Cultural Heritage: Property, Personhood, and International Returns

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Abstract

This thesis focuses on international claims for return of corporeal movable cultural heritage and the problems potential claimants face when seeking return of their heritage, particularly when resort is had to the traditional rules of private international law. It examines the difficulty of defining cultural heritage within a proprietary context and looks to the principle of legal personhood as an alternative way to govern claims for return. To draw inspiration, it examines the attribution of personhood to environmental objects, and looks to *Bumper Development Corporation v The Metropolitan Police and Ors* ([1991] 1 WLR 1362) in terms of what attribution of personhood might mean for extraterritorial recognition in the context of private international law. While the force of attributing legal personhood to objects of cultural heritage is largely rhetorical, it helps to change domestic attitudes surrounding the protection of cultural heritage. In particular, viewing cultural heritage through the lens of personhood, as not mere property but a type of 'quasi-person,' justifies an analogy to the successful return mechanism, the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Convention is examined as it might influence claims for return of objects of cultural heritage. The thesis proposes suggestions for an improved cultural heritage return mechanism.

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Author's Declaration

I declare that, except where explicit reference is made to contributions of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or other institutions.

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Introduction

'Cultural heritage' encompasses a wide variety of art, artifacts, and monuments, as well as rituals, traditional skills, and other aspects of intangible heritage.[1] To many, objects of cultural heritage hold meaning beyond mere property. For example, the president of the Council of Elders of Rapa Nui (Easter Island) stated regarding the four-ton lava rock sculpture, *Hoa Hakananai'a*, at the British Museum, 'This is no rock. It embodies the spirit of an ancestor, almost like a grandfather. This is what we want returned to our island – not just a statue.'[2]

Increasingly, the view is that cultural heritage is worthy of special protection, not only for the objects themselves, but for the communities to whom they are important.[3] This is demonstrated, for example, by increased ratification over the last decades of international instruments designed to prevent illicit trade of cultural property and facilitate returns.[4] However, for several reasons many potential claimants are unable to demand return of their heritage under these instruments. In international disputes, resort is often had to the rules of private international law,[5] in which cultural heritage is typically reduced to ordinary items of movable property. Given a recent surge in looting, trafficking, and illicit online sales,[6] exacerbated by COVID-19 and lockdowns worldwide,[7] return claims will likely only increase.

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[1] This thesis will only cover corporeal movable objects.
[2] John Bartlett, 'Easter Islanders call for return of statue from British Museum' (*The Guardian*, 4 June 2019) <https://www.theguardian.com/culture/2019/jun/04/easter-islanders-call-for-return-of-statue-from-british-museum> accessed 28 March 2021.
[3] Protection of cultural heritage is increasingly seen as fundamental to the protection of human rights (UNGA Cultural rights and the protection of cultural heritage, Resolution (Human Rights Council 22 March 2018) (A/HRC/RES/37/17)).
[4] E.g., 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
[5] While alternative dispute resolution has become increasingly common, private international litigation remains important for resolving cultural heritage disputes (Irini Stamatoudi, 'Alternative Dispute Resolution and Insights on Cases of Greek Cultural Property' (2016) 23(4) *International Journal of Cultural Property* 433).
[6] Tom Mashberg, 'Facebook, Citing Looting Concerns, Bans Historical Artifact Sales' (*NYTimes*, 23 June 2020) <https://www.nytimes.com/2020/06/23/arts/design/facebook-looting-artifacts-ban.html> accessed 28 March 2021.
[7] Agnès Bardon, 'Art Traffickers: Pillaging peoples' identities' (2020) *The UNESCO Courier 50 Years of the Fight Against the Illicit Trafficking of Cultural Goods* 5, 5.

This thesis explores means of improving upon the rules applicable to private international return claims for cultural heritage. **Chapter One** discusses the issues of scope and terminology pertaining to cultural heritage and their returns, particularly 'cultural property' and why that term is inappropriate.

Chapter Two looks at the law which currently applies to return claims for cultural heritage. It examines both the applicable international instruments and their return mechanisms, as well as the residual rules of private international law applicable to cultural heritage return claims. It explores why these rules fall short; predominantly, the treatment of cultural heritage as ordinary corporeal movable property governed by the rules applicable to normal proprietary transactions.

In order to examine cultural heritage disputes outside of a proprietary framework, **Chapter Three** explores the idea of attributing legal personhood to objects of cultural heritage. This may be seen as giving a voice to the objects themselves, as well as to communities in their claims for return that might otherwise be barred due to lack of standing. The chapter examines potential consequences that flow from this attribution. It looks to examples in environmental law and examines how legal personhood might apply to objects of cultural heritage. It examines *Bumper Development Corporation v Commissioner of Police of the Metropolis* [8] in detail regarding extraterritorial recognition of foreign legal personality, and it explores the potential use of a personal law connecting factor in this context. The chapter determines ultimately that the force of attributing personhood to inanimate objects is largely rhetorical. For the purposes of private international law, however, conceiving objects of cultural heritage through this lens - a type of quasi-personhood - allows an analogy to be drawn to the treatment of children under the law. Specifically, the analogy justifies looking to the very successful return mechanism in the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[9]

Chapter Four examines the 1980 Hague Convention and the ways in which it might influence the drafting of new rules for return mechanisms that might better apply to cultural heritage than those currently in use. It provides a reimagining of rules for a return mechanism for cultural heritage. This thesis provides a different perspective through which cultural heritage might be evaluated.

[8] [1991] 1 WLR 1362.
[9] HCCH, 25 October 1980.

1 Definition

1.1 Introduction

Cultural heritage law is complex, and its discourse is complicated by terminology, including the definition and scope of cultural heritage itself. Language is reflective of societal values and social constructs, and its use is important in framing cultural heritage laws and disputes.[10] For example, a property-oriented framework produces specific consequences and remedies, while a human rights-based approach will likely result in others. Cultural heritage law and discourse are evolving concepts that vary depending upon the approach taken, applicable laws and international instruments, and the outcomes desired.[11] It is therefore useful to examine what constitutes 'culture,' 'cultural property,' and 'cultural heritage,' as well as the significant terms 'repatriation,' 'restitution,' and 'return.'

1.2 Defining Cultural Heritage – A Framework

Traditionally, cultural heritage has been 'a realm of vivid contrasts and wildly conflicting ideals,'[12] and language describing cultural heritage is reflective of this.[13] For example, there is the traditional divide between so-called 'market states' - nations where cultural heritage enters the international art market, such as the United States and the United Kingdom- and 'source states' - those rich in cultural materials, often subjects of looting and trafficking fuelled by international demand, such as Greece and Italy, Syria and Iraq.[14] Dichotomies such as these provide a framework within which cultural heritage law is discussed and practiced.

To frame cultural heritage arguments, Sherry Hutt proposed six (sometimes overlapping) theoretical approaches: moralist, property law, scientific, market, nationalist, and

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[10] Karen Warren, 'A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues' in Phyllis Messenger (ed), *The Ethics of Collecting Cultural Property* (2nd Edn University of New Mexico Press 1999)14; Christa Roodt, *Private International Law, Art and Cultural Heritage* (Edward Elgar 2015) 6.
[11] Irini Stamatoudi, *Cultural Property law and Restitution: A Commentary to International Conventions and European Union Law* (Edward Elgar 2011) 4.
[12] Norman Palmer, 'Recovering Stolen Art' in Kathryn Tubb (ed), *Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues* (Archetype 1995) 27.
[13] James Nafziger, *The Cultural Heritage of Mankind* (Martinus Nijhoff 2008) 200.
[14] John Henry Merryman, 'The Nation and the Object' (1994) 3(1) *The International Journal of Cultural Property* 61; SRM Mackenzie, *Going, Going Gone: Regulating the Market in Illicit Antiquities* (Institute of Art and Law 2005) 8-9.

internationalist theories.[15] The cultural nationalist and internationalist approaches, terms coined by John Henry Merryman, an outspoken proponent of cultural internationalism,[16] are the most polarized. Cultural nationalism emphasizes preservation of cultural heritage within state boundaries, and is said to be supported by international cultural heritage instruments containing return mechanisms for states to claim their national cultural heritage.[17] Conversely, cultural internationalists stress that cultural heritage be conserved, yet widely accessible as a 'global public good.'[18] Merryman posited that cultural internationalists take an object-oriented approach as opposed to a nation-centered one,[19] and regard the nationalist perspective as politically motivated, producing extreme 'nationalist retentionist' laws, such as blanket state ownership legislation for undiscovered archaeological finds and strict export restrictions.[20]

While these theories may be useful to understand the basic context within which cultural heritage disputes operate, particularly when dealing with jurisdictions with sharply contrasting domestic cultural heritage laws, they can be abstract, reductive, and adversarial.[21] However, they are reflective of the frameworks that influence judicial reasoning and domestic and international legal instruments designed to protect cultural heritage.

1.2.1 What Counts as Cultural Heritage?

Cultural heritage engages diverse parties with varying interests and may encompass a wide array of objects. Objects deemed worthy of protection (whether internationally, nationally, within communities, or organizations) and how that protection is enacted legally (ratification of international instruments, existence of bilateral agreements, national legislation, professional codes of ethics, etc), differs greatly between jurisdictions. Therefore, defining

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[15] Sherry Hutt, 'Cultural Property Law Theory: A Comparative Assessment of Contemporary Thought' in Jennifer Richman and Marion Forsyth (eds), *Legal Perspectives on Cultural Resources* (Altamira Press 2004) 17-36.
[16] John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80(4) *American Journal of International Law* 831; Merryman 1994 (n14).
[17] E.g., 1970 UNESCO 'incumbent upon every State to protect the cultural property existing within its territory' (Preamble). Lorna E Gillies, 'The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects' (2015) 11(2) *Journal of Private International Law* 295, 300.
[18] 'Global public good,' referring to fundamental international values superior to individual states' interests (Alessandro Chechi, 'The 2013 Judgment of the ICJ in the *Temple of Vihear* Case and the Protection of World Cultural Heritage Sites in Wartime' (2015) 6(2) *Asian Journal of International Law* 353, 354).
[19] Merryman 1994 (n14).
[20] James Cuno, *Who Owns Antiquity?* (Princeton University Press 2008) 124; Merryman 1986 (n16) 847.
[21] Nafziger (n13) 200.

cultural heritage and objects which may be characterized as such is 'one of the most delicate [questions] to resolve.'[22] Texts often use terms to define cultural heritage interchangeably and there is no universally accepted definition of cultural heritage in international instruments.[23] Classification of objects is often left to the contracting state parties.[24] Defining what may be considered cultural heritage is important, for omission of objects means that they might not be protected by specific regimes, particularly if under dispute in a forum that does not recognize an object's cultural significance. This is especially a concern with objects significant to indigenous and other minority cultures.[25]

Given the range of interests and complexity of cultural heritage disputes, it is useful to examine more closely the core concepts of cultural heritage law discourse: culture, cultural property, and cultural heritage.

1.2.2 Culture

Characterizing an object or a practice as 'cultural' involves a value judgement.[26] It elevates an ordinary object to something significant, worthy of protection and preservation.[27] UNESCO defines culture as 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'[28] Culture may be reflected in, e.g., religion, laws, folklore, as well as the material culture, from, art to everyday items.[29] Culture influences a society's way of life and the materials they produce. Culture represents identity, and the products reflecting that culture can be emotionally connected to a community as part of their identity. This may be seen in the reaction of states or communities when demanding return of their heritage.

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[22] Marina Schneider, '1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects: Explanatory Report' (2001) 3 *Uniform Law Review* 476, 496.
[23] James Nafziger and Robert Kirkwood Paterson 'Cultural Heritage Law' in Nafziger and Kirkwood Paterson (eds) *Handbook on the Law of Cultural Heritage and International Trade* (Edward Elgar 2014) 1; Lyndel V Prott, 'The International Movement of Cultural Objects' (2005) 12(2) *International Journal of Cultural Property* 225; Stamatoudi (n11) 4.
[24] 1970 UNESCO Art 1; Directive 2014/60/EU Art 1(1).
[25] Roodt (n10) 6.
[26] Schneider (n22) 496; Christa Roodt and David Carey-Miller, 'Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law' (2013) 10(5) *Transnational Dispute Management* 1.
[27] Defining culture this way might also be particularly Western. (James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Harvard University Press 1988) 215-248); Richard Handler, 'Cultural Property and Culture Theory' (2003) 3(3) *Journal of Social Archaeology* 353, 359.
[28] 2001 UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, (47 ILM 57), Preamble.
[29] Nafziger (n13) 179-180; Roodt (n10) 2-5.

Parthenon Marbles

Consider the paradigmatic example of the Parthenon Marbles[30] residing in the British Museum since 1816. Greece has long demanded their return, maintaining that they are part of their identity. Melina Mercouri, former Greek Minister of Culture and Sports stated: "You must understand what the Parthenon Marbles mean to us. They are our pride. They are our sacrifices. They are our noblest symbol of excellence. They are a tribute to the democratic philosophy. They are our aspirations and our name. They are the essence of Greekness."[31] At the same time, it is argued that they have been implicitly adopted by the English, becoming part of its cultural heritage, not only because they have resided in London for 'longer than the modern state of Greece has been in existence,'[32] but also due to their influence on British culture.[33] As Merryman wrote, 'The Elgin Marbles and other works in the British Museum have entered British culture, help define the British to themselves, inspire British arts, give Britons identity and community, civilize and enrich British life, and stimulate British scholarship.'[34]

At what point can it be said that something has become part of a nation's cultural heritage? Regardless of legality, does Greece have a better claim to the Parthenon Marbles as part of their cultural identity? Are ancient Athenian sculptures inherently linked to modern-Greek identity?

Sevso Treasure

It is particularly difficult to reconcile claims made by modern nations for return of objects produced by ancient cultures markedly different than their own. This is especially true when modern borders do not correspond with the ancient civilization. Consider the Sevso (Seuso) Treasure, a hoard of fourth-century CE Roman silver illegally excavated from an unknown find spot, now believed to be Hungary.[35] It was purchased by the Marquess of Northampton in 1984 in Switzerland (following a failed sale to the Getty Museum due to forged export

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[30] It is worth noting opinions regarding language used: 'the term Elgin Marbles has the effect of ceding legitimacy to British seizure' (Rosemary Coombe, 'The Properties of Culture and the Politics of Possessing Identity' (1993) 6(2) *Canadian Journal of Law and Jurisprudence* 249, 263).
[31] Melina Mercouri, Speech to the Oxford Union, June 1986 <http://www.parthenon.newmentor.net/speech.htm >accessed 02 April 2021.
[32] Select Committee on Culture, Media and Sport, Minutes of Evidence, Annex IV: The Parthenon Sculptures (March 2000) 10.4.
[33] Nadia Banteka, 'The Parthenon Marbles Revisited: A New Strategy for Greece' (2016) 4(37) *University of Pennsylvania Journal of International* Law 1231, 1240.
[34] John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1915.
[35] Patty Gerstenblith, 'The meaning of 1970 for the acquisition of archaeological objects' (2013) 38 *Journal of Field Archaeology* 364, 372.

documents). In 1990 the Marquess consigned the silver to Sotheby's and the hoard was shipped to New York for sale. To ensure that it was not stolen or illegally exported, Sotheby's notified all 29 nations within the borders of the Roman Empire in the fourth-century.[36] Subsequently, Lebanon, Hungary, and the Socialist Republic of Yugoslavia, whose claim was replaced by Croatia following the fall of Yugoslavia, claimed the Treasure as their own. Ultimately, following withdrawal of Lebanon's claim and rejection of those by Hungary and Croatia, the Sevso Treasure was returned to the Marquess in London. Years later, Hungary purchased the hoard in two private sales in 2014 and 2017 for 15 million and 28 million euros respectively. Hungary's Prime Minister Viktor Orbán thereafter stated that "Hungary's family silver is coming home."[37] This case illustrates the difficulty of attributing cultural continuity and any sort of claim of belonging over objects made by markedly different ancient cultures based solely on modern day boundaries 'of origin.'

The reactions from government officials regarding the Parthenon Marbles and the Sevso Treasure illustrate how cultural heritage transcends ordinary property and represents cultural identity. Their intrinsic worth, while often of extreme monetary value, transcends economic value. They are 'the outcome of human creativity and express meanings distinct from the commercial value that they may possess'[38] and have attained a special status inseparable from a group's identity.[39] The Parthenon Marbles and the Sevso Treasure also emphasize that culture is fluid; geographical boundaries change, people and their creations move around the world, influence and are influenced by each other. While cultural heritage is representative of identity, one that may be felt deeply and emotionally, it may be a direct or derivative identity claimed by many.

Mercedes

States with original, cultural, historical, or archaeological links are given so-called 'preferential rights' for preservation and disposal of cultural heritage in the context of the law of the sea, where state boundaries may be irrelevant for objects found in international waters (and thus beyond the limits of national jurisdiction). The UN Convention on the Law

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[36] *Republic of Lebanon v Sotheby's, the Trustee of the Marquess of Northampton Settlement, and the Socialist Federal Republic of Yugoslavia* 167 AD.2d 142, 561 NYS.2d 566 (NY S.Ct 1990).
[37] David Landry, 'Sevso Treasure,"Hungary's family silverware," returned (*Budapest Business Journal* 26 March 2014) <https://bbj.hu/budapest/sevso-treasure-hungarys-family-silverware-returned_77609> accessed 28 March 2021).
[38] Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014) 11.
[39] Patty Gerstenblith, 'Identity and Cultural Property: The Protection of Cultural Property in the United States' (1995) 75 *Boston University Law Review* 559, 569-570.

of the Sea states that, 'all objects of an archaeological and historical nature found in the Area [international waters] shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.'[40] Similarly, the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage frequently mentions the inclusion of states with 'a verifiable link [to the cultural heritage], especially a cultural, historical or archaeological link.'[41] However, enforcement of these 'preferential rights' raises complications, as no clarification is given where multiple claims arise.[42] Consider the Spanish warship sunk in 1804, *Nuestra Señora de las Mercedes*. A US company discovered the wreck, excavating a hoard of artifacts and gold and silver coins. It transported the treasure to the US and filed suit claiming its seizure.[43] Spain subsequently filed claim, asserting Spanish origin of the ship. Peru claimed ownership of the treasure, asserting that it had originated from its territory and formed part of its cultural patrimony. Peru argued that the case did not concern sovereign rights to the ship, but rather entitlement to heritage culturally and physically originating in Peru. Bolivia also inquired about identifying the treasure's origin. In the end, the court granted Spain's motion to vacate arrest of the *Mercedes* and the treasure was transported to Spain.[44]

1.2.3 Cultural Property

The term 'cultural property,' a term used frequently in legal discourse, is incongruous with the definition of culture as identity, as it emphasizes a narrow, Western legal conception of ownership.[45] The term first appeared in English in an international legal context in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[46] It is derived from long-established civil law language, for example, *biens culturels* in French and *beni culturali* in Italian.[47] **'**Cultural property' is used in the 1970 UNESCO Convention

[40] (10 December 1982) 1833 UNTS 397, Art 149.
[41] Arts 6(2), 7(3), 9(5), 11(4)-(5), 18(3)-(4); Andrzej Jakubowski, *State Succession in Cultural Property* (Oxford University Press 2015) 253-254, 317-318.
[42] Jakubowski (n41) 253-254, 312-318.
[43] *Odyssey Marine Exploration Inc v the Unidentified Shipwrecked Vessel*, 675 F.Supp. 2d 1126 (M.D. Fla. 2009) (proceedings *in rem* under US admiralty law).
[44] Based on Foreign Sovereign Immunities Act 28 USCA §1602 and principle of comity of nations (*Odyssey Marine Exploration Inc v the Unidentified Shipwrecked Vessel*, 675 F.Supp. 2d 1126 (M.D. Fla. 2009)); Jakubowski (n41) 312-318; Patrizia Vigni,'The Enforcement of Underwater Cultural Heritage by Courts' in Francesco Francioni and Ana Vrdoljak (eds) *Enforcing International Cultural Heritage Law* (Oxford University Press 2013) 128-133.
[45] Chechi (n38) 14-15.
[46] (14 May 1954) 249 UNTS 240, Art 1.
[47] Lyndel V Prott and Patrick J O'Keefe, ''Cultural Heritage' or 'Cultural Property'?' (1992) 1(2) *International Journal of Cultural Property* 307, 312; Manilo Frigo 'Cultural property v cultural heritage, A "battle of concepts" in international law?' (2004) 86(854) *International Review of the Red Cross* 367, 367.

on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which defines it as 'property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science' that belong to a wide range of categories, from natural specimens to art and archaeology.[48]

'Cultural property' is rooted in Western legal tradition, one that prioritizes property ownership[49] and 'commercial convenience.'[50] It is reflective of Western-European history of colonialism and collecting, rooted in power structures that prioritize certain cultures over others. Property connotes ownership and the associated Western legal rights, such as destruction or restricted access to property,[51] concepts that may be unfamiliar or have different meanings in other legal systems when relating to cultural heritage.

