounding the acquisition of the marbles corresponding to part of the friezes decorating the Parthenon, see John Merrymann and Albert Elsen, Law, Ethics and the Visual Arts, 3 ªed., London, 1998, pp. 14 et seq..

Note 41. The vote following the debate that took place on 7 June 1816, demonstrated a very divided House of Commons. Cf. Parlimentary Debates, 1816, pp. 1031 et seq..

Note 42. John Henry Merrymann, while acknowledging the importance of the friezes, recalls the attacks carried out by the Ottomans on the Acropolis. Any permanence of the friezes on that site would therefore face, in addition to serious political instability, a very adverse climate and level of pollution which would have led to significant destruction of those cultural assets. Cf. "Thinking About The Elgin Marbles" in Michigan Law Review, Vol. no. 84, no. 1, 1985, pp. 1895 et seq.. From another perspective, Christopher Hitchens, after dismantling Lord Elgin's supposed acquisition, defends the return of the friezes and not even ruling out an extensive restoration of the Parthenon itself. Cf. "The Elgin Marbles"

in The Elgin Marbles: Should They Be Returned to Greece?, London, 1997, pp. 45 et seq..

Note 43. As Astrid Müller-Katzenburg points out, the extent of the expropriation of works of art carried out by the Soviet Union government, right after the October Revolution, that later motivated the filing of lawsuits in German courts when some of those assets were put up for sale at public auctions to be held on German territory. Cf. Internationale…op. cit., p. 240.

Note 44. On this subject, Quentin Byrne-Sutton describes the systematic looting of allied cultural assets. Cf. Le Trafic International des Biens Culturels Sous l´Angle de Leur Revendication par l' État d' Origine, Zurich, 1988, pp. 12-3.

Note 45. Jeanette Greenfield underlines this topic, stressing how subsequent returns have always been far from reaching the totality of the lost or stolen goods. Cf. The Return…op. cit., pp. 204-5.

Note 46. On the activity of the Soviet War Trophies Brigade on German territory, Susanne Schoen, "Beutekunst: Von der Kriegstrophäe zur Handelsware" in Raub, Beute, Diebstahl, Baden-Baden, 2013, pp. 77 et seq..

Note 47.This was the case with the request for the return of the Holy Family painting by Joachim Wtewael, brought by the Federal Republic of Germany, which obtained a favourable decision from the British High Court of Justice on 9 September 1998. Cf. Kurt Siehr, "Guter Glaube im Kunsthandel" in Bulletin Kunst und Recht, no. 3, 2012, pp. 5 et seq..

Note 48. On this topic, see Sigrun Holst, Biens Culturels et Relations Internationales: Spoliations, Protection, Restitution, Paris, 1983, pp. 23 et seq..

Note 49. According to Erik Jayme, the postmodern era is characterised by the cultural identity of individuals which is affirmed as a legal category. Cf. "Identité Culturelle et Intégration: Le Droit International Privé Postmoderne" in Recueil des Cours, no. 251, 1995, pp. 167 et seq..

Note 50. Cf. Gabriel Lepointe, Droit Romein et Ancien Droit Français: Droit des Biens, Paris, 1958, p. 23.

Note 51. Cf. Max Kaser, Römisches Privatrecht, Munich, 1992, Portuguese translation, p. 147.

Note 52. Pieter van Bemmelen attaches great importance to the customs of port cities which, to a certain extent, privileged the protection of purchasers. Accordingly, regarding the practice in effect for the city of Hamburg in 1270, and later replicated in the statutes of Bremen, Lübeck and Riga, he stresses the circumstantial nature of purchases involving goods from abroad and how they were witnessed by two men of good repute. Cf. Le Système de la Propriété Mobilière, Paris, 1887 pp. 56 et seq..

Note 53. In this context, Pieter van Bemmelen alludes to the statutes of Murten, Leobschütz and Bamberg where, in several passages, the duty to compensate the buyer in good faith, deceived by the perpetrator of the theft, stands out. Cf. Le Système…op. cit., pp. 172 et seq..

Note 54. As there was no animus, which was practically equivalent to corpus, Gewere was eventually circumscribed to detention. Cf. Wilhelm Albrecht, Die Gewere als Grundlagen des ältern deutschen Sachenrechts, Konisberg 1828, pp. 19 et seq..

Note 55. Cf. Andreas Heusler, Die Gewere, Weimar, 1872, p. 492.

