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Cultural Property and Claims for Repatriation

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2 Introduction

I have chosen to write my master's thesis on cultural property, more specifically the issue of the right place for cultural objects and the demands for repatriation to countries of origin. I also analyse the relation between cultural heritage and property in legislation, international conventions and the current debate.

It is not completely clear which branch of law that my thesis relates to. There are obvious connections to international public law: there are international conventions and Treaties dealing with the subject and the issue is discussed on a state-to-state level. Cultural objects are being transferred across borders, which make international private law relevant to the issue, but my thesis will not deal very much with it, since my interest does not lie on the detailed case level, but on the principles. The discussion on principles and property is naturally a legal philosophical one. Other legal areas are often relevant to the cultural property discussion and in practice, especially intellectual property law, private law and criminal law, but this lies outside the scope of my thesis.

The law of cultural objects is no doubt a study area where things are happening at the moment. It is by no means a *new* legal area – the protection of cultural property, especially in wartime, has taken legal forms during centuries – but it seems to be an area that currently interests scholars, experts and politicians alike. It is often said that the international antiquities market is flourishing more now than ever and that a large part of the objects traded are illegally exported and originate from illicit excavations.¹ The debate over cultural property is quite complex, since it includes objects of different types, from all over the world, from different epochs and with different histories. We deal here with a treasure chest full of stolen objects, wonders brought to Europe by enthusiastic archaeologists, war booty, pieces bought and sold according to current laws, smuggled art, potsherds stolen by soldiers, gifts to and from dictators and emperors, illegally excavated fortunes, nationalised mummies and much more. As you understand, the scope is very wide.

Today, countries of origin demand both international legal instruments regarding cultural property that are more favourable for them and the repatriation of specific objects. Market countries – the states where a large part of the world's cultural heritage is currently placed – do not always respond to these demands, but at least there is a large debate going on. Sometimes this depends on a genuine interest from politicians and academics, but it can also be a necessary response to a received demand or a measure taken before the fear of losing whole museums. To my delight, the cultural property issue has been dealt with in a multitude of books and articles, especially the latest decade, I think. Newspapers and magazines have also found the subject interesting. The war in Iraq has raised the awareness on international cultural heritage issues, even in traditionally “conservative” countries like the United Kingdom and the United States. Naturally, museums also feel the need to discuss the issue. In Gothenburg, the Museum of World Culture is currently exhibiting a valuable collection of ancient textiles from the Paracas Peninsula in Peru, that belongs to the City of Göteborg and that has been formally demanded back by Peruvian Government. The exhibition deals at length with the issue of repatriation.² In Stockholm, the Museum of Ethnography shows a collection of Benin Bronzes that also has had an uncertain past, in

¹ Brodie, Neil, Foreword and Introduction, in Neil Brodie, Morag M Kersel, Christina Luke and Kathryn Walker Tubb (eds.), *Archaeology, Cultural Heritage and the Antiquities Trade*, University Press of Florida, 2006, p 1, among many.

² Museum of World Culture, Göteborg, Exhibition *A Stolen World*
<http://www.varldskulturmuseet.se/smvk/jsp/polopoly.jsp?d=863&a=12322>

order to highlight the problem.³ The fact that these issues have been present in current cultural debate in Sweden has inspired me. It is nice that there is now a Swedish connection to my subject, when it is one that earlier was mostly discussed in the foreign press and academic world.

One reason why I find this issue so interesting is that it contains a lot of different problems, can be seen from many points of view and connects to other, equally interesting areas. There is definitely a North/South dimension to it (even though far from all cultural objects come from developing countries), and naturally this connects to the fact that many source countries used to be colonies and to the postcolonial discourse. The view on cultural objects also depends on the view of culture and cultural politics in general and can work as a starting point for the discussion on how to define art. I also think that it is difficult to ignore that your view on the market and other economical matters can affect how you regard cultural objects. Finally, it is also interesting to see how the United Nations system treats the issue, which is connected to its state and future. Unfortunately I do not have the time or space to deal with all these perspectives (and other ones, not mentioned here), but at least I am aware of them.

I have other, more personal, reasons for choosing this subject for my last work effort at the Institution of Law in Göteborg. For a while, I have been considering working with culturally related law areas. I have an interest in culture and I am tempted by the possibility to work within a field where law is not the only component and which has also a large political aspect. When I studied in Spain during one academic year in 2008/2009, I took a course in international private law dealing with cultural property that focused on the looting in Iraq during the latest war there and the return of paintings that had been taken by the Germans from Jewish families before and during the Second World War. It was no doubt the most interesting course I took during that year and opened my eyes to this branch of law. I was also inspired when I during my six-month stay in Paris last year, visited the Quai Branly museum. It is a public museum founded on the initiative of former President Jacques Chirac that since 2006 exhibits “non-European art”, in the words of the museum homepage.⁴ It is a very beautiful museum with large collections of objects from all continents but our own. What surprised me on my visit was that the question of repatriation was not at all considered. There is also the sensible question on France’s colonial past and continued relations with the developing world.

3 Presentation of the problem

It is often said that there exists an enormous market of stolen, or in other ways illicitly acquired, cultural objects. We also hear about the problems with illegal excavation, looting of antiquities on archaeological sites, theft of art from museums and private collections and the plundering and destroying of historical and artistic objects during armed conflict. This illicit commerce is made possible by corruption, lack of control in source countries, conflicting rules on private law and ownership, forged documents and the eagerness to earn money or include a fantastic object into one’s collection. The history and chain of previous owners is falsified in such ways that the provenance of the object becomes impossible to prove. The object can be sold on the open market and any crimes that have been committed

³ Museum of Ethnography, Stockholm, Exhibition *Vem tillhör föremålen?*
<http://www.etnografiska.se/smvk/jsp/polopoly.jsp?d=1705&a=16136>

⁴ Museum of Quai Branly, Paris: <http://www.quaibrantly.fr>

remain unsolved.⁵ Even though it is often mentioned in the media, at conferences etc that the illegal market of art and cultural objects is huge and represents the third or fourth most common form of trafficking, after the trafficking of drugs and arms, there are no numbers to prove this. The statistics available are very few and unreliable.⁶ The fact that there are no international definitions accepted by all states that decide what is to be considered cultural property, stolen, illegally exported etc makes it difficult to map the scope of the problem and also to find satisfactory solutions to it. Another interesting point is that archaeologists often denounce cases of illicit trade, while lawyers in the same cases do not define them as illicit. Immoral practices might not always be illegal. Apart from the illegal trade, it seems that transactions of art and cultural objects in general have increased in the last decades.⁷

Some countries have very severe legislation on nationalisation of objects and exportation. This is criticised by some and makes a large part of the handling of objects illicit. Others view fewer problems with the trafficking and think that the problem should be seen in another light. The issue is even more complicated when objects were moved a long time ago. The conclusion is that how large – and which – problems that are connected to the cultural heritage field and the commerce with objects, depends on the person's opinions in other questions and the ideas on cultural property in general. All aspects of the debate on cultural heritage are not crucial to my thesis, but in the debate on the possible return of objects, the same lines of arguments exist within the general debate as in the discussion on issues of return. Decisions and opinions in one field can affect the other one.

What we can be sure of is that demands are being made for the return of cultural objects, to what is argued to be its country of origin and that is the interest of my thesis. It is however necessary to be aware about the background to the demands and understand that they are not an isolated phenomenon but part of a larger debate. I have not seen any statistics on the return of objects, which is in fact quite logic, since demands can be made in a number of ways and might not always be public. Often states make the demand directly to another state, without passing through the museum where the object is located. Demands are sometimes pass through the courts, but it seems that more often diplomatic discussions are used. Dialogue between states can go on for years and the outcome differs greatly.

Many of the objects claimed today origin from colonial powers having taken objects back with them to the metropolis, explorers that left Europe to discover unknown territories and brought interesting things with them and wars where cultural objects were taken to prove the conqueror's power and cultural knowledge or supremacy. The world has changed a lot during the past century: colonialism has in general become a dirty past, wars have, at least partly, changed character and there seems to be more knowledge and sensibility towards questions about cultural heritage in our 21st century society. International conventions have been written and national legislation has been drafted. Because of new regulations, changed perspectives and the fact that museum directors and dealers have been convicted of smuggling, museums and other institutions seem to have become more careful when acquiring objects. This must not lead us to believe that having sorted out the claims for return that are made today, we will see no more in the future. Potential future problems are created all over the world today: objects with unclear precedence are

⁵ Brodie, 2006, p 1

⁶ Interpol Homepage, Stolen works of art: <http://www.interpol.int/Public/WorkOfArt/woafaq.asp>

⁷ Carducci, Guido, The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations, in Barbara T Hoffman (ed.), *Art and Cultural Heritage, Law, Policy and Practice*, Cambridge University Press, 2006, p 71

incorporated into collections, wars are going on, conflicts between ethnic groups continue, objects are stolen, smuggled, looted and exported without the necessary license. Lawyers, archaeologists, politicians and museum directors do not agree on if all this activity is illegal – or should be – but it seems clear that it will lead to new claims for restitution.

Most demands come from parts of the world where advanced human cultures have existed for a very long time: Egypt, Greece, certain parts of Africa, Latin America, Iraq... Today, the states that rule these areas are often – but not always – developing countries.⁸ The demands for return can be divided into two different groups: demands made by one country towards another and demands within a country, made by an ethnic group, often the native population.

Problems with cultural objects exist also in Sweden: two examples are the theft of the Silver bible and illegal excavations on Gotland.⁹ Sweden has also received demands for return of objects. This might not be very surprising, considering that we have quite an impressive history of looting and taking war-booty. Between the 16th and 18th century, Swedish troops battled across Europe and both individual soldiers and kings took valuable objects home with them. Even then, there were a few rules regarding the looting; the king Gustav Adolf the Second had decided that it could only start once the battle was properly over. Soldiers were assigned a certain part of the town and violence was forbidden against priests, elderly, women and children – as long as they did not make resistance.¹⁰ As mentioned above, there are also objects in Swedish museums that have been claimed back, both from cultures from other continents but also human remains and ritual objects from the Sami culture.

The first issue that my thesis deals with is how demands for return of cultural objects should be treated. I am interested in both the regulations that can be found in national legislation and international conventions and what principles and ethical rules that could and should be applied. I have however chosen to focus on the slightly more complicated cases, the ones where the objects not have been recently stolen or illicitly exported and in many cases have been away from the country that demands it “back” for hundreds or even thousands of years. It is the case with a lot of the objects that are kept in museums in the Western world. The cases where normal legislation on private law and criminal law can be applied are not the ones that interest me the most, but the ones where general principles or politics must be used to solve the cases and where it is necessary to take a special approach to each case individually. Since these cases are often very complicated, they tend to lead to discussions not only about the individual object, but also about culture and heritage in general. Special laws and conventions on cultural property are often quite recent and cannot be used for objects that arrived in museums in the 18th century or when the truth about its provenance is long forgotten. In many cases, objects were not stolen or looted, but bought or given as a gift in a manner that was legal at least during the time of the acquisition. This does not stop countries of origin to demand the objects back, but it certainly complicates the decision making about the object’s future. According to Jote, objects that are demanded back can be divided into the ones that were taken in war or during occupation or colonialism

⁸ Greenfield, Jeanette, *The Return of Cultural Treasures*, Cambridge University Press, 3rd edition, 2007, p 222

⁹ Weibull, Knut, 1970 års Unescokonvention och andra konventioner till skydd för kulturföremål och Sveriges inställning till dem, in Anna Landberg (ed.), *Vems är museet? Rapport från konferensen Vems är museet? Kulturen i Lund 26-27 januari 2000*, Museiforum i samarbete med Svenska unescorådet, 2001, p 22

¹⁰ Bursell, Barbro, Krigsbyten i svenska samlingar, in Ann Grönhammar (ed.), *Krigsbyte/War-Booty*, Journal of the Royal Armoury 2007-2008, Livrustkammaren, 2007, p 13

on one hand, and objects taken in peace time, illegally exported, given as a gift, etc, on the other.¹¹ This division does however not suit the purposes of my thesis, which rather divides between objects that have been taken recently and the ones that have been located “abroad” for a long time.

The next issue that I will investigate is in what way that the cultural objects are to be considered as property. I want to know if it is possible to apply the same old legal philosophical perspectives on ownership on cultural objects and especially the ones that are ancient and are of great interest to scholars and could be considered the heritage of the whole of humanity. I will try to describe in what way the question of possible return can be solved or viewed if taking property theories in consideration. In order to do this, I will investigate how and if the property side of cultural objects is regulated in laws and conventions and how it maybe should be regulated. It is also necessary to examine how scholars – legal and others – talk about cultural objects and in what way the property perspective is treated.

4 Method and literature

During the work of my thesis, I have mainly been using academic literature, such as books and articles from different kinds of academic journals. In addition, I have to some extent read newspaper articles, primarily to get information on interesting cases and the opinions of states and Governments. Naturally, I have also studied laws and international conventions in the field. My aim has been to study the regulation and debate on the subjects of my thesis in order to draw conclusions on how demands on repatriation of cultural property should be received. To this background and with the help of different theories on property, I have also intended to analyse the different views on property in the field of cultural objects and in what way the objects are treated like property.

Maybe I should mention that I have used academic material produced by representatives for different disciplines. Naturally, it is mostly lawyers that discuss the legal problems and possibilities in the sector, and my thesis is one of law, but I have found it useful to acquaint myself with the ideas of archaeologists, ethnographers, museum directors and others. These groups have been very active in the debate and have produced a large amount of articles and books. It seems to me that it is in the humanistic faculties of the world, rather in the law ones, that most of the debate on issues of repatriation and the proper place for cultural property has taken place. As always, it is interesting and rewarding studying literature that gives you new perspectives, but in this case it was also important for me to get a full view on the debate in order to pursue my analyses. Especially the views on property differ a lot between the groups. In the field of cultural property, lawyers are not the only ones that are listened to. I seems that the most important and influential debate takes place in the cultural and humanistic rather than legal community. Further, archaeologists and museum curators often take decisions on important matters. However, I think that it is important to keep in mind that the opinions and models of discussion often differ between the legally trained and others. This is of course especially crucial for me. It is also vital to be critical when non-lawyers present and discuss legal issues, conventions and their contents, etc.

¹¹ Jote, Kifle, *International Legal Protection of Cultural Heritage* (diss.), Juristförlaget, 1994, p 261

5 Delimitations

My thesis does not deal with some of the often discussed issues regarding cultural property. I am not primarily interested in the basic protection of cultural objects in peace and war time. I will not discuss looting of archaeological material or theft of cultural objects. I will not offer solutions on how to stop the, according to some, enormously extensive traffic in cultural property. I only discuss demands for return against states and public institutions, not against private persons. These are the claims most generally discussed in literature and where the moral and political questions are more obvious. Claims against private subjects should normally be made in court and by using ordinary legal methods.

It is not the protection *per se* that is the subject of my thesis. However, all these issues are intimately related to the questions I discuss, and they will to some extent be present in my work. I study all the five relevant conventions on the field, and there other issues than just restitution (or rather, *mainly* other issues) are regulated. The fact that the objects demanded back in some way have arrived to their new home also has an impact: they might have been stolen, looted in wartime, found in the ocean...

Another limitation is that I will leave the possible restitution of body parts (skulls, skeletons...) outside of the scope of this thesis. I think that the issues regarding them are somewhat different and deserve a proper study.

It is difficult to define and limit the area of cultural heritage, but at least I have decided to focus on the movable and tangible heritage. Matters on immovables and the intangible heritage will appear in the thesis, but only in the periphery. The question on the intangible leads into the field of intellectual property, which is very interesting, but too much to handle for this text. Private law issues, *bona fide* purchases, transfer of property, etc. will not be discussed more than indirectly. I frankly do not have the time or space to consider them.

6 Definitions

6.1 Definitions in my thesis

Below, I go into depth on the different terms and words that are used in academic texts and debate to describe cultural objects. This is very important, since it often reflects the view on culture and property, which is essential for my essay. The fight over words is common in the cultural property debate: the right use is discussed and the choice of terms by others, representing the opposite position, is often criticised, sometimes in a patronising way. Here, I will explain how I myself use the terms in my essay.

I just wrote that words matter, but – maybe a bit contradictory – I will now explain that I have not had a strict linguistic policy while writing this. My thesis is not mainly arguing for or against one view on cultural objects, but analysing the different views in legal instruments and academic and political debate. Therefore, I sometimes use the words used by scholars in their own texts and employed in legal texts, while writing about these. Apart from my conclusions, I try to take a neutral stand on definitions and critical issues. There is also the interest in creating a product where the texts flows freely and is not too focused on finding the exact right word, which is why I mix terms like cultural objects, cultural property and cultural heritage, partly for the sake of variety. Naturally, in the parts where I focus on the definitions themselves, I try to be more careful and stringent in my use of the words. When talking about the objects themselves, it seems less important using the “right” word than when discussing theories.

It should also be remembered that the use of the words differ between scholarly disciplines. My thesis is one of law, but it can be interesting to know that within the archaeological field, there are strong feelings about the use of words. For example, talking about *antiquities* is generally not accepted; nowadays archaeologists talk about *artefacts*.