Margaret Radin's theory of property and personhood is useful as means of understanding this relationship. She posits that certain property is so closely bound with personhood that it is constitutive of individual identity, and as a result deserves greater protection and is above commodification.[52] She explained that the significance of a personal relationship with an object could be gauged by the pain that it would cause the person if it were lost.[53] However, Radin's theory is centered around the idea of *individual* personhood, which does not adequately describe the relationship that some communities have to their heritage. She touches on claims from minority groups, but still based on the idea of individual autonomy: 'their claims would seem stronger because more clearly necessary to their being able to constitute themselves as a group and hence as persons within that group.'[54] Joseph Sax called for recognition of a type of qualified ownership based upon a community's 'rightful stake' in certain important objects. This would limit the rights of private owners to, as the title of his book suggests, 'play darts with a Rembrandt.'[55]

[48] 1970 UNESCO Art 1(a)-(k).
[49] Nafziger and Paterson (n23) 1; Prott and O'Keefe (n47) 310.
[50] *Winkworth v Christie, Manson & Woods, Ltd* [1980] Ch.496, 512-513 per Slade J.
[51] Joseph L Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999).
[52] Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957*;* Kristen A Carpenter, Sonia Katyal and Angela Riley, 'In Defense of Property' (2009) 118(6) *Yale Law Journal* 1022, 1046-1048.
[53] Radin (n52) 959.
[54] Radin (n52) 1013; Carpenter, Katyal and Riley (n52) 1048.
[55] Sax (n51).

Some cultures may not have a concept of property or ownership at all.[56] Some communities view cultural objects as animate entities engaging with the community, which 'throws the legal and mechanistic narratives on restitution into disarray […]. It forces confrontation on the reality that the terms of our intellectual engagement come from a specific historically and politically situated discourse with a dominant version of Western Modernity.'[57]

Consider certain ritual objects believed to embody divine spirits, that belong to but are not owned by their communities, such as *ahayu:da*, statues representing personified gods of the Zuni Pueblo[58] or *katsinam*, sacred masks embodying ancestral spirits of the Hopi Tribe.[59] Another example is Maori *taonga*, objects that, translated roughly into English, can mean property, anything highly valued, and/or something of influence. They are considered to be the ancestors themselves.[60] 'Cultural property' with its connotations of ownership is simply incompatible with such beliefs.[61]

1.2.4 Cultural Heritage

As means of accounting for these differences and avoiding possible misinterpretations of the meaning of property, it is argued that 'cultural heritage' be used in lieu of 'cultural property.' It is the preferred term in other cultural heritage disciplines, such as archaeology and anthropology,[62] and it has been used in post-1970 UNESCO conventions, such as the 2001 Convention on the Protection of Underwater Cultural Heritage and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. The shift in terminology denotes a shift away from the narrow treatment of cultural heritage as simple corporeal property.

'Heritage' connotes lineage, something passed down or inherited. 'Cultural heritage' encompasses the objectives at the heart of international cultural heritage law in a way that

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[56] Prott and O'Keefe referenced *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, and the Yolngu people's conception of ownership: 'rather than believing that the land belonged to them, they believed that they belonged to the land.' (Prott and O'Keefe (n47) 310).
[57] Yannis Hamilakis, 'A Semiotics of Cultural Property Argument' (2007) 14(2) *International Journal of Cultural Property* 160, 162.
[58] Adele Merenstein, 'The Zuni Quest for Repatriation of the War Gods' (1992) 17(2) *American Indian Law Review* 589.
[59] Jonathan Liljeblad, 'The Hopi, the *katsinam*, and the French courts: looking outside the law in the repatriation of Indigenous Cultural heritage' (2016) *International Journal of Heritage Studies* 1.
[60] AH Angelo, 'Personality and Legal Culture' (1996) 26(2) *Victoria University of Wellington Law Review* 395, 396.
[61] 'Cultural objects' is used Directive 2014/60/EU and 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. While an object implies something to be owned, the subject of ownership, 'cultural objects' is relatively more neutral than 'cultural property.'
[62] Prott and O'Keefe (n47) 310, 319.

'cultural property' does not. For example, those of preservation, protection and access, [63] as well as cultural diversity and pluralism.[64] For these reasons, 'cultural heritage' or 'cultural objects,' as opposed to 'cultural property,' will be used throughout when referring to the subjects of this thesis, notably corporeal movables.

In the end, coming to a precise and internationally accepted definition of what cultural heritage entails is likely impossible[65] given the enormity of objects and the diversity of parties and their varied interests. What is common is the importance of the material. Regardless of the term employed, the cultural significance of an object is clear and self-explanatory, particularly when an object of cultural heritage, and thus its importance, is under dispute.

1.3 Repatriation, Restitution, Return

'Repatriation,' 'restitution,' and 'return' are at the heart of cultural heritage disputes.[66] While used interchangeably in practice, they apply to different factual situations and may have distinct legal implications, particularly in the context of cultural heritage regulations.

1.3.1 Repatriation

'Repatriation' denotes the restoration of cultural heritage to its country of origin. It is rooted in the notion of belonging to a place or a people.[67] Contrary to its literal meaning, 'repatriation' may apply to intra-state claims, particularly the return of human remains and cultural objects to indigenous communities.[68] As Lyndel Prott observed, "There are special resonances turning around 'repatriation' or 'return to country' in the Indigenous context. […] embodiment of identity, people and belief brought together in the idea of 'country.' Here the relationship to 'Country' is by no means a term of property, ownership, civil law or citizenry."[69] In general, 'repatriation' signifies cultural integrity as opposed to ownership rights.

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[63] Prott and O'Keefe (n47) 310.
[64] 2001 UNESCO Universal Declaration on Cultural Diversity.
[65] Beat Schönenberger, *The Restitution of Cultural Assets* (Eleven International 2009) 40; Roodt (n10) 5.
[66] Also 'reparation,' but typically regarding redress for victims after damage to cultural heritage in war/other conflicts; *Prosecutor v Al Mahdi*, ICC-01/12-01/15, Reparations Order (17 Aug 2017). Al Mahdi charged with war crime of destruction of protected cultural heritage sites in Timbuktu. Reparations ordered for economic and moral losses, individually and collectively, to the community (Oumar Ba, 'Who are the Victims of Crimes Against Cultural Heritage? (2019) 41(3) *Human Rights Quarterly* 578).
[67] Stamatoudi (n11) 14-17.
[68] E.g., Native American Graves Protection and Repatriation Act (25 USC Ch32 §3001).
[69] Lyndel V Prott, 'Note on Terminology' in Lyndel V Prott (ed), *Witness to History* (UNESCO 2009) xxiii.

1.3.2 Restitution

'Restitution' is a legal term in civil and common law systems. As a specific remedy, it entails the defendant giving back something that has been taken from the claimant. The defendant's gain reflects the claimant's loss, and a court redresses this. Generally, the remedy of restitution aims to restore a party to their original position and provide reparation for injury. For cultural heritage, this could mean return of an object to its original holder, and/or, depending on the legal system, compensation.[70] 'Restitution' presumes a lack of authorisation and is associated with ownership in many jurisdictions. Historically 'restitution' was used for cultural heritage pillaged in war, and came to include the restoration of both wartime plunder and objects removed during colonialism.[71] However, former colonizing States 'were very sensitive to the vigorous criticism of colonization' and 'uncomfortable with any implication that the cultural items being sought from their museums had been stolen or that their taking was an injury for which reparation was due.'[72] Pushback against its use in colonial contexts was supported by the argument that removals complied with existing international law and domestic legislation.[73] The strictly legal connotation of 'restitution' has diminished in modern cultural heritage law.[74] It is posited that 'restitution' should not apply in cultural heritage law as a term "of 'ownership' but as one of justice; not as a matter of legality, but as one of legitimacy."[75] 'Restitution' connotes giving back what was wrongfully taken.

1.3.3 Return

'Return' has become an autonomous term,[76] preferred over 'restitution' for heritage removed during colonialization, and in this context the illegality of removal is not implied.[77] 'Return' is frequently used in international cultural heritage instruments.[78] Returns made under these

[70] Prott 2009 (n69) xxi; Stamatoudi (n11) 15-16.
[71] E.g., UNGA Restitution of works of art to countries victims of expropriation, 18 December 1973 (A/RES/3187) (referring to restitution of objects removed 'as a result of colonial or foreign occupation'); Wojciech Kowalski, 'Types of Claims for Recovery of Lost Cultural Property' (2005) 57(4) *Museum International* 85, 85-96.
[72] Prott 2009 (n69) xxi-xxii.
[73] Kowalski (n71) 96-97.
[74] Stamatoudi (n11) 15-16.
[75] Prott 2009 (n69) xxi.
[76] Kowalski (n71) 96.
[77] Marie Cornu and Marc-André Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' (2010) 17(1) *International Journal of Cultural Property* 1, 3.
[78] 1970 UNESCO 7(b)(ii); 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State. The terms 'return' (stolen cultural objects) and 'restitution' (illegally exported objects) are separate in 1995 UNIDROIT Convention.

instruments are based on illegality, however, in general 'return' is a fairly impartial term,[79] 'not generally associated with the rectification of a 'wrong' or the amendment of an 'injury.''[80] Given its relative neutrality and the variety of cases cited, the term 'return' will be used throughout this thesis, unless in reference to specific sources using other terms.

1.4 Conclusion

To recap, this thesis will use the terms 'cultural heritage' and 'return' throughout. The idea of cultural heritage is geographically and culturally diverse. Nuance and sensitivity must be had not only in the manner in which objects of heritage are used, preserved, and studied, but should also be reflected in the ways in which disputes over such heritage are handled. As will be discussed, this unfortunately is not always the case.

[79] Prott 2009 (n69) xxi.
[80] Stamatoudi (n11) 17-18.

2 The Law Pertaining to International Claims for Return

2.1 International Cultural Heritage Rules

Special rules for protection, preservation, and recovery of cultural heritage are contained in several international instruments.[81] The primary instruments facilitating return of objects of cultural heritage will be discussed briefly below, namely the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[82] the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects,[83] and Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State,[84] as well as the First Protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[85]

2.1.1 First Protocol 1954 Hague Convention

An early return mechanism was introduced by the First Protocol to the 1954 Hague Convention following the destruction of cultural heritage during World War II.[86] It requires contracting states to prevent exportation of cultural heritage from any territory under its occupation.[87] States must seize objects imported directly or indirectly from occupied territories, automatically or on request from the occupied territory, regardless of a possessor's good faith. They must return them to authorities in the former occupied territory at the close of hostilities.[88] No time limitations are specified. The occupying state shall pay an indemnity to holders in good faith of cultural property returned,[89] however, no guidance is provided.[90]

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[81] Smaller-scale agreements also exist, such as bilateral agreements.
[82] (14 November 1970) 823 UNTS 231.
[83] (24 June 1995) 34 ILM 1322.
[84] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 and amending Regulation (EU) No.1024/2012 (Recast) OJ L159/1.
[85] (14 May 1954) 249 UNTS 358.
[86] It was not intended as a separate document, but states opposed seizure/return provisions (i.e., private law aspects) in Convention's main text. (Patrick J O'Keefe and Lyndel V Prott, *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries* (Institute of Art and Law 2011) 35).
[87] First Protocol I(1).
[88] Ibid, I(2)-(3).
[89] Ibid, I(4); Lyndel V Prott, 'UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects' (1996) 1(1) *Uniform Law Review* 59, 67.
[90] O'Keefe and Prott (n86) 36.

While the First Protocol was an important early instrument acknowledging the need to return objects looted during occupation, it is rarely used. Its scope is narrow, as the law of occupation only applies to international armed conflict.[91] Not all states involved in potential export-seizure-return relationships will necessarily be contracting parties, thus obtaining returns might be difficult.[92] Additionally, many states do not have implementing legislation to address situations in which domestic property and ownership laws conflict with First Protocol provisions, which has prevented states from fulfilling return obligations.[93] Reservations regarding seizure and return[94] are also allowed, which may permit states to prioritize domestic law over First Protocol provisions.[95] Lastly, private owners of any cultural heritage removed during armed conflict would require state support to request return of their cultural heritage.

2.1.2 1970 UNESCO Convention

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property established a framework for state collaboration in preventing and recovering unlawfully removed cultural heritage.[96] The Convention has been highly influential. It has inspired adoption of domestic cultural heritage laws,[97] and highlighted the problems caused by illicit trade and the consequences to global cultural heritage. It marked a normative shift in the ethics of collecting.[98] Following its adoption on 14 November 1970, major museum associations, such the International Council of Museums (ICOM), implemented codes of ethics reflecting the Convention's principles.[99] The 1970 UNESCO Convention marked a 'watershed in museum attitudes and practice, separating off the years before 1970, when the problems caused by illicit trade were either

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[91] Liesbeth Lijnzaad, 'Sleeping Beauty, the Untold Story of the First Protocol to the 1954 Hague Convention' in van Woudenberg and Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict* (Martinus Nijhoff 2010) 148.
[92] Currently 133 state parties to the Convention; 110 to the First Protocol. <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/>accessed 01 February 2021; Lijnzaad (n91) 150.
[93] *Greek Autocephalous Orthodox Church in Cyprus v Lans* (Court of Rotterdam, 4 Feb 1999), in S Matyk, 'The Cypriot Icons in The Netherlands (*Lans* Case)' in Lyndel V Prott (ed), *Witness to History* (UNESCO 2009) 386-387.
[94] First Protocol I-II.
[95] See Japan's reservations in O'Keefe and Prott (n86) 37.
[96] Christa Roodt, *Private International Law, Art and Cultural Heritage* (Edward Elgar 2015) 123.
[97] Some specifically implementing the Convention (Convention on Cultural Property Implementation Act 19 USC§§2601-13), others based on the Convention (Dealing in Cultural Objects (Offences) Act 2003) (Patty Gerstenblith, 'Implementation of the 1970 UNESCO Convention by the US and other Market Nations' in Jane Anderson and Haidy Geismar (eds) *Routledge Companion to Cultural Property* (Routledge 2017).
[98] Roodt (n96) 134.
[99] 'cultural institutions, museums […] should ensure that their collections are built up in accordance with universally recognized moral principles' (1970 UNESCO Preamble).

not widely known or thought to be unimportant, from the time afterwards, when the problems became better known and of mounting concern in the museum world.'[100]

Article 7(b)(ii) of the 1970 UNESCO Convention provides for return of stolen cultural objects specifically designated by each state.[101] Returns are limited to 'clear and egregious'[102] cases, specifically, documented objects stolen from museums, public monuments, or similar institutions.[103] Return requests may be brought by contracting state parties through diplomatic offices.[104] Where a return is ordered, the requesting state must pay 'just compensation' to an innocent purchaser (not defined), or one with valid title to the object.[105] While the Convention contains no rule for time limitations for claims, state parties, in implementing the Convention, may apply their national rules.[106] All documentation and evidentiary expenses, as well as return and delivery costs, are the responsibility of the requesting state.[107] (Which, in litigation would be borne by the losing party.)

While the 1970 UNESCO Convention is influential and relatively widely adopted,[108] its return provision is limited. The scope of objects covered is narrow, excluding unregistered, illicitly excavated, or illegally exported objects. Claims for return depend on contracting state intervention, leaving no recourse for private parties without state support, particularly if claimants are seeking return of non-state-designated cultural objects.

2.1.3 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention on stolen or illegally exported cultural objects complements and is compatible with the 1970 UNESCO Convention. At UNESCO's behest, UNIDROIT drafted rules to govern the private law issues relating to transfers of illegally acquired objects not addressed in the UNESCO Convention.[109] The 1995 UNIDROIT

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[100] Neil Brodie, 'Provenance and Price: Autoregulation of the Antiquities Market?' (2014) 20(4) *European Journal on Criminal Policy and Research* 427, 440.
[101] And meeting Art 1 criteria.
[102] Paul M Bator, 'An Essay on the International Art Trade' (1982) 34(2) *Stanford Law Review* 275, 354; Isabelle Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (Transnational Publishers 2004) 19-20.
[103] 1970 UNESCO Art 7(b)(i)-(ii).
[104] Ibid, Art 7(b)(ii).
[105] Ibid. Some states made reservations to Art 7(b)(ii) regarding the payment of compensation (Declarations and Reservations).
[106] Prott 1996 (n89) 66.
[107] 1970 UNESCO Art 7(b)(ii).
[108] Currently ratified by 140 state parties <https://en.unesco.org/fighttrafficking/1970> accessed 01 April 2021.
[109] Prott 1996 (n89) 61.

Convention is centered around the return of stolen and illegally exported cultural objects.[110] It is the only international heritage instrument that covers private civil claims for return,[111] providing a mechanism for personal right of recovery without state intervention.

Claims may be brought before the courts of the contracting state where a cultural object[112] is located (or others with jurisdiction according to the laws of the applicable contracting states).[113] Stolen objects, which includes those unlawfully excavated,[114] must be returned.[115] For illegally exported objects, a contracting state may request an object's return[116] on the condition that its removal significantly impairs, *inter alia*,[117] the object's physical preservation,[118] its traditional or ritual use by a tribal or indigenous community,[119] or it is established to be of significant cultural importance to the requesting state.[120] There are two periods in which claims must be brought, one relative and one absolute. The relative period asserts that claims must be brought within three years of discovery of an object's location and identity of its possessor. [121] This rule was seen as being in the best interest of the claimant.[122] The absolute limit is within fifty years from the time of the theft, [123] which was designed to safeguard the rights of the possessor.[124] For certain stolen objects, there is an exceptional period in which states may allow a time limitation of 75 years 'or such longer period as is provided in its law.'[125] The Convention applies from the date of entry into force in the state where a claim is brought,[126] however it does not limit the right to make a claim under remedies outside the framework of the Convention.[127]

[110] Roodt (n96) 231-232; Marina Schneider, 'The 1995 UNIDROIT Convention: An indispensable complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive' (2016) 2 *Santander Art & Culture Law Review* 149.
[111] Lorna E Gillies, 'The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects' (2015) 11(2) *Journal of Private International Law* 295, 297.
[112] A wide range of categories of objects are covered by the Annex.
[113] 1995 UNIDROIT Art 8(1).
[114] Ibid, Art 3(2), according to the law of the state where the excavation took place.
[115] Ibid, Art 3(1).
[116] Ibid, Arts 5(2), 6(3)(a) (State may agree that possessor retains object instead of compensation).
[117] Ibid, Art 5(3).
[118] Ibid, Art 5(3)(a).
[119] Ibid, Art 5(3)(d).
[120] Ibid.
[121] Ibid, Art 3(3), 5(5).
[122] Marina Schneider, '1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects: Explanatory Report' (2001) 3 *Uniform Law Review* 476, 508.
[123] 1995 UNIDROIT Arts 3(3); 5(5).
[124] Schneider 2001 (n122) 508.
[125] 1995 UNIDROIT Art 3(3).
[126] Ibid, Art 10(1).
[127] Ibid, Art 10(3).

Possessors of objects to be returned are entitled to fair and reasonable compensation provided they exercised due diligence.[128] That is, they 'neither knew nor ought reasonably to have known' of the object's wrongful removal and can prove due diligence in acquisition of the object. Regard will be had to all circumstances surrounding acquisition.[129] The due diligence requirement in Article 4 has the effect of limiting protections afforded to good faith possessors in civil legal systems. (See *2.2.4.1* below regarding good faith possession.) The Convention's due diligence standard, 'a benchmark for the evaluation of due diligence,'[130] has been influential beyond the rules of the Convention.[131]

The Convention specifies that reasonable efforts must be made to hold the transferor(s) of stolen objects accountable for compensation if consistent with the law of the forum state.[132] Otherwise, the dispossessed owner or the requesting state is responsible for compensation.[133]

While the 'genuine restitution machinery'[134] of the 1995 UNIDROIT Convention is commendable, it has limitations. Most significantly is its lack of application due to limited ratification. The Convention's prohibition on reservations, requirement of compensation, wide scope of heritage covered, and the length of time limitations and 'the limited factors which trigger them' have been cited as reasons against accession.[135] Notably, the UK deemed limitation periods 'the greatest barrier to the adoption of the UNIDROIT Convention.'[136] The limitation periods were seen as too generous for potential claimants, particularly those who 'fail[ed] to take obvious and reasonable steps'[137] to discover an object's location and identity of the possessor, to the detriment of possessors who had exercised due diligence in acquisition.[138]

[128] Ibid, Arts 4(1), 6(1).
[129] Ibid, Arts 4(4), 6(2).
[130] Schneider 2016 (n110) 157.
[131] For example, it is included in the domestic legislation of some signatory states that have not ratified the Convention, such as Switzerland (Swiss Federal Act on the International Transfer of Cultural Property of 20 June 2003, Art 16) and the Netherlands (Dutch Civil Code, Art 3:87a) (Schneider 2016 (n110) 157).
[132] 1995 UNIDROIT Art 4(2).
[133] Ibid, Art 6(4).
[134] European Commission Study on preventing and fighting illicit trafficking in cultural goods in the EU (October 2011) *CECOJI-CNRS-UMR 6224*, 203.
[135] Ministerial Advisory Panel on Illicit Trade (ITAP) Report December 2000, Department for Culture Media and Sport 49, 48-53; Lyndel V Prott, 'The Unidroit Convention Ten Years On' (2009) *Uniform Law Review* 215, 222.
[136] ITAP Report 50.
[137] Ibid.
[138] Ibid, 49-53.