Note 56. According to Sachsenspiegel, the person who lends or entrusts an object to another cannot ask for its return from a third party who, in turn, has acquired it for a paid amount. Cf. Deutstschenspiegel uns Ausgsburger Sachsenspiegel, II, 60, §1º.

Note 57. Cf. Ulrich von Lübtow, "Hand wahre Hand" in Festschrift der juristischen Fakultät der Freien Universität Berlin, Berlin, 1955, p. 177.

Note 58. Cf. Part I, 15, §§17 et seq. of the ALR, Allgemeines Landrecht für Preussischen Staaten.

Note 59. Article 2279 of the Code stipulates the following: "En fait de meubles, la possession vaut titre".

Note 60. The model of possession equals ownership favours the transmission of movable assets and inherent confidence in such transactions to the detriment of the conservation of assets and the private interests of the dispossessed person. On this matter, Marcel Planiol, Traité Élémentaire de Droit Civil, tome I, 3rd ed., Paris, 1946, pp. 1110-1; Louis Tournesac, Application Pratique de la Maxime "En Fait de Meubles Possession Vaut Titre", Paris, 1913, pp. 38-9.

Note 61. Cf. Article 707 of the Italian Civil Code of 1865.

Note 62. Cf. Articles 1153 et seq. of the Italian Civil Code of 1942.

Note 63. Acknowledging this, Marco Comporti, "Il Codice Italiano e la Convenzione UNIDROIT" in Protezione Internazionale del Patrimonio Culturale, Milan, 2000, p. 156.

Note 64. According to Ludovico Barassi, we would be faced with a true principle of protection of third parties acting in good faith that favours modernity, the anonymity of exchanges and the overcoming of the distinction between deposited or entrusted goods and other goods that have not been so entrusted. Cf. Diritti Reali e Possesso, Vol. II, Milan, 1952, pp. 462 et seq..

Note 65. Cf. Rodolfo Sacco, Il Possesso, 2ªed., Milan, 2000, pp. 282 et seq.

Note 66. Cf. §§932 and 935 BGB.

Note 67. Therefore, Jean Sauveplanne accepts that the acquirer's legitimacy when purchasing stems from the absence of intention or serious fault when taking into account the circumstances of the specific case. Cf. La Protection de l' Acquereur de Bonne Foi d' Objets Mobiliers Corporels, Vol. I, Rome, 1961, pp. 55 et seq.

Note 68. According to Anette Hipp, §935 covers at least the following situations: stolen cultural goods; the misappropriation of goods handed over for restoration; the actions of restorers/specialists whenever appropriating a cultural good. Cf. Schutz von Kulturgütern in Deutschland, Berlin, 2000, p. 156. On the other hand, Raymond Salleiles argues theft is a relative vice and hence not precluding any subsequent acquisition by persons acting in good faith. Cf. De la Possession des Meubles, Paris, 1907, p. 137.

Note 69. Cf. Article 464 of the Spanish Civil Code.

Note 70. Alfonso-Luis Caravaca positions the Spanish CC solution as closer to that of Article 1153 of the Italian CC. Cf. "Private International Law and the UNIDROIT Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects" in Festschrift für Erik Jayme, Vol. I, 2004, pp. 88 et seq..

Note 71. See our “Bens culturais…” in op. cit., p. 900.

Note 72. Ibidem.

Note 73. Thus, Rui Pinto Duarte argues that Article 1301 and the enunciative register seek to ensure the protection of the trust that, under other legal regimes, was assumed by the possession equals ownership model. Cf. Li ções de Direitos Reais, 3rd ed., Cascais, 2013, pp. 182-3.

Note 74. Cf. UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in The Hague on 14 May 1954.

Note 75. Cf. Article 1 of the Convention.

Note 76. Kurt Siehr emphasises precisely this point Cf. “Kulturgüter als Res Extra Commercium im Internationalen Rechtsverkehr” in Festchrift für Reinhold Trinkner zum 65. Geburstag, Heidelberg, 1995, p. 717.

Note 77. Gerte Reichelt points out the case Winkworth versus Christie, Mason and Woods, of 1980, when a collection of Japanese artworks belonging to a British subject were stolen in the UK and then exported to Italy, where they were sold to an Italian citizen. The latter, in turn, re-exported them to London in order to be sold at Christie's. As Reichelt notes, this conditionality does not therefore only prefigure a situation concerning goods from museums or public collections. Cf. “La Protection Internationale des Biens Culturels” in Révue de Droit Uniforme, Vol. I, 1985, pp. 80 et seq..