Apart from the most central definitions described below, there are also other sensitive words. One example is the variants used for the *return* of cultural objects. The word *return* seems like the most neutral one, with a broad use outside the cultural world. However, other words commonly used are *repatriation* and *restitution*. They seem to be used more by people in favour of returning objects to their countries of origin. Especially *repatriation* has very strong connections to the nationalist movement; not so strange considering *patria* meaning homeland and the underlying view that objects *belong* somewhere. To me, I do not regard it as too problematic for me using these words, since at least in the view of the claiming part it is a matter of restitution. Restitution is also a term utilised in the legal lingo, whereas repatriation has stronger emotional connotations.

Apart from the definitions directly connected to the subject of my thesis, there are also other, possibly problematic words used in it. I think of words like tribe, indigenous, colonialism, native... In other disciplines, the definitions and use of these words might be more important because of their cultural, historical and emotional content, than in law, where it is, generally, the legal meaning that matters. I do not mean that the definitions do not interest me; it is only that I do not really have the time to go into depth on them. The focus of my thesis lies elsewhere and I think that the reader must accept that I use these words in a perhaps naïve way for my own purposes and even for a linguistic change.

Finally I want to add that most of my sources are in English and I have studied the international conventions in this language. That makes my discussion of the definitions a bit one-sided, since in the Latin languages the words used are slightly different and this discrepancy cannot fully be explained by transnational issues.

6.2 Definitions of cultural objects

Scholars, legal instruments, governmental bodies, organisations and so on use different terms and definitions to describe culturally important objects that have a certain history: cultural property, cultural heritage, patrimony, antiquities... Here I am going to describe the most important ones.

To define cultural property and cultural heritage, it is not enough discussing these terms in them; it could also be interesting defining *culture*. It is however a quite complicated issue and not the focus of my thesis. I therefore will not go into depth on it. According to Greenfield, *culture* is used much more restrictedly in Anglo-Saxon countries than elsewhere, in a "*limited scientific, ethnological or artistic sense*". She also says that the word is more political in developing countries. Greenfield adds that it is not aesthetic boundaries that decide what is to be considered as culture. To get around the complicated matter of defining culture, many states have chosen to base their laws on exports, protection, etc on lists of types of objects, and factors like local origin and age. Interestingly, the protected property we have to deal with here is sometimes *natural* objects. Normally, we see this as just the opposite to culture which is often seen as something made by man.¹² Brown defines the accepted anthropological definition of culture "*as an abstraction or analytical place-holder for shared behavioural patterns, values, social practices, forms of artistic expression, and*

¹² Greenfield, 2007, p 364

technologies". However, outside the world of anthropology, culture has lately come to be understood as *society*. Belonging to a culture equals being a part of a society. This is connected to ethnic nationalism and political claims for independence and the acknowledgement of certain communities. A last definition of culture can be found in the 2007 UN Declaration on the Rights of Indigenous Peoples; the whole instrument is a description of what constitutes indigenous culture and heritage.¹³ This definition is at least helpful within the scope of declaration, but since it is a much-cited document, it might be interesting.¹⁴

During about fifty years, five different UNESCO Conventions on cultural objects have been drafted. Each convention has its own definition and it has evolved from *cultural property* to *cultural heritage* and then expanded to cover also *intangible cultural heritage*. This development is of course a product of the economic, social and legal changes that have occurred in society. There is an *ad hoc* approach to the cultural heritage definition; there is no definition that suits every situation and each convention is only trying to address a certain problem.¹⁵ Other terms used, but not as frequently, are *cultural treasure*, *cultural patrimony* and *cultural material*.¹⁶ Cultural patrimony can be seen as very close to being a synonym to cultural heritage. The expression cultural treasure is criticised since it "*perpetuates the image of archaeology fostered by...Indiana Jones*".¹⁷

6.2.1 Cultural property

The term cultural property includes a large number of objects. When the first rules protecting cultural objects were made, legal protection was a matter of physically protecting cultural objects. This was the point of view of the 1954 Hague Convention. Most important to the Convention was protecting the physical objects and to do this, the thought of cultural heritage as property served well and *cultural property* was consequently the term used in the document. The term is also used in several other UNESCO documents. Many of these were created to strengthen the cultural value of heritage, in contrast to the commercial one. However, the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property has an aim of facilitating the exchange of objects and therefore has a vague and broad definition of cultural property. Another document using the cultural property definition is the 1978 Recommendation for the Protection of Movable Cultural Property. Through the text of the Recommendation, it is clear that it is the physical object that is protected, but it is done in order to protect the *value* of it.¹⁸

Using the *cultural property* term for cultural objects has been criticised. First, it could mean different things in different jurisdictions; the differences are especially large between civil and common law systems. Second, using the word property means emphasizing the commercial side of culture and not enough appreciating the cultural side, which is contra

¹³ United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007

¹⁴ Brown, Michael, Heritage as Property, in Katherine Verdery and Carolina Humphrey (eds.), *Property in Question, Value Transformation in the Global Economy*, Berg, 2004, p 50f

¹⁵ Forrest, Craig *International Law and the Protection of Cultural Heritage*, Routledge, 2010, p 20ff

¹⁶ Glass, Aaron, Return to Sender: On the Politics of Cultural Property and the Proper Address of Art, *Journal of Material Culture* 2004, vol. 9, p 119

¹⁷ Herscher, Ellen, Many Happy Returns? New Contributions to the Repatriation Debate, *American Journal of Archaeology*, vol. 102, no. 4, 1998, p 810

¹⁸ Forrest, 2010, p 21ff

productive to protection. For these reasons, the term *heritage* has step by step replaced *property* within the legal framework of protection.¹⁹

6.2.2 Cultural heritage

Cultural heritage is probably the term most widely used today to describe objects and monuments of cultural value. Since it is used for a wide range of objects that seems to be growing, it is quite difficult to pin down as a definition. Further, it is constantly modified, new meanings and values being added to the definition. It seems to be a broader concept than *cultural property* and covers also the intangible heritage (see below).²⁰ Within the UNESCO, it is used for all kinds of cultural expressions: art, cinema, underwater heritage, intangible traditions, natural sacred sites, songs, traditional sports... *Heritage* indicates something with historic origins, something inherited from the past. The first time that *heritage* was used to describe cultural objects was actually in the 1954 Hague Convention, which otherwise uses the term *cultural property*. In article 1 it is declared that objects protected include “*movable or immovable property of great importance to the cultural heritage*”. In this early moment, cultural heritage is not used as describing the property covered by the Convention, but rather describing the cultural value of it. It was in the 1972 World Heritage Convention that cultural heritage was first used in the way that it is now used. This document only refers to immovables, whereas nowadays the term is used for all kinds of objects. The more recent usage of the term seems to prove a definite move towards the recognition of collective and public interest in the heritage. This change of perspective is also reflected in the Convention’s article 4, where it is stated that it is the duty of every state to “*identify, protect, conserve and transmit the cultural and natural heritage to future generations*”. The fact that this decisive step was taken in 1972 is explained by the currents of the time. There was a growing awareness of environmental problems and the need for international co-operation to address them. The cultural heritage must be protected internationally in order to ensure its passing on to future generations. This change of definition is by some seen as a shift from a traditional rights-based view with emphasis on ownership and economic value, where the cultural objects belong to “a political sovereign”, to a view dominated by a duty to preserve a heritage inherited from the past with a value that goes beyond national boundaries.²¹

Many authors have tried to give their own definition of cultural heritage. Prott and O’Keefe describe it as “*manifestations of human life which represent a particular view of life and witness the history and validity of that view*”. Koboldt’s definition is “*an expression or representation of the cultural identity of a society in a particular period*”. Loulanski’s slightly different version is: “*culture and landscape that are cared for by the community and passed on to the future to serve people’s need for a sense of identity and belonging*”.²² According to one UNESCO document, cultural heritage is “*the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in*

¹⁹ Forrest, 2010, p 24

²⁰ Frigo, Manlio, Cultural property v. cultural heritage: A “battle of concepts” in international law? *International Review of the Red Cross*, Vol. 86 No 854, June 2004, p 369

²¹ Forrest, *International Law and the Protection of Cultural Heritage*, p 24ff

²² All three quoted in Forrest, 2010, p 2

the personality of the peoples in the world".²³ This definition also includes the intangible heritage.²⁴

The objects covered by the cultural heritage term could be just about anything given value by man. Both movable and immovable objects are covered: famous paintings, ancient domestic utensils, caves, buildings, gardens, music, landscapes, oral tradition... This includes almost anything that we can inherit from our predecessors and want to pass on to future generations. Attribution of cultural heritage status is closely connected to *value*. It is not the object itself that is prima facie protected, but its content, what it represents. It is this value that the legal instruments try to protect.

Greenfield argues that the term *cultural heritage* is not very appropriate, since it has been too widely used and can now mean just about everything. It is ineffectual because of its constant use, which has contributed to devaluating it.²⁵ Others argue that it is not a good definition since it, like *cultural patrimony*, implies moral claims.²⁶

6.2.3 Intangible cultural heritage

Finally, there is the intangible cultural heritage. Since I have chosen to focus my thesis on the return of objects, the intangible cultural heritage is not within the scope of my work. I will however give short introduction to the subject since the term will emerge later on. Intangible cultural heritage is difficult to define, but it could be described as expressions, skills, practices, knowledge, etc and some examples are music, rituals, agricultural methods, oral literature and traditional games. These are however only manifestations of intangible heritage; it is intangible and should be seen as "*an enactment of meanings embedded in collective memory*". The intangible is sometimes a complement to the tangible cultural heritage, giving it meaning and context, and in some cultures the main heritage, since tangible heritage was not produced, destroyed or not preserved for other reasons, like looting. There has been some initiatives for legal protection of the intangible heritage for a couple of decades (for example in connection to intellectual property rights), but the international awareness of it has grown and in 2003 the UNESCO adopted the Intangible Cultural Heritage Convention.²⁷

7 The legal protection of cultural property

7.1 Historical overview of the protection in peacetime

In times of armed conflict and for shipwrecks, there have however been rules and policies for a very long time. This will be described in following chapters. The specific protection of goods with a cultural value has been present within states through national regulation during about 200 years.²⁸ Some rudimental rules existed however as early as during the Roman period; Emperor Majorian demanded in 457 that all buildings serving public or aesthetic purposes should be specially protected against attacks and changes. Even after the

²³ Preamble to the UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works.

²⁴ Forrest, 2010, p 1ff

²⁵ Greenfield, 2007, p 366

²⁶ Herscher, 1998, p 810

²⁷ Forrest, 2010, p 362ff

²⁸ Forrest, 2010, p 1

fall of the Roman Empire, the monuments created by it have been legally protected.²⁹ Within the territories controlled by the Pope, rules on cultural property have existed since the 15th century. They were laws restricting the export on works of art, protection of important buildings, rules giving powers to the Holy See on excavated materials, etc. In Sweden there has been protection of culturally and historically important objects since mid 17th century. A proclamation made in 1666 prohibited the destruction of ancient monuments and relics irrespective of if it was on private or public property. As early as 1684, Sweden legislated on archaeological findings in the ground, attributing the found objects to the king while the finder was rewarded. In France, during the period of the Revolution, cultural objects were begun to be seen as the cultural heritage of the country and the Museum of Louvre was created. The Code Civil created by Napoleon also contained special rules on cultural property. Archaeology started to flourish in Europe during the era of Romantic nationalism, and this led to new laws on the protection of cultural objects.³⁰ Archaeologists and collectors also went abroad to find interesting objects, which led to legislation outside of Europe in order to protect objects and sites against these heritage tourists. Both Turkey and Egypt prohibited most exports of objects in the 1870's. Several states, some of them still British colonies, introduced protective legislation in the 1920's and 1930's. The League of Nations also protected the cultural heritage to some extent. The UN and the UNESCO started working for the protection of cultural heritage also in peace time some time after adopting the 1954 Hague Convention.³¹

7.2 Historical overview of the protection in armed conflicts

Naturally, war and other kinds of armed conflicts lead to the destruction not only of human lives, but also of buildings, monuments and other cultural objects. Sometimes this is just the coincidental consequences of belligerent acting, but it can also be the very aim of the fighting. Destruction of cultural heritage can be an act of war in itself, meant to demoralise the enemy or to earn money through pillaging. During centuries, plundering during and after war was common practice, accepted by all major nations. There were even rules for how this pillage should be acted out. For a long time, there have been attempts to limit the repercussions of war. In the beginning, the idea was to protect humans, both civilians and soldiers, but soon it extended also to cultural objects. According to Forrest, the will to protect humans and civilian property, among it the cultural heritage, is only one part of the history of wartime protection. The other one is the doctrine of military necessity; that protection can only be given as far as it does not interfere with the army's possibilities to a victorious outcome of the conflict. Even in ancient times some saw the need for protection of cultural objects; the Greek historian Polybius underlined this in his writings. Cicero protested against the plundering by Roman soldiers. In the 9th century, French Emperor Charlemagne recognised the principle of return of cultural property to its rightful owners. However, proper legal protection of cultural heritage in wartime did not yet exist. The earliest protection of cultural objects and sites, was given to sacred places, like churches and temples. Pillage and plundering was still seen as the right of the victor. During the Renaissance, the idea of protecting cultural objects for its artistic and historical values started to prevail. In several peace treaties during the following centuries, obligations on the

²⁹ Adlercreutz, Thomas, *Kulturegendomsrätt*, Fakta info direkt, 2001, p 15f

³⁰ Erh Soon Tay, Alice, Law and the Cultural Heritage, in Isabel McBryde (ed.), *Who Owns the Past?*, Oxford University Press, 1985, p 108f

³¹ Forrest, 2010, p 133f

restitution of plundered cultural property were included. Some decisive steps were taken about 400 years ago, with the publication of Gentilis' *De iure belli* and Grotius' *De iure belli ac pacis*. In these two works, it is emphasised that killing and destruction is often necessary in wartime but should only be used when necessary. These thoughts were developed by Rousseau in his *Du contrat social*; he made a clear distinction between soldiers and civilians and their property. Civilians should be protected as far as possible. These limitations were however not always the result of humanitarian care, but economic and political considerations. After the war against Napoleon, the British tried to return some of the cultural treasures taken by the emperor's troops, mainly from Italy. Another important point in the development of the legal protection of cultural heritage was the 1864 Instructions for the Government of Armies of the United States in the Field, more commonly known as the Lieber Code. It was a set of rules written by the law professor Francis Lieber that introduced the doctrine of military necessity. It was used during the US Civil war. According to Forrest, it was the "*first formal set of rules laid down by a state as to how both its own armies and that of its enemies should be treated*". It made a difference between soldiers and civilians and introduces detailed rules on the protection of civilian property, including museums, religious places and educational institutions. Cultural objects should be protected "*even when they are contained in fortified places whilst being besieged or bombarded*". The Code does not exclude the seizing of valuable cultural objects by military forces, but the ownership over it shall be decided by a peace treaty and it cannot be sold, privately appropriated or destroyed. Nevertheless, all these rules are subordinate to the rule of military necessity.³²

The Hague Regulations were annexed to the 1907 Convention Concerning the Laws and Customs of War on Land. The Regulations codified the customary international law of war at the time. It protects property in general, but also cultural objects. Cultural objects and sites shall be spared, as long as they are not used for military purposes. The state to which the objects belong is responsible for indicating the whereabouts of those objects. During occupations, cultural heritage shall be considered private, and not public, property. Destruction or damage to it is forbidden and shall be legally prosecuted. Here, the military necessity rule does not apply. Between the two World Wars, some work was done to protect cultural heritage in wartime, but no really efficient legal products were drafted. During the Second World War, enormous destruction was caused by the armed forces all over the world and cultural objects were damaged or annihilated in many places, both with or without purpose. One of the consequences was the upset of American and British Commissions for protecting the cultural heritage in the territories occupied by Allied forces. The Allies also dealt with the question on property, also on cultural objects, stolen from the Jews.³³

7.3 Legal protection in recent times

Some of the most important legal instruments regulating cultural property are the documents originating from the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The UNESCO is required by article 1 of its Constitution to "*assure the conservation and protection of the world's inheritance of works of art and monuments of history and science*" and to this mean it can "*recommend such international agreements as may be necessary*" (article 2). The most important of the documents from this UN body are five conventions that will be described below. Every one of these conventions has a different

³² Forrest, 2010, p 56ff and Koen De Jager, Claims to Cultural Property under International Law, *Leiden Journal of International Law*, Vol.1, No.2, 1988, p 184

³³ Forrest, 2010, p 56ff

approach and scope and they have not been created to interact.³⁴ I will discuss these conventions below, but only treat the parts that are especially interesting for the subject of my thesis. States also sign bilateral treaties to help each other within the cultural property field, for example in the customs sector or promising help from the law enforcing powers.