The failure of many states to accede, particularly 'market/import' states such as the UK and the US, is attributed to heavy opposition from the art trade.[139] Furthermore, several signatory states have failed to ratify the Convention, such as France, Switzerland, the Netherlands, and Russia.[140] While their domestic laws may meet or exceed the Convention's requirements, such as that of due diligence, for example, through alignment with relevant EU legislation (particularly Directive 2014/60/EU, as discussed in *2.1.4* below), or other domestic legislation (as discussed at *n131* above), it is still notable that the Convention has not been ratified.[141] These factors greatly limit the Convention's reach and applicability. While its rules were carefully drafted, taking into account numerous interests and balancing the needs of claimants and possessors, its impact as a viable return mechanism remains limited.

2.1.4 Directive 2014/60/EU

The 1995 UNIDROIT convention influenced the 'so-called Return Directive,'[142] Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.[143] It functions in combination with Council Regulation (EC)116/2009 on the export of cultural goods[144] and Regulation (EU) 2019/880 on the introduction and the import of cultural goods.[145] The Directive provides a system of administrative cooperation between EU Member States, working closely with institutions such as Interpol,[146] allowing them to bring proceedings before national courts for return of cultural objects unlawfully removed from their territories. The Directive's objective is to ensure return of such objects to Member States irrespective of property rights.[147]

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[139] Prott 2009 (n135) 231.
[140] 50 contracting state parties <https://www.unidroit.org/status-cp>(accessed 02 April 2021).
[141] For example, the 2018 Sarr-Savoy Report on the restitution of African cultural heritage encourages France's ratification of the UNIDROIT Convention to address inconsistencies in restitution claims between EU and non-EU states: 'The compensation for this imbalance and the writing of a common law of restitution between France and Africa requires that both the (sic) France and the African states concerned ratify the UNIDROIT Convention […] This convention puts in place an automatic mechanism of restitution for any future claims. […] We will note that the European states have already established such an ambition among themselves by infusing the principles of the 1995 UNIDROIT Convention into the European directive of May 15, 2014 [Directive 2014/60/EU] […] the extension of these principles to extra-European states, using the 1995 UNIDROIT Convention as a springboard, shouldn't pose any difficulties.' (Felwine Sarr and Bénédicte Savoy, *Rapport sur la restitution du patrimoine culturel africain. Vers une nouvelle éthique relationnelle*. (*Ministère de la culture*, Drew S Burk (tr) 2018) 85).
[142] *R (on the application of Simonis) v Arts Council England* [2020] 3 CMLR 22 [48].
[143] Prott 2009 (n135) 223.
[144] Council Regulation (EC) No 116/2009 of 18 Dec 2008 on the export of cultural goods OJ L 39/1.
[145] Regulation (EU) 2019/880 on the Introduction and import of cultural goods [2019] OJ L151/1.
[146] Directive 2014/60/EU Preamble (8).
[147] Ibid.

Directive 2014/60/EU recast Council Directive 93/7/EEC,[148] under which proceedings could be brought by Member States for return of national treasures[149] (belonging to categories in its Annex meeting specific age and financial thresholds) unlawfully removed from their territory on or after 1 January 1993.[150] However, after nearly two decades, Council Directive 93/7/EEC proved ineffective.[151] Member States reported lack of use due to restrictive scope of objects, short limitation period, and high costs associated with proceedings.[152] Nevertheless, they reported that the Council Directive had a preventative effect against unlawful removals, and that it was a 'useful tool for the recovery of certain cultural objects removed unlawfully from the territory of a Member State, and for protecting heritage.'[153] While return proceedings were rare, amicable out of court returns increased after its entry into force.[154] In the UK, for example, regarding the Directive's implementing instrument,[155] '[i]n the 24 years since this regulation was introduced, the powers have not needed to be used – all concluded cases involving the UK have been resolved without the need to revert to national or EU courts.'[156]

Directive 2014/60/EU was drafted with the above criticism in mind. The Council of the European Union recommended universal ratification of the 1970 UNESCO and 1995 UNIDROIT Conventions to complement the Directive, but this was ultimately abandoned.[157] However, encouraged by Member State demand to extend the limitation period,[158] Directive 2014/60/EU aligned with the UNIDROIT Convention and extended it from one year to three years following date of discovery, maintaining the thirty-year period

[148] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L 74/74.
[149] Within the meaning of Art 36 (Treaty on the Functioning of the European Union [2016] OJ C202/1). Derogation from the principle of free movement of goods between Member States. (93/7/EEC Art 1).
[150] Directive 93/7/EEC Art 13.
[151] Schneider 2016 (n110) 160; Third (COM/2009/0408) and Fourth Reports (COM/2013/0310) on the application of Council Directive 93/7/EEC.
[152] Directive 2014/60/EU Preamble (4), (8); Maciej Górka,'Directive 2014/60/EU: A New Legal Framework for Ensuring the Return of Cultural Objects within the European Union' (2016) 2 *Santander Art & Culture Law Review* 27, 29.
[153] Third Report 93/7/EEC, 5.
[154] Geo Magri, 'Directive 2014/60/EU and Its Effects on the European Art Market.' (2016) 2 *Santander Art & Culture Law Review* 195, 202. Member States reported '148 actual returns of cultural objects following negotiations between the national authorities, without recourse to the courts' (Third Report 93/7/EEC, 4.2; Annex), and 22 amicable out of court settlements (Fourth Report (Annex)).
[155] The Return of Cultural Objects Regulations 1994 (SI 1994/501) amended by Return of Cultural Objects (Amendment) Regulations 2015 (SI 2015/1926); The Return of Cultural Objects (Revocation) (EU Exit) (Amendment) Regulations 2020.
[156] Explanatory Memorandum, The Return of Cultural Objects (Revocation) Regulations 2018 (No.1086), 7.3.
[157] 2014/60/EU Preamble (16); Tamás Szabados, 'In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications' (2020) 27(3) *International Journal of Cultural Property* 323, 325-326.
[158] Schneider 2016 (n110) 160.

after illicit export and 75 years for certain objects.[159] The Annex and financial/age thresholds were eliminated, expanding the scope to all objects classified as national treasures by Member States.[160] In terms of compensation, allocation of burden of proof for exercise of due diligence was reversed from Council Directive 93/7/EEC and placed upon the possessor. 'Due care and attention' was defined, copying the text of the UNIDROIT Convention almost exactly.[161] However, Directive 2014/60/EU applies the criteria uniformly to both stolen and illegally exported objects, whereas the UNIDROIT Convention's due diligence criteria applies to stolen objects only.[162] The spirit of Directive 93/7/EEC was carried over, that is, 'to ensure the physical return of the cultural objects to the Member State from whose territory those objects have been unlawfully removed, irrespective of the property rights applying to such objects.'[163] Article 13 specifies that '[o]wnership of the cultural object after return shall be governed by the law of the requesting Member State.'[164]

It is hard to judge the impact of Directive 2014/60/EU on the number of returns to Member States. As prescribed by the Directive, Member States were to submit reports to the Commission reviewing its application by 18 December 2020, and every 5 years thereafter.[165] As of date of writing, the final report has not been released. However, taking the deficiencies of Directive 93/7/EEC into account, Directive 2014/60/EU has hopefully provided an accessible return mechanism permitting Member States to quickly recover national treasures from other Member States. By allowing Member States to certify what they consider to be national treasures, the Directive removes the risk that the state assessing summary return does not recognize the special nature of the object and block its return.[166] Any ownership disputes are to be determined by authorities in the Member State to which an object holds particular significance. This will hopefully allow for appropriate, culturally sensitive rulings. While it is positive that objects covered by the Directive are designated by Member States, there is the possibility that certain heritage will not be included, such as those significant to indigenous groups or other communities that a Member State does not recognize as national treasures or are not protected by national laws. However, as with the 1970 UNESCO Convention, standing is an issue, as an individual or community seeking return of an object requires State intervention in order to raise a claim. The scope of the Directive is limited in

[159] Directive 2014/60/EU Art 8(1).
[160] Ibid, Arts 1, 2(1).
[161] Ibid, Art 10; Magri (n154) 203.
[162] UNIDROIT Convention Art 4(4); Schneider 2016 (n110) 160.
[163] Directive 2014/60/EU Preamble (8).
[164] Ibid, Art 13.
[165] Ibid, Art 17(2); Corrigendum to Directive 2014/60/EU L 147/24.
[166] E.g., Roodt (n96) 82-83.

that it only applies to Member States, and objects must also be located in another Member State to qualify for return under the Directive. Lastly, its non-retroactivity and limitation periods might not allow for older, more ambiguous claims.

2.2 The Rules of Private International Law

When the aforementioned international instruments do not apply to international claims for return, resort is likely had to the 'residual' rules of private international law. Cultural heritage disputes engage the rules of private international law when they involve a private claim with a foreign legal element. These rules determine which court is competent to adjudicate a claim and which body of law should govern the dispute.[167] However, the rules of private international law are not universal, comprising separate systems of rules developed by state and national courts and legislatures. While there is a move towards harmonization,[168] no set of rules is universally recognized.[169] Civil return claims for objects by original 'owners' of cultural heritage are, for the most part, governed by these ordinary, yet complex, rules of private international law.

Private international disputes involve the establishment of jurisdiction, characterization of the nature of the dispute, allocation of the legal system to be applied to the dispute, and application of the law following proof of its content to the satisfaction of the judge.

2.2.1 Jurisdiction

Return claims are typically adjudicated where the object is located,[170] as 'adjudication and enforcement are more certain when the decision can be rendered by that court with physical control over the object.'[171] For example, under the Brussels I Recast, civil claims for return from EU Member States 'based on ownership' may be brought 'in the courts for the place where the cultural object is situated at the time the court is seized.'[172] The Brussels I Recast no longer applies to civil and commercial proceedings in the UK commenced after the end

[167] Generally, *Dicey, Morris & Collins on the Conflict of Laws*, Lord Collins of Mapesbury and ors (eds) (15th edn Sweet & Maxwell 2012) Chapter 1; *Cheshire, North & Fawcett Private International Law*, Paul Torremans (ed) (15th edn Oxford University Press 2017) Chapter 1; Elizabeth B Crawford and Janeen M Carruthers, *International Private Law: A Scots perspective* (4th Edn W Green 2015).
[168] E.g., development of Conventions in EU law.
[169] *Cheshire* (n167) 8.
[170] Sometimes where defendant is domiciled, e.g., Brussels I Recast, Art 4(1), although these will typically coincide.
[171] Roodt (n96) 80-81.
[172] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) OJ L351/1, Art 7(4).

of the Brexit implementation period, 31 December 2020. Currently, jurisdiction is generally where the defendant is present or domiciled.[173]

The *lex fori* (law of the forum) applies to all procedural matters, and the *lex causae* (the law applicable to the action, be it the law of the forum or foreign law) applies to matters of substance.[174] The distinction is not always obvious and may vary according to the forum.[175] Jurisdictional differences regarding cultural heritage disputes are apparent the moment a claim is lodged, as the rules of the forum decide which matters are classified as substantive or procedural. The forum may also determine issues such as the requirement of due diligence,[176] burden of proof,[177] the use of a public policy exception, and the type of remedy available.[178] These procedural differences between jurisdictions may be of great consequence to parties claiming return of an object.[179]

A court may decline or be barred from ruling on the merits of a case. There are certain instances in which claims for return may not be admissible by a court under private international law, such as lack of standing or jurisdictional immunity.

2.2.1.1 Standing

Standing to sue is typically a procedural matter.[180] Claimants must be recognized as proper juristic entities with legal interest in a claim. However, these requirements may present difficulties for parties seeking return of cultural heritage in foreign jurisdictions. In certain instances, such as with indigenous groups, this is particularly difficult as they may lack standing domestically,[181] preventing the bringing of claims in domestic and foreign forums.[182] Where a foreign entity is recognized in their home state, the judge of a foreign forum may still deny standing. For example, French courts held that the Native American Hopi tribe lacked standing to halt the sale of their *katsinam* (*see Chapter 1, 1.2.3*)

[173] Scotland: Civil Jurisdiction and Judgments Act 1982 Sch.8; England: *Maharanee Seethadevi Gaekwar of Baroda v Wildenstein* [1972] 1 QB 283.
[174] *Dicey* (n167) Rule 19.
[175] *Cheshire* (n167) 73-76, 86; Janeen M Carruthers 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53(3) *International Comparative Law Quarterly* 691.
[176] Roodt (n96) 96-98.
[177] *Dicey* (n167) 7-034.
[178] Ibid, 7-011.
[179] Roodt (n96) 80-98.
[180] *Cheshire* (n167) 86-87; *Dicey* (n167) Rule 19(2).
[181] Native American tribal standing was once contested. Federally recognized tribes now have capacity of sovereign entities under federal law. (Richard Collins, 'To Sue and Be Sued: Capacity and Immunity of American Indian Nations' (2018) 51 *Creighton Law Review* 391, 424.)
[182] Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage' (1989) 217 *Recueil des Cours de l'Académie de Droit International* 214, 246-249; *Dicey* (n167) 7-017.

notwithstanding its federal recognition in the US.[183] This is not always the case. In *Bumper Development Corp v Commissioner of the Police of the Metropolis*[184] an Indian temple was permitted standing to sue in English courts even though it was not a legal person under English law.

2.2.1.2 State Immunity

States and their property may be immune from suit in foreign courts under the doctrine of state immunity.[185] International law provides the framework[186] but it may be applied as matter of domestic law.[187] State immunity was absolute, but there is a trend towards exceptions to immunity in many states, typically those arising from *jure gestionis*, private acts such as commercial transactions (as opposed to *jure imperii*, by virtue of sovereign authority).[188]

Consider *Barnet v Ministry of Culture & Sports of the Hellenic Republic.*[189] In 2018, Greece emailed Sotheby's a letter demanding return of an ancient bronze horse set to be auctioned, claiming ownership and illegal removal. Sotheby's and the consignor, the Barnet Trust, sought declaratory judgment of ownership and ability to sell the bronze. Greece filed motion to dismiss for lack of subject matter jurisdiction due to state immunity, citing plaintiffs' failure to satisfy any exceptions under the Foreign Sovereign Immunities Act (FSIA).[190] The district court denied Greece's motion, holding that sending a letter asserting ownership of items at auction was commercial activity with direct effect in the US, included under FSIA's commercial activity exception.[191] However, the appellate court reversed the decision with instructions to dismiss for lack of jurisdiction, holding that the letter invoked Greece's

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[183] TGI Paris, interim orders 12 April 2013, RG n°13/25880; 6 December 2013, RG n°13/59110; 27 June 2014, RG n°14/55733 (Laetitia Nicolazzi, Alessandro Chechi, Marc-André Renold, 'Case Hopi Masks' Art-Law Centre University of Geneva <https://plone.unige.ch/art-adr/cases-affaires/hopi-masks-2013-hopi-tribe-v-neret-minet-and-estimations-ventes-aux-encheres>accessed 01 April 2021.)
[184] [1991] 1 WLR 1362, [1991] 4 All E.R. 638; *See Chapter 3, 3.2.*
[185] Cf (1) foreign act of state doctrine (principle in English/US law): courts will not adjudicate on another state's acts committed within its territory; (2) non-justiciability, which may be raised preliminarily, but (being fact-specific) may be impossible to determine until after trial (H. Fox 'International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States' in Dixon, McCorquodale, Williams (eds) *Cases and Materials on International Law* (6th edn Oxford University Press 2016) 317).
[186] Principle of customary international law; codified in UN Convention on Jurisdictional Immunities of States and their Property 2004 (resolution 59/38 (A/59/49)).
[187] E.g., UK State Immunity Act 1978 (to meet obligations under European Convention on State Immunity ETS No.074 1972).
[188] *Federal Republic of Germany v Philipp* 141 S.Ct.703 (2021) [7]; *Atty-Gen of New Zealand v Ortiz* [1984] AC 1.
[189] *Barnet v Ministry of Culture & Sports of the Hellenic Republic* 391 F.Supp.3d 291(SDNY 2019); 961 F.3d 193 (2d Cir. 2020).
[190] 28 USC §§1602-1611.
[191] *Barnet* 391 F.Supp.3d 291 (SDNY 2019), 299-230; (FSIA §1605(a)(2)).

patrimony law, which stated that movable ancient monuments belonged to Greece. The nationalizing of property was a distinctly sovereign rather than commercial act.[192]

Another recent example is *Federal Republic of Germany v Philipp.*[193] The heirs of art firms owned by Jewish residents of Germany filed suit against Germany in US District Court (D.C.) for a collection of medieval relics, the Welfenschatz, alleging its 1935 sale to Prussia at approximately one-third value was coerced. Germany moved to dismiss for lack of jurisdiction under state immunity. It asserted that the claim fell outside FSIA's expropriation exception,[194] which revokes immunity for rights in property taken in violation of international law. Germany claimed a sovereign's taking of its own nationals' property was not unlawful. The heirs countered that the purchase was an act of genocide violating international human rights law. The district court denied Germany's motion to dismiss;[195] the appellate court affirmed.[196] The Supreme Court considered whether FSIA's expropriation exception allowed jurisdiction for claims that a foreign state violated international human rights law by expropriating from its nationals within its borders. Chief Justice Roberts held, 'We need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights. We do not look to the law of genocide to determine if we have jurisdiction over the heirs' common law property claims. We look to the law of property.'[197] FSIA's expropriation exception includes the 'domestic takings rule,' which recognizes that a foreign sovereign's taking of its nationals' property does not violate international law, and therefore Germany had immunity.

2.2.2 Public and Penal laws

The distinction between private and sovereign acts of state also applies regarding immunity from enforcement of foreign state acts and laws. Returns based on enforcement of foreign public or penal laws, such as export laws, may preclude cases from being adjudicated.[198] In *Attorney-General of New Zealand v Ortiz,*[199] New Zealand brought a claim in England against Swiss collector George Ortiz to recover an illegally exported

[192] *Barnet* 961 F.3d 193 (2d Cir. 2020) 201.
[193] *Federal Republic of Germany, et al v Philipp, et al* 141 S.Ct.703 (2021).
[194] USC §1605(a)(3).
[195] *Philipp* 248 F.Supp.3d 59 (DDC 2017).
[196] *Philipp* 894 F.3d 406 (DC Cir.2018).
[197] *Philipp* 141 S.Ct.703 (2021) [712].
[198] *Dicey* (n167) Rule 3(1); *Iran v Barakat* [2007] EWCA Civ 1374 [2009] Q.B. 22.
[199] *Attorney-General of New Zealand v Ortiz* [1982] QB 349; [1984] AC 1.

Maori carving. New Zealand asserted ownership under its 1962 Historic Articles Act, which stipulated that historic articles exported in breach of the Act be forfeited to the Crown.[200] At first instance, Staughton J. held that title passed to New Zealand automatically upon illicit export; that the law was not penal; and there was no residual category of unenforceable 'other public laws,' such as export laws. The Court of Appeal reversed the decision. Title did not pass automatically without seizure in New Zealand. Lord Denning stated that the export statute, as public law, was unenforceable and, in obiter comments, that no state had sovereignty beyond its borders. Thus, the English court could not adjudicate claims to enforce foreign penal, revenue laws or other public laws, distinguishing between acts *jure imperii* and *jure gestionis*.[201] The House of Lords affirmed the decision regarding title and made no comments on enforceability. It should be noted that a recurrence of a case such as *Ortiz* would be unlikely due to legislative reform in New Zealand, particularly the enactment of the Protected Objects Amendment Act 2006.[202]

A distinction must be drawn between non-enforceable public laws and patrimonial laws vesting ownership in the state, as the latter may have extraterritorial application.[203] In *Islamic Republic of Iran v Barakat Galleries Ltd*[204] the Court of Appeal addressed whether an Iranian law, declaring unauthorized excavations unlawful, was a penal or public law, under which Iran could not raise a claim in England. The court determined on preliminary matters that Iran could sue under that law for return based on a patrimonial claim of ownership. They approved Lord Denning's test for 'other public laws,' establishing that English courts will not enforce claims based on foreign public law concerning the enforcement of sovereign acts or rights (unless it would be contrary to public policy to preclude it),[205] such as export laws[206] and those which authorize governmental interference with private property, such as confiscation or nationalization.[207] This suggests that the general trend will be in favor of enforcing foreign cultural heritage laws.