Note 78. Accordingly, Daphn é Voudouri highlights such inefficiency by identifying how the Convention does not prohibit the export of cultural assets unaccompanied by certificates. Cf. “Circulation et Protection des Biens Culturels dans l’ Europe sans Frontières” in Révue de Droit Public et de la Science Politique, no. 2, 1994, pp. 500-1.

Note 79. Cf. Gerte Reichelt, “La Protection…” in op. cit., pp. 110 et seq.. In a similar vein, Lyndell Prott, “UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects” in R évue Droit Uniform, no. 1, 1996, p. 60.

Note 80. John Merrymann argues that the UNESCO Convention is imbued with cultural nationalism in contrast to the 1954 Hague Convention with its clear internationalist or cosmopolitan emphasis. Cf. “Two Ways of Thinking About Cultural Property” in American Journal of International Law, vol. 80, 1996, pp. 845 et seq..

Note 81. Cf. Sophie Lenski, “Der uneingestandene…” in op. cit., p. 683.

Note 82. Cf. Kurt Siehr, “Die Umsetzung des UNESCO- Übereinkommens von 1970 in Deutschland aus der Sicht der Wissenschaft” in Kulturgüterschutz-K ünstlerschutz, Baden-Baden, 2009, p. 79.

Note 83. Adopting this perspective, Kurt Siehr, “Die Umsetzung…” in op. cit., p. 92.

Note 84. The Convention was approved for ratification by Government Decree no. 26/85 of 26 July 1985 and the corresponding instrument was deposited on 9 December 1985 with the UNESCO Director General.

Note 85. On this topic, see Jo ão Martins Claro, “Enquadramento e Apreciação Crítica da Lei no. 13/85” in Direito do Patrim ónio Cultural, Lisbon, 1996, pp. 297 et seq.. In fact, the insufficiency and

inoperability of the previous Basic Law was also the object of criticism in the Report that preceded the current Basic Law. Cf. Relatório Intercalar…op. cit., p. 20.

Note 86. Kurt Siehr does not only underline this fact but also argues that the Convention is difficult to apply in any direct manner and thus requiring subsequent transposition into the legal orders of Member States. Cf. “Die Umsetzung…” in op. cit., p. 79.

Note 87. According to Pierre Lalive, the failure of the UNESCO Convention stemmed from an imbalance favouring the claims of states that export cultural assets to the detriment of the interests of importing states. Furthermore, emphasising the multidisciplinary nature of this problem, it would be necessary to reach beyond the level of mere declarations of intent of Public International Law and proceed according to the relevant reflections on the basis of Private Law and Private International Law. Cf. “Sur le Retour des Biens Culturels Illicitement Exportés” in Nouveaux Itinéraires en Droit: Hommage à François Rigaux, Brussels, 1993, pp. 293 et seq..

Note 88. As the UNESCO Convention only covers the importation of assets stolen from museums or similar institutions and registered in that entity's inventory, it excludes assets stolen from private individuals and non-inventoried cultural assets. Cf. Stefano Rodotà, “Les Aspects de Droit Civil de la Protection International des Biens Culturels” in La Protection Juridique International des Biens Culturels: Actes du 13 ºColloque de Droit Européen, Strasbourg, 1998, pp. 100 et seq.. In a similar vein, Marques dos Santos describes how the Convention does not solve the problems raised by theft, robbery or illegal export as it only covers goods that are part of the collections of museums or public monuments. Furthermore, this takes into account aspects of public law without considering the issues arising at the level of private law under the auspices of the international protection of cultural assets. Cf. “Draft UNIDROIT Convention on the International Return of Stolen or Illicitly Exported Cultural Property” in Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional, 1998, p. 223.

Note 89. Therefore, allusion is made to contract law, rights in rem, public international law, private international law and administrative law. Cf. Pierre Lalive, “Une Avancée du Droit International: La Convention de Rome d’UNIDROIT sur les Biens Culturels Volés ou Illicitement Exportés” in Révue de Droit Uniforme, no. 1, 1996, p. 41.

Note 90. According to Article 9(1), nothing in the Convention shall affect the application by a Contracting state of other more favourable provisions concerning the return or restitution of stolen or unlawfully exported cultural assets.