Within the UNESCO systems, there are also other documents without the value of convention, mostly recommendations to the member states. Recommendations are adopted by majority by the General Conference and do not impose legal obligations. One of them that could be worth mentioning is the Recommendation no. 53 from the World Conference on Cultural Policies, held in Mexico in 1982. It states that states should “*initiate bilateral negotiations between the holding authorities and countries of origin with a view to returning cultural property*”.³⁵

I shall also mention the 1976 Recommendation Concerning the International Exchange of Cultural Property. As its name indicates, it is a document supporting increased international exchange of culture. According to Merryman, it is however not any kind of exchange; the Recommendation is opposed to the international trade with cultural objects. In the Recommendation it is said that the exchange of culture today largely depends on trade, which leads to “speculation”, which in its turn makes objects inaccessible to poor countries and public institutions. Trade is also said to lead to illicit trade. Against this, Merryman argues that an open market actually makes prices lower and objects more accessible, since the selection is larger. In Merryman’s interpretation, the Recommendation wants a world where there are no dealers or collectors; only governments and (public) institutions. He further says that this view can be partly explained by the fact that the Soviet Union was still a member of the UN system in 1976, but that it is not the whole explication, since these thoughts exist within the UNESCO still today, even stronger than before.³⁶

In 1978, the UNESCO set up an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. The purpose of this Committee was to “*seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost such property as a result of colonial or foreign occupation*”. It was meant to be an organ for promoting co-operation and helping on negotiations. The Committee has also helped in establishing cultural inventories: list of cultural objects and their locations. A number of demands of return have been made through the Committee and some objects have been returned with its help, but on the whole, its activity has been low.³⁷ At the moment, three demands of return are being treated by the Committee; one of them regards the famous Parthenon Marbles, British property demanded by Greece.³⁸ An explanation to the low activity could be that only 22 of the UNESCO member states are represented and the fact that the decisions are not of binding nature.³⁹

³⁴ Forrest, 2010, p ix ff

³⁵ Greenfield, 2007, p 223

³⁶ Merryman, John Henry, A Licit International Trade in Cultural Objects, in Kate Fitz Gibbon (ed.), *Who Owns the Past?*, Rutgers University Press, 2005, p 269f

³⁷ Greenfield, 2007, p 226ff

³⁸ The two other regard the Bogazköy sphinx, which is demanded by Turkey from Germany and the Makonde mask, demanded by Tanzania from a Swiss museum. (Rapport du secrétariat, Report from the 15th Session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Paris, 11-13 mai 2009)

³⁹ SOU 2005:3 Sveriges tillträde till 1995 års Unidroitkonvention om stulna eller olagligt utförda kulturföremål, Betänkande av Kulturföremålsutredningen, p 112

The General Assembly of the UN has also encouraged member states, mass media and others to increase their efforts to realise returns and raise the awareness on these matters. However, when such recommendations and even resolutions have been voted, important market countries have often voted against. Especially the UK has said that it cannot accept the principle that legally acquired objects shall be returned.⁴⁰

Apart from laws and international treaties and conventions, there are also other documents that regulate the commerce of cultural objects and affect their safeguarding. One important phenomenon is the policies that museums themselves decide upon and that serve as guidelines for purchasing, lending, demands for return, etc. Due to the last years' debates on the issue, many institutions have seen the need to establish this kind of documents. In Germany, the United States and the United Kingdom, museum organisations have created guidelines for their member institutions. German and British museums are only allowed to buy objects with a proven provenance that goes back to 1970, the year in which the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was created. Similar rules are also applied in the United States. According to de Montebello, these guidelines, despite not being legal norms, have proven to be very efficient. He says that they have led to a diminished supply of illicit objects. Museums also acquire fewer objects.⁴¹

After the Second World War, awareness rose about the importance of cultural heritage in society and also the threats to it. One consequence was the foundation of the International Council of Monuments and Sites (ICOMOS) in 1965. According to its Charter, it is "*an international assembly of architects and specialists of historic building*". This organisation has contributed on defining and conceptualising cultural heritage and it has also participated in developing certain international legal instruments. It has also done an important work on making up definitions for different kinds of places in need of protection.⁴² However, de Montebello calls it "the most hawkish anti collecting body".⁴³

There is also a similar organisation for museums, the International Council of Museums (ICOM). It is quite active in the debate on collection ethics, looted objects, etc and it has put together a Code of Ethics to be used by the members. Most important museums of art, history and archaeology of the world are members of the organisation.⁴⁴ In 1977, this organisation stated that it was to be seen as a general ethical principle that objects of major importance for a country's history or identity shall be returned.⁴⁵ This is also expressed in ICOM's code of ethics article 6.3: "*When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum*

⁴⁰ Greenfield, 2007, p 226ff

⁴¹ De Montebello, Philippe, "And What Do You Propose Should Be Done with Those Objects?" in James Cuno (ed.), *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2009, p 69f

⁴² Forrest, 2010, p 22

⁴³ De Montebello, 2009, p 69

⁴⁴ Renfrew, Colin, Museum Acquisitions and the Illicit Trade in Antiquities, in Neil Brodie, Morag M Kersel, Christina Luke and Kathryn Walker Tubb (eds.), *Archaeology, Cultural Heritage and the Antiquities Trade*, University Press of Florida, 2006, p 247

⁴⁵ Greenfield, 2007, p 234

concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return.”⁴⁶

8 International conventions

8.1 The 1954 Hague Convention

Having witnessed the horrors of the two World Wars, when cultural treasures were demolished, expropriated and looted to a large extent, the international community felt the need for a proper protection of cultural heritage. The international regulation existing at the time had been far from sufficient to stop pillaging and bombing. The 1949 Geneva Conventions had already been drafted, but concerned war situations in general and hardly mentioned cultural objects. This was the background to the creation of the 1954 Hague Convention, or the Convention for the Protection of Cultural Heritage during Armed Conflicts, as its full name is. It came into force in 1956 and is said to be the first universal convention dealing only with the protection of cultural property. It was meant to permanently protect cultural heritage; during armed conflict as well as before and after. The idea was not to create an ideal convention, but rather a more modest and realistic one that could actually be implemented and used. The Convention is considered a product of the same thoughts that guided Francis Lieber in his work.⁴⁷

The Convention covers all kinds of cultural heritage, but it separates between objects under the general protection and the ones under Special Protection; heritage of “*very great importance*”. The Convention does not include rules on importation and exportation of cultural heritage objects. In its preamble, it recognises the idea of a “*common cultural heritage of all humankind*” and that damage to cultural heritage affects the whole world, not just the country of origin. Protection of cultural heritage is important to everybody and it must be made on the international level. The Convention shows a clear internationalist approach. The scope of application is international armed conflict between two or more contracting parties to the convention, irrespectively of if war has been formally declared or of the legality of the use of force. It applies also to occupation. The Convention could potentially be applied to civil war situations, but in practice this application would be difficult.⁴⁸

The drafting parties wanted to narrow the definition of cultural property in the Convention to make it clearly defined and easier to implement. Cultural property in the sense of the Convention includes both movables and immovables and in article 1 (a) there is a non-exhaustive list of what could be included: groups of buildings, art, books, etc. It also includes buildings meant to exhibit or store cultural property, for example libraries or museums. The cultural property shall be “*of great importance to the cultural heritage of every people*”. It is up to each state to decide which cultural property shall be protected by the Convention, even though the states are obliged to interpret the document in good faith, act in a way that gives effect to it and respect general treaty law. This will probably not entirely prevent states from acting in bad faith, however. The Convention demands

⁴⁶ Frigo, Manlio, Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property, *International Journal of Cultural Property*, vol. 16, 2009, p 54

⁴⁷ Merryman, John Henry, Two Ways of Thinking About Cultural Property, *The American Journal of International Law*, vol. 80, no. 4, 1986, p 833ff and Forrest, 2010, p 78ff

⁴⁸ Forrest, 2010, p 80ff

safeguarding and respecting of cultural property. This imposes both positive and negative duties on states and they are to be fulfilled during both peace and war. The obligations apply to states that are home to cultural property *and* states that might carry out armed conflict. It is important that the state where the property is situated has obligations and even before the potential conflict has started; these states are normally best prepared to protect the property. The Convention does not describe which measures should be taken for the protection, but the aim is to make preparations for the eventual outbreak of a conflict. One measure that is often of great importance is to make lists, maps etc of the country's cultural property, that can be deposited at the UNESCO or made accessible to the states involved in conflict. During conflict or occupation, states may not use the cultural property in a way that might harm it or expose it to danger. One example is that cultural heritage sites cannot be used as military bases. Acts of hostility or reprisals cannot be aimed at cultural property, neither in the own country nor in another state. Requisitioning of cultural property is also forbidden.⁴⁹

According to the First Protocol of the Convention, states must stop and prevent theft, pillage and plundering of cultural property. They must also prevent the exportation of objects from occupied territory and to make these obligations more efficient, other states must take into custody illegally exported property that enters their territory. The seized property must be returned to the previously occupied state. If the property belongs to a citizen of the state where the property is situated, it must anyhow be seized. If the citizen purchased the object in good faith, he is entitled to compensation from the occupying state. Cultural property may never be retained as war reparations.⁵⁰ The 1999 Second Protocol replaces the social protection scheme with a new regime; enhanced protection.⁵¹

Even though it has been applied on numerous occasions, the agreement has far from put an end to the destruction of cultural objects during wartime, which the armed conflicts in places like Cambodia, the Middle East, the Balkans and the Gulf area have shown.⁵²

8.2 The 1970 UNESCO Convention

This legal document is one of the most important in the cultural property field and has a public law perspective. The drafting of the The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was a way of handling the growing illicit market for cultural heritage. Some problems that are covered by the agreements is property stolen from public institutions, removed from temples, monuments and such, illegally excavated from archaeological sites that is later moved from the country of origin and entered into the global market of art and antiques. It came into force in 1972. Mexico and Peru were some of the developing countries rich in cultural heritage that long had wanted to regulate the commerce. For different reasons, the product of the negotiations was a Convention that intends to prevent illicit traffic in cultural property, but that imposes more responsibility on exporting states, than importing ones.⁵³

The Convention also shows in several ways the difficulties of finding a balance between the wishes and needs of importing and exporting countries. The Convention is based upon

⁴⁹ Forrest, 2010, p 85f

⁵⁰ Forrest, 2010, p 104ff

⁵¹ Forrest, 2010, p 110ff

⁵² Forrest, 2010, p 78ff

⁵³ Forrest, 2010, p 166ff and 195

the thought that “*cultural property constitutes one of the basic elements of civilization and national culture*”. The interchange of cultural property is encouraged, since it can contribute to tolerance, peace and understanding between people and illicit handling threatens these positive effects. It is established that every state has a *moral* obligation to protect its own cultural heritage. It is also every country by itself that has to decide which cultural objects are to be protected under the Convention. Regarding the definition of the objects target to the Convention, the term *cultural property* is used. Several categories of cultural property are set up in the article 1 and an object must fall under one of these categories to gain protection. It must also be of importance for archaeology, prehistory, history, literature, art or science. It is the states that establish if such importance is at hand or not. Some states use the method of creating special categories or classes of objects, sometimes defined by age, to define the objects worthy of protection in an easy way. Since the granting of protection is made on a national level, some importing states feared that exporting states, in their designation of protected items, would go too far in an abusive way, and subject too many objects to export control. The property regarded as cultural property of a state in the sense of the Convention is not only objects that have their historic origin in that state, but also objects that have been given as a gift to it, that have been “*subject of a freely agreed exchange*”, etc (article 4). Even cultural property acquired by a state or a person before the entry into force of the Convention is included in the scope of the Convention.⁵⁴

A special category of cultural property is created in article 13 (d), the objects subject to inalienability. The article reads as follows:

“States parties to this Convention also undertake, consistent with the laws of each state, to recognize the indefeasible right of each state party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the state concerned in cases where it has been exported.”

This provision is clearly inspired by laws existing in certain civil law countries, such as France, Spain and Mexico that make it impossible to transfer the legal ownership of objects in public collections etc. States can always claim back this kind of property, irrespective of time and other conditions, and even purchasers that have acted in good faith are not paid any damages. The practical purpose of the article seems to be nothing more than making all states accepts that this concept exists in certain national legislations. However, the consequences with clashing legislations could be quite problematic.⁵⁵

One of the problems that led to the creation of the Convention is that countries of origin have difficulties enforcing their laws protecting these objects from being illegally transferred and exported, once the objects have left the state. This is partly due to practical and evidentiary issues, but also due to the fact that other states often refuse to give effect to the laws of the countries of origin. The Preamble establishes the moral obligation of all state parties to respect the cultural property of all nations. This line of thought is developed in article 2, recognising that illegal trade of cultural property is “*one of the main causes of the impoverishment of the cultural property of the countries of origin*”. The Convention establishes that the best of battling this trade is by international co-operation and the state parties are obliged to act to put an end to the practice, by doing something about the causes

⁵⁴ Forrest, 2010, p 166 ff

⁵⁵ Forrest, 2010, p 173 ff

and by putting an end to current practices. According to Forrest, this is a proper obligation and more than just a political standpoint.⁵⁶

The Convention obliges states of origin to well protect their cultural property, but the main focus is set on the trade and regulating import and export of cultural objects. One could argue, as Forrest does, that the most efficient way of control this trade, would be to make illegal the import of illicitly exported objects. Due to conflicting positions of exporting and importing states, the Convention does not establish such a rule. Some states argued that it could mean too hard restrictions on imports and wanted to put more responsibility on exporting states. The result is that article 3 plainly states that *“import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the states parties thereto, shall be illicit”*. This provision can be interpreted in different ways and the weight and importance of it is not at all clear. Some scholars argue that the provision means that states party to the Convention are responsible to make illegal all import of goods that have been exported in a way that is contrary to the Convention. Others give it little importance, meaning that the extent of the protection depends wholly on each state.⁵⁷

One of the measures introduced by the Convention to stop illicit trade is the introduction of a special certificate that shows the authorised export of the object (article 6). Exportation without a certificate shall be illegal according to national law. Importation without said document is however not made illegal by the Convention. The importation side of the problem is left to the states to decide upon, which makes a multitude of legislations and interpretations possible. According to article 7, signing states must also prevent museums and other kinds of institutions from acquiring illegally traded objects. There is no obligation to draft new legislation and current legislation is allowed to remain an impediment to the effectiveness of the Convention. Article 7 further includes an obligation for states to inform the state of origin if a public institution is offered to purchase an illicitly exported object. This duty of information is however only valid from the time when both of the states entered as parties to the Convention. As made clear above, states are not required to introduce a general ban on the import of illegally exported objects. In article 7 (b) there is however an importation ban, but with a very narrow scope. It only obliges states to *“prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another state party to this Convention after the entry into force of this Convention for the states concerned, provided that such property is documented as appertaining to the inventory of that institution”*. As we can see, only a handful of objects are affected. This excludes for example objects that have been illicitly excavated, since they naturally not can exist in an inventory. Art 7 (b) continues with an obligation for importing states to *“take appropriate steps”* to via diplomatic channels return illegally exported objects at the request of the exporting state. The obligation is only valid for importations made after the entry into force of the Convention for both states. The term *“appropriate steps”* is very vague. Further, if the diplomatic relation between the states is strained or completely discontinued, there can be no return. Another possible problem is that the exporting country might not have the ability to initiate the process, being a developing country, especially since it must pay the expenses of the repatriation. Problematic is also the obligation to pay *“just compensation to an innocent purchaser or to a person who has valid title to that property”*. This can be a heavy burden for an exporting

⁵⁶ Forrest, 2010, p 174f

⁵⁷ Forrest, 2010, p 176 f

country and also means the introduction of private property regulation. The Convention also demands that states impose penal or administrative sanctions on persons carrying out illegal export or import (article 8), but only in relation to article 7 and its narrow scope.⁵⁸

Apart from the import and export of objects, article 13 demand states to introduce legislation to prevent transfers of ownership that can lead to illicit export or import. No explanation is given to which kind of transfers should be prohibited. Every state can decide for itself what steps – if any – need to be taken in order to fulfil article 13.⁵⁹

The Convention is not retroactive and applies only from the time when a certain State ratified it. Further, national legislation is necessary to implement it.⁶⁰

In 2009, 117 states had ratified the Convention, but since many of the importing, developed states have chosen a narrow interpretation of it, the effects of the document are not as strong as some had wished for. Further, since some countries, among them the big importer the UK, have not drafted new legislation upon the ratification of the Convention, which makes it difficult to say if the Convention at all has any effects on these states' policies. Sweden follows the same trail as the UK; the Convention was recently ratified, but no new legislation has been drafted and it is not prohibited to import illegally exported cultural objects to Sweden. Importing countries do not want too harsh rules on trade and want to be able to decide over their own legislation and enable a continued trade. They want to keep treating the objects as possible objects for trade.⁶¹

There were great hopes about the Convention meaning an important step in the protection of cultural objects from illicit trade. Some progress has been made and the Convention seems to have an influential and educational role for the international community. The Convention might have raised the awareness of the issue to the media and to other international organisations and it has shaped the legal and political discussions on the subject. It has nevertheless been criticised for being too easily interpreted in the way that suits every individual state, for putting too much responsibility on developing states and not being efficient enough. Finally, Forrest argues that the instrument is now outdated and needs to be replaced with a more modern agreement.⁶²

8.3 The 1995 UNIDROIT Convention

The origin of the Convention lies in the demand of the UNESCO to the International Institute for the Unification of Private Law (UNIDROIT) to investigate if national private law legislation on the illicit trade with cultural property could be standardised. This was partly because of the unclear interpretation of the 1970 UNESCO Convention. The issues to deal with were mainly ownership, the position of *bona fide* purchasers and payment of compensation. It was very difficult to reach a consensus since the private law is very differently regulated in every country, and the differences are especially large between civil law and common law jurisdictions. However, the work proceeded and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was ready in 1995 and entered into force in 1998. The problems of uniting different legal systems were solved by introducing minimum rules that could be accepted by all parties. The states have the freedom to draft laws that are even more beneficial to the return of cultural property (article 9). The Convention has been