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[200] 1962 Historic Articles Act, Art 2(2).
[201] *Atty-Gen of New Zealand v Ortiz* [1984] A.C. 1 [20-21]; Patty Gerstenblith, '*Schultz and Barakat*: Universal Recognition of National Ownership of Antiquities' (2009) 14(1) *Art Antiquity and Law* 21, 33-34.
[202] It fulfils New Zealand's obligations under the 1970 UNESCO and 1995 UNIDROIT Conventions and, among other protective measures, prohibits export of protected New Zealand objects without approval (Protected Objects Amendment Act 2006); Piers Davies and Paul Myburgh, 'The Protected Objects Act in New Zealand: Too Little, Too Late?' (2008) 15(3) *International Journal of Cultural Property* 321.
[203] Alessandro Chechi, 'When Private International Law Meets Cultural Heritage' (2017/2018) 19 *Yearbook of Private International Law* 269.
[204] *Iran v Barakat* [2007] EWCA Civ 1374: [2009] QB 22.
[205] *Barakat* [2009] QB 22 [114]- [154]; *Dicey* (n167) 5-038.
[206] *Italy* (*King of) v Marquis Cosimo de Medici Tornaquinci* (1918) 34 TLR 623.
[207] *Princess Paley Olga v Weisz* [1929] 1 KB 718.

Similar enforcement of foreign patrimonial laws was decided in *United States v Schultz,*[208] a criminal conviction of conspiring to deal Egyptian artifacts under the National Stolen Property Act (NSPA).[209] Per the *McClain* doctrine,[210] the government may impose criminal penalties under the NSPA if cultural objects have been unlawfully removed from a state with clear laws vesting state ownership of undiscovered heritage effective at time of removal. This has the effect of recognizing foreign patrimonial rights in the context of criminal proceedings 'even where the State never had possession.'[211] Violations under NSPA also permit the government to bring *in rem* actions against stolen objects for their recovery.[212]

It should be noted that national export laws are recognized and enforceable between EU Member States under Directive 2014/60/EU,[213] and the introduction/importation of unlawfully exported cultural goods from third countries (non-EU) is prohibited under Regulation (EU) 2019/880.[214] Additionally, courts in states party to the 1995 UNIDROIT Convention must order the return of illegally exported cultural objects.[215]

2.2.3 Characterization

Once jurisdiction is established, substantive questions are determined by the *lex causae*.[216] To identify it, the forum first must characterize, or classify, the dispute according to the basis of the claim and the facts. Characterization determines the cause of action and a connecting factor links a person, object, event, or transaction to the legal system and its rules that will determine the dispute.

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[208] *US v Schultz* 333 F.3d 393 (2d Cir.2003).
[209] 18 U.S.C. §2311, 2314-2315; Gerstenblith 2009 (n201) 28.
[210] *US v McClain, et al* 545 F.2d 988 (5th Cir. 1977) US dealers convicted under NSPA for smuggling artifacts, violating Mexico's national ownership laws [991-992].
[211] *Barakat* [2007] EWCA Civ 1374 [150]. (Application of this principle discussed in *Barakat* at [163])
[212] Proceedings *in rem* (civil recovery/forfeiture actions) are raised by the state on behalf of an original owner, often another state, as means of effecting return of its property. Criminal charges/convictions are not required, only that the object was involved in a crime warranting forfeiture. See, e.g., Proceeds of Crime Act 2002; *US v 10th-Century Cambodian Sandstone Sculpture* 12-cv-2600-GBD (SDNY 2013); Stefan D Cassella, 'Recovering Stolen Art and Antiquities Under the Forfeiture Laws' (2020) 45 *North Carolina Journal of International Law and Commerce Regulation* 393; European Commission, Analysis of Non-Conviction Based Confiscation Measures in the EU (12 April 2019).
[213] Directive 2014/60/EU Art 1 (return of national treasures unlawfully removed from territory of a Member State); Art 2(2)(a) (unlawful removal is one in breach of a Member State's rules or of Regulation (EC) No 116/2009 [on the export of cultural goods]).
[214] Regulation (EU) 2019/880 on the Introduction and import of cultural goods Art 3(1).
[215] 1995 UNIDROIT Art 5.
[216] *Dicey* (n167) Rule 19.

Property is characterized as movable (corporeal or incorporeal) or immovable according to the *lex situs*, the law of the place the property is located.[217] The transfer of cultural heritage, and its ongoing transport and maintenance, may be characterized as, e.g., contractual;[218] however, claims for return and declarations of ownership are typically characterized as proprietary matters. If there are contractual and proprietary consequences applicable to a transfer a distinction must be drawn, for different rules apply in private international law.[219] As most cultural heritage claims for return are characterized as proprietary disputes over movables, this will be the focus of the following sections.

2.2.4 Connecting Factor and Choice of Law

Once the cause of action has been characterized, the proper connecting factor must be selected to determine the choice of law applicable to the dispute. A connecting factor does not decide the outcome of a case but connects the dispute to the appropriate body of law.[220]

The *lex loci rei sitae*, or *lex situs*, is a well-established and frequently applied rule in disputes concerning movable property, and, consequently, of conflict of law disputes over cultural heritage. The law of the place where the cultural heritage was situated at the time of alleged transfer governs whether valid title was transferred and its associated proprietary rights and responsibilities.[221]

The forum usually applies the domestic law of the *situs*. It may consider its conflicts rules, as detailed by the doctrine of *renvoi* (to send back), an infrequently applied choice of law.[222] This arose in *Islamic Republic of Iran v Denyse Berend*[223] concerning ownership of an ancient limestone fragment purchased in New York in good faith by Denyse Berend. Per French domestic law, Berend obtained title upon delivery in France. She consigned the fragment for auction in London. Iran brought an action in England to recover the fragment as part of a national monument, asserting its illegal removal. Iran argued that *renvoi* was

[217] Cf *Iran v Berend* [2007] EWHC 132 (QB): parties agreed fragment was movable, instead of determination by *lex situs*; (Lyndel V Prott, 'Movables and Immovables as Viewed by the Law' (1992) 1(2) *International Journal of Cultural Property* 389) discussion of difficulties determining movable/immovable status of frescoes in *Abegg v Ville de Genève* (D.1988.325).
[218] *Jeanneret v Vichey* 541 F.Supp.80 (SDNY 1982); 639 F.2d 259 (2d Cir.1982).
[219] GA Zaphiriou, *The Transfer of Chattels in Private International law: A Comparative Study* (Athlone Press 1956); Pierre Lalive, *The Transfer of Chattels in the Conflict of Laws* (Clarendon Press 1955) 113.
[220] Szabados (n157) 328.
[221] *Cammell v Sewell* (1858) 3 H&N 617; (1860) 5 H&N 728; *Winkworth v Christie, Manson and Woods* [1980] Ch. 496.
[222] Derek Fincham, 'Rejecting *Renvoi* for Movable Cultural Property: *The Islamic Republic of Iran v Denyse Berend*' (2007) 14(1) *International Journal of Cultural Property* 111, 113.
[223] *Berend* [2007] EWHC 132 (QB).

applicable and that French conflicts rules would apply the *lex origins*, Iranian law, for cultural heritage. Eady J. reasoned that application of *renvoi* is 'largely a question of policy.'[224] He added, 'I can think of a number of reasons why it might be desirable to apply generally, in dealing with national treasures or monuments, the law of the state of origin but that is a matter for governments to determine and implement if they see fit…I hold that, as a matter of English law, there is no good reason to introduce the doctrine of *renvoi* and that title to the fragment should thus be determined in accordance with French domestic law.'[225] Given its criticisms, *inter alia*, giving too much deference to foreign legal experts and the possibility of endless circular reasoning, application of *renvoi* is rare.[226]

There are instances in which the *lex situs* is not considered the most appropriate law and might be set aside. These were detailed by Slade J. in *Winkworth v Christie, Manson and Woods Ltd*:[227]

> First, ''if goods in transit and their *situs* is casual or not known, a transferer which is valid and effective by its proper law will (semble) be valid and effective in England.'[228] The second exception… arises where a purchaser claiming title has not acted bona fide.[229] The third exception is the case where the English court declines to recognise the particular law of the relevant situs because it considers it contrary to English public policy.[230] The fourth exception arises where a statute in force in the country which is the forum in which the case is heard obliges the court to apply the law of its own country… Fifthly…special rules might apply to determine the relevant law governing the effect of general assignments of movables on bankruptcy or succession.'[231]

Winkworth and its application of the *lex situs* will be discussed in more detail below.

2.2.4.1 Applying the *Lex Situs*

In order to determine the *lex situs*, the forum must pinpoint the location of the relevant transfer. This is not always easy, as journeys of cultural heritage may be long, with objects

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[224] Ibid, [20].
[225] Ibid, [30]- [32].
[226] Typically limited to succession in the UK. (Fincham 2007 (n222) 111).
[227] *Winkworth* [1980] Ch. 496, 501.
[228] Citing *Dicey* (9th edn 1973).
[229] Interpretation of good faith exception varies depending on applicable law (Janeen M Carruthers**,** ***The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers*** (Oxford University Press 2005) paras 8.45-8.46).
[230] E.g., laws infringing human rights or gross breaches of international law (Pippa Rogerson, 'Public Policy and Cultural Objects' (2008) 67(2) *Cambridge Law Journal* 246, 247) as in *Kuwait Airways Corp v Iraqi Airways* [2002] 2 AC 883; Prominence of public policy doctrine varies across jurisdictions (e.g., more prominent in France, Germany than England) (*Dicey* (n167) 5-004).
[231] *Glencore International AG v Metro Trading International Inc* (No2) [2001] 1 All ER (Comm) 103; Crawford and Carruthers (n167) para 17-15.

changing hands and jurisdictions several times. Courts applying the *lex situs* potentially face a *conflit mobile*, the possibility that more than one potential *situs* exists.[232] Consider the 17th-century Japanese *netsuke* under dispute in *Winkworth*.[233] The figurines were stolen from Winkworth's home in England and smuggled to Italy where they were sold to good faith purchaser, the Marchese Da Pozza. He consigned them to Christie's (London) for auction. There they were discovered by Winkworth, who lodged a claim of ownership against Christie's and the Marchese.[234] The *situs* of the *netsuke* at the time of the transfer in question was determined to be Italy. Under the Italian Civil Code, good faith purchasers of stolen property may acquire ownership if obtained through a transaction able to transfer title if the seller were the owner.[235] As a result, the Marchese held valid title to the *netsuke*.[236]

The principle favoring good faith purchasers is based on the maxim *en fait de meubles, la possession vaut titre* (regarding movable property, possession is equivalent to a title). Civil law systems typically acknowledge the title of good faith purchasers over rights of original owners as means of facilitating commerce.[237] What is considered good faith, or bad faith,[238] as well as requirements such as burden of proof and due diligence vary.[239] However, most legal systems protect original owners against *bona fide* purchase in cases of theft to some extent, 'not because of the heinousness of the crime but because […] the owner has not voluntarily handed over his moveable to an intermediary and thus facilitated the ultimate disposal.'[240] For example, France[241] and Switzerland[242] allow for recovery of lost or stolen items within certain timeframes. The distinction is usually made between lost, wrongfully sold, and stolen property, varying between jurisdictions. German law, for example, differentiates between theft and conversion;[243] only theft precludes acquisition in good faith.[244] Some jurisdictions protect certain objects from being transferred altogether,

[232] Symeon C Symeonides, *Choice of Law* (Oxford Commentaries on American Law 2016) 584.
[233] *Winkworth* [1980] Ch. 496.
[234] *Ibid*, 497-499.
[235] Italian Civil Code Arts 1153-1155; *Winkworth*, 500; Magri (n154) 201.
[236] *Winkworth* [1980] Ch. 496, 500-514.
[237] Scottish Law Commission (SLC) Memorandum (1976) n.27, Corporeal Moveables 52.
[238] E.g., Swiss Civil Code Art 940 (person possessing object in bad faith must return it to rightful owner with compensation for any damage resulting from wrongful possession, subject to no time limits).
[239] E.g., due diligence requirement under 1995 UNIDROIT Art 4(4) for good faith purchasers' compensation; Marc-André Renold, 'Stolen Art: The Ubiquitous Question of Good Faith' in Lyndel V Prott (ed), *Witness to History* (UNESCO 2009), 309-313.
[240] SLC Memorandum (1976) n.27, 56.
[241] French Civil Code Art 2277 (three years).
[242] Swiss Civil Code Art 934(1)(bis) (right to recover cultural objects prescribes one year after owner learns of location and possessor, maximum 30 years after loss, minus objects *res extra commercium*.)
[243] Taking of movable with intent to exercise ownership inconsistent with owner's right of possession.
[244] *Kunstsammlungen zu Weimar v Elicofon* 536 F.Supp 829 (EDNY 1981), 833 (Christa Roodt and David Carey-Miller, 'Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law' (2013) 10(5) *Transnational Dispute Management* 1, 6-7).

regardless of good faith purchase or prescription.[245] The Italian Civil Code, as demonstrated in *Winkworth*, is an extreme example leaving no protection for original owners.

Had the Marchese's purchase occurred when the object was located in England, Winkworth could have had a valid claim of ownership under English domestic law, [246] as the principle of *nemo dat quod non habet* (no one can give what they do not have) rules the transfer of movable property in England.[247] (As well as other typically common law systems.[248]) This is exemplified by the Scots law doctrine of *vitium reale*, that an inherent defect in title to stolen objects cannot be transferred, even to innocent third parties.[249] 'The basic doctrine is that theft constitutes a *vitium reale* which cannot be purged even by sale in market overt.'[250]

In English law until 1995[251] theft was a defect of title only cured in market overt. 'An ugly medieval relic,'[252]good faith buyers of stolen goods at open market, with no notice of defective title from sellers, automatically acquired ownership.[253] It does not currently exist in common law countries,[254] but, in France [255] and Switzerland,[256] for example, original owners may recover objects purchased at open market upon reimbursement of price paid to the possessor. The Italian Code 'seems to make every vendor a 'market overt'…if a sale is consummated with the proper formalities, the vendee acquires title even though the vendor has none to give – in short, a thief can pass good title to a *bona fide* vendee.'[257]

[245]E.g., *Duc de Frias c Baron Pichon* Tribunal Civil de la Seine, J Clunet 1886, 599; Swiss Federal Act on the International Transfer of Cultural Property of 20 June 2003, Art 3(2) (registered cultural objects belonging to Switzerland are *res extra commercium*, protection of good faith purchasers excluded).
[246] Slade J. suggested *renvoi* could theoretically apply, if plaintiff argued an Italian court would apply English law (*Winkworth*, 514).
[247] Sale of Goods Act 1979, Art 21. Common law principle codified.
[248] E.g., US Uniform Commercial Code §2-403.
[249] *Todd v Armour* (1882) 9 R.901.
[250] SLC Memorandum (1976) n.27, 54; *Bishop of Caithness v Fleshers in Edinburgh* (1629) Mor. 4145.
[251] Abolished by Sale of Goods (Amendment) Act 1994 (following market overt sale of paintings stolen from Lincoln's Inn. Lord Renton: 'Although I am a member of Lincoln's Inn […] that is not why I am introducing the Bill. I should be doing so even if our pictures had not been stolen because, quite frankly, the market overt rule has become a thieves' charter.' (HL Debate 12 January 1994 Vol.551, 210).
[252] Brian Davenport and Anthony Ross, 'Market Overt' (1993) 2(1) *International Journal of Cultural Property* 25.
[253] Sale of Goods Act 1979, formerly s.22(1) (repealed).
[254] David Carey-Miller, 'Positive Prescription of corporeal moveables?' (2011) 15 *Edinburgh Law Review* 452.
[255] French Civil Code Art 2280.
[256] Swiss Civil Code Art 934(2).
[257] Daniel Murray, 'Sale in Market Overt' (1960) 9 *International & Comparative Law Quarterly* 24, 43.

While cases like *Winkworth* present 'tales of two innocents,'[258] the *lex situs* rule is neutral.[259] It does not favor any law over another. Per Slade J., 'It must be accepted that exclusive reference to the *lex situs* must cause hardship to a previous owner in some cases, particularly if his goods have been moved to and sold in a foreign country without his knowledge or consent.'[260]

Policy justifications for the *situs* rule are simplicity, predictability, and commercial security.[261] While these reasons are important for commerce, they do not adequately protect objects of cultural heritage from illicit trade. Excluding the most well-known objects, looted cultural heritage is relatively easy to smuggle across borders, conceal until limitation periods have passed, and resell.[262] Those looking to sell looted or illegally exported items (notwithstanding 'bad faith' preclusions, such as that in Switzerland, which is not subject to any time limit[263]) are able to take advantage of the *situs* rule and exploit differences in domestic laws relating to movable property, such as statutes of limitations and prescription,[264] adverse possession (or acquisitive prescription in civil law),[265] the demand and refusal rule,[266] and discovery rules.[267] When cultural heritage is illegally removed and sold to good faith purchasers in a jurisdiction such as Italy, the object loses protections afforded it under domestic laws, and title may be easily 'laundered' in a new jurisdiction.[268] Cultural heritage caught in these disputes also lose protections afforded them under applicable international conventions. For example, 'the 1995 Convention does not surmount the difficulty that a calculated use of the *situs* rule by professional traffickers can extinguish

[258] Ashton Hawkins, Richard Rothman, David Goldstein, 'A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art' (1995) 64(1) *Fordham Law Review* 49.
[259] *Goetschius v Brightman* 245 NY 186, 156 NE 660 (1927).
[260] *Winkworth* [1980] Ch.496, 513.
[261] Ibid, 512 affirming *Cammell v Sewell* (1858) 3 H&N 617, 5 H&N 728.
[262] Bator (n102); Thomas W Pecoraro, 'Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law' (1990) 31 *Virginia Journal of International Law* 1.
[263] E.g., Swiss Civil Code Art 940; Renold (n239) 309-313.
[264] *City of Gotha and the Federal Republic of Germany v Sotheby's and Cobert Finance SA* [1998] 1 WLR 114 (QB) (Roodt and Carey-Miller (n244) 8).
[265] Uninterrupted possession becomes ownership after specified time period; *Cassirer v Thyssen-Bornemisza Collection Foundation* 824 Fed.Appx.452 (9th Cir. CA 2020). Appellate court held Thyssen-Bornemisza acquired valid title to Pissarro painting (stolen by Nazis in 1939) by acquisitive prescription, not applicable under California law, but applies in Spanish law (the choice of law with most significant relationship). (Laurie Frey, 'Another chapter in the Cassirer Nazi-era saga focuses on choice of law' (2015) 22(4) *International Journal of Cultural Property* 527).
[266] Cause of action won't accrue until original owner demands stolen property and good faith possessor refuses, which starts owner's time limit to commence proceedings. An innocent purchaser's possession cannot be wrongful until original owner demands return. (*Solomon R Guggenheim Foundation v Lubell* 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991)).
[267] Actions to recover stolen objects do not accrue until discovery of the object and identity of possessor known (*Naftzger v American Numismatic Society* 42 Cal.App.4th 421 (1996)) (Chechi 2017/18 (n203) 287).
[268] Roodt (n96) 227-228.

any benefits bestowed by the Convention. In short, the 1995 Convention cannot prevent the sale and purchase of works of art, or other exchange of cultural property, if that is lawful according to the law of the situs.'[269]

2.2.4.2 Moving Away from the *Lex Situs*?

Lex Originis

Given the disconnect between the treatment of cultural heritage as regular goods in private international law and the special status of cultural heritage afforded in international instruments and various domestic legislation, some scholars have proposed adopting the *lex originis*, the law of the place of origin of the object under dispute, as the connecting factor in lieu of the *lex situs* for cases relating to cultural heritage.[270] The reasoning is that the *lex originis* provides a greater connection to the law of the country most closely connected with the heritage under dispute.[271] As seen, this was argued for by counsel for Iran in *Berend*, and Eady J. voiced some support, although asserted that it was a matter for governments to decide.[272] However, to date it has not received much state support. The Institute of International Law's 1991 Resolution[273] first advocated for its application. It stated 'the transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country,'[274] defining 'country of origin' as 'the country with which the property concerned is most closely linked from the cultural point of view.'[275] The conflict rules of Belgium apply the *lex originis* to cultural heritage disputes, however it is the only jurisdiction to do so.[276]

Given the often complex and meandering journeys of cultural heritage, particularly clandestinely excavated objects, it is not always clear which state is the one of origin. Consider again the Sevso Treasure (*Chapter 1, 1.2.2*). Lacking a proven find spot, with three nations vying for ownership and 29 modern-day nations within the boundaries of the Roman Empire at the date of dispute, it would be difficult, if not impossible for a court to determine a *lex originis*.