Note 91. Within this scope, Jean-Sylvestre Bergé identifies rules on limitation periods, claims for return and the restitution of assets as examples of areas where recourse to national law appears necessary, and accordingly demonstrates the absence of a uniform substantive law. Cf. “La Convention d’ UNIDROIT sur les Biens Culturels: Remarques sur la Dynamique des Sources en Droit International” in Journal du Droit International, Year 127, 2000, pp. 244 et seq.. In a similar vein, Ioannis Voulgaris warns on the competence of national courts for interpreting the questions arising from the Convention’s specific

terms. Cf. “Les Principaux Problèmes Soulevés par l’Unification du Droit Régissant les Biens Culturels” in Révue de Droit Uniforme, no. 1, 2003, pp. 547-8. Conversely, Guido Carducci maintains that the Convention represents a system of substantive law. However, he adds at the outset that Directive 93/7/EEC also constitutes a system of substantive law even while not establishing an exhaustive normative system. Cf. La Restitution Internationale des Biens Culturels et des Objets d’Art, Paris, 1997, pp. 8-9.

Note 92. According to Georges Droz, chapter II sets out a uniform law designed to regulate the civil aspects of cultural asset theft while chapter III provides a type of convention for mutual judicial and administrative assistance. Cf. “La Convention d’ Unidroit sur le Retour International des Biens Culturels Volés ou Illicitement Exportés” in Révue Critique de Droit International Privé, no. 2, 1997, p. 258.

Note 93. According to Kurt Siehr, it is of little importance for the UNESCO Convention that the cultural assets have been qualified as national treasures in the state of origin as the Convention is based on its own assumptions, such as importance and qualification, according to the categories set out in its Annex. Cf. “The Protection of Cultural Property: The 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared” in Uniform Law Review, no. 2, 1998, pp. 673-4. In a similar vein, Marilú Marletta, La Restituzione dei Beni Culturali: Normativa Comunitaria e Convenzione Unidroit, Milan, 1997, pp. 137 et seq..

Note 94. According to Gerte Reichelt’s stance, the shortcomings of the UNESCO Convention represented the impetus for the drafting of the UNIDROIT Convention. In particular, regarding the inability of the respective articulation to solve a circumstantialism similar to that described in the Winkworth versus Christie case. Or even the one known as the Weimar Collection versus Elicofon, decided by the US Court of Appeal, in 1984, where the theft of two Dürer portraits, later sold by an American soldier to the lawyer Elicofon for a patently derisory price, was at issue. Cf. “20 Jahre UNIDROIT Konvention: Status quo und Ausblick” in Kultur im Recht: Recht als Kultur, Baden-Baden, 2016, pp. 44 et seq.

Note 95. Cf. Article 3(2) of the UNIDROIT Convention.

Note 96. Guido Carducci emphasises the possibility under the UNIDROIT Convention of bringing an action for restitution before the courts within clearly defined time limits, in contrast to the diplomatic application and the absence of time limits under the UNESCO Convention. Cf. “Complementarité Entre les Conventions de l’UNESCO de 1970 et d’UNIDROIT de 1995 sur les Biens Culturels” in Révue de Droit Uniforme, Vol. XI, 2006, p. 97.

Note 97. Cf. Article 3(3) of the Convention.

Note 98. Cf. Article 4(1) of the Convention.

Note 99. Cf. Article 5(2) of the Convention.

Note 100. Cf. Article 5(3) of the Convention.

Note 101. According to John Merryman, export control is not even intended to protect property but

rather represents a limitation on its exercise. Cf. “Il Controllo Nazionale sull’ Esportazione dei Beni Culturali” in Rivista di Diritto Civile, 1988, p. 635.

Note 102. Cf. Article 5(5) of the Convention.

Note 103. Cf. Article 6(1) of the Convention.

Note 104. Cf. Interim Report …op. cit. p. 90.

Note 105. On the growing restrictiveness of the acquisition a non domino and, consequently, of the precepts of Article 1153 of the Italian Civil Code, see Marco Comporti, “Per una Diversa Lettura dell’ Art. 153 Cod. Civ. A Tutela dei Beni Culturali, in Scritti in Onore di Luigi Mengoni, Vol. I, Milan, 1995, pp. 402 et seq.. In the opposite direction, and forming a counter-current to a certain extent, see Geo Magri, “Beni Culturale e Acquisto a Non Domino”, in Rivista di Diritto Civile, Year LIX, no. 3, 2013, pp. 741 et seq..

Note 106. Cf. Marco Comporti, “Il Codice…” in op. cit., pp. 160-1.

Note 107. Cf. Kurt Siehr, “A Special Regime for Cultural Objects in Europe” in Uniform Law Review, 2003, p. 562.

Note 108. Cf. Lyndel Prott, “The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Ten Years On” in Uniform Law Review, 2009, pp. 231 et seq..

Note 109. Cf. Article 9(1) of the Convention.