⁵⁸ Forrest, 2010, p 177 ff

⁵⁹ Forrest, 2010, p 184

⁶⁰ Greenfield, 2007, p 225

⁶¹ Forrest, 2010, p 192 ff

⁶² Forrest, 2010, p 195 f

criticised for complicating the art and antiques market, even though some would say that it is the objective of it.⁶³

There is a clear connection between the UNESCO and the UNIDROIT Conventions. The latter completes the former and regulates stolen and illegally exported cultural goods and their return. It is a private law instrument; when a state ratifies it; private individuals automatically are given the right to take action in front of a court to demand the return of their property etc. Since the UNIDROIT Convention was meant to complement the 1970 UNESCO, it was regarded as sensible using the same definition of cultural property as in the first drafted Convention. There were on the other hand problems associated with this, since one of the aims of the new Convention was to address the uncertainties with the old one, and the definition was seen as one of them. The solution, not appreciated by everyone, was to list the categories of cultural property included in the UNESCO Convention in an annex to the UNIDROIT instrument. The scope of the UNIDROIT Convention is anyhow larger than the one of its UNESCO cousin's, since it applies also to the claims by private persons and not only from states. Interestingly, the term used in the Convention is neither "cultural property" – seen as too outdated in 1995 – nor "cultural heritage", the term normally used. The definition chosen is "cultural objects", which according to the Convention are "those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex" (article 2). There is no need for the objects to be designated by a state, since the Convention applies irrespective of if the owner is a state, private person or company. This makes the scope quite wide. The Convention further applies to stolen or illegally exported cultural objects with an international character, even that which has been stolen from other places than public institutions or museums, unlike its precedent. The fact that customs regulations have been breached is not enough to make an export illegal in the sense of the Convention.⁶⁴

One of the two main issues of the Convention is the restitution of stolen cultural objects. This includes only theft and not any other ways of illicitly gained possession, like fraud or conversion, even though states can cover this by national legislation. The main rule is that "the possessor of a cultural object which has been stolen shall return it" (article 3). During the creation of the Convention, there were serious problems with combining the common law and civil law traditions on how to handle illicitly transferred property. Article 3 shows that the common law rule was chosen: *nemo dat quod non habet*, meaning that the ownership can never be transferred in this kind of situations, in contrast to the civil law possibility to make *bona fide* transactions. This is explained by cultural objects being unique and not being in the first place interesting for their economical value; compensation in the form of money is not enough to compensate a loss. Compensating a *bona fide* purchaser could also be seen as encouraging theft. The fact that an object is in the hands of the possessor because it has been given gratuitously, for example as a donation to a museum, does not change the situation. To decide if the object actually was stolen and to whom it should be returned is to be decided by national courts. However, the Convention clarifies that objects that have been illegally excavated are to be considered stolen, if national law of the state where the excavation took place has such legislation (article 3 (2)). The drafting states saw the need to also take *bona fide* purchasers' interests in consideration. Therefore, the Convention establishes certain time limits within which claims for restitution must be made. According to article 3 (3), claims must be made within three years from the time

⁶³ Forrest, 2010 p 196, p 218 f

⁶⁴ Forrest, 2010, p 197 ff

when the claimant gets knowledge about the whereabouts of the object and who possesses it. The time of the theft is only of importance when establishing the maximum time limit: no claims can be made fifty years after the theft. This was seen as a suitable compromise; giving claimants quite a lot of time to make their claim and at the same time establish a certain level of certainty for purchasers. Article 3 (4) makes it possible for states to introduce rules for especially important objects, where the fifty year rule does not apply. It is not mandatory, but a possibility, for states to impose national rules for compensating possessors of stolen objects. A possessor can only be entitled to compensation provided that he *“neither knew nor ought reasonably to have known that the object was stolen and prove that it exercised due diligence when acquiring the object”* (article 4 (1)); a variation of the *bona fide* rule, but without copying the version used in any specific state’s national legislation.⁶⁵

The second part of the Convention concerns objects that have been illegally exported. Some countries, especially the US and the UK (two importing countries that generally opposes rules that regulate the market too much), objected to the Convention imposing rules making the import of illicitly exported objects illegal on a national level. On the other hand, many developing countries saw this development as necessary. The purpose of the 1995 Convention was to clarify the different possible interpretations of the 1970 Convention on the importation field and at the same time reach a balance between states promoting a more restrictive approach and the more liberal ones. To make this possible, the question on ownership is separated from the return of illegally exported objects. This means that the Chapter III of the Convention regulates the return of all property to the state from which it was illicitly transferred but does not decide to which subject within that state that it should be returned to. One of the consequences is that the object is demanded by and returned to the state, rather than to an individual. This is partly because it might be the owner that has carried out the illegal exportation in order to sell the object. It is the exporting state that decides through national legislation whether the objects have been illicitly exported or not. Article 5 gives the possibility for states to request the return of the object, but it does not contain an obligation to return it. The return is only mandatory under special conditions, described in article 5 (3), for example when the physical preservation of the object is at stake or when the object is of high importance for a state. The rules on compensation are almost the same as for stolen property, but the level of due diligence demanded by the possessor is slightly lower. Compensation can only be given when the possession was acquired after the illicit export.⁶⁶

An important exception to Chapter III, containing the rules on exportation, is that they do not apply to objects created by people that are still alive and not until fifty years have passed since their death. This is clearly an exception meant to leave the market for contemporary art outside the scope of the Convention and reflects a more liberal view instead of underlining the cultural importance of the works for states (article 7) There is however an exception to this exception: even though it has been produced recently, the objects made by *“a member or members of a tribal or indigenous community for traditional or ritual use by that community”*, are covered by the Convention.⁶⁷

The choice of jurisdiction is of great importance for the return of cultural objects. There are several possible jurisdictions, but the Convention makes it possible to take the claim to the courts of the country where the object is found, where the legal possessor or owner is or

⁶⁵ Forrest, 2010, p 201 ff

⁶⁶ Forrest, 2010, p 208 ff

⁶⁷ Forrest, 2010, p 214f

any other competent court or to a body of arbitration. To prevent the object from being moved there are provisional measures. The Convention is not retrospective; it is only applicable to objects stolen after the entry into force of the Convention and after the ratification of each state, but this does not mean that it legitimizes thefts and exportations carried out earlier. However, both questions of time and jurisdiction are complicated by the fact that non-party states could be involved in the case.⁶⁸

8.4 World Heritage Convention

The World Heritage Convention is probably the document regulating cultural property that is most famous to people outside the legal sphere. It has an international approach and is based on the thought of certain cultural objects as being important to humankind as a whole and not only for one culture or nation. Impoverishment of a monument affects all peoples of the world and the whole international community has a responsibility for its protection. The concept “world heritage” was introduced by the Convention. One of the main reasons for creating this Convention was the fact that cultural heritage is at risk, threatened by tourism, pollution, armed conflict, etc. Especially environmental issues and the growing industrialisation and urbanisation in developing countries were important to the creation of the Convention. The building of the Aswan Dam in Egypt – which meant flooding archaeologically important areas – was one of the events that showed the difficulties for these states to combine economical development and preservation of the cultural heritage. The Convention is a UNESCO document and the result of combining two documents from this organ and the International Union of the Conservation of Nature. It entered into force in 1975 and is today an instrument embraced by almost all the countries in the world; in January 2009, 186 states were parties.⁶⁹

Only objects of “outstanding universal value” can be awarded the world heritage label, even though this value is not defined in the Convention. It covers both natural and cultural heritage and “links the concept of nature conservation with the site preservation”.⁷⁰ Importantly, the Convention covers only monuments, sites and groups of buildings – movable objects fall outside the scope. Objects must also fulfil the requirements of authenticity and integrity to be protected. This means that the value should be trustworthy and that the site must be in good condition and already protected in some way. The Convention is based on the principle of respect for national sovereignty and it is still the responsibility of states to protect the world heritage within their borders (article 4). They must also identify the heritage on their territory and are encouraged to undertake measures for promoting and protecting their heritage. The Convention also imposes a duty on the international community to protect the world heritage. This takes the form of a Fund and a mechanism for cooperation and protection. Objects can be inscribed on the World Heritage List with the consent of the state on whose property the site is situated, but states can nominate sites in other countries. There is a political body with representatives from the state parties, the World Heritage Committee, to handle issues regarding the Convention. It is the Committee that decides whether or not to let an object enter the list. Having a site on the list means that a state can receive support, most importantly from the Fund, for

⁶⁸ Forrest, 2010, p 215ff

⁶⁹ Forrest, 2010, p 224ff

⁷⁰ Magness-Gardiner, Bonnie, International Conventions and Cultural Heritage Protection, in Yorke Rowan and Uzi Baram (eds.), *Marketing Heritage. Archaeology and the Consumption of the Past*, Altamira Press, 2004, p 29

protecting the heritage. However, even if a site does not make it onto the list, it might be awarded some protection by the Convention.⁷¹

In 2009 there were 878 properties in 145 countries inscribed on the World Heritage List. Most properties are European and according to Forrest, it is not a coincidence. European countries have been active in developing the Convention. They have a lot of expertise to carry through nominations and a good understanding of the process. It is also argued that since the Convention only covers immovable heritage, this means protecting a kind of heritage that is extremely present and appreciated in Western societies. In other regions, due to tradition or/and lack of resources, cultural expressions have often taken other forms, like dance or oral tradition. Until today, natural heritage is underrepresented on the World Heritage List.⁷²

According to article 6 (1), the recognition of a site as world heritage is “*without prejudice to property rights provided by national legislation*”. This shows the primacy of national law over the Convention. According to Forrest, this provision is superfluous since the Convention gives the responsibility to protect the heritage to states, meaning that they can do this in any way they wish. This also means that it is decided on the national level what level of protection every object is rewarded, but also which property rules should be applied, if and how property of heritage can be transferred etc.⁷³

The Convention contains several obligations for the state parties, but it is generally considered that they are vague and difficult to enforce. It only regulates the responsibilities of States towards the heritage itself. The instrument is seen as soft law, rather than a set of rules that can effectively be applied. State sovereignty is central and there are more general rights and principles than legal obligations. There are no possibilities of remedies, sanctions or penalties should an obligation not be fulfilled, which means that it is doubtful if the provisions are at all to be seen as obligations.⁷⁴

Since the Convention only regards immovable property, claims of return can hardly come in question. Even though the sites stay where they are, the question about property and the exploitation of the values of the heritage are however discussed. I do not know if the registered sites and the land that they stand on are sometimes subject to private ownership (this is probably not so in most cases), but the utilization of the land has been subject to debate. In the United States, politicians have argued that the Convention does not deal sufficiently with questions of the protection of private and state property. This has led to the US refusing to finance the World Heritage Fund. Legislation is also prepared to stop the inclusion of US sites on the list unless the rights to commercial development on the area are secured. One example is the protests against making a place in Tennessee a Heritage site since this was said to restrict the possibilities of continuing the mining business there. At the same time, exploitation for tourist purposes has caused concerns about the preservation of the World Heritage site of Machu Picchu. The building of tourist facilities that was planned with the consent of the Peruvian government was interrupted until the site could be examined by specialists.⁷⁵

⁷¹ Forrest, 2010, p 229ff, p 247f

⁷² Forrest, 2010, p 247ff

⁷³ Forrest, 2010, p 246ff

⁷⁴ Forrest, 2010, p 276f

⁷⁵ Magness-Gardiner, 2004, p 31

9 EU Regulation

The two relevant European rules on cultural objects are the Council Directive 93/7 and the Council Regulation 3911/92. The former demands the recovery of *national treasures* illegally exported to other countries *within* the Union and the latter regulates export licenses for objects that are exported *outside* of Europe. According to the Commission, these documents have raised the awareness of member states on the necessity to improve the protection for cultural objects on the communitarian level.⁷⁶ The rules were made to regulate the European art market and have influence on how current trading in art and cultural objects should be carried out. They do not regulate or solve the problem with objects that are already located within the Union, which have been there for some time and that are demanded back to their countries of origin. They could however contribute on reducing future problems within the sector. Apart from the mentioned legal acts, there is no European regulation of interest. There has been no harmonisation within the field of cultural protection.⁷⁷

The foundation for these two instruments can be found in article 36 of the Treaty of the Functioning of the European Union (TFEU)⁷⁸. It is established that member states are allowed to make exceptions from the fundamental freedom of movement for goods, for "*the protection of national treasures possessing artistic, historic or archaeological value*". There is no European definition of *national treasure*; this is made according to the laws of each member state.⁷⁹

10 Cultural property in Sweden

10.1 Sweden's approach to the international conventions

For quite some time, Sweden had not ratified the two most important cultural heritage Conventions; the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. According to Kurt Weibull, assistant under secretary at the Swedish Ministry of Culture, this was due to legal, not political, reasons. In 1994, the Government dismissed a ratification of the UNESCO Convention on the basis that the importation control demanded by the agreement would be too difficult to implement and control. The fact that Sweden has some war booty from wars during the 17th century in its public collections is not the explanation, since the Conventions are not retroactive. However, Sweden ratified the 1970 Convention in 2003, specifying which Swedish objects that are covered by the Convention with special rules for several Sami objects.⁸⁰ Even before becoming a party to the Convention, Sweden already fulfilled some, but not all, of the obligations contained in it; rules on archaeological excavations, export licenses etc. However, after ratifying the Convention, no new legislation was made to implement the provisions contained in it.⁸¹

⁷⁶ Greenfield, 2007, p 236

⁷⁷ Biondi, Andrea, The Merchant, the thief and the citizen: the Circulation of Works of Art within the European Union, *Common Market Law Review*, Vol. 34, 1997, p 1183

⁷⁸ Former article 30 in the EC Treaty.

⁷⁹ SOU 2005:3 Sveriges tillträde till 1995 års Unidroitkonvention om stulna eller olagligt utförda kulturföremål, Betänkande av Kulturföremålsutredningen, p 166

⁸⁰ UNESCO Homepage, Official list of the State Parties to the 1970 UNESCO Convention (<http://portal.unesco.org/la/convention.asp?KO=13039&language=E>)

⁸¹ Weibull, 2001, p 28 ff

Regarding the UNIDROIT Convention, the government earlier argued that the rules on stolen objects in the instrument differed from the Swedish legislation on acquisitions made in good faith and that when possibly implementing the Convention, it would have been necessary to create special rules for culture which could lead to technical problems on defining what objects are to be regarded as cultural. However, the Swedish legislation on acquisitions made in good faith has changed since then and today it is not possible anymore to acquire the ownership of an object that the owner has been illegally deprived of.⁸² This means that it would be easier to ratify the Convention today. However, it was also argued that the rules on illicitly exported objects in the Convention made it difficult to ratify it. The rules mean that Sweden would have to accept other states' public law on exportation, which is quite conspicuous. Since the rules on exportation differ a lot between states, the Convention could mean legal insecurity and unexpected consequences for private persons.⁸³ In 2004, the social democratic government of the time expressed that it deemed it suitable for Sweden to ratify the Convention.⁸⁴ A committee was created to investigate how it could be implemented and in what way Swedish legislation needed to change in case of ratification. The work of the committee resulted in a report, proposing changes in the law on cultural heritage (*kulturminneslagen*) and the law on good faith acquisitions (*godtrostförförslagen*).⁸⁵ At present, the ratification is processed at the Ministry of Culture.⁸⁶

Regarding the rest of the international conventions earlier mentioned, in 1985 Sweden ratified the World Heritage Convention⁸⁷ and accessioned the 1954 Hague Convention⁸⁸. The current Swedish government has examined the national implementation of the convention on the intangible heritage and has said that it is ready to ratify it later this year.⁸⁹

10.2 National legislation

Probably the first rule on cultural property in Sweden, was the 1571 Regulation of the Church, attributed the responsibility of the churches and their movables to the bishops. During the 17th century, the Kings and the nobility were interested in the legacy of past times, for example rune stones, to connect the present military progresses to a noble past. In 1666, the first law protecting cultural property, mainly churches and other religious buildings, was made. Laws were later made to regulate the findings of coins and other ancient objects in the ground. An important step was taken in 1935 when 284 buildings were given the new status of cultural heritage building (*kulturminnesmärke*). In 1942 it was made possible to protect also privately owned buildings with a special importance, making it more difficult to repair, change or destroy them. Sweden did not have any laws the export of cultural objects until 1927, when it was made illegal to export some Swedish objects of

⁸² SFS 2003:161 Lag om godtrostförför av lösöre

⁸³ Weibull, 2001, p 28 ff

⁸⁴ Proposition, 2004/05:1, Budgetpropositionen för 2005, Utgiftsområde 17

⁸⁵ SOU 2005:3 Sveriges tillträde till 1995 års Unidroitkonvention om stulna eller olagligt utförda kulturföremål, Betänkande av Kulturföremålsutredningen and UNIDROIT Homepage, Official list of the State Parties to the 1995 UNIDROIT Convention (<http://www.unidroit.org/english/implement/i-95.pdf>)

⁸⁶ SOU 2007:65 Domstolarnas handläggning av ärenden, Betänkande av Ärendeutredningen, p 371

⁸⁷ UNESCO Homepage, States to the World Heritage Convention as of Apr 16, 2009,

(<http://whc.unesco.org/en/statesparties>)

⁸⁸ UNESCO Homepage, Official list of the State Parties to the 1954 Hague Convention

(<http://erc.unesco.org/cp/convention.asp?KO=13637&language=E>)