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[269] Carruthers 2005 (n229) para 5.29.
[270] Eric Jayme, 'Globalization in Art Law: Clash of Interests and International Tendencies' (2005) 38(4) *Vanderbilt Journal of Transnational Law* 927, 937.
[271] Derek Fincham, 'How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property' (2008) 32 *Columbia Journal of Law & The Arts* 111.
[272] *Berend* [30].
[273] Institute of International Law, *The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage* (3 September 1991).
[274] Ibid, Art 2.
[275] Ibid, Art 1(b).
[276] Belgian Code of Private International Law 2004 Art.90; Chechi 2017/18 (n203) 285.

States are also reluctant to adopt the *lex originis* for fear that it would frustrate the rights of good faith purchasers. The 1995 UNIDROIT Convention and Directive 2014/60/EU have sought to balance the need to protect states of origin and their cultural heritage, as well as the rights of good faith purchasers. The instruments have adopted application of the *lex originis*, but allow for payment of compensation to a possessor, if the possessor proves to have exercised required due diligence in acquiring the object.[277]

Most Significant Relationship

Another alternative to the *lex situs* is the most significant relationship, or closest connection, linking the law of the state most closely connected to the dispute. In legal systems preferring the *lex situs*, which is presumed to have the closest connection to the dispute, resort to the law of the closest relationship is restricted to cases where the *lex situs* would lead to an inappropriate choice of law, as seen by the exceptions listed to the *lex situs* in *Winkworth*.[278] The forum is given discretion to determine the law with the closest connection given consideration of relevant factors.[279]

However, in the United States, most jurisdictions favor the law of the jurisdiction with the 'most significant relationship' according to the American Law Institute's Restatement (Second) of Conflict of Laws.[280] Absent constitutional restrictions or statutory directives on choice of law, a court will consider a number of factors relevant to the choice of applicable law and choose the law with the most significant relationship.[281] For movable property these are, *inter alia*, the needs of the interstate and international systems, relevant policies of the forum, and certainty, predictability and uniformity of result.[282] Some states, such as New York and California, take a combined approach that considers both the traditional *lex situs* rule and the principles of the most significant relationship approach.[283]

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[277] 1995 UNIDROIT Art 4(4);Directive 2014/60/EU Art 10; Chechi 2017/18 (n203) 285; Szabados (n157) 334; Renold (n239) 309-313.
[278] *Winkworth*, 501.
[279] Chechi 2017/18 (n203) 283.
[280] Restatement (Second) of Conflict of Laws (1971) governing the rules of contract, tort, and property; Symeon C Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (Martinus Nijhoff Publishers 2006).
[281] Restatement (Second) §6 (Choice of Law Principles).
[282] Ibid, §244 (Validity/Effect of Conveyance of Interest in Chattel).
[283] Pecoraro (n262) 8; Symeonides 2016 (n232) 584.

Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts, Inc[284] provides an illustrative example. The Republic and Church of Cyprus sued to recover stolen Byzantine mosaics from Indiana art dealer, Peg Goldberg. She paid ('$1.2 million reduced to $100 bills and stuffed into two satchels'[285]) and took possession of the mosaics in the Geneva airport's 'free port' (outside customs control) and returned with them to Indiana. Determining admissibility and applicable law turned on a number of factors, including differences in time limitations and good faith exceptions between the three relevant jurisdictions, Cyprus, Switzerland, and Indiana. Switzerland was determined to be 'the place of the wrong,' as Goldberg took possession and control of the mosaics there. However, Swiss law was ruled out given its few connections to Cyprus's action, *inter alia,* the citizenship of the parties in the suit, the transaction, and the 'fortuitous and transitory' connections of the mosaics to Switzerland.[286]

The action was deemed admissible under Indiana law, [287] which was held to have the most significant contacts to the suit. The court considered, 'with special attention given to the Second Restatement factors,' *inter alia*, Goldberg's residence, financing from an Indiana bank, and the mosaics being situated in Indiana.[288] This choice of law 'was to the exclusion of the Swiss and Cypriot legal systems, i.e., where the mosaics had been acquired […] and where they had resided for over 1400 years […] respectively. […] Ironically […] the court reached the correct substantive outcome – the restitution of the mosaics – without applying the law of the only State that had the most evident cultural and historical connection to the mosaics and hence a truly legitimate claim'[289] [of ownership given that the mosaics were *extra commercium* and could not be acquired by a private person under Cypriot law[290]]. As Symeon Symeonides referred to the decision, 'Right Result, Wrong Law.'[291]

As seen, use of the most significant relationship does not provide a perfect solution. While the Second Restatement is followed by many US jurisdictions, the *lex situs* still plays a large part in determining the most significant relationship. Under the Second Restatement, if the most significant relationship to the parties cannot be ascertained or agreed upon 'greater weight will usually be given to the location of the chattel […] at the time of the conveyance

[284] *Autocephalous* 717 F.Supp. 1374 (S.D.Ind.1989); 917 F.2d 278 (7th Cir 1990).
[285] *Autocephalous* 917 F.2d 278, 283.
[286] *Autocephalous* 717 F.Supp. 1374, 1393-94; 917 F.2d 278.
[287] *Autocephalous* 917 F 2d 278 (7th Cir 1990), 288-290).
[288] *Autocephalous* 717 F.Supp. 1374, 1393-94; 917 F.2d 278.
[289] Chechi 2017/18 (n203) 283-284.
[290] *Autocephalous* 717 F.Supp. 1374, 1397.
[291] Symeon C. Symeonides, 'A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property' (2005) 38(4) *Vanderbilt Journal of Transnational Law* 1177, 1182-1183.

than to any other contact in determining the state of the applicable law.'[292] As Thomas Pecoraro stated regarding the validity and effect of conveyance, '[d]espite the development in the United States of flexible choice-of-law rules capable of responding to policy considerations and better able to render a just result, the *lex situs* rule has survived….'[293]

2.3 Conclusion

Disputes over cultural heritage engage several areas of domestic and international law and policy. They are often factually complex and must balance a range of interests and diverse values relating to the heritage under dispute. Nations implement very different policies regarding not only the protection and regulation of cultural heritage within their jurisdictions, but also the rules that determine those disputes in private international law.

While international instruments contain special rules regarding protections and returns of cultural heritage, these are often not applicable, and resort is had to the rules of private international law. Most jurisdictions do not have special conflict rules concerning the treatment of cultural heritage, and the normal rules governing transfers of movable property are applied. When foreign heritage and interests are involved, their significance may not be fully understood or accepted by the *lex fori* or the *lex causae*.[294]

Additionally, cultural heritage litigation tends to arise in 'market states,' typically Western countries concerned with the interests of the commercial art trade. The primary concern in these disputes is the protection of transactions of movable property, allowing for predictability and stability in commercial transactions. While this is a reasonable approach when relating to ordinary goods and trade, this view strips away the values, be they cultural, emotional, or moral, that are inherent to dealings in cultural heritage. Even in a jurisdiction with a special choice of law rule concerning cultural heritage, such as Belgium with the *lex originis*, or the move in the United States towards a more flexible, less mechanical approach than the *lex situs* rule, objects of cultural heritage are treated simply as goods to be owned.

What is needed is an approach that considers the welfare and the needs of the cultural heritage itself, as well as the communities to whom it is important, taking into consideration and respecting the significant cultural values associated with the heritage. The question

[292] Second Restatement §244(2).
[293] Pecoraro (n262) 10; Symeonides 2016 (n232) 584-602.
[294] Prott 1989 (n182) 237-238.

shouldn’t be to whom does the object belong, but rather, where does the object belong? Taking into consideration the specific values relating to certain objects of cultural heritage under dispute, which body of law is the most appropriate to decide this question?

3 Legal Personhood of Cultural Heritage?

The rules applicable to cultural heritage disputes are not always aligned with the special status afforded cultural heritage in international instruments. While specific rules contained in international instruments take into account the special needs of cultural heritage, both these and the residual rules of private international law operate on a property paradigm. Dealing with recovery claims requires more nuance and 'complexity both in our thinking about, and our remedies to' these disputes.[295]

An alternative way of thinking may be to view cultural heritage through the lens of legal personhood. For example, standing is a hurdle potential claimants face when demanding return of their heritage. As Lyndel Prott posited, an 'imaginative solution' to this problem would be to attribute legal personhood in order 'to allow suit by the object itself.'[296] The cultural heritage would be the subject of legal rights[297] with standing to bring suit in its name via the agency of human representation. By according cultural objects standing, the *lex fori* might acknowledge the interests of claimants in objects under dispute that might not otherwise be recognized, particularly those not based in Western ideas of ownership or possession, but on a cultural belonging to a community or a place.[298] The emphasis would be on cultural heritage as subjects, those with cultural context and value and entitled to certain protections, as opposed to goods caught in proprietary disputes.[299]

Standing is not the only potential consequence. Attribution of personhood could also justify a change in connecting factor, from the proprietary *lex situs* to a potential use of a personal connecting factor, such as domicile. While the effects of attributing personhood

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[295] Karen Warren, 'A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues' in Phyllis Messenger (ed), *The Ethics of Collecting Cultural Property* (2nd Edn University of New Mexico Press 1999)19-20.
[296] Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage' (1989) 217 *Recueil des Cours de l'Académie de Droit International* 214, 251-252.
[297] Defining legal persons as bearers of rights and duties: Frederic William Maitland, 'Moral Personality and Legal Personality' (1905) 6 *Journal of the Society of Comparative Legislation* 192, 193; Bryant Smith, 'Legal Personality' (1928) 37 *Yale Law Journal* 283, 283; John Chipman Gray, *Nature and Sources of the Law* (Macmillan 1921) 27.
[298] For example, the Hopi Tribe (see *n183*).
[299] Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014) 62-63; Enver Hoxhaj, writing of Kosovo during armed conflict, stated, 'the protection of cultural heritage will be in the future, not a professional, but basically a political problem… Maybe, when we talk about this issue in Kosova (*sic*), we should understand "the right of the stones and monuments."' ('The Protection of Cultural Property: "The Right of Stones and Monuments"' in Edwin Micewski, Gerhard Sladek (eds) *Protection of Cultural Property in the Event of Armed Conflict* (Austrian Military Printing Press 2002) 46, 48.

would likely be limited to municipal law, emphasizing the importance of protecting cultural heritage through domestic substantive law, this shift in thinking might help to justify the use of alternative means of settling international private disputes for return of cultural heritage. This reoriented perspective will be discussed below.

3.1 Legal Personhood

'Legal persons, being the arbitrary creation of the law, may be of as many kinds as the law pleases.'[300] Legal personhood is conferred upon whatever or whomever a community deems worthy of rights, societal protection, and regulation of its behavior and the behavior of others toward it. There may be differing degrees of legal personhood, for example 'quasi-person' status (having partial but not full range of rights) and personhood may be restricted or removed for policy reasons.[301] From bodies corporate to artificial intelligence,[302] the attribution of personhood is an accepted legal concept. The recognition of foreign legal persons in private international law disputes is procedural and determined by the *lex fori*. Generally, the approach of the English courts is fairly flexible. It is not a strict application of the *lex fori* but takes into account status recognized by foreign law,[303] as demonstrated in *Bumper Development Corporation v Commissioner of Police of the Metropolis and Ors.*[304]

The attribution of personhood to entities other than humans or bodies corporate is increasingly employed in environmental law. A comparison between the treatment and protection of cultural heritage and that of the environment is not far-fetched, as discussion on cultural heritage preservation has been compared to, for example, non-renewable resources and endangered species.[305] Certain endangered species have been recognized as

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[300] Sir John W Salmond, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966) 306.
[301] Alexander Nékám, *The Personality Conception of the Legal Entity* (Harvard University Press 1938) 26, 44-45; John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655, 661; Smith B (n297) 296.
[302] E.g., European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2013 (INL): calls to consider 'creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently.'(59(f)).
[303] *National Bank of Greece & Athens S.A. v Metliss* [1958] AC 509; The Privy Council recognized existence of a foreign 'entity' (a foreign trust) and its attributes, despite it not having personality in English law, and, arguably, under the *lex causae* (*Investec Trust (Guernsey) Ltd and Ors v Glenalla Properties Ltd et al* [2018] UKPC 7); John Robb, 'Personhood and Status of Legal Persons in Private International Law' (2019) 15(2) *Journal of Private International Law* 288.
[304] *Bumper* [1991] 1 WLR 1362.
[305] Non-Renewable Resource Argument in Warren ((n295) 19-21); Prott 1989 (n296) 310.

legal persons under United States Endangered Species Act.[306] Early signs of recognition of personhood were promising,[307] however standing is now more ambiguous.[308]

Attributing legal personhood to natural objects was brought to the forefront with Christopher Stone's article, *Should Trees Have Standing? Towards Legal rights for Natural Objects*.[309] It was written in an attempt to influence the US Supreme Court's decision in the environmental case *Sierra Club v Morton.*[310] While the Court did not endorse the idea, Justice Douglas, referencing Stone, recognized the benefits of conferring standing on nature in his famous dissent:

> 'Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. […] The river, for example, is the living symbol of all the life it sustains or nourishes […] including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.[311] […]
>
> The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[312]
>
> Perhaps they will not win. Perhaps the bulldozers of 'progress' will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?'[313]

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[306] 16 U.S.C. §§1531-43 (1982); J Baird Callicott and William Grove-Fanning, 'Should Endangered Species Have Standing? Toward Legal Rights for Listed Species' (2009) 26(2) *Social Philosophy and Policy* 317, 329-331.
[307] *Palila v Hawaii Dept of Land and Natural Resources*, 852 F.2d 1106 (9th Cir.1988).
[308] *Cetacean Community v Bush*, 386 F.3d 1169, 1173 (9th Cir.2004) holding listed species may not sue in their own right under the ESA. In *NATURO, a Crested Macaque, by and through his Next Friends, People for the Ethical Treatment of Animals, v Slater et al* (888 Fed 3d Series 418) (2018) ('Monkey Selfies' case), Art 3 Constitutional standing recognized for the macaque. The court determined that *Cetacean* needed 'reexamination' (at 418).
[309] Christopher D Stone, 'Should Trees Have Standing – Toward legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450.
[310] *Sierra Club v Morton*, 405 US 727 (1972).
[311] Ibid, 742-743.
[312] Ibid, 749-750.
[313] Ibid, 751.

As mentioned by Justice Douglas, it is useful to look to personality rights being given to rivers and their ecosystems, the number of which have increased in recent years. This section will highlight a few examples of the attribution of personhood to rivers by different means, via national legislation and judicially, and potential links that might be made in attributing personhood to objects of cultural heritage.

3.1.1 Whanganui (Te Awa Tupua)

An influential example is the Whanganui River in New Zealand's Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. It is the culmination of nearly two centuries of conflict, negotiations, and compromise between the Whanganui Iwi (the Maori of the Whanganui River) and the Crown over control of the river and its environment.[314] The act confers upon Te Awa Tupua (the whole of the Whanganui River, including 'its physical and metaphysical elements,'[315] Tupua te kawa, 'intrinsic values that represent the essence of Te Awa Tupua'[316]) 'all the rights, powers, duties, and liabilities of a legal person.'[317] It balances the beliefs and practices of the Whanganui Iwi with the interests of the Crown, which acknowledged and apologized for injury caused by colonialism.[318] Under the Act, ownership of Crown-owned parts of the riverbed and other lands vest in Te Awa Tupua.[319] It also created Te Pou Tupua, a guardian body comprised of one member nominated by the Whanganui Iwi and another by the Crown.[320] With guidance from an advisory group,[321] the body acts as Te Awa Tupua's representative with full capacity and powers to exercise its rights and duties, including spiritual and cultural rights, and any proprietary rights and obligations for land vested in it.[322] The Act is silent on the question of extraterritorial enforcement.

A criticism of the Act is that it largely functions within the English legal framework and Western conception of rights, demonstrated by terminology used throughout.[323] However, it is fundamentally seen as an innovative instrument that sensitively balances the interests

[314] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s.69-70 (Cron Acknowledgements and Apology); Linda Te Aho, '*Te Mano o te Wai*: An Indigenous Perspective on Rivers and River Management' (2019) 35 *River Research and Applications* 1615; Liz Charpleix, 'The Whanganui River as Te Awa Tupua: Place-based Law in a Legally Pluralistic Society' (2018) 184 *The Geographical Journal* 19.
[315] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s.12.
[316] Ibid, s.13.
[317] Ibid, s.14.
[318] Ibid, s.3.
[319] Ibid, s.39-56.
[320] Ibid, s.18-26 (In consultation with ministers for environment, Maori development, conservation).
[321] Ibid, s.27-28.
[322] Ibid, s.18-19.
[323] Charpleix (n314) 24.

of both the Whanganui Iwi and the Crown.[324] The personhood of Te Awa Tupua is an effective tool for recognizing Maori sovereignty and beliefs and facilitating their control of Te Awa Tupua within New Zealand's existing legal framework. While its implementation is still fairly recent, thus too early to tell if the attribution of personhood and an appointed guardian has aided in the river's protection, it is an important and significant step, for it 'signals a shift from more utilitarian and imperial legal modes towards an appreciation of the rights of everything that constitutes the Earth, and in showing that settler societies can, and must, forge new identities in ways that honor both their Indigenous and colonial histories.'[325]

3.1.2 Atrato

A similar outcome was achieved judicially in Colombia. In November 2016, Colombia's Constitutional Court (unilaterally) granted legal personhood to the Atrato River in a victory for plaintiffs representing indigenous and Afro-Colombian communities living along the Atrato in the Chocó Department.[326] Years of illegal gold mining caused severe environmental damage and a humanitarian crisis.[327] The court granted legal personhood to the Atrato's river basin to protect and restore it and its communities. It ordered the creation of a commission of guardians to represent the Atrato's interests, with the local communities sharing responsibility for the river's protection,[328] and detailed an implementation plan in consultation with the communities.[329]

In the judgment, Judge Jorge Iván Palacio justified the attribution of personhood with reference to 'biocultural rights':

> 'the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories – according to their own laws and customs – and the natural resources that make up their habitat, where their culture, traditions and way of life are developed based on the special relationship they have with the environment and biodiversity. These rights result from the recognition of the deep

[324] Charpleix (n314) 19.
[325] Ibid.
[326] *Center for social justice studies representing the greater community council of the peoples, et al v the Presidency of the Republic et al* (Case T-622/16) Translation: Dignity Rights Project, Delaware Law School <http://files.harmonywithnatureun.org/uploads/upload838.pdf> accessed 02 April 2021.
[327] 'A River with Rights: Community Response to Illegal Gold Mining in Chocó, Colombia' *ABColombia* (08 February 2019) <https://www.abcolombia.org.uk/a-river-with-rights-community-response-to-illegal-gold-mining-in-choco-colombia/> accessed 20 March 2021.
[328] Craig M Kauffman and Pamela L Martin, 'When Rivers Have Rights: Case Comparisons of New Zealand, Colombia, and India' *International Studies Association Annual Conference* (San Francisco, 4 April 2018) 8-12<http://files.harmonywithnatureun.org/uploads/upload585.pdf> accessed 02 April 2021; Myriam Ximena Arenas Orbegozo, 'Who Are We After Worlds Collide: Explorations into the Sources of Sui generis Legal Persons in Colombia: The Atrato River,' MLL Thesis Tilburg University (23 June 2019) 11-16.
[329] Case T-622 [10.2].

> and intrinsic connection that exists between nature, its resources and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation.'[330]

The court based these rights partly on Colombia's ratification of international treaties,[331] including 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.[332] The bio-cultural argument is significant in that it links protection of indigenous and ethnic minority groups and the health of their cultures with the biological diversity of the Atrato's ecosystem. The rights of nature are connected with the rights of communities dependent upon river. This case is reflective of a normative shift not only regarding environmental protection, but also the need to protect the cultural practices and beliefs of the communities that are intertwined with and dependent upon and those environments.[333]

3.1.3 Ganga and Yamuna

A second judicial example was less successful in its outcome. In March 2017, days after the Te Awa Tupua Act was announced, the Uttarakhand High Court (UHC) in India declared in the surprise ruling *Mohammad Salim v State of Uttarakhand and others,* that the Ganga and Yamuna rivers were 'juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties, and liabilities of a living person.'[334] Sharma J. declared, 'Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.'[335] The rivers, worshipped as goddesses Ganga and Yamuna, hold deep significance to Hindus. Millions rely on them for survival. They are also highly polluted. The action was brought by a private citizen to, *inter alia,* address pollution and the building of riverbank encroachments after lack of/failed state action.[336] The court emphasized that legal personhood develops out of necessity, 'subserving the needs and faith of society,'[337] and decided that attributing personhood was necessary 'in order to preserve and conserve'[338] the rivers.