Note 110. Lyndel Prott reaffirms this view. Cf. Biens Culturels Volés ou Illicitement Exportés, Paris, 2000, p. 127.

Note 111. Cf. Guido Carducci, “Complementarité…” in op. cit., p. 99.

Note 112. In this sense, Frédéric-Edouard Klein, “En Relisant la Convention UNIDROIT du 24 Juin 1995 sur les Biens Culturels Volés ou Illicitement Exportés: Réflexions et Suggestions” in Révue de Droit Suisse , no. 118, no. 3, 1999, p. 270.

Note 113. Josef Kohler, regarding the return of a work of art, already defended, at the beginning of the 20th century, the prevalence of the original owner’s claim. Cf. “Das Recht an Denkmälern und Altertumsfunden” in Deustche Juristenzeitung, Vol. IX, no. 16/17, 1904, pp. 771 et seq. Subsequently, many others followed suit. Accordingly, Kurt Siehr dismisses the relevance of the purchaser’s good faith in purchasing cultural assets. Cf. “International Art Trade and the Law” in Recueil des Cours, 1993, pp. 57 et seq.

Note 113. According to Alfonso-Luis Caravaca, this becomes one of the problems of the UNIDROIT Convention. Cf. “Private…” in op. cit., pp. 91-92.

Note 114. On this subject, Marina Schneider alludes to a movement of solidary relations between states in order to cooperate in the protection of cultural assets. Cf. “La Convention d’ UNIDROIT sur les Biens Culturels. État de Mise en Oeuvre” in Révue de Droit Uniforme, Vol. II, 1997, p. 507.

Note 115. Pierre Lalive expresses sympathy for some retroactivity. Cf. “Une Avancée…” in op. cit., p. 55. Conversely, Maher El Wahed, reflecting on Egyptian law, as an exporting country, considers that only retroactivity would materialise the intentions inscribed in the UNIDROIT Convention. Cf. “The

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: A View from Egypt" in Révue de Droit Uniforme, Vol. VIII, 2003, p. 539.

Note 116. Cf. Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural assets unlawfully removed from the territory of a Member State.

Note 117. Directive 93/7/EEC of the Council of 15 March 1993.

Note 118. Cf. Article 13(3) of the UNIDROIT Convention. On this subject, Alessandro Tomaselli, La Tutela dei Beni Culturali nel Diritto Dell' Unione Europea, Ariccia, 2015, pp. 56-7.

Note 119. On this topic, Guido Carducci, La Restitution…op. cit., pp. 5 et seq..

Note 120. Cf. Article 1 of Directive 93/7/EEC.

Note 121. Daphné Voudouri doubts the fairness and reasonableness of this classificatory measure, which was intended to avoid clogging up the courts. Cf. "Circulation…" in op. cit., p. 517.

Note 122. In this regard, see Ignaz Seidl-Hohenveldern, "Patrimoine Culturel Mobilier et Marché Intérieur de la Communauté Européenne" in Études de Droit International en l 'Honneur de Pierre Lalive, Bâle, 1993, p. 756.

Note 123. Regarding this difficulty, see Kurt Siehr, "International Protection of Cultural Property in the European Community" in Études de Droit International en l ' Honneur de Pierre Lalive, Bâle, 1993,p. 766.

Note 124. Cf. Article 1 of the Directive.

Note 125. Among others, Ferrer Correia highlights the following primordial conditions: assets which were integral parts of buildings or groups of buildings of undeniable historical or artistic significance; assets of great importance from the point of view of ancient religious worship; works of art produced by leading national artists; archaeological objects of artistic interest or historical significance; works of art by foreign artists integrated for a considerable time into public or private collections of a given country. Cf. A Venda Internacional de Obras de Arte, Coimbra, 1994, pp. 22 et seq.

Note 126. François Rigaux expresses its agreement with the choice of Directive. Cf. "Libre Circulation…" in op. cit., p. 110. Similarly, Susanna Quadri, "Il Regime dell' Unione Europea in Materia di Restituzione dei Beni Culturali Illecitamente Exportati" in La Restituzione dei Beni Culturali Rimossi com Particolare Riguardo alla Pratica Italiana, Milan, 2014, pp. 211 et seq.

Note 127. Although, on another occasion, François Rigaux raises several questions in order to identify a national treasure. In particular whether a Matisse, illicitly exported from Italy to the United States, can still be considered an Italian treasure or whether a Manet, sold in London, can become an English national treasure. Cf. "Le Commerce des Oeuvres d' Art dans le Marché Commun" in Études de Droit International en l' Honneur de Pierre Lalive, Bâle, 1993, p. 744. Still on the same issue, "Nations et Nationalismes au Cours des Deux Dernières Siécles" in Festchrift für Erik Jayme, Munique, 2004, pp. 1204 et seq..