⁸⁹ Proposition 2009/10:3, Tid för kultur, p 84

special importance that had been produced before 1860. Curiously enough, the proclamation on the export ban was first meant to have effect only during a little more than a month, due to the present demand for Swedish antiques, but in the end, it was prolonged several times until it was replaced by a law on exportation, in 1985.⁹⁰

The Swedish regulation of cultural property has partially foundations in the Constitution, which allows for expropriation of private property in some cases (article 2:18, *regeringsformen*⁹¹).⁹² Apart from this, rules on cultural heritage are found in the law on cultural heritage (*kulturminneslagen*)⁹³. Immovable cultural property of old age (*fornlämning*), both objects that are already known and the ones still hidden, has traditionally a strong protection. Graves and old shipwrecks belong to this category, but there is no legal definition of the concept. It applies mainly to very old objects and only to objects that are no longer in use. To change an object and its surroundings, the land owner needs a special permit from the authorities. He might also have to pay for the protection of the object. Old shipwrecks without an owner that are salvaged, become the property of the Swedish state. It is forbidden to damage the objects.⁹⁴

There are also rules on *fornfynd*, movable objects of old age that do not have an owner. The general law on found objects (*hittegodslagen*) cannot be applied to these objects. These objects go to the state. In some cases, a reward can be awarded to the person who has found the object. However, if the object is found without connection to a site of immovable heritage, it becomes the property of the finder. When the find regards a metallic object or two or more objects found together, the find shall be reported to the authorities with an obligation to let them buy it. In addition to the price, a finder's fee can be paid out.⁹⁵

Immovable objects that are not considered *fornlämning* can also be protected by law, but there is no automatic protection. This concerns buildings, parks and other objects. To attain protection for an object of general interest, the authorities (*länsstyrelsen*) must start a legal process. The legislation in this area seems very vague. In Denmark and Norway, the legislation concerns all objects of a certain age, but in Sweden a selection must be made. Since the buildings concerned are still in use, legal protection means restrictions of the owner's use. The legal protection of an object implies that it should stay in a certain state. The owner has a right to economical compensation, but this is seldom used. According to the law on expropriation, it is possible to expropriate an immovable object of historical or cultural value (article 2:8, *expropriationslagen*⁹⁶).⁹⁷ Some special legislation exists for buildings belonging to the Swedish Church.⁹⁸

Regulation and limitations of the export of cultural objects have been made in order to keep Swedish objects in Sweden. It is important to keep objects here to be able to understand our history and cultural identity. Objects with a big importance for the cultural heritage should not be allowed for export and objects that belong to a rare category (for instance objects that are scarcely represented in museums) should be specially protected. If the reason for export is commercial, the scrutiny should be more restrictive. Adlercreutz

⁹⁰ Adlercreutz, 2001, p 27 ff

⁹¹ SFS 1974:152 Regeringsformen

⁹² Adlercreutz, 2001, p 55

⁹³ SFS 1988:950 Lag om kulturminnen m m

⁹⁴ Adlercreutz, 2001, p 60ff

⁹⁵ Adlercreutz, 2001, p 85ff

⁹⁶ SFS 1972:719 Expropriationslag

⁹⁷ Adlercreutz, 2001, p 116ff

⁹⁸ Adlercreutz, 2001, p 160ff

criticises this and argues that trading in cultural property is completely legal in Sweden and that the freedom of trade is constitutionally protected. He also thinks that the definitions and the foundation of the decisions are unclear and that it is difficult to foresee the consequences. In the future, we might see cases regarding exportation taken to the European Court of Human Rights.⁹⁹

To take the object out of the country, permission must be applied for. The rules regard objects out of certain categories (paintings, furniture, sculptures, archaeological objects, books, maps, etc.) that are older than 100 years. In addition to this, only objects with a value that exceeds a certain limit are affected. The limit depends on the type of object. There are differences in the regulation of Swedish and foreign objects, but both categories need permission for export. The most important factor when deciding if an object should be allowed to leave the country is its importance for the Swedish cultural heritage. When a private person moves from Sweden and takes his belongings with him or in cases when the object is part of a heritage, property involved in divorce proceedings and similar situations, permission is normally granted. The authorities have to take in consideration not only the Swedish law, but also EU regulation.¹⁰⁰ It seems that an export license is almost always granted when applied for. It should however be remembered that it is quite easy to remove objects from Sweden without the customs authorities noticing.¹⁰¹

10.3 Return of cultural objects

In Swedish public collections, there are a lot of objects that were taken by armed forces during wars several hundreds of years ago. This includes both military objects like arms or suits of armour, and things like paintings, books and furniture. A large part of them were taken in accordance to the international law of war that was applied in Europe at the time and accepted by both sides of the conflict. Interestingly, in the Westphalia peace treaties in 1648, it was agreed that all property looted in accordance with the laws of war should remain with the state that took it during the conflict, in order to forget the horrors of the war. This has not kept some states from raising demands of restitution of objects from Sweden. One example – quite absurd – is the demand made by Danish politician Peter Skaarup, representing the ultra right Dansk Folkeparti. He claimed back several objects taken during the 17th century and argued that they had been stolen by the Swedish army during the course of an ethnic cleansing (!) of Danish people in the South of Sweden.¹⁰² The government has to this date been very restrictive towards demands of return of war booty. One exception is the restitution of a Polish roll of paintings that was given back when Swedish Prime Minister Olof Palme made a state visit to Poland in 1974.¹⁰³ Instead of returning the objects, Swedish institutions often cooperate with museums and universities in other countries, especially in the Baltic Sea area, by lending objects, creating digital copies of books and manuscripts, etc.¹⁰⁴

⁹⁹ Adlercreutz, 2001, p 179

¹⁰⁰ Adlercreutz, 2001, p 167ff

¹⁰¹ Weibull, 2001, 28 ff

¹⁰² Munkhammar, Lars, De många och stora bokroven, in Ann Grönhammar (ed.), *Krigsbyte/War-Booty*, Journal of the Royal Armoury 2007-2008, Livrustkammaren, 2007, p 88

¹⁰³ A decision criticised by law professor Ove Bring for violating the prohibition of ministerial government in the Swedish constitution (article 11:7 Regeringsformen) (Bring, Ove, *Moralen väger tyngre än juridiken*, *Svenska Dagbladet*, 30 November 2007).

¹⁰⁴ Bursell, 2007, p 31f

When Sweden receives demands for repatriation, there is no general policy or law to be applied. The Government decides on the fate of the objects on a case to case basis, usually after having consulted the Parliament. The approach to the issue is strict: objects that have been legally bought by the state for public museums can normally not be returned. There is an exception for human remains, which can be returned if the country of origin can show that they can properly take care of the objects. At the State Museums for World Culture, a policy, which seems to be informal, says that human remains should be returned if they are younger than 200 years old. In that way, Egyptian mummies and other valuable objects are not returned. Several objects have however been returned to their country of origin during the last fifteen years; most of them are body parts or sacred objects. Among them are a Tasman skull and a Guatemalan stele.¹⁰⁵ A totem pole from a Native American tribe was demanded to be returned from Sweden in 1991. The Museum of Ethnography was first reluctant to the restitution since they did not consider the pole as property of the Haisla people, but in the end the Swedish Government accepted the demand, on the condition that the pole would be stored in a place with appropriate climate control. The decision was based on the fact that the totem pole was regarded as holy by the tribe and that it had been donated, not bought, to the museum. According to Greenfield, there is now a new friendship between the Haisla and the Swedish people that was made possible without any legal intervention. In 2004, human bones and other artefacts were returned to aboriginal groups in Australia. They had been taken from graves by Swedish explorers about 100 years ago. This return was seen as very important by the indigenous people of Australia, since it was the first in its kind, done unconditionally by a foreign government.¹⁰⁶ In 2009, the rests of five Maoris were returned to New Zealand.¹⁰⁷ The current Minister of Culture has said that all human remains of Sami in public collections in Sweden shall be given back to the Sami community as soon as possible. This is however not a position shared by all academics concerned by the repatriation.¹⁰⁸

In chapter 6 of the Swedish law on cultural heritage (*lag om kulturminnen m m*¹⁰⁹), there are rules on the return of objects, but there are no general provisions. The chapter incorporates the EC Directive 93/7, mentioned earlier, and the rules are only applicable on objects illicitly transferred from the territory of another EU state. The rules apply when a cultural object (specified in various lists) has been removed from another EU state in breach of that country's legislation. Since the Directive is not retroactive, only objects that arrived in Sweden after our insertion in the EC (1st January 1995) are included. The demand for restitution is made by the *state* within one year of the knowledge of the object's whereabouts or within thirty years of the illegal removal. Once returned, the demanding state's laws on property are applied to the object. The process for restitution is dealt with by courts and the appointed authorities in each state.¹¹⁰ The possessor of the object has the right to compensation in some cases.¹¹¹ The rules in chapter 6 only regards objects

¹⁰⁵ Weibull, 2001, p 32f and Hellekant, Johan, Museer tar fram skelett ur garderoben, *Svenska Dagbladet*, 13 November 2009

¹⁰⁶ Greenfield, 2007, p 310ff and Hellekant, 2009

¹⁰⁷ Sveriges Radio Sameradion/TT, Maorier återbördas till Nya Zeeland, 13 November 2009: <http://sverigesradio.se/Sameradion/nyheter/artikel.asp?artikel=3235570> (Consulted 17 June 2010)

¹⁰⁸ The homepage of the Sami Parliament : <http://www.sametinget.se/1922>

¹⁰⁹ SFS 1988:950 Lag om kulturminnen m m

¹¹⁰ In Sweden, the responsible authority is the Swedish National Heritage Board (Riksantikvarieämbetet).

¹¹¹ Adlercreutz, 2001, p 187ff

appointed *national treasure* by another EU state, in accordance to the Directive and the TFEU.¹¹²

There are practically no court cases on the illicit export or removal of cultural objects in Sweden. Between 1998 and 2004, the Swedish Customs Authority handled only four cases concerning illegal export of cultural objects and only one of them led to conviction.¹¹³

11 National legislation in other states

Naturally, I cannot describe the legislation on cultural property in every state where such legislation exists – and it exists in most countries. However, I want to highlight some common policies and interesting points used in different countries of the world to show their views on the subject and to study their strategies, even though I will not go into depth of the subject. In international public law, the concept of national sovereignty is one of the most important. Every state can act within its borders just as they like and draft any kind of legislation, with very few exceptions, mainly the *jus cogens* rules.¹¹⁴ This means that even if a state severely prohibits the export of any object of the national cultural heritage, it cannot demand that other states apply the export laws and enforce them in court. It can be noted that some source countries do demand that this should be done. However, in all countries the tribunals demand the restitution of a stolen object to its owner, even if he or she resides abroad. Some states have made all cultural objects the property of the state, which means that the illicit export of an object equals theft from the state. This is a strategy mainly used by developing source countries.¹¹⁵ States that have made all objects state property include Egypt, Iraq and Mexico – all three states where there are a lot of rests of ancient cultures. This includes also objects that are undiscovered and still rest under the surface of the ground.¹¹⁶

Export restrictions are common all over the world, also in countries that are not traditional source countries. The restrictions can be in the form of a total ban on exports to a system of licenses. Increased travelling and relaxed border controls (or no control at all, like in the European Schengen area) do however make it more difficult to enforce the laws.¹¹⁷

I will take Peru as an example of a source country with quite severe rules on cultural property. Similar legislation exists in several Latin American states. In the beginning of the last century, politicians wanted to put an end to the looting of archaeological material and since then, extensive legislation controls cultural property. Today, the Constitution (of 1993) gives the right of private ownership over objects belonging to the country's cultural heritage. The *Código Penal* criminalises unauthorised excavation, extraction and export. Another law regulates non-penal affairs. All historical, domestic material, both movable and immovable, is presumed to belong to the cultural property category and is registered. It is prohibited to

¹¹² SOU 2005:3 Sveriges tillträde till 1995 års Unidroitkonvention om stulna eller olagligt utförda kulturföremål, Betänkande av Kulturföremålsutredningen, p 73

¹¹³ SOU 2005:3 Sveriges tillträde till 1995 års Unidroitkonvention om stulna eller olagligt utförda kulturföremål, Betänkande av Kulturföremålsutredningen, p 59

¹¹⁴ Cassese, Antonio, *International Law*, Oxford University Press, 2nd edition, 2005, p 201

¹¹⁵ Merryman, John Henry, The Nation and the Object, in James Cuno (ed.), *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2009, p 184

¹¹⁶ Gerstenblith, Patty, Recent Developments in the Legal Protection of Cultural Heritage, in Neil Brodie, Morag M Kersel, Christina Luke and Kathryn Walker Tubb (eds.), *Archaeology, Cultural Heritage and the Antiquities Trade*, University Press of Florida, 2006, p 69

¹¹⁷ Brodie, Neil, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material*, The McDonald Institute for Archaeological Research, 2000, p 31

in any way dismember or modify these objects, even in cases where they are private property. Objects can be traded domestically, but all transactions must be reported to the National Institute of Culture. These transactions are subject to the ordinary *Código Civil*. Cultural property cannot however be exported, but for exceptional circumstances. Transactions that in any way differ from the requirements in the law are regarded as null and void. Excavation of sites can only be done after receiving an authorisation following a complicated procedure, and only by archaeologists. Newly discovered objects belong to the state and cannot be made into private property, which means that objects that are found under current legislation legally never can come into the hands of a private person.¹¹⁸

The French system for protecting the cultural heritage is rather special and has inspired similar laws in many countries, like Spain, Italy and Austria. Since 1887, France has maintained laws making objects in public collections inalienable. In the beginning of the 20th century, legislation was drafted introducing a system of classifications for cultural property – both movable and immovable – in order to protect it. This system remains today. Classified objects may not be destructed, repaired or sold abroad without authorisation and the owner has a responsibility to protect it. It can be demanded back even from a *bona fide* purchaser. Until 1993, the state had a pre-emptive right when cultural objects were sold on auction.¹¹⁹

France is one of several countries where legislation makes it mandatory to demand an export license for taking certain works of art out of the country. The vindication of this is that some objects form part of the French cultural heritage, belong France and could only leave the country during certain circumstances.¹²⁰ Italy has similar laws. The same goes for several Latin American countries, which do not allow the export of *any* pre-Columbian objects.¹²¹ Interestingly, France sometimes even prohibits the export of objects which are claimed to be a part of the French cultural heritage, but which might be seen as having stronger connections to other countries. Some examples where an export license has been denied, is for paintings by van Gogh and Italian artists, a Chinese vase and a Swiss painting picturing Turkey.¹²²

Following the colonial times and the establishment of big auction houses and one of the most important antiquities markets in the world, Britain has become the home of great quantities of cultural property. The British have chosen not to follow the French system, giving a lot of powers to the state. Due to the political powers of landowners, the creating of a legal system for protecting cultural property had to wait until the end of the 19th century. The National Trust, a kind of trust system was created for the protection of both movables and immovables. Valuable objects must have export licenses and public collections have the right to tender on objects that are to be exported.¹²³

In the United States, the protection of cultural property is not a federal issue, apart from the territories of the Native Americans. Archaeological objects are protected and cannot be exported. There is extensive and severe legislation on objects with Native

¹¹⁸ Batievsky, Jack and Jorge Velarde, *The Protection of Cultural Patrimony in Peru*, in Barbara T Hoffman (ed.), *Art and Cultural Heritage, Law, Policy and Practice*, Cambridge University Press, 2006, p 100f

¹¹⁹ Erh Soon Tay, 1985, p 115 f and Adlercreutz, 2001, p 19f

¹²⁰ Sometimes the French export ban even extends to works of non-French artists, only because the painting was produced in France.

¹²¹ Merryman, 2009, p 188

¹²² Merryman, 2005, p 275

¹²³ Adlercreutz, 2001, p 20f

American origin. Trade is prohibited and they should be returned on demand. Regarding other American objects, there are practically no limitations.¹²⁴

Quite surprisingly, the United States has supported nationalist countries in their aims of keeping their cultural heritage to themselves, in spite of being an important market country and its general embracing of the free market. The US participated in the negotiations of and early ratified the 1970 UNESCO Convention¹²⁵ and has drafted subsequent legislation, but did not ratify the Hague Convention until just recently, in 2009. The Americans also support several Latin American states in their nationalist aims by giving back objects, signing agreements, action by the Customs Service etc. However, within US borders, the commerce with the American cultural heritage is unregulated, apart from Native American objects, and there are no restrictions on export.¹²⁶ The NAGPRA (Native Americans Graves Protection and Repatriation Act) a law for protecting the cultural heritage of the Native Americans was passed in 1990. It is meant to make an inventory of and return human remains and cultural objects to the Native American and Hawaiian communities. The law gives the tribes property rights over the objects.¹²⁷ It is said that the law works quite well and that it has brought tribes and museums closer to each other. The law is however also criticised for lacking rules prohibiting tribes from reselling objects that have repatriated.¹²⁸

Generally, the stand held on the repatriation issue depends on how culture and cultural objects are interpreted. One position is that cultural property should be seen as parts of a common human culture and that this is true irrespective of conditions like “origin or present location, independent of property rights or national jurisdiction”. This view often leads to the opinion that repatriation is not the best option for cultural property. It is also the view represented by the 1954 Hague Convention. Culture can also be seen as national heritage, which means that objects are attributed national character, states are seen as having interests over them and repatriation is demanded. According to Merryman, this also means the division of the world into source countries and market countries, depending on the relation between the supply and demand of cultural property. Among the source countries we find states whose territory has harboured ancient cultures: Mexico, Greece, Egypt, India etc. The market countries are mainly rich, Western democracies: Switzerland, the United States, France, Germany etc. Since there is a demand in the market countries for cultural property, there is a flow of objects from the source countries to the auction houses and museums in the market countries. These exports are however not appreciated by the source countries, which often try to stop them by imposing export control legislation. However, laws controlling exports, for example by demanding special licenses, are found also in market countries. This view on cultural property is embodied in the 1970 UNESCO Convention.¹²⁹

¹²⁴ Adlercreutz, 2001, p 22f

¹²⁵ Despite of not becoming a member of the UNESCO until 2003. UNESCO Homepage, Official list of the Member States (<http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en>)

¹²⁶ Merryman, 1986, p 850ff

¹²⁷ Messenger, Phyllis Mauch, Epilogue, in Phyllis Mauch Messenger, *The Ethics of Collecting Cultural Property*, University of New Mexico Press, 2nd edition, 1999, p 255ff

¹²⁸ Boyd, Willard L, Museums as Centers of Cultural Understanding, in John Henry Merryman (ed.), *Imperialism, Art and Restitution*, Cambridge University Press, 2006, p 61

¹²⁹ Merryman, 1986, p 831 f

12 Cases

It is impossible to count the number of demands for return of cultural objects that have been made to this date. There are probably thousands of them and they are made both formally and informally, in courts, by diplomats and directly between governments. Below, I describe three examples: the ongoing discussion on the Paracas collection in Sweden, a demand towards Denmark that led to the return of objects to Iceland and the very infected debate about the Parthenon Marbles. I hope that these three cases will make it easier to understand how the claims for return are made and which arguments that are used.