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[330] Ibid, [5.11].
[331] Ibid, [5.3.7].
[332] [5.19] (Paris 17 October 2003 (MISC/2003/CLT/CH/14)).
[333] Kauffman and Martin (n328) 8-12.
[334] *Mohammad Salim v State of Uttarakhand and others,* Writ Petition (PIL) No.126 of 2014, March 20, 2017, 19.
[335] Ibid, 11, 17.
[336] Kauffman and Martin (n328) 13-14.
[337] *Mohammad Salim v State of Uttarakhand and others,* Writ Petition (PIL) No.126 of 2014, March 20, 2017, 12-14.
[338] Ibid, 19.

Sharma J. referenced the juristic personhood of Hindu idols as recognized in Indian law. Properly consecrated idols are viewed as living embodiments of deities inhabiting them.[339] Their interests and property, which may include temples, endowments, and devotional offerings,[340] are overseen by human managers (*shebaits*) according to their founders' intentions, but are not owned by the *shebaits*.[341] The Bombay High Court established that the pious intentions embodied in Hindu idols entitle them to juristic personality, allowing property to vest in them.[342] This may extend to temples and other religious institutions.[343] The legal personality of Hindu idols and religious endowments has been described as 'something of an oddity in the Indian legal system,'[344] and 'a legal fudge,' one that while 'convenient and flattering to devotees' was 'devised by British jurists as a way of getting out of the tedious process of sorting out the claims of various Indian parties, with their complexities of caste and community practices.'[345] Nevertheless, the doctrine is accepted in Indian law.

In *Salim*, the UHC declared a number of state officials 'as the human face to protect, conserve, and preserve the rivers.'[346] Sharma J. likened it to the ability of idols to hold property and to be taxed through a *shebait*.[347] The court invoked *parens patriae*, the inherent power and authority of the court to 'uphold the status of rivers Ganges and Yamuna and also to promote the health and well-being of these rivers and the Advocate General shall represent all legal proceedings to protect the interest of Rivers Ganges and Yamuna.'[348] However, in contrast to previous examples, very little guidance on enforcement was provided. While the Te Awa Tupua Act was the product of several years of negotiation and legislative planning, the *Salim* ruling was 'a bolt from the blue.'[349]

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[339] Ibid, 12, 13.
[340] Richard H Davis, *Lives of Indian Images* (Princeton University Press 1997) 249.
[341] *Yogendra Nath Naskar v Commission of Income Tax, Calcutta* 1969 (1) SCC 555, 6; *The Union of India and others v Bumper Development Corporation* [1988] Lexis Citation 1257 (QB Transcript) [2.27(i)] ('*Union of India Transcript'*).
[342] *Manohar Ganesh Tambekar v Lakhmiram Govindram* ILR (1888) 12 Bom 247; *Union of India Transcript* [2.2.3(iv)].
[343] See application in *Union of India Transcript* [2.3-2.3.9]; *Bumper Development* 1373.
[344] Kartick Maheshwari and Vishnu Vardhan Shankar, 'Stone Gods and Earthly Interests: The Jural Relations and Consequences of Attributing Legal Personality to Hindu Idols' (2004) 16 *Student Bar Review* 46, 47.
[345] Vikram Doctor, 'Hoping for Divine Justice: When Gods Become Litigants' (*The Economic Times Blog*, 11 August 2018) < https://economictimes.indiatimes.com/blogs/onmyplate/hoping-for-divine-justice-when-gods-become-litigants/> accessed 02 April 2021.
[346] *Mohammad Salim Salim v State of Uttarakhand and others*, Writ Petition (PIL) No.126 of 2014, March 20, 2017, 19.
[347] Ibid, referencing *Yogendra Nath Naskar v Commission of Income Tax, Calcutta* 1969 (1) SCC 555.
[348] Ibid, 19-20.
[349]Goutham Shivshankar, 'The Personhood of Nature' (*Law and Other Things*, 5 April 2017) <https://lawandotherthings.com/2017/04/the-personhood-of-nature/>accessed 19 March 2021. Cf Atrato case - plaintiffs asked the court to protect their fundamental rights; the court provided detailed arrangements involving community participation to protect the river and the people.

India's central government, the Uttarakhand State, and officials appointed as guardians for the river petitioned India's Supreme Court to overturn *Salim*,[350] expressing concerns, including potential jurisdictional issues.[351] Crucially, the Ganga and Yamuna are transboundary rivers flowing through several Indian states, and the Ganga into neighboring Bangladesh, raising issues of extraterritorial recognition of personhood and enforcement of Uttarakhand judgments regarding the rivers.[352] In a press conference, Uttarakhand minister Madan Kaushik stated, "Let me be very clear that we are not against according of living entity status of the two holy rivers Ganga and Yamuna," but, "how can the chief secretary here be held accountable if the river is polluted in West Bengal, Bihar, Jharkhand or Uttar Pradesh?"[353] Soon after, the Supreme Court stayed the UHC judgment. It continues to be stayed.[354]

3.1.4 Evaluation

The attribution of personhood is about deciding what is sufficiently important and worthy of protection. In the above-mentioned cases, it was both the river ecosystems and the communities dependent upon them. Based on the examples, the attribution of personhood seems to have a greater potential effect on substantive domestic law than would be its, arguably, more procedural consequences in private international law. The aims are attributing personhood to rivers are clear: to protect ecosystems from environmental damage, give voice to the communities affected by and intertwined with those environments, and reinstate the autonomy of indigenous communities and atone for past harms. Personhood as it pertains to environmental cases is instructive in terms of its domestic attribution and application. The appointment of clearly designated guardians with specific duties is important in order for the aims of legal personhood to function. Achieving a balance between the needs of the parties involved in ways that work within

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[350] *State of Uttarakhand v Mohd Salim*, Petition for Special Leave to Appeal no16879/2017.
[351] Kauffman and Martin (n328) 15-16.
[352] Julia Talbot-Jones, 'Flowing from Fiction to Fact: Challenges of Implementing Legal Rights for Rivers' (2019) 44 *Water International* 812, 813; Similar issues presented in *Colorado River Ecosystem a/n/f Deep Green Resistance et al v State of Colorado et al*,17-cv-2316 (D.Colo.2017). Like Ganga, the Colorado River spans several states and flows into Mexico. The river lacked standing. The case presented a non-justiciable public policy issue.
[353] 'Supreme Court stays Uttarakhand high court's order declaring Ganga and Yamuna 'living entities'' (*Times of India*, 7 July 2017) <https://timesofindia.indiatimes.com/india/supreme-court-stays-uttarakhand-high-courts-order-declaring-ganga-and-yamuna-living-entities/articleshow/59489783.cms> accessed 02 April 2021.
[354] Since this case, Justice Sharma, a 'usual suspect' in granting personhood to nature, declared several environmental entities as juristic persons (Chitleen Sethi, 'HC Judge who declared Sukhna Lake living entity also granted legal rights to Ganga, Animals' (*The Print*, 5 March 2020) <https://theprint.in/judiciary/hc-judge-who-declared-sukhna-lake-living-entity-also-granted-legal-rights-to-ganga-animals/375776/> accessed 02 April 2021.

existing legal structures also helps to achieve the goals of attributing personhood. The involvement and shared responsibility of the communities affected by and dependent upon the subjects granted personhood is also important.

While these lessons might be instructive for improving domestic protections for cultural heritage, (for example, in demonstrating effective cooperation for the protection of heritage, including recognition of cultural practices and beliefs, between governments and indigenous communities), extraterritorial recognition and application of legal personhood is another matter. The Te Awa Tupua Act is silent regarding international recognition or enforcement, and the transboundary nature of the Ganga/Yamuna rivers helped to preclude the attribution of personhood altogether. While jurisdictional issues regarding multi-state rivers arise, the possibility of a river going too far beyond its state of origin is not relevant in the same way as with cultural heritage. In order to examine potential extraterritorial recognition in terms of its use for return claims of cultural heritage, it is necessary to look elsewhere.

3.2 *Bumper Development* and extraterritorial recognition

An example of the recognition of foreign legal entities by the *lex fori* may be seen in *Bumper Development v The Metropolitan Police.*[355] The case provides an example in which recognition of foreign juristic persons facilitated the return of an object of cultural heritage. The object under dispute was the Pathur Nataraja, a bronze idol of the Hindu god Siva, likely part of a religious endowment intended for the twelfth-century Arul Thiru Viswanath Temple in Pathur, Tamil Nadu.[356] When consecrated, Natarajas are worshipped as deities in their own right.[357]

Buried for centuries, the Nataraja was discovered by a 'landless labourer' within the ruins of the abandoned temple.[358] For five years it passed through a web of underground dealers and was sold in London under false provenance to good faith purchaser Robert Borden (through Canadian Bumper Development Corporation).[359] Prior to export, the Nataraja was sent to the British Museum for conservation where suspicions regarding provenance were

[355] *Bumper Development Corporation v Commissioner of Police of the Metropolis and Ors* [1991] 1 WLR 1362.
[356] Ibid,1364-1365.
[357] *The Union of India and others v Bumper Development Corporation* [1988] Lexis Citation 1257 (QB Transcript) [0.2]. ('*Union of India Transcript'*)
[358] *Bumper* 1364; Davis 1997 (n340) 226-227.
[359] *Bumper* 1366; *Union of India Transcript* [0.3], [1.2.2], [1.3.2]-[1.3.11].

raised. It was seized by Metropolitan Police 'with the intention of returning it to its rightful owners.'[360] Bumper brought a claim in detinue and conversion, an action in tort for recovery of wrongfully detained goods, against the Commissioner of Police. The Union of India and associated claimants also sought its return. A trial was ordered to determine that the idol seized was in fact the Pathur Nataraja (it was), and whether any claimants had better title to it than Bumper Development.[361]

The Union of India withdrew their claim prior to trial. While Union legislation protecting national cultural heritage existed,[362] no provision allowed assertion of title.[363] The Union continued to support the action by appointing solicitors and paying associated costs.[364] The State of Tamil Nadu also claimed the Nataraja under legislation permitting state intervention in abuse of religious and charitable endowments, however it was held to have no claim.[365] Thiru Sadagopan, a public official managing the temple's interests[366] (third claimant), the temple (fourth claimant), and the temple's Sivalingam,[367] a cylindrical stone embodiment of Siva[368] (fifth claimant) were all held to be proper claimants. Thiru Sadagopan was able to sue on behalf of the temple as juristic entity according to Tamil Nadu law,[369] and the Sivalingam, which as a temple idol was considered a juristic entity under Indian law.[370] Kennedy J. held that the temple and the Sivalingam, juristic entities imbued with the pious intention of the twelfth-century founder, proved to be owners with superior title to the Nataraja than Bumper.[371]

Bumper appealed on the grounds that, *inter alia*, the temple, long defunct, was no longer a juristic entity capable of owning property or brining suit for its recovery. Bumper furthered that neither the temple nor the Sivalingam were capable of recognition as legal persons under English law. The Court of Appeal only considered whether the temple was capable

[360] *Bumper* 1363; *Union of India Transcript* [0.4].
[361] *Bumper* 1363.
[362] Indian Treasure-Trove Act 1878.
[363] *Union of India Transcript* [2].
[364] Davis 1997 (n340) 248-249.
[365] *Union of India Transcript* [2.5.7].
[366] *Union of India Transcript* [2.1.2(i)].
[367] Which was 'added to the proceedings to meet a point taken by the defendant that a temple is not a juristic person in Indian law' (*Union of India Transcript* [2.1.2(i)]).
[368] *Union of India Transcript* [2.3.8]; Richard H Davis, 'Temples, Deities, and the Law' in Timothy Lubin, Donald Davis Jr, Jayanth Krishnan (eds) *Hinduism and the Law: An Introduction* (Cambridge University Press 2010) 196.
[369] *Union of India Transcript* [1.10.4].
[370] Ibid, [2.3.8]; Sandy Ghandhi and Jennifer James, 'The God that Won' (1992) 1(2) *International Journal of Cultural Property* 369, 370.
[371] *The Union of India and others v Bumper Development Corporation* [1988] Lexis Citation 1257 (QB Transcript) [1.10.4], [2,7,4]; Ghandhi and James (n370) 372; *Bumper* 1363-1364.

of recognition as a juristic entity in English law.[372] Kennedy J., having conducted his own research into the question, was reversed on his use of foreign law.[373] However, the court affirmed that the temple, together with its idols, were juristic entities under the law of Tamil Nadu and recognizable as such by the English court, 'notwithstanding that it was incapable of accepting legal personality under English law.'[374] Therefore, they were capable of bringing suit in English courts through Sadagopan as representative for the purpose of recovering religious objects taken from them. The court stated: 'We emphasise that it is essential to our decision that the third claimant, although not himself a competent party, is empowered by the constitution of the temple to take all necessary steps in the proceedings on its behalf, very much as they would be taken by the next friend or guardian *ad litem* of a minor or patient.'[375] The Court of Appeal affirmed that the temple had superior title to the idol than that of Bumper Development.[376]

The Appellate Committee dismissed Bumper's application for leave to appeal, [377] and the judgment against Bumper was recognized and enforced by the Queen's Bench of Canadian Alberta Court.[378] The Nataraja was 'then entrusted to the Indian High Commission in London and has since been returned to India.'[379]

The Court of Appeal confirmed that recognition of foreign juristic entities as parties to legal proceedings in England is determined by the *lex fori*, and that English courts have long recognized foreign juristic persons such as corporations established by foreign law which would be recognised by English law as having legal personality.[380] However, the court stated:

> 'The novel question which arises is whether a foreign legal person which would not be recognised as a legal person by our own law can sue in the English courts. The particular difficulty arises out of English law's restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognising as a party entitled to sue in our courts something which on one view is little more than a pile of stones.'[381]

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[372] *Bumper* 1362, 1364.
[373] Ibid, 1369-1370.
[374] Ibid, 1362.
[375] Ibid, 1373.
[376] Ibid, 1362.
[377] Ibid, 1373.
[378] *Union of India, State of Tamil Nadu and Others v Bumper Development Corp Limited* [1996] I.L.Pr. 78, 79-80; Robert K Paterson, 'The Curse of the London Nataraja' (1996) 5(2) *International Journal of Cultural Property* 330.
[379] Paterson (n378) 331.
[380] *Bumper* 1371 citing *Lazard Bros and Co v Midland Bank* [1933] AC 289 per Lord Wright at 297.
[381] *Bumper* 1371.

As means of assessing the personhood of an inanimate temple that had lain in ruins, 'unworshipped for a matter of centuries,'[382] the court considered the principles of legal personality according to *Salmond on Jurisprudence*. Per *Salmond*, legal personality is the arbitrary creation of the law and its application may be 'as many kinds as the law pleases.'[383]

> 'Salmond recognises the possibilities which may not be far-fetched, of (say) a foreign Roman Catholic Cathedral having legal personality under the law of the country where it is situated; and, in order to make the concept more comprehensible, let it be assumed that it is given that personality by legislation specifically empowering it to sue by its proper officer for the protection and recovery of its contents. It would, we think, be a strong thing for the English court to refuse the Cathedral access simply on the ground that our own law would not recognise a similarly constituted entity as a legal person. The touchstone for determining whether access should be given or refused is the comity of nations […]'[384]

The court's recognition of the temple as a party entitled to claim the Nataraja was based on comity and deemed not contrary to English public policy, even though it was unrecognizable as a juristic entity under English law. The court stated that the decision 'avoids the danger of there being any fetter of an artificial procedural nature imported from the *lex fori* which might otherwise stand between a right recognised by and enforceable under the *lex causae*.'[385]

In *Bumper*, the recognition of foreign juristic entities resulted in the return of an important piece of cultural heritage, one that the Union of India vigorously pursued.[386] As Kennedy J. stated,

> 'I am sure that the real energy behind the present claim is that of the Government of the Union which […] wants to stop, and if possible, reverse, the outward flow of a precious part of the nation's cultural heritage. I do not believe that these claims have much to do with the spiritual welfare of the people of Pathur. But I am satisfied that the pious intention of the 12th-century notable, who gave the land and built the Pathur temple, remains in being and is, personified by the temple itself, a juristic entity, which has a title to the Nataraja superior to that of the defendant.'[387]

Nevertheless, as Richard Davis stated: 'Modern-day Hindus in southern India, however, understood the dynamics of the case differently. As one Tamil Nadu state official put it, "I

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[382] *Bumper* 1364.
[383] *Salmond* (12th edn 1966) 306-308, cited in *Bumper* 1371-1372.
[384] *Bumper* 1373, referencing *National Bank of Greece & Athens S.A. v Metliss* [1958] A.C.509, 525 'in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this?'
[385] *Bumper* 1373.
[386] India appointed and financed solicitors (see *n364*).
[387] *Union of India Transcript* [1.10.4].

can only say that Lord Nataraja himself won the case appearing before courts in the form of the idol."'[388] While the Union of India supported the efforts to obtain return of its cultural heritage, the Pathur community viewed the case as the deity, through the idol, genuinely taking itself through the court process. While the Nataraja itself was not a claimant or a plaintiff in the case, *Bumper* demonstrates how domestic establishment of legal personhood and its recognition by a foreign forum enabled a community to secure return of its cultural heritage.

However, unless personhood is attributed domestically to cultural heritage, and with explicit instructions regarding next friend representation or guardianship, the principles in *Bumper Development* are of little use to the settling of international private disputes for the return of cultural heritage.

3.3 Consequences of Personhood

3.3.1 Standing

Recognition of certain objects of cultural heritage as legal persons would potentially bestow standing to sue for their return through a guardian. This would allow access to courts for, e.g., indigenous groups,[389] religious communities,[390] or individuals otherwise unable to raise claims for return based on lack of recognition of personhood or sufficient interest.[391] While this was demonstrated in *Bumper*, recognition was entirely dependent upon the classification of the temple as a legal person under its foreign domestic law. The ruling did nothing to change the standing of other objects of cultural heritage, and the Nataraja under dispute was still treated as an object to be owned. Nonetheless, it might inspire other courts faced with similar cases to accept foreign objects of cultural heritage with legal personhood as proper claimants. If domestic legislation, and perhaps persuasive court rulings, clearly establishes what is considered a legal person, combined with explicit instructions as to guardianship or representation, this might allow better access to the courts for demands for return.

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[388] Davis 2010 (n368) 206.
[389] E.g., the Hopi Tribe.
[390] E.g., Chinese community group brought suit against a Dutch collector for return of Zhanggong-Zuzhi, their stolen Buddha, yet were denied standing; Mandy Zuo,'Dutch Court Rejects Chinese villagers claim to have their Buddha mummy returned' (*South China Morning Post*, 13 December 2018) <https://www.scmp.com/news/china/society/article/2177825/dutch-court-rejects-chinese-villagers-claim-have-their-buddha>accessed 02 April 2021.
[391] Prott 1989 (n296) 245-249.

For example, the Hopi tribe might have succeeded in their attempts to stop the Parisian auctions of their *katsinam* had the objects themselves been granted standing in French courts (*Chapter 2, 2.2.1.1*). All efforts to halt the auctions were unsuccessful due to procedural grounds, most significantly because the French courts held that the Hopi lacked legal personality in France,[392] irrespective of their federally recognized sovereign status in the United States.[393] The merits of the tribe's claim, including provenance information, went unaddressed, for their lack of standing barred tribal representatives from bringing a recovery action.[394] As attorney Pierre Ciric stated:

> 'This dismissive denial of access to justice flies in the face of the progress made in international law by all tribes and indigenous peoples, as the French government had expressed its support for the legal status of indigenous peoples by endorsing the 2007 United Nations Declaration on the Rights of Indigenous Peoples at the U.N. General Assembly. […] Considering that US courts define a foreign citizen's standing by whether his home nation would define his legal capacity, it is shocking that France does not grant legal entities under US law the same courtesy.'[395]

Had the *katsinam* been granted legal standing in the US, the Hopi, with the *katsinam* as claimants acting through a representative, might have been able to halt the auctions and had the merits of their arguments heard in a recovery claim. However, as the sovereign status of the Hopi tribe was not recognized, and US protections of Native American cultural heritage were not considered applicable, it is a stretch to believe that the same courts would recognize the standing of foreign objects of cultural heritage. Furthermore, even if the *katsinam* were allowed standing in French court, the matters of proprietary rights would still be at issue. The Hopi view religious artifacts, including *katsinam*, as a form of collective property,[396] 'to which French law is generally hostile.'[397] Without a recognized claim of ownership, the *katsinam* might have been denied standing due to lack of a legitimate claim. In *Bumper Development*, the Pathur Nataraja was returned to India

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[392] TGI Paris, interim orders 12 April 2013, RG n°13/25880; 6 December 2013, RG n°13/59110; 27 June 2014, RG n°14/55733 (see *n183*); Jonathan Liljeblad, 'The Hopi, the *katsinam*, and the French courts' (2016) *International Journal of Heritage Studies* 1.
[393] 1934 Indian Reorganization Act (P.L. 73-383 48 Stat. 984).
[394] Liljeblad (n392) 4.
[395] Pierre Ciric,'Hopi and Navajo Masks Auction Precedent in France is Dangerous' (*Artnet*, 25 July 2014) <https://news.artnet.com/market/opinion-hopi-and-navajo-masks-auction-precedent-in-france-is-dangerous-66975>accessed 02 April 2021.
[396] Derek Fincham, 'Can the Hopi Thwart the Sale of Sacred Objects in Paris Next Week?' (*Illicit Cultural Property*, 5 April 2013) <http://illicitculturalproperty.com/can-the-hopi-thwart-the-sale-of-sacred-objects-in-paris-next-week/>accessed 02 April 2021.
[397] 'In France, the dominant proprietary model is that of individual property, defined under Art 544 of the Civil Code.' (Marie Cornu, 'About Sacred Cultural Property: The Hopi Masks Case' (2013) 20(4) *International Journal of Cultural Property* 451, 458.)

because the Hindu temple, according to the law of India, was the owner of the idol and therefore held better title than Bumper. While standing would allow potential access to the courts for the Hopi tribe through the *katsinam*, it would not assist in a proprietary claim.