Note 128. Cf. Article 5 of the Directive.

Note 129. In this sense, Jean-François Poli, after recognising that the protective purpose between the

Directive and the UNIDROIT Convention has similarities, states that the Convention is more understandable and appropriate. Cf. "Droit Communautaire, Compétences Culturelles des États Membre en Matière de Protection du Patrimoine National, et Convention d' UNIDROIT sur les Biens Culturels Volés ou Illicitement Exportés" in Révue du Marché Commun et de l' Union Européenne, no. 415, 1998, p. 91. For his part, José Sánchez Felipe recommends adapting European legislation to the guidelines of the UNIDROIT Convention. Cf. "El Convenio de UNIDROIT sobre los Bienes Culturales Robados o Exportados Ilícitamente, Hecho en Rome el 24 de Junio de 1995" in Revista Española de Derecho Internacional, Vol. 48, no. 1, 1996, p. 439.

Note 130. Cf. Article 2 of the Directive.

Note 131. Cf. Directive 96/100/EC of the European Parliament and of the Council.

Note 132. Cf. Directive 2001/38/EC of the European Parliament and of the Council.

Note 133. Cf. Article 8(1) of the Directive.

Note 134. Idem.

Note 135. As regards Spanish law, the strengthening of the powers of the central authority and the courts. Cf. Maria Jesús Benayas, "Transposición al Ordenamiento Español de la Directiva 2014/60/EU sobre Restitución de Bienes que Hayan Salido de Forma Ilegal de un Estado Miembro Mediante la Ley 1/2017" in Revista Española de Derecho Internacional, Vol. 70, no. 1 2018, pp. 181 et seq.; In German law, the possibility of adopting new protective legislation has been considered, with a view to unifying in a single piece of legislation the aspects relating to the movement, importation and return of cultural goods. On this issue, Lucas Elmenhorst and Moritz Wargalla, "Sinnloser Behördenaufwand oder drägende Notwendigkeit? Der Entwurf zur Neuregelung des Kulturgutschutzrechts" in Zeitschrift für Rechtspolitik, no. 15, 2016, pp. 1 et seq.; Henrike Weiden, "Kulturgutschutzgesetz: deutsche Bilder nicht mehr handelbar?" in Gewerblicher Rechtsschutz und Urheberrecht, 2015, pp. 1085 et seq..

Note 136. Law no. 30/2016, of 23 August, transposing Directive 2014/60/EU, regulates the regime for the restitution of cultural assets that have been unlawfully removed from the territory of a European Union member state.

Note 137. Cf. Article 3(1) of Law 30/2016.

Note 138. Cf. Article 11(1) of Law 30/2016.

Note 139. Cf. Mathias Weller, Rethinking EU Cultural Property Law: Towards Private Enforcement, Baden-Baden, 2018, pp. 40 et seq.

Note 140. Cf. Mathias Weller, Rethinking…op. cit., pp. 42 et seq.

Note 141. Cf. Mathias Weller, Rethinking…op. cit., pp. 46 et seq.

Note 142. Cf. Sophie Schönberger, "Der Entwurf…" in op. cit., pp. 62-3.

Note 143. On this topic, see Jason Lustig, "Who Are to Be the Successors of European Jewry? The Restitution of German Jewish Communal Archives" in Looted Art and Restitution in the Twentieth Century: Europe in Transnational and Global Perspective, Cambridge, 2014, pp. 11-12; Bianca Gaudenzi e Astrid Swenson, "Looted Art and the Restitution in the Twentieth Century: Towards a

Global Perspective" in Journal of Contemporary History, 2017, pp. 491 et seq.; Bruce Hay, Nazi-Looted Art and the Law, Cambridge, 2017, pp. 15 et seq..

Note 144. The Washington Declaration on the restitution of cultural assets confiscated by the Nazi authorities was adopted on 3 December 1998 at a conference to discuss the losses caused to the Jews. On this subject, see Lisiane Ody, "Restituição Internacional de Obras de Arte" in Revista da Escola de Magistratura do TRF da 4 ªRegi ão de Porto Alegre, no. 13, 2019, pp. 179 et seq..

Note 145. Cf. Gunnar Schnabel and Monika Tatzkow, Nazi Looted Art, Berlin, 2007, p. 44.