12.1 The Paracas Textiles

I have already mentioned the case of the collection of Paracas textiles, located in Göteborg and claimed by the Peruvian Government. The collection is currently exhibited at the Museum of World Culture where it forms part of the exhibition “A Stolen World” – the title exposes that the museum wants to discuss the claim for return. The exhibition has even been criticised for focusing too much on the question about how the collection ended up in Göteborg.¹³⁰

The collection consists of 100 textiles from the Pre-Columbian Paracas culture, 89 of them owned by the City of Göteborg and 11 by the Swedish state. According to the exhibition, the objects are looted, but it should be remembered that the textiles came from Sweden after being bought from the archaeological museum in Lima. The Swedish consul-general bought them from representatives of the museum and donated them to the Municipal Museum of Göteborg in 1930, even though it is sometimes claimed that the donator is unknown. We do not know if he was aware of how the textiles had ended up in the Peruvian museum.¹³¹

In December 2009 the Peruvian ambassador made a demand that the textiles be returned to Peru. Earlier, the Peruvian government saw no problem with the textiles being kept in Sweden, but this has changed after the elections in 2006. In an answer to this demand, very common arguments against repatriation have been used: the textiles are better protected in Sweden, the Peruvian museums are deficient, the demand is just a question about politics and this common cultural heritage is more accessible in Europe.¹³² The Peruvian demand led to the administration of culture in Göteborg recommending a slow and successive return of the collection, since the objects were smuggled to Sweden, the export was illegal and violated the Peruvian law of the time. The administration also refers to international documents regarding the return of cultural heritage.¹³³ In April 2010, the Committee of Culture in Göteborg decided to recommend the City Council to return the collection to Peru and transfer the ownership to the Peruvian state. The decision also states that the return needs to be further examined and that the scientific co-operation between Sweden and Peru should be intensified.¹³⁴ The City Council has however not yet tried the question and I have not found an explanation for this. The question of return is therefore still not solved. Museum administrators in Göteborg have however said that even with a

¹³⁰ Nordin, Torgny, Fel att skeppa iväg textilier, *Göteborgs-Posten*, 23 December 2009

¹³¹ Ulfsson, Boel, Världskulturmuseet: En stulen värld (Review article), *Göteborgs-Posten*, 24 October 2008

¹³² Clausson, Malin, Peru kräver tillbaka Paracastextilier, *Göteborgs-Posten*, 23 December, 2009, Clausson, Malin, Tillbaka till Peru?, *Göteborgs-Posten*, 26 January, 2010 and Nordin, 2009

¹³³ Clausson, Malin, Peru får tillbaka Paracassamlingen, *Göteborgs-Posten*, 15 March, 2010

¹³⁴ Protocol from the session of the Committee of Culture in Göteborg, 26 April 2010

formal decision, a return might never happen or at least have to wait for a long time, since Peruvian museums are said to lack the resources for properly caring about the textiles.¹³⁵

12.2 The Parthenon Marbles

The demand of return to Greece from the UK of the Parthenon Marbles, also known as the Elgin Marbles, is probably the most famous and debated case of return to this date. Lord Elgin was the British Ambassador in the Greek region in 1799 and a Hellenist enthusiast. Arguing that it was needed to for its protection during the ongoing war, he transported parts of the Parthenon temple to the UK. During the journey, the objects suffered some damage. The sculptures were also cut in pieces to facilitate the transportation. Today, most of the material brought to the UK is exhibited in the British Museum. Even in the 19th century, public and political opinion was divided on the rightfulness of the transfer. Famously, Lord Byron criticised Lord Elgin's action and called it "shameless vandalism".¹³⁶

Some people claim that a demand for the return of the Marbles was made by the Greek as early as 1832, just after they gained their independence from Turkey, but this seems unclear. It is also said that Winston Churchill suggested a return "as a gesture of allied solidarity". The question was discussed in the UK during the Second World War. In 1982, during the Mexico Conference of the UNESCO, a recommendation was made in favour of a return. The Parthenon Marbles have been discussed in almost every NGO in the field of art and culture. A formal demand was made by Greece in 1983. This was rejected by the UK, even though some MP's voted for a return, and a new claim was made through the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in 1984.¹³⁷ In 2002, some British MP: s demanded the return of the sculptures.¹³⁸ In Britain, as well as in Sweden, there are Parthenon Committees that support the return of the sculptures.¹³⁹

The British has argued that a return is not possible, since the acquisition was, and still is, legal because the Turkish rulers of Greece agreed on it. Another argument is that the current statute of the British Museum does not allow the Marbles' disposal. The Greek argue that the Turkish were unlawfully occupying Greece and could therefore not give binding consent. Today, it is clearly established by international law that the appropriation of property under occupation is unlawful and that occupying rulers do not have the right to sell or give away property. Besides, the Greek argue claim that the British went beyond the competences given to them by the Turkish document, the Firman. Turkey was also under great pressure at the moment and could not afford withdrawn British support.¹⁴⁰

Apart from the legal arguments, the British also argue that the Marbles were rescued from destruction by Lord Elgin and that they still receive better care in London than in Athens and that transportation might damage them. It is also argued that the works are more accessible and reach a greater audience on British soil. Academic knowledge and possibilities for independent studies are also said to be better in the UK. The British also fear that a return would be seen as a precedent and cause a flood of demands. On their side, the Greek say about the Marbles: "They are the symbol and blood and the son of Greek people...

¹³⁵ Clausson, Malin, *Textilier lär stanna, Göteborgs-Posten*, 16 March, 2010

¹³⁶ Jote, 1994, p 296f

¹³⁷ Jote, 1994, p 299ff

¹³⁸ Brittisk strid kring grekiska skulpturer, *TT Spektra/Svenska Dagbladet*, 16 January 2002

¹³⁹ Bäcksted, Eva, Parthenonkommitté - nu även i Sverige, *Svenska Dagbladet*, 26 May 2003

¹⁴⁰ Jote, 1994, p 303f

This is the most beautiful, the most impressive, the most monumental building in all Europe". A more practical argument is that the sculptures are part of a larger creation and that a return is important for its unity and integrity. In Athens it will be possible to admire the Marbles within sight of the Parthenon temple.¹⁴¹ The Parthenon has been a symbol for national identity, freedom and superiority ever since the independence from the Ottoman Empire in the 19th century. During the Second World War, this symbolism was very strong in the resistance movement. The link between past times and modern Greece is still constantly underlined by Greek officials, for example during the Olympic Games in 2004. According to studies, the Parthenon and the Acropolis have rather become a physical incarnation of the Greek identity.¹⁴² Interestingly, the Parthenon is now regarded as a symbol for Greece, even though the temple was built by Athenians who defined themselves in opposition to *other* Greek city states and the Persians.¹⁴³

The Greek recently inaugurated the Acropolis Museum in Athens, where parts of the temple are exhibited and where they would be more than happy to make room even for the Elgin Marbles. There are copies of the missing sculptures, but the visitor is supposed to be constantly reminded about that the originals are missing. As a matter of fact, there are even empty spaces for them. The museum is used in the battle for repatriation and shows the British that the Marbles now can return without fear of damage. In 2009, the British Museum said that they were prepared to loan the sculptures to the Greek for a couple of months, but the reaction from Athens was indifferent. The only possible solution is a permanent transfer.¹⁴⁴ At last it can be added that the Marbles represent large values for both countries, because of the tourism potential in the old pieces of stone.¹⁴⁵

12.3 The Icelandic manuscripts

When we think about colonialism and demands for return of cultural objects from Western country, we probably imagine this happening in distant places, mainly in African countries. There are however examples to be found a bit closer to Sweden. In Iceland – not yet independent – a nationalism movement formed in the early 1800's and in 1830, a formal request was sent from the bishop to Denmark, demanding the return of some historically important manuscripts. The demand was not accepted. The claim was repeated several times during the first decades of the 20th century, but was still ignored. Following Iceland's full independence in 1944, talks were held with Denmark to solve remaining problems between the two countries. Iceland then claimed that the manuscripts was one of the issues that had led to the claim of independence and that it had to be solved before the states could have normal relations. The Icelandic generally admitted that theirs was not a legal right, but a moral one. They argued that Iceland had an important cultural connection to the documents: they were written in Icelandic, for the Icelandic and it was because of the Icelandic that these very important manuscripts (among them the *Edda*) had been saved to the after world. The works were described as cornerstones of Icelandic nationality and

¹⁴¹ Jote, 1994, p 306ff

¹⁴² Siapkas, Johannes, Akropolis en konstgjord nationalsymbol, *Svenska Dagbladet*, 13 August 2004

¹⁴³ Vinson, Steve, From Lord Elgin to James Henry Breasted: The Politics of the Past in the First Era of Globalization, in Yorke Rowan and Uzi Baram (eds.), *Marketing Heritage. Archaeology and the Consumption of the Past*, Altamira Press, 2004, p 59

¹⁴⁴ Santillo Frizell, Barbro, Ny nationalism präglar minnet av gamla greker, *Svenska Dagbladet*, 16 March 2008 and Andersson, Elisabet, Nytt museum i blåsväder, *Svenska Dagbladet*, 16 June 2009

¹⁴⁵ Kersel, Morag, The Politics of Playing Fair, or Who's Losing Their Marbles? in Yorke Rowan and Uzi Baram (eds.), *Marketing Heritage. Archaeology and the Consumption of the Past*, Altamira Press, 2004, p 42

language and that they have contributed to keeping the nation alive. The same people lived in Iceland now as thousand years ago, when the documents were created. A Professor of the University of Iceland said that the manuscripts were as important to the Icelandic as Shakespeare to the English. Several arguments were used by Danish scholars and politicians opposing the return. First, some argued that the manuscripts were a common Scandinavian heritage and not just of Icelandic interest. The “identity” of the documents was intensely discussed. Second, it was argued that Iceland did not dispose of the proper technical resources to conserve the manuscripts and lacked the academic expertise to study them. Third, one politician claimed that Iceland’s heritage would be kept alive as much in Copenhagen as in Reykjavík. Finally, it was said that since the manuscripts had been donated to Denmark in a will, moving them to Iceland would be unconstitutional, judicially wrong and constitute an expropriation of private property. In the end, some, but not all, documents were returned to Iceland. The original collection was parted in two. This final decision followed a complicated legal and political process.¹⁴⁶ Greenfield says that “*Undoubtedly the homecoming of the manuscripts has strengthened Icelandic national feeling and cultural consciousness.*” She also thinks that the return has helped preserving Icelandic as a language and that it has been one of the most important events in its cultural history.¹⁴⁷ Some years later, the Icelandic ambassador to the UN said that the return was a “powerful expression of respect for the cultural heritage of the country of origin”.¹⁴⁸

13 Nationalism and internationalism

I am now going to discuss the different approaches to cultural property and especially to the return of objects. I have chosen to divide the different positions into two groups; nationalism and internationalism. It was Merryman who first introduced this division in his famous 1986 article “Two Ways of Thinking about Cultural Property”.¹⁴⁹ Of course the division is a bit simplified and there are differences in motives, backgrounds and opinions within both groups, but I still think that it is quite an enlightening explication of the issue. Merryman has been criticised by some archaeologists for forgetting their view on the matter; a context-based approach.¹⁵⁰ However, I still stick with Merryman’s division since it has been used by others. The context-based archaeological view seems quite vague and difficult to legally interpret to me. Finally, archaeologists and other scholars in related fields seem to use nationalist arguments in many cases.

I am also aware of that nationalism and internationalism might not be ideal terms since they already have content and connotations and could be seen as filled with values. I have still chosen to use them since they explain quite well the two main positions or ideologies, and I hope that they can be understood in the right context here. When using the term nationalism, I do not mean the same as political nationalism. It can however not be neglected that cultural property is used as an arm in a political nationalist struggle and that the cultural heritage of a country is often deeply connected to its national identity.

¹⁴⁶ Greenfield, 2007, p 19 ff

¹⁴⁷ Greenfield, 2007, p 38

¹⁴⁸ Greenfield, 2007, p 39

¹⁴⁹ Merryman, 1986, p 831f

¹⁵⁰ Brodie, Introduction, in Brodie and Walker Tubb (eds.), *Illicit Antiquities, The Theft of Culture and the Extinction of Archaeology*, Routledge, 2002, p 5 and Coombe, Rosemary, The Properties of Culture and the Politics of Possessing Identity. Native Claims in the Cultural Appropriation Controversy, in Dan Danielsen and Karen Engle (eds.), *After Identity, A Reader in Law and Culture*, Routledge, 1995, p 258

Nationalists and internationalists are for or against repatriation, meaning the return of an object. It should however be remembered that there exist other forms of compensation that can be used, for example when an object is too fragile to be transported, when it has been destroyed or when no agreement on return can be made. It can be economic indemnification, the creation of a replica of the object, temporal or permanent loans to museums, etc.¹⁵¹

13.1 The nationalist side – For repatriation

There are several arguments for returning objects to what is believed to be their countries of origin and to make sure that objects stay there. The most common approach is however the attribution of national character to cultural objects; the idea that the cultural heritage *belongs* in the territory where it was produced and where the culture has its roots. It is based on the thought that all peoples have their own cultural heritage, crucial to national identity, and that they have a *right* to it. Logan expresses it like this: “*Local communities need to have a sense of ‘ownership’ of their heritage; this reaffirms their worth as community, their ways of going about things, their ‘culture’*”.¹⁵² The heritage consists of the cultural aspects which are significant for the country, has formed its history and makes it stand out compared to others. Every country has the right to protect its heritage.¹⁵³ This approach also indicates that there is an original state for cultural objects to where it can be returned.¹⁵⁴ The return of objects is also seen as one part of a greater project: the battle against looting of archaeological sites and theft of cultural property in the countries of origin.¹⁵⁵ A New Guinean explained his view on repatriation like this during a symposium on Oceanic art in 1980: “*We are people. We do not like the way in which we have been regarded as passive objects of research and study by experts. We view our masks and our art as living spirits with fixed abodes.*”¹⁵⁶

Nationalism is defended by many archaeologists. They want to keep cultural property in its original archaeological context, since without it is meaningless and become just a collection of beautiful objects.¹⁵⁷ In difference to internationalists, who want to make objects accessible to as many as possible, nationalists are often sceptical against museums and their “*object collecting*”.¹⁵⁸ When located in its original context, the object can reveal much more about the past and an object that isolated seems unimportant can be shown to have great scientific significance. Objects with a context can also tell other stories than the strictly historical ones; it can tell us about climate change, natural disasters and other

¹⁵¹ Jote, 1994, p 262

¹⁵² Logan, William S, Cultural Diversity, Heritage and Human Rights, in Brian Graham and Peter Howard (eds.), *The Ashgate Research Companion to Heritage and Identity*, Ashgate, 2008, p 439

¹⁵³ Warren, Karen J, A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues, in Phyllis Mauch Messenger, *The Ethics of Collecting Cultural Property*, University of New Mexico Press, 2nd edition, 1999, p 8f

¹⁵⁴ Bauer, Alexander A, Shanel Lindsay and Stephen Urice, When Theory, Practice and Policy Collide, or Why Do Archaeologists Support Cultural Property Claims?, in Yannis Hamilakis and Philip Duke (eds.), *Archaeology and Capitalism*, Left Coast Press, 2007, p 47

¹⁵⁵ Bauer, Lindsay and Urice, 2007, p 45

¹⁵⁶ Mulvaney, Derek John, A Question of Values: Museums and Cultural Property, in Isabel McBryde (ed.), *Who Owns the Past?*, Oxford University Press, 1985, p 92

¹⁵⁷ Cuno, James, Introduction, in James Cuno (ed.), *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2009, p 2

¹⁵⁸ Kramer, Jennifer, Figurative Repatriation, First Nations ‘Artist-Warriors’ Recover, Reclaim, and Return Cultural Property through Self-Definition, *Journal of Material Culture*, vol. 9, 2004, p 161

changes in the environment. Archaeologists also argue that even if collectors examine their belongings, they do not have the interest or the means to do analyses as thorough as scientists'.¹⁵⁹

The main subject of my thesis is the possible return of cultural objects, but the nationalist ideas and policies of repatriation are deeply connected to the treatment that cultural property shall have in the country of origin, before it is taken from there. Therefore it is necessary to broaden the perspective a little. The main points in the nationalist agenda are the restitution of objects (at least the ones that have been illicitly taken from their countries of origin), the nationalisation of objects and hard controls of exports and excavations. Often, a strong connection is made between what is described as "looting" (illicit excavations, excavations that do not reach the appropriate level according to nationalists, etc.) and the international market for antiquities. The market is often regarded with great suspicion and objects with uncertain provenance are considered looted. All this is of course backed by a certain view on cultural heritage and the importance of culture to different groups.