If personhood is granted domestically and recognized by a foreign forum, representative standing through a guardian only takes a case so far in terms of adjudicating an object's return and how a forum should treat an object of cultural heritage with standing. For example, who is the guardian if not explicitly stated? Who brings the claim? Which law is taken to confer standing? What is the connecting factor and how is it determined? Would the object own itself and exercise self-ownership, as does the Whanganui River under the Te Awa Tupua Act? If so, the cultural heritage under dispute would at once be an object and a person, which would not make the situation any clearer. While most scholarship on legal personhood has focused on standing, there are other logical conclusions that would follow, such as the use of a personal connecting factor.

3.3.2 Connecting Factors

In addition to standing, the attribution of legal personality raises the question of whether a proprietary characterization is correct. Following the logic of personhood to conclusion, cultural heritage should not be treated as objects under a proprietary choice of law rule, but as persons, akin to the rules applying to status of natural persons and bodies corporate. Attribution and recognition of personhood of cultural heritage might potentially justify use of a personal law connecting factor as opposed to the *lex situs* at the time of the relevant transaction A personal connecting factor might better connect an object to the community to whom it is important, as opposed to focusing on the location of the relevant transaction. Such a connecting factor would identify from where the object was removed, allowing for the use of a return mechanism to give that state (of origin) priority in the handling of any disputes over rights to the object.

Personal status, whether naturally occurring or attributed by application of choice of law rules, grants an individual certain rights, capacities, and duties.[398] This is not an automatic consequence of granting standing to objects but an additional step the law may take. If legal personhood were granted to an object of cultural heritage, it might be viewed as a type of quasi-person, or a third class of persons (to natural persons and bodies corporate).

[398] Elizabeth B Crawford and Janeen M Carruthers, *International Private Law: A Scots Perspective* (4th edn, W. Green 2015) para 10-01.

This would entail recognition of the capacity to sue and possibly justify the use of a personal law connecting factor in international disputes related to the object. The cultural heritage would remain an object, but one with an elevated, special status.

People may be as transient as objects of cultural heritage, becoming subject to the law of several jurisdictions over the course of a lifetime. As with the *lex situs* and determination of the applicable transaction for cultural heritage, personal law connecting factors must be ascertained at a specific moment, the *tempus inspiciendum*. The level of transience reacted to by personal law connecting factors depends on the connecting factor being employed. Determination of an applicable *tempus inspiciendum* for objects of cultural heritage would likely be at the point when an object was wrongfully removed or retained.[399] This would principally apply to modern-day removals, as application of any provisions indicating its use would not likely operate retroactively. Furthermore, historical removals or looted ancient objects with no clear find spots, such as with the Sevso treasure (*Chapter 1, 1.2.2*), would raise significant issues of evidence and burden of proof.

The personal connecting factors that could apply are domicile, nationality, and habitual residence. Common law domicile, determined according to the rules of the forum, links a person to a single body of law with which a person has a significant connection, usually a permanent home. Domicile of origin is typically derived from parental domicile, and a domicile of choice may be acquired with both change in domicile and an intention to remain there for the foreseeable future.[400] Nationality links a person to a country and is determined by the applicable country. It does not identify a constituent of that country, such as a region or a tribe, and a person may have multiple nationalities.[401] Habitual residence is the state in which a person's habitual center of interests lies on a stable basis and should be determined based on the factual circumstances of a person's life. Unlike domicile and nationality, it reflects a connection to a state rooted in the immediate circumstances of a person's life, as opposed to ties based on origin or lineage.[402] Case law pertaining to children has shaped the use of habitual residence, particularly relating to the

[399] Which would operate similarly to the *lex originis* rule.
[400] Generally, *Dicey, Morris & Collins on the Conflict of Laws*, Lord Collins of Mapesbury (eds) (15th edn Sweet & Maxwell 2012), 6R-001-6-117; *Anton's Private International Law*, Paul Beaumont and Peter McEleavy (eds) (3rd Edn W Green 2011) 7.13-7.59; Crawford and Carruthers (n398) paras 6-01-6-37; Restatement (Second) of Conflict of Laws Chapter 2.
[401] Generally, Francesco Salerno, 'The Identity and Continuity of Personal Status in Contemporary Private International Law' (2018) 395 *Recueil des Cours de l'Académie de Droit International* 9, 88-93; Crawford and Carruthers (n398) paras 6-39-6-41.
[402] Generally, *Dicey* (n400) 6-119-6-164; *Anton's* (n400) 7.60-7.127; Crawford and Carruthers (n398) paras 6-43- 6-51.

1980 Hague Convention in which the habitual residence of the child is the primary connecting factor indicating the place where a child is integrated into.[403]

However, the requirements of these personal connecting factors render them inappropriate for objects of cultural heritage. For example, habitual residence is considered the most appropriate connecting factor in cases involving children, who depend on their environment for stability and care. The needs of objects are different than those of children. Basing a wrongfully removed object's habitual center of interests on its immediate circumstances would potentially link it to a jurisdiction completely removed from its source community, possibly one with much less favorable cultural heritage protections.

Nationality proves problematic in terms of potential instances of dual or multiple nationalities. There also exists the risk that states might grant citizenship to objects that don't necessarily 'belong' to them as means of retention. If two or more countries claiming an object had granted it citizenship, how would a court determine which would prevail, particularly as the object could not express any intention or preference? However, this would not likely become an issue as states do not often grant objects citizenship,[404] which would ultimately be an impediment to use of this connecting factor. Furthermore, nationality does not identify regions or territories within a country, which would significantly disadvantage certain tribal or indigenous claims. Nationality might also link an ancient or historical object to a state that did not exist at the time of its creation.

In terms of domicile, the requirement of intention in ascertaining domicile of choice would make its application to insentient objects of cultural heritage particularly difficult, unless somehow proved by its guardian. Domicile of origin appears to be the closest fit, as it would connect an object of cultural heritage to the place from which it originated, perhaps a type of domicile derived from the community to whom the object belonged. This, however, would pose problems if there is no 'parental' community from which to derive domicile. Use of this connecting factor would undoubtedly raise issues of bias in favor of return. Lastly, application of domicile would produce results similar to that of the *lex*

[403] *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60.
[404] However, in 2017 Sophia, a humanoid robot developed by Hong Kong, California, and Amsterdam-based companies, was granted full citizenship in Saudi Arabia. (Ugo Pagallo, 'Vital, Sophia, and Co – The Quest for Legal Personhood of Robots' (2018) 9 *Information* 230).

originis (or the *lex situs*, depending upon the object's location at the time of its removal), which would arguably be a more appropriate fit.

Given the above, it is ultimately not worth pursuing the use of a personal connecting factor in potential instances of cultural objects with recognized personhood.

3.4 Conclusion

As Stone stated in *Should Trees Have Standing*: 'What the granting of rights does involve has two sides to it. The first involves what might be called the legal-operational aspects; the second, the psychic and socio-psychic aspects.'[405] Attribution of personhood in the river examples originated from the struggles of local communities to protect not only their natural resources, but 'their ethnic and cultural identities [and] the places they hold sacred.'[406] The substantive effects of the attribution of personhood might be felt internally, but the real impact of these decisions are extra-legal, largely rhetorical, and reflective of normative shifts. What a community values as worthy of personal status is protected, but unless clear domestic law is established and is universally recognized, rhetoric only goes so far.

The practical consequences of attribution and recognition of personhood of cultural heritage would be title to sue, as well as a potential justification of the use of a personal law connecting factor, which might produce results more closely related to the communities to whom they are important. However, the attribution of personhood might not confer any real legal benefit beyond state borders. Nevertheless, viewing cultural heritage through the lens of legal personhood might emphasize the significance of the cultural heritage itself, and also the values of the community to whom the heritage is important and who demand its return. The granting of personhood solidifies that cultural heritage are not mere objects and should not be treated as normal property. The transfer of title should not be the focus, rather, the question should be where does the cultural heritage belong?

The laws and practices pertaining to cultural heritage vary greatly across jurisdictions. They are often culturally specific, making them easy to misconstrue or cast aside. Because of this, it is argued that the forum best placed to adjudicate these disputes would not be the

[405] Stone (n309) 458.
[406] Kauffman and Martin (n328) 2.

court seized (usually where the object is located), but one most closely connected to the object under dispute. This is similar to the reasoning behind the 1980 Hague Convention and the forum of the habitual residence of the child being best placed to determine any custody agreements. The question that is to be answered is where and to whom should the object be returned? The analogy of objects of cultural heritage as legal persons might help to better answer this question.

4 The 1980 Hague Convention and a Reimagined Return Mechanism

The return of wrongfully removed cultural heritage is vital for its protection.[407] The primary return mechanisms applicable to cultural heritage, as discussed in chapter two (*2.1*) are detailed in the table below. As they exist, they are under-utilized and limited in application. This is mainly due to issues of standing (particularly for private parties), non-retroactive date of application, and the instruments' scopes in terms of state accession and ratification. Issues of due diligence and payment of compensation are also of concern.

	First Protocol 1954 Hague Convention	***1970 UNESCO Convention***	***1995 UNIDROIT Convention***	***Directive 2014/60/EU***
Private Standing	No	No	Yes	No
Scope of Objects Covered	'Cultural property' exported from occupied territory in armed conflict	'Cultural property' designated by state.	Stolen and illegally exported objects.	'National treasures' (designated by Member States) stolen/illegally exported from a Member State.
Time Limitations	None specified	None specified	-3 years from date object's location /possessor's identity known - 50 years from unlawful removal - 75 years or longer for special objects (stolen only)	- 3 years from date object's location /possessor's identity known - 30 years from unlawful removal - 75 years for special objects
Compensation for Good Faith Possessor	Payable to 'good faith holders' (not defined)	Payable to 'innocent purchaser'/ 'person who has valid title'	Payable to possessors who have 'exercised due diligence.'	Payable if possessor 'exercised due care and attention.'
Due Diligence Requirement	Not defined	Not defined	All circumstances of acquisition considered; possessor neither knew/ought reasonably to have known of unlawful removal	All circumstances of acquisition considered
Contracting State Parties	110	140	50	27

[407] One of three axes of cultural heritage law: prevention and control, sanction, restitution. (Isabelle Gazzini, *Cultural Property Disputes* (Transnational Publishers 2004) 4).

Where these instruments are not applicable, resort is typically had to the residual rules of private international law. The treatment of cultural heritage under these rules is problematic, the focus being on the latest proprietary transaction, as well as adjudication typically taking place in a foreign forum that might not understand the context and significance of the object or the laws of its home state. Given this, the need for a reimagined return mechanism arises. The discussion of personhood, and the establishment of cultural heritage as a special type of property, might benefit the formulation of new rules.

Along these lines, there exists a sort of comparison between the treatment of cultural heritage and of children under the law. Cultural heritage might be considered as a special form of property with particular protections, but it remains property.[408] Children are considered quasi-persons, protected by others under the law and possessing rights, but not full rights. Similar themes in cultural heritage conventions are present in those regarding children, such as the importance of domestic measures to protect and prevent wrongful removal and trafficking, as well as the necessity to return children unlawfully removed.[409] Viewing cultural heritage through the lens of personhood, of being a type of quasi-person, might justify the application of a type of abduction and summary return mechanism common to international disputes regarding children. It is insightful, therefore, to look to the workings of the summary return mechanism in the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[410]

4.1 1980 Hague Convention

The objectives of the 1980 Convention are to prevent and deter international child abduction[411] and to protect children from its harmful effects. The Convention strives to achieve these goals through cooperation among contracting states to secure summary return of abducted children to their state of habitual residence.[412] It is said that the 1980 Convention[413] 'has been extremely successful. It has resulted in the summary return of

[408] Marilyn Phelan, 'The Unidroit Convention Confirms a Separate Property Status for Cultural Treasures' (1998) 5 *Jeffrey S Moorad Sports Law Journal* 31, 45-55.
[409] Preamble of, e.g., 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (HCCH 29 May 1993) and Art 21(c); Compare with preambles of 1995 UNIDROIT, 1970 UNESCO Conventions.
[410] HCCH 25 October 1980 ('1980 Hague').
[411] Wrongful removal or retention, in breach of custody rights (1980 Hague Art 3).
[412] 1980 Hague preamble, Art 7.
[413] 101 contracting parties<https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> accessed 02 April 2021.

thousands of abducted children worldwide and deterred the abduction of countless others.'[414]

4.1.1 Return to Child's State of Habitual Residence

Any person or institution may apply for assistance in securing the return of an abducted child[415] from a central authority (in the state where the child is located,[416] of the child's habitual residence, or that of any other contracting state[417]). The central authority shall take 'all appropriate measures in order to obtain the voluntary return of the child,'[418] and in any proceedings for the return of a child, '[t]he judicial or administrative authorities of Contracting States shall act expeditiously.'[419]

There is an assumption under the Convention that prompt, urgent return of abducted children is of greatest priority as it alleviates harm to children caused by their wrongful removal or retention. Unless one of the exceptions is established, it assumed that children's best interests are served by automatic return to their place of habitual residence, where any substantive custody disputes will be decided.[420] Prompt returns are also said to have a preventative effect[421] in that abductors (typically parents), aware that children will be summarily returned to their place of habitual residence, are less likely to unilaterally remove children or to breach custody agreements. Furthermore, summary return prevents an abductor from being able to choose a new, more favorable forum in which to decide any custody arrangements,[422] placing the abductor at an unfair advantage over the left-behind parent.[423]

Like Directive 2014/60/EU regarding ownership rights, the 1980 Hague Convention does not debate the merits of any award of custody rights[424] and emphasizes that 'a decision

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[414] Helen Blackburn, Marianna Michaelides, 'Is it time for the 1980 Hague Convention to be revised?' (*Family Law LexisNexis*, 7 November 2018) <https://www.familylaw.co.uk/news_and_comment/Is-it-time-for-the-1980-Hague-Convention--to-be-revised>accessed 02 April 2021.
[415] Habitually resident in a Contracting State prior to abduction (1980 Hague Art 4).
[416] As designated by the Contracting State according to the Convention (1980 Hague Art 6).
[417] 1980 Hague Art 8.
[418] Ibid, Art 10.
[419] Ibid, Art 11.
[420] Elisa Pérez-Vera, Explanatory Report on the 1980 HCCH Child Abduction Convention, *Acts and Documents of the Fourteenth Session* (HCCH 1980) 430.
[421] Pérez-Vera (n420) 430.
[422] Wrongful retentions of children was complicated after the rule against no unilateral retention was abolished (*In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35).
[423] Pérez-Vera (n420) 429-430.
[424] 1980 Hague Arts 16-17, 19.

under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.'[425] In terms of the law chosen to govern the initial validity of the claim, custody rights of contracting states are to be respected in the courts of other contracting states. [426] Normally, custody disputes are to be determined by authorities in the place of the child's habitual residence upon return, whether based on domestic or conflict rules of that state.[427] As with Directive 2014/60/EU and ownership rights, two proceedings will likely occur – one concerning the return of the child to their state of habitual residence and another regarding custody upon the child's return.

Would the same assumption, that automatic return is in the best interest of children, apply to objects of cultural heritage? Under the 1980 Convention, the goals of automatic return are to restore abducted children's status quo as means of protecting their well-being and to deter abductions from initially occurring. It cannot be said that the same urgency of return exists for a cultural object (although one might consider the standpoint of a bereft community), unless there are special instances of, e.g., specific conservation practices that are required at the place of origin. Prompt, automatic return, however, might have a preventative effect, hopefully discouraging future looting and illegal export, an aim of the UNESCO, UNIDROIT Conventions and the EU Directive.[428] This would help thwart illicit trade in general (illegal sales, illegal exports). Wrongfully removed objects would be returned automatically, thus removing any temptation to search for more favorable jurisdictions and exploit the differences between legal systems.

4.1.2 Defences Against Return Applicable to Cultural Heritage

4.1.2.1 Settlement Defence

Under the 1980 Convention, return of a child is ordered 'if a period of less than one year has elapsed from the date of the wrongful removal or retention.'[429] However, the court shall order a return even where proceedings commenced after expiration of the one-year period, unless it can be shown that a child has become settled in the new environment.[430] This exception leaves room for the fact that return to place of habitual residence prior to

[425] 1980 Hague Art 19.
[426] Ibid Art 1.
[427] Pérez-Vera (n420) 436, 446.
[428] E.g., Third Report Directive 93/7/EEC, 5 ('These Member States acknowledge that the Directive has a preventative effect and discourages the unlawful removal of objects.'); Maria Schneider, 1995 UNIDROIT Explanatory Report (2001), 490 ('emphasising that its aim to establish "common, minimal legal rules" in as many States as possible so as to prevent traffickers from exploiting differences between legal systems.')
[429] 1980 Hague Art 12.
[430] Ibid.

abduction would cause more harm than good if a child has become settled. There is no guidance provided as to what constitutes settlement. Courts have taken into account several factors, such as integration within the community, circumstances surrounding daily life, and regard being had to the child's future circumstances.[431] Overall, there is a certain level of discretion left to the courts, in which they must weigh the best interests of the child against the interest of comity and policy considerations relating to the Convention, namely the prompt, automatic return of children.[432]

A type of settlement defence has also been used to justify the retention of certain objects of cultural heritage. As John Henry Merryman posed when speaking about the Parthenon Marbles, 'It is true that they are Greek in origin, but they have been in England for more than a century and a half and in that time have become part of the British cultural heritage.'[433] However, it cannot be said that settlement should be a true defence when applied to cultural heritage, particularly when viewed through the lens of the 1980 Hague Convention. The best interests of a cultural object are very different than that of children, whose health and well-being are greatly affected by changes in routine. The 'settlement defence' as suggested by Merryman focuses on the community around the objects as opposed to the objects themselves. In actuality it is more likely that the truly aggrieved community is the one from whom the cultural heritage was originally taken, whereas the 1980 Hague Convention focuses solely on the best interests of the child. An object might be regarded as having settled into its environment, if, for example, it has undergone sophisticated conservation or expensive exhibition arrangements have been put in place for the object. While these efforts might be viewed as being in an object's best interest, this cannot constitute settlement, particularly if it is contrary to the use or display of the object as intended by the community of origin.

4.1.2.2 Grave Risk

Return to a child's habitual residence may also be refused if it would expose a child to grave risk of physical or psychological harm, or an otherwise intolerable situation.[434] As with the settlement defence, the Convention does not define the risk of gravity required to

[431] E.g., *C v C* [2008] CSOH 42, 2008 SCLR 329, 'settlement' is flexible, varies according to individual circumstances; *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, the bar for settlement is higher than mere adjustment to a new environment - requires physical establishment in community and an emotional component of stability.
[432] *Re M (Children)* [2007] UKHL 55, [2008] 1 AC 1288, Baroness Hale [40]-[41].
[433] John Henry Merryman, 'Thinking About the Elgin Marbles' (1985) 83 *Michigan Law Review* 1881, 1915.
[434] 1980 Hague Art 13(b).

trigger the exception's application. The degree of gravity required to refuse return varies according to specific facts of each case and from state to state.[435] Similarly, return may also be refused if it would 'not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'[436] In general, the Convention strives to balance the priority of return as the best way of preventing and protecting children from the harmful effects of international abduction with the understanding that certain situations arise in which the unilateral removal of a child might serve the child's best interests.[437]

A grave risk exception might be triggered regarding return of an object to a country in armed conflict, or for objects too fragile to survive removal and transport. Exceptions to return do currently exist in the current instruments. For example, the 1954 Hague Convention's First Protocol allows for cultural heritage to be temporarily transferred to another contracting party for protection against the dangers of armed conflict, and later returned state of origin.[438] The 1995 UNIDROIT Convention provides that 'Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located.'[439]

Perhaps a grave risk exception, similar to that of the 1980 Hague Convention, might entice more states to accept a return mechanism. This type of exception for cultural heritage must be clearly defined and the threshold for application must be high in order to avoid abuse. As means of avoiding exploitation of such an exception, procedures including burden of costs for safe removal and transport of objects must be clearly defined, albeit allowing for the individual needs of the heritage under dispute.