Note 146. The term has been used in a variety of contexts. In particular, in relation to the duty to report suspicions of money laundering and tax evasion. Cf. Max Heywood and Jessica Ebrard, Tainted Treasures: Money Laundering Risks in Luxury Markets, Berlin, 2017, pp. 19 et seq.

Note 147. According to Sandrine Giroud and Charles Boudry, the term due diligence is an ethical concept that seeks to guide professionals acting in the art market in aspects as diverse as lending, exporting and requisitioning works of art. Cf. "Art Lawyers' Due Diligence Obligations: A Difficult Equilibrium Between the Law and Ethics" in International Journal of Cultural Property, no. 22, 2015, pp. 405-6.

Note 148. On another occasion, we have distinguished between the following models of protecting the legal entitlement to movable assets: the fair deed; Hand wahre Hand; possession equals ownership and rebuttable presumption. See our "Bens Culturais. Posse não Vale Título?" in O Direito, no. 142, 2010, pp. 886 et seq..

Note 149. According to Lyndell Prott's opinion, another term would have been preferable because due diligence has been deployed differently under North American law. Thus, if he also disagrees with the locution "due diligence", he believes the expression "required diligence" to be more appropriate, which is able to move beyond the idea of degrees of diligence in favour of something required or demanded without any malleability. Cf. Biens Culturels…op. cit., p. 82.

Note 150. On this topic, Jan Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law" in New York University Journal of International Law and Politics, no. 36, 2004, pp. 265 et seq..

Note 151. Cf. Article 4(1) of the UNIDROIT Convention.

Note 152. Cf. Article 4(4) of the UNIDROIT Convention.

Note 153. Lyndell Prott mentions the airport customs office, the departure pier, night time, or even a very low price compared to market prices, as factors that may indicate suspicious circumstances. Cf. Biens Culturels…op. cit., pp. 83 et seq..

Note 154. Accordingly, Marc ílio Franca Filho, Matheus Vale, Nath álya Lins da Silva highlight, among other initiatives, the consultation of databases from INTERPOL, Carabinieri, UNODC, ICOM, Getty Provenance Index and Smithsonian Provenance Research Initiative. Cf. "Mercado de Arte, Integridade e Due Diligence no Brasil e no MERCOSUL Cultural" In Revista da Secretaria do Tribunal Permanente de Revis ão do Mercosul, Ano 7, no. 14, 2019, p. 266.

Note 155. Cf. Lyndell Prott, Biens Culturels…op. cit., p. 84.

Note 156. Cf. Gerte Reichelt, “20 Jahre…” in op. cit., p. 49.

Note 157. Cf. Article 9 of Directive 93/7/EEC.

Note 158. Cf. Article 10 of Directive 2014/60/EU

Note 159. According to Gerte Reichelt, a paradigmatic example of this fundamental principle arises from the case of Marei von Saher versus Norton Simon Museum. She also allows for the previous case of Thwaytes versus Sotheby's, concerning a painting attributed to Caravaggio, having already denoted this. Cf. “20 Jahre…” in op. cit., p. 49.

Note 160. Cf. Law no. 30/2016 of 23 August.

Note 161. Cf. Article 69(1) and (2) of the Basic Law.

Note 162. See our Manual…op. cit, pp. 164-5.

Note 163. Cf. Pires de Lima and Antunes Varela, Código Civil Yeartado, Vol. III, Coimbra, 1981, p. 20.\

Note 164. The lack of protection of the bona fide third party purchasing stolen assets appears, for example, in US law. Cf. Jean Sauveplanne, “The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law” in Rabels Zeitschrift für ausländisches und internationales Privatrecht, no. 4, Vol. 29, 1965, pp. 651 et seq.; Deborah DeMott, “Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Market” in Duke Law Journal, no. 3, Vol. 62, 2012, pp. 611 et seq.;

Note 165. Cf. Article 10(1) of the UNIDROIT Convention.

Note 166. Cf. Report of the Special Commission, UNESCO 16C/17, Annex II, 1969, pp. 6-7.

Note 167. Cf. Minutes of the 4th Expert Session, UNESCO doc. 48, 1970, pp. 238 et seq..

Note 168. In addition to paragraph 1, also Article 10, paragraph 2 of the UNIDROIT Convention.

Note 169. Cf. Article 10(3) of the UNIDROIT Convention.

Note 170. Let us recall, in this regard, the request for the return of Klimt's painting, entitled Portrait of Adele Bloch-Bauer, also known as the Golden Lady, decided by the Supreme Court of the United States in 2004, after a long dispute between Maria Altmann and the Republic of Austria. Cf. http//www.supremecourt.gov/opinions/03pdf.