Nationalism is a position most importantly held by several source countries, but also by scholars and politicians in market countries. It has also been influential within the UNESCO. According to Merryman, nationalism gained importance and become the dominating position in the 1970's and 1980's. This can at least partly be explained by dividing lines between developing and developed countries and socialist and capitalist ideologies being present in the debate and the United Nations.¹⁶⁰

The 1970 UNESCO Convention embodies the nationalist ideology and it is constructed upon the idea that cultural property belongs in the territory where it has its provenance. In its Preamble, the importance of cultural heritage to national culture is underlined and it is said that the cultural heritage can only be fully appreciated "*in relation to the fullest possible information regarding its origin, history and traditional setting*". Of course this fear of de-contextualisation is not only an ideological stand, but also expresses the interest in archaeological review of found objects. It is argued that an object's integrity demands that it is preserved in its historical, geographical and socio-economic context since the object "*in its entirety is more than the sum of its component parts*."¹⁶¹ Further, the national retention of objects is an important part of the Convention and the source countries – mostly representing a nationalist view – are allowed to draft any kind of legislation controlling exports and which will then decide the definition of what is an "illicit" export in the meaning of the Convention. Shortly after the drafting of the Convention, the United Nations General Assembly adopted various resolutions demanding the repatriation of cultural objects to their countries of origin. In 1978 the UNESCO founded the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.¹⁶²

13.1.1 Nationalism in practice

Nationalism is not only an ideology, but also the current policy in many countries of the world. It means in practice that objects that are excavated during archaeological projects are to stay in the source country and not partially be brought home by foreign scholars, like in

¹⁵⁹ Brodie, Doole and Watson, 2000, p 10f

¹⁶⁰ Merryman, 1986, p 850

¹⁶¹ De Jager, 1988, p 190

¹⁶² Merryman, 1986, p 843ff

past days, prohibition of exportation of objects, state ownership of all antiquities, demands for repatriation directed at mostly Western countries, etc. Similar laws exist in a large number of countries.¹⁶³¹⁶⁴

In Saddam Hussein's Iraq, the heritage from the past was used for ideological purposes. In 1979 – the year when he became president – he made a speech at a convention for Iraqi archaeologists and said that "*Antiquities are the most precious relics the Iraqi possess, showing the world that our country, which today is undergoing an extraordinary renaissance, is the offspring of previous civilizations which offered up a great contribution to humanity*". Hussein often used references to the past in speeches and propaganda, reinforcing the Ba'athist ideology. One example is renaming the parliament The Hammurabi Building.¹⁶⁵

Egypt is a state that pursues one of the most ferocious nationalist policies. According to Cuno, the dominating picture was for a very long time that the Pre-Islamic era had little importance. This started to change when the Western interest in Egyptian antiquities began. The population became more interested in the past and at the same moment, the independence movement started to rise in Egypt, ruled during long time by Ottomans, French and British.¹⁶⁶

In Mexico, all objects from pre-Columbian times found within the country, are considered its archaeological heritage. This is explained by the belief in the idea that everything that can explain and make understandable the history of Mexico is important. Cultural objects are objects of study, rather than objects that deserve protection. This view is the base for the Mexican legislation on cultural property. It can partly be explained by the political discourse dominant during many years, especially after the Revolution starting in 1910; that Mexico should be a *mestizo* society, based on *one* language, *one* history and *one* model of society. The difference towards other states should be underlined. This centralism explains why archaeological sites are federal property. This ideology lost importance from the 1970's and instead, regionalism was encouraged. More recently, Nalda says that decentralization has been replaced by an effort to show Mexico's place in the globalization process by underlining the country's contributions to human development instead of focusing on national sovereignty. At the same time, indigenous groups and guerrillas like the Zapatistas, demand the recognition of indigenous rights and protest against the central power. This has led to claims for making archaeological sites as well as the objects found in them, the property of the communities living next to it, instead of federal property. When the Maya museum in Palenque was going to loan parts of its collections to an exhibition in Venice, Italy, crowds gathered outside the museum to protest against the loan, fearing that the objects might never come back to its territory of origin. In some cases, agreements¹⁶⁷ have been made that give the indigenous people some training in the management of sites and the right to what is gained through tourism at sites. The indigenous struggle has also led to some groups given the right to large parts of land. Sometimes the indigenous groups still have an important connection to a site or to certain objects, while other groups may not

¹⁶³ Among them Egypt, Mexico, Venezuela, Peru, Chile, Bolivia and Costa Rica.

¹⁶⁴ Cuno, 2009, p 37f

¹⁶⁵ Cuno, James, *Who Owns Antiquity? Museums and the Battle over Our Ancient Heritage*, Princeton University Press, 2008, p 54f

¹⁶⁶ Cuno, 2008, p 10f

¹⁶⁷ The San Andrés Larrainzar Agreements between the federal Government and the EZLN (Ejército Zapatista de Liberación Nacional).

have anything linking them to their past, apart from the ties of history – or sometimes not even that; claims are sometimes made by groups that quite recently moved into an area. Sometimes, groups demand the building of museums or the transfer of interesting objects to a central town, in order to make it more attractive to tourists. Using the cultural heritage can be one way of improving living conditions today, which is shown by the fact that disputes over cultural property are much more common in the tourism-friendly South Mexico, than in the North. Other cases talk about indigenous groups being involved in the illegal traffic of antiquities originating from their ancestors. Nalda's conclusion is that "*claims over sacred places constitute part of a broader resistance and have more to do with responses to specific situations and less to do with respecting ancestors or ways of life*".¹⁶⁸ Interestingly, in Mexico archaeologists sometimes claim that the indigenous groups ignore their history and also are responsible for looting.¹⁶⁹

Nationalist policies in source countries have also led to the gradual disappearance of *partage*. This is a traditional practice that means that objects found during excavation are divided between the foreign archaeologist and the source nation. The adverse position to *partage* in source countries has led to less objects being incorporated in foreign public collections.¹⁷⁰

13.1.2 Objects still in use

In relation to this, it seems that demands of return often regard objects that still are in use in indigenous cultures, objects with a ceremonial or spiritual value or use or objects used in burial traditions. In these cases, the classical concept of property might be especially unknown or unsuitable to use. It is also here that the concept of art not can be applied in the same ways as for other objects. Glass criticises that the spiritual side of objects is sometimes exaggerated motivated by romanticism or commercialisation, and that it sometimes seem that groups must be able to show this spiritual connection to gain back their objects, as if it were the only possible relation to an object.¹⁷¹

13.1.3 Colonialism

The urge to keep objects in their country of origin is often strong in states that have experienced colonialism. Fighting for the cultural heritage has been a part of the postcolonial ideology since the 1960's. Demands for restitution can be a part of a larger political struggle in order to form or re-establish national identity or pride and to give power to people that before had none. This is especially the case when objects were taken away by the colonial powers or people taking advantage of the colonial system. It is said that the repatriation of objects to ex-colonies "*fits well within contemporary 'postcolonial' criticism of the Western hegemonic power structures that have dominated global politics in general and anthropological research in particular since the field's inception*".¹⁷² Prott and O'Keefe think that since colonialism has never been permitted in international law, there is no legal ground

¹⁶⁸ Nalda, Enrique, Mexico's archaeological heritage: a convergence and confrontation of interests, in Neil Brodie and Kathryn Walker Tubb (eds.), *Illicit Antiquities, The Theft of Culture and the Extinction of Archaeology*, Routledge, 2002, p 205 ff

¹⁶⁹ Nalda, 2002, p 214

¹⁷⁰ Merryman, John Henry, Introduction, in John Henry Merryman (ed.), *Imperialism, Art and Restitution*, Cambridge University Press, 2006, p 9

¹⁷¹ Glass, 2004, p 120 f

¹⁷² Bauer, Lindsay and Urice, 2007, p 45

for acquiring objects during colonial rule and they should thus be returned. Against this, former colonial powers object that at the time, the countries of origin had no laws prohibiting the removal of the objects and the acquisitions should be regarded as rightful. Jote deems this argument outdated and underlines that the objects were taken without the consent of the local population. Since the objects were taken with the help of force under colonisation, this is to be considered as plundering. Jote adds that these actions were condemned even during the time when they occurred.¹⁷³

Thurstan Shaw, Emeritus Professor of Archaeology in Nigeria, argues that the refusal to return objects taken during a colonial regime equals “*denying part of the independence ‘granted’ to such countries; and this is a neo-colonialist policy*”.¹⁷⁴ The physical objects come to represent the history of a people and the process of demanding itself can be symbolically important; the object is demanded and is then returned and received. The cultural objects are often talked about as having personality; when they return, it is described like the return of a child. Cultural objects become physical proof of the difficult processes of reconciliation and commemoration. The argument is that earlier injustices and crimes cannot be undone, but at least the objects can be returned to their rightful owners. Nowadays, the issues on cultural property are also involved on a broader level in the politics of representation of groups and indigenous peoples.¹⁷⁵

13.1.4 Public exhibition not the solution

Internationalists normally argue that it is crucial to ensure a big audience for cultural objects in order to encourage understanding and learning. Some nationalists agree partially and want objects to be exposed in museums – but in their countries of origin. However, there are indigenous groups that do not value this; according to their view, the objects have not been produced for public consumption and are not meant to be preserved at all. This might be very problematic when Western states accept repatriation only on the condition that the objects will be put on display in a public place.¹⁷⁶

Against the internationalist will to make objects accessible and expose them in museums and the like, it is also argued that this does not at all lead to “international harmony and understanding”. On the contrary, the objects only travel in one direction – to rich countries in the North and the result is a division of the world.¹⁷⁷

13.1.5 Depreciation of unprovenanced objects

Renfrew, together with many others, argues that private dealers should return objects both evidently looted and the ones with uncertain provenance, to museums in the countries of origin. When it comes to museums, they should on the first hand never buy, accept as donations, loan or even show objects with an unclear provenance, since this encourages looting and even gives public money to it. In line with this, governments should also prohibit in law the import of unprovenanced cultural objects. In Renfrew’s view, self-regulation is not enough and states should therefore create a licensing system for dealers to control their businesses.¹⁷⁸

¹⁷³ Jote, 1994, p 262

¹⁷⁴ Greenfield, 2007, p 109

¹⁷⁵ Glass, 2004, p 116, p 124 f

¹⁷⁶ Glass, 2004, p 123

¹⁷⁷ Brodie, Doole and Watson, 2000, p 12

¹⁷⁸ Renfrew, Colin, *Loot, Legitimacy and Ownership*, Duckworth, 2000, p 91 f

13.1.6 Risks with commercialisation

Nationalists often argue that if cultural objects are regarded as art – which in Western societies is an economical commodity – this increases the risk of looting and destruction of archaeological sites, when locals and foreigners try to find objects worth selling. That is why many dismiss the idea of cultural heritage as art, and wants it to be treated in a different way.¹⁷⁹ It is said that when the demand of cultural objects grows, the number of illicitly provenanced objects on the market raises. One strategy for reducing this problem is thus closing the market. Nationalists often claim that this is the best way of fighting the illicit trade.¹⁸⁰

Accepting or even embracing the commercial side of cultural objects to give it a value and in that way protect it and guarantee its survival, is not necessary, argue nationalists, since there are *other* values to cultural property. One such value is nationalism; many nations claim that certain objects from ancient times are of special importance to them, for historical, religious, cultural and other reasons.¹⁸¹

13.1.7 Against universalism

Nationalists think that certain objects are representative for and important for individual cultures and therefore demand that they stay in and are returned to their countries of origin. The universal heritage may or may not exist, but cultural objects are best understood where they were created and belong. As we will see below, internationalists claim that there is a universal cultural heritage that objects do not belong in any special place and matter to the world as a whole. The whole concept of universality is however questioned by many nationalists. According to Cleere it is not compatible with the notion of cultural heritage and in his view; it can only be applicable to very earliest phases of human culture and maybe to “the global culture” of the latter parts of the past century. The technological wonders of the industrial revolution could maybe also be part of a global culture, possible to be appreciated by all. He thinks that human culture naturally is a matter of diversification, which makes universal culture impossible.¹⁸²

Mathur says that the idea of universality – especially as it is expressed in the Declaration on the Importance and Value of Universal Museums mentioned below (chapter 12.2.8) – stands for a “George Bush approach” to culture, using museums to once again impose the European or Western power that was the base for the creation of these museums. Mathur questions the definition of what is global or universal. She argues that truly universal museums should “highlight different topographies of power”, deal with current problems for cultural property and apply new museological practices and new approaches. Modern museums must also be aware of the colonial and imperial context in which they have been created.¹⁸³

De Montebello, himself an internationalist, has used an argument defending universality that might actually serve the nationalist side better, since it seems to prove the supposed “Eurocentric” view of internationalists. He argued that it is a problem that the

¹⁷⁹ Brodie, Doole and Watson, 2000, p 12

¹⁸⁰ Carducci, 2006, p 71

¹⁸¹ Tokeley, Jonathan *Rescuing the Past, The Cultural Heritage Crusade*, Imprint Academic, 2006, p 45f

¹⁸² Cleere, Henry, The uneasy bedfellows: universality and cultural heritage, in Robert Layton, Peter G. Stone and Julian Thomas (eds.), *Destruction and Conservation of Cultural Property*, Routledge, 2001, p 24

¹⁸³ Mathur, Saloni, Museums and Globalization, *Anthropological Quarterly*, vol. 78, no. 3, 2005, p 703

countries of origin are “remotely located”, by which I assume that he means that these countries are far from Europe and North America.¹⁸⁴

One more practically oriented critique of the universal view, or rather of the universal museums aiming to show their collections to an audience as large as possible, is the uncertainty about what should be done if there is a clash of interest between the access of the great public and the interest of scholars. Is one interest more important than the other?¹⁸⁵

Coombe refers to the thoughts of Clifford in his book *The Predicament of Culture*, where he talks about modern, Western painters like Picasso and Miró being inspired by traditional, “tribal” art and argues that seeing universal values in objects from non-Western cultures in the modernist way, means appropriation of these cultures and “denying particular histories, local contexts, indigenous meanings, and the very political conditions that enabled Westerns artists and authors to seize these goods for their own ends”. According to Clifford, this must be seen in an imperialist context; it is not until the Western artists discover the greatness of what was formerly seen as “ethnographic specimens” that they gain the status of *art*. Art is however to be seen as a European concept. Clifford thinks that when the objects turn into art, they go from being tribal to being universal, becoming part of civilisation and a human cultural heritage. They no longer belong to “the cultures” in the anthropological way, but to Culture, in the European sense.¹⁸⁶ This could be seen as proving that universalism is not about a common heritage, but about Western values being appointed to non-Western objects in a less than equal way.

13.1.8 The human rights perspective

The claims of ethnical groups or whole countries for the return of cultural objects are by some seen from a human rights perspective. It is argued that people have a human right to their cultural heritage.¹⁸⁷ Using the human rights structure for defending one’s cultural heritage is tempting because of the moral foundation that is based on.¹⁸⁸ This is sometimes defined as a right to “control over one’s culture” or a right to “cultural privacy”. Culture as a right is connected to the need to maintain a community’s identity and in that way preserving cultural diversity. Since the 1960’s, the UNESCO promotes the rights perspective on cultural heritage.¹⁸⁹ The right to one’s culture is also declared by several international documents. The Universal Declaration of Human Rights declares that everyone “*is entitled to realization... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality*” (article 22). Article 27.1 states that “*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*”. The 1966 Covenant on Economic, Social and Political Rights develops these rights further.