Fear of object safety in transport is a common argument against return. To use the example of the Parthenon Marbles, Merryman posed 'what reason would there be to expose them to the danger involved in removal and transport? [...] The masterpiece is better dismembered than destroyed or seriously damaged.'[440] As means of assuaging an argument such as this,

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[435] What is considered grave risk is considered on a factual, case-by-case basis – see recent case concerning COVID-19 (held not to be a grave risk; child returned to father in Spain) (*Re PT (A Child)* [2020] EWHC 834 (Fam)).
[436] 1980 Hague Art 20.
[437] Pérez-Vera (n420) 432; Danielle Bozin,'The Hague Child Abduction Convention's Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance between Comity and the Best Interests of the Child' (2016) 35 *University of Tasmania Law Review* 24.
[438] First Protocol, II(5).
[439] 1995 UNIDROIT Art 8(3).
[440] Merryman 1985 (n433) 1917,1919.

a court in the jurisdiction of return should be able to commence proceedings and adjudicate any applicable ownership, etc., rights once an order for summary return has been made without the object first being returned. This would prevent unnecessarily transporting a fragile object to the state of origin only for it be returned or sent onto a third state. Additionally, this would help to alleviate the argument that this type of return mechanism is overly biased in favor of return. It can be imagined that, if an object were to be returned prior to determination of rights to it, there would be nothing to prevent a state from declaring that the object would remain there pending the hearing of the merits of any potential ownership claims. The object's physical presence in the jurisdiction at the time of adjudication is not of primary importance. It is about application of the appropriate rules to decide the object's fate.

4.1.3 Possible Undertakings

In addition to a grave risk exception, certain undertakings and their applicability to objects of cultural heritage should be considered.

4.2.3.1 Safe Environment for Return

In contrast to the grave risk defence as applicable to the 1980 Hague Convention, there should not be requirements regarding use, preservation, or 'proper' display of an object upon its return, such as a museum waiting to accept the object.[441] This is another common defence used against the return of cultural objects.[442] Greece's culture minister Lina Mendoni, referencing the Parthenon Marbles, had observed, 'For years, she said, the [British] museum had argued that Athens had nowhere decent enough to display Phidias' masterpieces. "It is sad that one of the world's largest and most important museums is still governed by outdated, colonialist views."'[443] The merits of housing or usage of an object should be determined by the proper authorities in the state to which an object is returned.

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[441] Cf Brussels II bis (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility OJ L 338/1, Art 11(4) 'A court cannot refuse to return a child on the basis of Art 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.'

[442] Merryman 1985 (n433) 1917-1919.

[443] Helena Smith, 'Greece urges UK to return Parthenon marbles' (*The Guardian,* 20 June 2020) <https://www.theguardian.com/world/2020/jun/20/product-of-theft-greece-urges-uk-to-return-parthenon-marbles>accessed 02 February 2021. However, the British Museum's Trustees' statement refutes this, arguing public benefit instead. <https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures/parthenon-sculptures-trustees>accessed 01 April 2021.

From a cultural internationalist (*Chapter 1, 1.2*) standpoint, the preservation of cultural heritage is of utmost importance. Returns are viewed as detrimental to both the objects and to global heritage if conservation and access is not guaranteed. However, objects of cultural heritage deserve to be utilized per the purpose of their creation, housed and preserved in a manner in which the community sees fit. The fate of an object of cultural heritage might not be 'ideal' from the viewpoint of the court ordering return. For example, the Hopi *katsinam* are used in religious ceremonies until they are left to disintegrate into the earth.[444] The requirement of display in a museum would be antithetical to their purpose. It would be seen as imprisoning the divine spirits, robbing them of a peaceful return to the earth.

Along these lines, it is worth noting the fate of the Pathur Nataraja disputed in *Bumper Development* upon its return:

> 'Responding to a rash of thefts from rural temples, the Tamilnad government established the Icon Centre in the 1980s. […] The Centre is a vault with two reinforced concrete walls and doors with double locks. Armed police guard it round the clock. When the Pathur Nataraja arrived in 1991, about a thousand religious icons resided there. […] Safety to one, though, can be detention to another. […] The atmosphere inside was stifling hot, humid, and stale. The valuable icons were in danger from metal fatigue and diseases. [A] reporter called it a "death trap for idols."
>
> It is a sad irony that, after so much effort was expended by so many to regain the image for India, Tamilnad, and the "pious intention" of the twelfth-century donor, the Pathur Nataraja should end up in a concrete vault, virtually unworshiped, safe from the international art market but now in danger of suffocation and heatstroke. After its difficult life, it deserves a better retirement.'[445]

Even though the outcome might be shocking to many, this is not for the forum in a summary return proceeding to decide. It should be determined by the communities, states, or individuals most closely connected with the objects acting in their best interests. A return mechanism must allow for the ultimate fate of cultural objects to be decided upon their return. The basic values regarding the protection and welfare of children are (assumed to be) universal. The same cannot be said for those concerning cultural heritage, which are culturally and contextually diverse.

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[444] Tom Mashberg, 'Secret Bids Guide Hopi Indians' Sprits Home' (*NYTimes*, 16 December 2013) <https://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html>accessed 31 March 2021.

[445] Richard H Davis, *Lives of Indian Images* (Princeton University Press 1997) 256-259.

However, while an undertaking for an object's preservation or display should not be a requirement, one may be considered concerning to whom specifically the object should be returned.

4.2.3.2 Custody

While a parent who has had their child unlawfully removed or retained can be viewed as an aggrieved party, it is the child who suffers the most and with whom the 1980 Convention is primarily concerned. In the context of cultural heritage, while there could be damage to the physical object, removal of context, etc, the more clearly aggrieved party would be the community from whom the object was taken. They may experience a spiritual or cultural loss when deprived of their heritage. Merryman noted, regarding the return of the Afo-A-Kom statue to the Kom of Cameroon, from whom it had been stolen, 'Return of the object was essential to the well-being of the group, perhaps even to its survival… something essential is missing; there is a cultural wound.'[446] It is impossible to divorce cultural heritage from the human community. The preservation and protection of cultural heritage is ultimately for humans - their use, enjoyment, and cultural or spiritual enrichment. As Lyndel Prott stated, 'preservation is sought, not for the sake of the objects, but for the sake of the people for whom they have a meaningful life.'[447]

Any cultural heritage return mechanism would need to consider an object's protection to a certain extent, however, the focus should not be object-centered. Rather, the aim should be to determine whether an object was wrongfully removed, taking into account the aggrieved party, and ultimately, determining where the object belongs. This would support the international view that return of cultural heritage is in the interest of human rights.[448] Summary return would be made to the jurisdiction of the aggrieved party, likely the jurisdiction most closely connected with the object. There should be a special provision requiring that an object be returned to any community of origin deprived of its heritage within the jurisdiction. (Which would most likely correspond with the claimant requesting return.) This would be particularly important for indigenous communities within jurisdictions, and for instances of states experiencing cultural or actual civil war. However,

[446] Merryman 1985 (n433) 1914.
[447] Lyndel V Prott, 'The International Movement of Cultural Objects,' (2005) 12(2) *International Journal of Cultural Property* 225, 231; Tolina Loulanski, 'Revising the Concept for Cultural Heritage: The Argument for a Functional Approach' (2006) 13(02) *International Journal of Cultural Property* 207, 216.
[448] UNGA Cultural rights and the protection of cultural heritage, Human Rights Council Resolution (22 March 2018) (A/HRC/RES/37/17)).

enforcement might be difficult, as sanctions might prevent states from acceding to any instruments requiring them.

4.2 Reimagined Rules for Summary Return

Based on evaluation of the existing cultural heritage return mechanisms, and considering the 1980 Hague Convention, some conclusions may be drawn with which to formulate better rules for the return of objects of cultural heritage.

Given the highly complex nature of cultural heritage return claims, it is apparent that even minimal rules are hard to achieve in order for states to accept them, as demonstrated by the UNIDROIT Convention. This leaves individual states with much discretion in terms of the instrument's interpretation and implementation. While this is not necessarily problematic, some points must be carefully detailed in order to avoid certain types of claimants or objects from being excluded by the return mechanism.

First, standing is always problematic for certain individuals and communities, particularly when return mechanisms only allow contracting state authorities to bring a claim. In order to make a truly useful summary return mechanism, one that allows for any type of party to recover a wrongfully removed cultural object, it must permit a wide range of claimants to request return without the necessity of state intervention, similar to the 1995 UNIDROIT Convention regarding claims for stolen objects. As with the 1980 Hague Convention, any interested party should be able to request return of an unlawfully removed object, be it an NGO acting on behalf of a community or the object itself, an individual, a state, etc. Interest in a claim to allow standing must be defined broadly, perhaps along the lines of the sufficient interest test for judicial review under English law,[449] so as to avoid the overly narrow private law test dependent upon ownership.

Second, a broad definition of cultural heritage must be given so that the scope of objects covered is wide enough to include as many potential items of cultural heritage as possible, such as the definition provided in the 1995 UNIDROIT Convention. Perhaps as an extra safeguard, such as a provision allowing the requesting party to establish an object's

[449] The test for standing is 'sufficient interest in the matter to which the application relates' (Senior Courts Act 1981 s.31(3)), which courts have applied with increasing flexibility according to context (*AXA General Insurance Limited & Ors v The Lord Advocate & Ors* [2011] UKSC 46 [170]), 'so that groups and individuals without a direct interest were now more often able to bring judicial reviews in the public interest' (Ministry of Justice, *Judicial Review – proposals for further reform: the Government response*, February 2014, 32).

importance might be something to consider, taking into account several relevant factors such as types of use, spiritual and cultural links, socio-economic factors, etc, which would vary on a case-by-case basis. This alleviates the risk that a forum would not recognize the special nature of the object, preventing its return.

Third, limitation periods contained in the cultural heritage return mechanisms, as well as the instruments' non-retroactivity, pose problems for certain types of claims, such as objects removed during periods of colonialism. In the 1980 Hague Convention, there are no official time limitations prescribed in terms of when a party must raise a claim, proceedings must commence, or the date by which an authority shall order a child's return.[450] While the concept of settlement does function similarly to a time limitation in the Hague Convention, the concept of settlement for objects of cultural heritage is not particularly relevant. Removal of limitation periods might be something to explore when formulating a new return mechanism for cultural heritage. However, doing so might prevent states from acceding to the instrument. For example, the UK did not accede to the UNIDROIT Convention largely due to 'the length of the limitation periods in particular, and the limited factors which trigger them,' for they were viewed as too generous for potential claimants and unfavorable to possessors who had exercised due diligence.[451] Complete removal of limitations might ignite the all too familiar dissents: 'The courts will be drowned by suits;' it will 'lead to the destruction of existing collections;' it will cause 'the destruction of the art trade.'[452] The difference between the 1980 Hague Convention and the cultural heritage return mechanisms is clear – there are major financial and economic factors at play, with pressure exerted from the art trade and other groups looking to protect commerce and trade. While removal of any limitation period might be far-fetched, it is clear from the UNIDROIT Convention and Directive 2014/60/EU that a more permissive approach is better suited to cultural heritage.

Fourthly, it should be specified to where an object should be returned, as with the child's habitual residence in the 1980 Hague Convention. The analysis of domicile (*Chapter 3, 3.3.2*), particularly a sort of domicile of origin dependent upon/connected to the party requesting the object, might be an appropriate fit. This links in a way to the *lex originis* principle, the use of which has been advocated for to determine cultural heritage disputes.

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[450] 1980 Hague Arts 12, 18 (the powers of a judicial/administrative authority are not limited to order the return of the child at any time).
[451] ITAP Report December 2000, Department for Culture Media and Sport 49, 50-53. See *Chapter 2, 2.1.3* above.
[452] Lyndel V Prott, 'The Unidroit Convention Ten Years On' (2009) *Uniform Law Review* 215, 217-221.

A type of *lex originis* approach is taken by both the UNIDROIT and Directive 2014/60/EU, however not entirely – as the law to be used for any subsequent disputes over rights to the object will be determined by a forum upon an object's return. The connecting factor might not always be appropriate, however it should be the main factor to consider in terms of where an object belongs and where any subsequent disputes should be decided. A provision should be included that would require states to return an object to the community of origin, which would be particularly relevant in instances of civil war or for indigenous communities within the jurisdiction.

A return mechanism should provide the possibility of remuneration for a good faith possessor. Like the 1995 UNIDROIT Convention and Directive 2014/60/EU, a due diligence requirement placed on the possessor for all objects wrongfully removed must be strict as a means of deterring wrongful transfers of objects from happening in the first place, as well as avoiding excessive compensation. Compensation should be fair and reasonable, not market price or necessarily price paid. As with the UNIDROIT Convention, reasonable efforts should be made to hold any transferors of stolen objects accountable for compensation. Otherwise, the requesting party will be liable for compensation. However, it must be a fair and reasonable price, taking into consideration all factors surrounding the object's removal, circumstances of acquisition, etc.

Lastly, a type of grave risk exception should be included as a means of protecting the objects, and perhaps rules for interim protective measures for undergoing claims. However, any grave risk exception must be a last resort with a high threshold, as it is likely to be abused. There must also be provisions for return transport costs. As with compensation for good faith purchasers, it might be useful to consider holding any transferors of stolen objects accountable for this. Otherwise, it is most likely that these will need to be covered by the requesting party. There should not be any undertakings imposed upon the state in terms of proper housing or display. The courts of the jurisdiction granted recovery of the object should commence any proceedings over rights to it prior to its return, as means of reducing any biases or unnecessary transport of fragile objects.

4.3 Conclusion

A revised/reimagined summary return mechanism would hopefully facilitate returns for any type of claimant seeking return of wrongfully removed cultural heritage. Automatic return of wrongfully removed objects might avoid lengthy and costly return proceedings,

as well as provide a preventative effect in terms of illicit removal and trade. Any ownership rights should be determined by the receiving state according to their national laws, including conflicts laws. These proceedings are likely to be determined by the *lex situs*, as it remains the predominant way to deal with international claims for return. But perhaps 'ownership' rights and cultural heritage might be seen as analogous with custody rights and children, in which there exists a 'type of jurisdiction which by its nature'[453] is the most appropriate to determine the dispute.

Take for example, *Attorney-General of NZ v Ortiz*.[454] Had the Maori carving been returned to New Zealand, and the dispute over property rights been adjudicated there as opposed to in England, 'the nature of their interest and "ownership" would have raised complex issues of native law which would have been dealt with by a special tribunal set up to deal with such issues – the Maori Land Court.'[455] In this instance, the Maori Land Court would have been more appropriately placed to understand the intricacies of Maori conceptions of property, the specific roles that cultural heritage play in the community, and ultimately, to adjudicate the dispute.

Ultimately, the return of cultural heritage will remain a political question.[456] In the absence of a completely neutral, international tribunal,[457] courts and other authorities will likely question the reasoning for returning a cultural object, particularly if there is no clear-cut illegality. What are the merits in an argument to send it back? The focus must be on the circumstances surrounding removal, as well as the damage caused to the aggrieved party. If we look to the treatment of cultural heritage in light of the 1980 Hague Convention, viewing cultural heritage as a special type of property that has been 'abducted,' there might be a greater case to send it back. Upon return, any further disputes over an object will be treated in a more appropriate manner based on the particular heritage and the culture to which the object belongs.

It is recognized that fundamental incompatibilities exist between child abduction and cultural heritage returns. For example, economic motivations play a much larger role in

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[453] Pérez-Vera (n420) 445.
[454] [1982] QB 349, [1984] AC 1.
[455] Lyndel V Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage' (1989) 217 *Recueil des Cours de l'Académie de Droit International* 214, 247, 248.
[456] E.g., Maria Shehade and Kalliopi Fouseki, 'The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes' (2016) 23(4) *International Journal of Cultural Property* 357.
[457] Alessandro Chechi, 'Evaluating the Establishment of an International Cultural Heritage Court' (2013) 18 *Art Antiquity & Law* 31.

cultural heritage disputes. Financial interests in valuable objects motivate not only the parties in a dispute, but also may provoke nationalist or community bias from the courts, resulting in unfair dispute resolution and the deterioration of international cooperation. The social and cultural contexts surrounding children and cultural heritage also vary. Child abduction, on the one hand, is fundamentally a private matter and potential adjudicatory bias would not necessarily be linked to the state or community of origin. Disputes over cultural heritage, on the other hand, even if presented as proprietary disputes, remain essentially public issues. They are potentially bound with nationalist sentiment and bias in favor of retention.

The fundamental incompatibilities between contexts ensure that the analogy between child abduction and misappropriated cultural heritage cannot be pressed too far. However, while the analogy is not a precise one, there are enough similarities to see how the return mechanism of the 1980 Convention might influence the rules of cultural heritage returns.

Conclusion

The existing rules applicable to international cultural heritage return claims are incongruous with the special treatment afforded cultural heritage, particularly when resort is had to the rules of private international law. While return mechanisms currently exist in international cultural heritage instruments, they may not apply for a number of reasons. This leaves few options for potential claimants other than recourse to private international litigation. The rules of private international law typically characterize demands for return of cultural heritage as proprietary transactions governed by the *lex situs*. This framework fails to consider the cultural importance, sensitivity, and protections otherwise afforded cultural heritage in other areas of law and policy, such as domestically and under the international instruments.

An alternative way of thinking about these disputes is to view objects of cultural heritage through the lens of legal personhood. This viewpoint places cultural heritage at the center of a dispute, including its context and the cultural values of the people to whom the object is important. The consequences of legal personhood to objects of cultural heritage, such as title to sue, might produce results more closely related to the communities to whom the objects are important, yet the personhood analogy is limited. The substantive effects of attributing personhood to objects of cultural heritage might be restricted to municipal law, however, the true force of attributing personhood is rhetorical. What a community deems worthy of legal personhood might gain better protections in its home state, but unless personhood is established by clear national law and it is universally recognized, the rhetoric only goes so far. For the purposes of private international law, viewing cultural heritage through the lens of personhood, as a special type of property with a quasi-personhood status, allows an analogy to be drawn to the successful return mechanism in the 1980 Hague Convention on the Civil Aspects of International Child Abduction. In examining the 1980 Convention and how its rules might apply to returns for cultural heritage, improved rules for summary return mechanisms for cultural heritage may be envisioned.

While fundamental differences exist between abducted children and misappropriated objects, and the social, economic, and cultural contexts and biases vary considerably between the two, it is possible that the rules of cultural heritage return could be influenced by the mechanism contained in the 1980 Convention. Based on review of the 1980

Convention, new rules for cultural heritage summary return would hopefully accomplish the following. They would permit a wide range of claimants to demand return for cultural heritage wrongfully removed. The scope of objects covered would be wide and sensitive to specific cultural considerations regarding objects under dispute. Any limitation periods included would be permissive, and perhaps removed altogether. A type of *lex originis* approach, as seen in the 1995 UNIDROIT Convention and Directive 2014/60/EU, specifically of return to a type of domicile of origin connected to the community from which the object originated, should be considered.

A revised summary return mechanism would ideally facilitate return for any type of claimant seeking wrongfully removed cultural heritage and would avoid long and costly return proceedings under the ordinary rules of private international law. Importantly, it would allow for any ownership or other type of possessory rights, if applicable, to be determined by the courts or other competent bodies in the receiving state. As with the 1980 Hague Convention, this would be the jurisdiction best placed to determine these rights. While these reimagined rules might be aspirational, and perhaps biased in favor of return, they lay the groundwork for ways in which to improve existing summary return mechanisms.

There are signs that an instrument such as this might be more palatable to states. France has agreed to return part of the Parthenon frieze in the Louvre to Athens in exchange for a loan of Greek bronzes.[458] The National Museum of World Cultures in the Netherlands has adopted guidelines for return of artifacts 'that are of great value to source communities regardless of how they were obtained' with no obligation 'to prove that they have a suitable museum to house returned objects.'[459] A reimagined return mechanism would hopefully facilitate the return of wrongfully removed objects to the places and the people to whom they truly belong.

[458] Helena Smith, 'Boris Johnson rules out return of Parthenon marbles to Greece' (*The Guardian*, 12 March 2021) <https://www.theguardian.com/artanddesign/2021/mar/12/boris-johnson-rules-out-return-of-parthenon-marbles-to-greece>accessed 01 April 2021.
[459] Catherine Hickley, 'The Netherlands: Museums Confront the Country's Colonial Past' (2020) *UNESCO Courier 50th Anniversary of the 1970 Convention* 25, 26.

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