Note 171. Cf. Gesetz über die Einziehung volks- und staatsfeindlichen Vermögens of 14 July 1933.

Note 172. Cf. Judgment of the German Constitutional Court, BverfG, of 14 February 1968.

Note 173. Cf. Holocaust Return of Cultural Objects Act of 12 November 2009.

Note 174. On this topic, see Alessandra Buonasera, La Destinazione dei Beni Confiscati alla Mafia, Caserta, 2020, pp. 26 et seq.

Note 175. For example , E. K. Agorsah, “Restitution of Cultural Material to Africa”, in Africa Spectrum, no. 12, 1977, pp. 305 et seq.

Note 176. The original title reads as follows: Rapport sur la Restitution du Patrimoine Culturel Africain. Vers Une Nouvelle Éthique Relationelle.

Note 177. Speech by the President of the French Republic, Emmanuel Macron, delivered at Ouaga I

University in Ouagadougou, on 29 November 2017. Cf. https: //www.elysee.fr/emmanuel-macron/2017.

Note 178. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 9 et seq..

Note 179. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 11.

Note 180. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 14.

Note 181. Accordingly, the Director-General of UNESCO stated that the peoples who were victims of colonial plunder had not only been dispossessed of irreplaceable masterpieces but had also been deprived of a memory that would help them to know themselves better and, likewise, the others around them. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 15.

Note 182. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 17.

Note 183. Felwine Sarr e Bénédicte Savoy deploy the term oxymoron in a sense equivalent to contradictory or paradoxical. Cf. Rapport sur la Restitution…op. cit., p. 24.

Note 184. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 24.

Note 185. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 25 et seq.

Note 186. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 32.

Note 187. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 28-9.

Note 188. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 38.

Note 189. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 43 et seq..

Note 190. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 51-2.

Note 191. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 53.

Note 192. On this item, the Report highlights, among others, as regards Benin, the statue of King Ghézo, the four doors of the royal palace as well as the thrones of the monarchs Glélè and Ghézo. As regards Senegal, the pieces correspond to the sack of Ségou, concerning the El Hadj treasure. For Mali, the goods collected by the Laboutet (1932); Dakar-Djibouti (1931-1933); Sahara-Sudan (1935) and Niger-Lago Iro (1938-1939) missions. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 55 et seq..

Note 193. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 54.

Note 194. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., pp. 57 et seq..

Note 195. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 59.

Note 196. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 61.

Note 197. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 67.

Note 198. Cf. Felwine Sarr, Bénédicte Savoy, Rapport sur la Restitution…op. cit., p. 63.

Note 199. Cf. Interview with Hélène Leloup, in Le Point-Culture newspaper, on 19 November 2018.

Note 200. Ibidem.

Note 201. https://www.youtube.com/watch?v=llbo5KwiqY0

Note 202. http://www.senat.fr/compte-rendu-commissions/20200217/cult.html

Note 203. Idem.

Note 204. Idem.

Note 205. Idem.

Note 206. Idem.

Note 207. https://www.gouvernement.fr/conseil-des-ministres/2020-07-15/restitution-de-biens-culturels-au-benin-et-au-senegal-?utm_source=emailing&utm_medium=email&utm_campaign=conseil_ministre_20200715

Note 208. Idem.

Note 209. Cf. Didier Rykner, “Restitutions: Un Project de Loi Basé sur des Falsifications de l’ Histoire” in La Tribune de l’ Art, July, 2020, pp. 1 et seq..

Note 210. Cf. Didier Rykner, “Restitutions …” in op. cit., p. 2.

Note 211. Cf. Didier Rykner, “Restitutions …” in op. cit., pp. 2-3.

Note 212. Cf. Yves-Bernard Debie, “La Restitution du Sabre d’ El Hadj Oumar Tall: Un Périlleux Galop d’ Essai au Mépris du Droit ed de l’ Histoire” in La Tribune de l’ Art, November, 2019, pp. 1 et seq..

Note 213. Cf. Yves-Bernard Debie, “La Restitution…” in op. cit., pp. 4-5.

Note 214. Cf. Yves-Bernard Debie, “La Restitution…” in op. cit., p. 5.

Note 215. Cf. “Duelo” in the Expresso newspaper, 15 December 2018, p. 7.

Note 216. Cf. interview by Leopoldo Amado, to LUSA news agency, on 12 November 2019.

Note 217. Cf. interview with Paulo Costa in Diário de Notícias, 28 January 2020.