The International Covenant on Civil and Political Rights, article 27, states that many cultural rights must be enjoyed by groups and communities, not by individuals. The issue of the legal status for group rights in international law does however not seem to be completely clear. Human rights were from the beginning individual rights, but during the last

¹⁸⁴ De Montebello, 2009, p 55 ff

¹⁸⁵ Merryman, The Public Interest in Cultural Property, *California Law Review*, vol. 77, 1989, p 360

¹⁸⁶ Coombe, 1995, p 256 f

¹⁸⁷ Brodie, Doole and Watson, 2000, p 11

¹⁸⁸ Brown, 2004, p 50, p 58

¹⁸⁹ Logan, 2008, p 439, p 443

decades, the issue has been raised whether also the rights of groups should be protected. It is often in cases regarding native populations that this is an issue. Recent development in international law shows an opening towards group rights. Potential group rights could be the right to their own cultural identity or rights to the physical object; having it returned to them or the right of it not being destroyed. If these rights are to be seen as human rights, the level of international legal protection needs to be reinforced.¹⁹⁰ Group rights can cause problems while invading on individual rights, both for external subjects but also for individuals that are part of the group, have been part of the group or want to be part of the group.¹⁹¹

The right to property has also been used in the battle for cultural rights. Lenzerini writes that “*the Inter-American Court of Human rights held that the right to property affirmed by article 21 of the ACHR¹⁹² includes the collective rights of indigenous peoples over their ancestral lands and the natural resources they have traditionally used, due to the fact that the right has a meaning in international law that transcends its significance in domestic law*”. In a later case, regarding an indigenous group in Surinam, the same court stated that indigenous communities need to possess their traditional lands in order to enjoy their right to cultural integrity and identity. In yet another case, the Court stated clearly that property over lands was a guarantee for the communities keeping their cultural heritage¹⁹³. The court continued by saying that the collective property is different from the ordinary, individual one. The latter might need to be restricted in order to preserve cultural identity in a democratic and pluralistic society.¹⁹⁴ These cases are very interesting and reflect how the relation between cultural property and human rights often work: The connection between cultural property and human rights is seldom made by claiming the individual right to property as expressed in international legal instruments¹⁹⁵, but as a collective right to culture and traditions. In this situation, the right to culture is rather opposed to the traditional right to property, especially the right to private property.¹⁹⁶

13.2 The internationalist side – Against repatriation

The internationalist or cosmopolite side represents a very different view on the cultural heritage, compared to the nationalists. Their main arguments are that cultural objects are not automatically the property or heritage of *one* culture, but can be of interest to all people for historical, cultural and educational reasons. The world benefits from getting to know the past of *all* cultures, not only the local one. The archaeological context is regarded as one important value of the object, but only as one of many values. It is natural that if you share this view of culture – as something that belongs to everybody – return or restitution of objects cannot be an option. The objects are already located where they belong, since there

¹⁹⁰ Forrest, 2010, p 8

¹⁹¹ Francioni, Francesco, Culture, Heritage and Human Rights: An Introduction, in Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights*, International Studies in Human Rights, Martinus Nijhoff Publishers, 2008, p 4

¹⁹² American Convention on Human Rights

¹⁹³ “La propiedad sobre la tierra garantiza que los miembros de las comunidades indígenas conserven su patrimonio cultural”

¹⁹⁴ Lenzerini, Federico, Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge, in Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights*, International Studies in Human Rights, Martinus Nijhoff Publishers, 2008, p 137f

¹⁹⁵ Two important examples are article 17 in the UN Universal Declaration on Human Rights and article 1 in the First Protocol to the European Convention on Human Rights.

¹⁹⁶ Brown, 2004, p 58

is no preferential location based on cultural, nationalistic or ethnic claims.¹⁹⁷ Internationalists sometimes claim that while nationalists regard the nation as the most important, they themselves are above all concerned with the faith of the cultural object. They think that a few factors should be studied when assessing the situation: security of the object, the prospects of learning the history of it and the accessibility of it. Therefore, the result of the assessment is often that the object is better off in places other than its country of origin.¹⁹⁸ Cuno questions the very concept of cultural heritage; the notion that objects could *belong* in a specific country because of its importance for the cultural identity of the citizens. His reason is the above mentioned, that it is impossible to connect ancient cultures to the people of today. He also says that *"to include antiquities within the political construct of cultural property is to politicize them"*.¹⁹⁹

13.2.1 Universal heritage

Many internationalists base their arguments on the existence of a common cultural heritage. Cultural heritage can be of importance to humankind as a whole, often at the same time as being of value to a smaller community. Forrest argues that *"the culture of the world is greater than the sum of individual cultures"*. The universal value of cultural heritage has been recognised for a very long time, but it was concretised during the Renaissance and during this period it was even mentioned in international law. It is easy to understand the connection to the time's interest in ancient Greece and other cultures. This is also when the thoughts of a pan-European culture started to arise. During the centuries to come, war booty in the form of art and other cultural objects was taken in abundance, especially by Napoleon. This was not seen as a problem by some, since they regarded the artistic treasures the property of all Europeans. This point of view even gained legal importance during the 19th century. It was also during this century that cultural objects got proper protection in wartime. The developments in the field of archaeology also contributed to the recognition of cultural heritage as something belonging to the whole humankind. Universal cultural heritage was recognised by the League of Nations. A new perception of cultural heritage evolved, described by the International Council of Museums in 1939 *"as a component of a common human culture, whatever their places of origin or present location, independent of property rights and national jurisdiction"*. Nowadays, cultural heritage is often regarded as something that does not belong exclusively to the territory where it has its origins. A state can have a right to the heritage, but it must be shared with the humankind as a whole.²⁰⁰ Some even argue that the common heritage excludes the heritage of one individual state. According to this line of thought, there is no right to ownership and claims of return cannot be made arguing that the objects are the property of one country. The same goes however for individual claims of ownership made by museums, collectors or any other subject.²⁰¹

Merryman argues that the 1954 Hague Convention takes a clear internationalist stand. The cultural heritage is common to all humankind and any damage to it affects all people in the world, not just the citizens of the country of origin. The consequence is that the

¹⁹⁷ Greenfield, 2007, p 366

¹⁹⁸ Merryman, 2009, p 188

¹⁹⁹ Cuno, 2008, p 9ff

²⁰⁰ Forrest, 2010, p 11ff

²⁰¹ Warren, 1999, p 5

protection of the heritage must be made on the international level.²⁰² In the Preamble it is said that:

“damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”

and

“ the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection”

The concept of a common heritage to all humankind has since then been used in several international documents and UN instruments, even the ones that also talk about the heritage of a certain culture. The same ideas were expressed by UNESCO’s director-general in 1960: *“These monuments ... do not belong solely to the countries which hold them in trust. The whole world has a right to see them endure. They are part of a common heritage... Treasures of universal value are entitled to universal protection”*.²⁰³

Another argument opposing nationalism rejects the essentialist view on culture: culture as *“a set of specific objects and traditions that do not change”*. Culture should be seen as something dynamic, in constant change. Losing an object does not mean losing culture or cultural identity. The culture of New York did not vanish when the World Trade Centre was destroyed. There is no reason to believe that cultures from other parts of the world than ours should not be able to support a similar loss.²⁰⁴

13.2.2 Universality and encyclopaedic museums

The internationalist approach to world culture is the thought behind the so called encyclopaedic museums, representing Enlightenment ideas that appeared during the 18th century. Two famous examples of encyclopaedic museums are the British Museum in London and the Metropolitan Museum of Art in New York. They exhibit objects of artistic and historic interest from cultures all over the world in order to promote tolerance, understanding and knowledge of differences and the common developments and advances in all our cultures.²⁰⁵ According to Cuno, universal museums in difference to national(ist) museums are dedicated to ideas, not ideologies. The objective is to provide the broadest possible access and give benefit to and inspire people both today and in the future. It is also important to give access to scholars and to loan objects from collections to other museums of the world in order to reach a big audience. According to de Montebello, the possibility to study objects from the local culture does not exclude the study of objects from other cultures, in the same museum. When studied together, both cultures can be better understood and similarities can be discovered. If all objects stay in their original context, like the nationalists want, the knowledge will also stay there and the peoples of the world will not get access to it. This is a great loss for humanity. Spreading objects over the world can also mean that the cultures are strengthened and are better remembered and honoured,

²⁰² Merryman, 1986, p 836

²⁰³ Mulvaney, 1985, p 90

²⁰⁴ Bauer, Lindsay and Urice, 2007, p 47

²⁰⁵ Cuno, 2009, p 37

than if all their traces were left in their country of origin. By seeing the heritage of other cultures in “our own” museums, we can come to love it, despite not being “ours”.²⁰⁶ Neil McGregor, current Director of the British Museum, has said that “*In a world increasingly fractured by ethnic and religious identities, it is essential that there are places where the great creations of all civilizations can be seen together, and where the visitor can focus on what unites rather than what divides us*”.²⁰⁷

The position of the British Museum towards claims of restitution has until now been defensive – understandably, thinks Greenfield. The reasons are said to be the purpose of the museum, the risk of a flooding of demands for restitution and current legislation, even though Greenfield thinks that the regulation of the museum permits restitution. A former director of another museum in the UK said upon the return of an object to Native Americans, that he saw this as “*political revisionism of history and the diminution of a museum’s social role*”.²⁰⁸

In relation to the question of accessibility that is closely connected to the idea of the encyclopaedic museums, it has been argued that access to cultural objects is better secured by collectors and museums, than by archaeologists. Boardman argues that his study of British archaeologists shows that they often fail in publishing the result of their excavations. The public is only reached by information on their findings when something really spectacular is found. On the other hand, it lies in the interest of both museums and collectors to show their collections to an audience as broad as possible.²⁰⁹

13.2.3 Context and unprovenanced objects

As we have seen, many people in favour of returning cultural objects want museums and other public institutions to avoid objects with unknown provenance. Some nationalists even argue that objects found accidentally or by the local population are to be treated rather in the same way as illegally dug up objects, since it is not excavated by an archaeologist and might have an unclear provenance.²¹⁰ Not buying objects just because their provenance and history is unknown or unclear has large practical consequences; there is an enormous amount of objects in collections, museums, private persons’ homes etc that fall under this category. To always demand a certain history of an object before acquiring it, is seen as impossible by some. An uncertain provenance does not automatically mean that the object was stolen or in any other way unlawfully acquired. In auction-houses, goods are often sold anonymously and some argue that there is no problem with this. Tokeley argues that since collectors with good knowledge of antiquities normally can study the object they have bought and draw conclusions from its state, qualities, reparations, features etc., there is not at all an issue selling objects without informing about past owners. The information is in the object itself.²¹¹ De Montebello takes the example of “ordinary” art, where we seldom are able to establish a complete chain of transactions from the artist to today’s owner, which is often a public collection. This is not often discussed as a problem. Further, antiquities do not completely lose their value only because their full background is not known. The aesthetic

²⁰⁶ Greenfield, 2007, p 412

²⁰⁷ Quoted in Cuno, James, *Museums, Antiquities, Cultural Property, and the US Legal Framework for Making Acquisitions*, in Kate Fitz Gibbon (ed.), *Who Owns the Past?*, Rutgers University Press, 2005, p 145

²⁰⁸ Greenfield, 2007, p 103, p 316

²⁰⁹ Boardman, John, *Archaeologists, Collectors, Museums*, in James Cuno (ed.), *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2009, p 109 f

²¹⁰ Boardman, 2009, p 111 f

²¹¹ Tokeley, 2006, p 16 f

value of an object can be admired and scholars can tell a lot about it without knowing exactly where it was excavated. There is also the question of what to do with the objects if they are not to be bought. To completely ignore objects with an unknown past could mean losing important information, only because of the lack of some other information.²¹² Boardman argues that in the academic world, the refusal to buy unprovenanced objects equals censorship. When museums and other institutions acting in the interest of the public refuse to buy stolen goods or objects with an uncertain history, it could also mean that interesting objects are lost forever. One case is when objects coming from a country in conflict or under severe dictatorship are sold due to chaotic circumstances in the state. Many internationalists argue that humanity cannot take this risk just because of the lack of excavation and documentation.²¹³

The resistance against buying unprovenanced objects is closely connected to the idea of context, often defended by archaeologists. They argue that the meaning and scientific value of it is much less, or non-existent, without the physical context. Therefore, they often defend the return of cultural objects to the territories where they were found. In relation to this, internationalists claim that context is not everything and that objects still can be appreciated and have a value outside their original archaeological context. Archaeologists should not be the only ones that are allowed to have an opinion on the value of objects.²¹⁴ Cuno mentions the example of the Rosetta stone, found in Egypt in the early 19th century. It had been reused as building material while constructing a fort, and thus found out of its original context. Still, its scientific importance is very high. Cuno says that objects could have a lot of different meanings out of their original context: historical, aesthetic, technological, iconographic, epigraphic... There are unprovenanced objects in public collections today that serve scientific and other purposes.²¹⁵ Bauer, Lindsay and Urice argue that is now acknowledged that cultural objects have “social lives” in themselves, which leads to the conclusion that context is not everything. Objects can also get a new meaning when the context changes. Emphasising the “authenticity” of the objects can be regarded as paternalistic. Denying that the objects can evolve when they are located in Western societies is not wise; the life of an object can still be going on. Even the transfer of the object from its country of origin is a use of it and matters in the history of an object. Further, archaeologists and others intensely study the re-use of objects in ancient times, but condemn the same behaviour today and call it looting. Bauer, Lindsay and Urice also question whether it is correct to make a difference between the native population digging up and using objects and ordinary looters.²¹⁶

The discussion about context is also connected to the one about the aesthetic qualities of objects and the similarities with ordinary art. While archaeologists talk about context, some think that this should not be the only way to appreciate and measure the value of objects. It is argued that the aesthetic value can be just as important and that the beauty of an object transcends time and borders between countries and groups of people; it can be exposed, watched and celebrated without considering provenance. Naturally, this leads to a

²¹² De Montebello, 2009, p 65

²¹³ Boardman, 2009, p 114 ff

²¹⁴ Cuno, 2009, p 5ff

²¹⁵ Cuno, 2008, p xiv, p 9

²¹⁶ Bauer, Lindsay and Urice, 2007, p 47f

discussion about the definition of art and the question whether it means the same in the Western world as in the countries of origin.²¹⁷

De Montebello argues that archaeologists should not have an exclusive right to the objects; scholars of other disciplines should have a saying too since the archaeological context is not the only one. Reducing the possibilities of objects is not a good idea and against the idea of diversity and spreading of knowledge. Also when the objects were originally made, they were often used, traded with and spread knowledge in that way. We should not let the usage be less diverse now. Finally, for most museums the aesthetical value is very important and maybe the value that the public enjoys the most.²¹⁸

13.2.4 Commercialisation gives value to the cultural heritage

Some argue that commercialisation of cultural objects and letting collectors' buy them is beneficial to the objects, since this gives them a value, and what is valued, is cared for. If collectors or dealers are willing to pay large sums of money for an object, this normally means that they will give the object the best possible protection.²¹⁹ Obviously, collectors of antiquities affirm the economical value of objects but this is not necessarily the only existing value. Many collectors have a thorough scientific knowledge and interest in the objects that they buy and do not just shop around to find the most beautiful or the most expensive gadget.²²⁰ Further, the fact that collectors and dealers have a high level of knowledge means that the price of the object when sold at an auction not only reflects the value of it and its singularity, but also that possible forgeries and objects with a doubtful provenance are sold at a lower price, according to normal market behaviour. In this way, the integrity of the object is protected.²²¹

This means that the ownership over an object can give it value. Some even mean that it is the fact that cultural property has had a value that much of it has survived history and can still be admired. Nationalisation of objects and prohibition of taking the private property of people out of the country is not necessarily the only way to protect objects. Merryman argues that many types of objects can be traded worldwide without risk. Exportation could also mean that a private person sells an object to a public collection abroad, which makes it more accessible to the public than if it had stayed in its country of origin. The object can then make "publicity" for the source country and its art. It is also argued that more objects are found and safeguarded when the economical value of the objects is recognised. For farmers, landowners and others, it might be more interesting to notify the authorities of an object found in the ground if they receive a finder's fee instead of just plain nationalisation of the object. Without compensation, they might as well keep it in the family as a souvenir.²²² A commercial interest also leads to searching for new archaeological sites. These searches might not be run by archaeologists from the beginning, but they can lead to new and interesting finds.²²³

²¹⁷ Brodie, Doole and Watson, 2000, p 12

²¹⁸ De Montebello, 2009, p 59f

²¹⁹ Merryman, 1986, p 849

²²⁰ Tokeley, 2006, p 36f

²²¹ Brodie, 2006, p 8

²²² Merryman, 2005, p 274f

²²³ Tokeley, 2006, p 16f

13.2.5 The rescue argument

One argument commonly used against nationalism is not really ideological, but practically orientated. It is the claiming that source countries, especially when they are developing countries, do not have the resources or the knowledge to properly take care of objects. Warren calls this the rescue argument. Objects are said to be better protected against armed conflict, natural disasters and looting when located in Western countries. The states that take on the responsibility to protect the heritage should therefore be seen as having a moral right to the objects.²²⁴ For example, it has been reported that Peru has several objects from earlier cultures that are not displayed or conserved in an appropriate way. Merryman even goes as far as claiming that the damage that cultural objects are suffering through neglect and incorrect preservation is far exceeding the damage done by looters and smugglers, although he admits that there are no “hard data” to prove this.²²⁵ Internationalists argue that objects originating from developing source countries are much better off in another state, where they can receive proper attention and be preserved for the future. Nationalists are not completely oblivious to this problem, but some of them think that it might be preferable to let the objects be damaged before exporting them.²²⁶ Against this internationalist argument, it can be argued that there is no guarantee that Western museums will be ready to return objects once the standards in developing countries have improved.²²⁷

Related to this argument is the one that it is good to spread the heritage of one culture across the globe, in order to minimize risks that it will be destroyed. This is especially important for objects from countries in war or other conflicts or with authoritarian regimes, but can also work in areas hunted by natural disasters like earthquakes. Thanks to the Babylonian collections in Philadelphia, London and Berlin, we can still admire the works of early Mesopotamian art, even though the looting of the National Museum of Iraq still remains a tragedy. If nationalist policies are adopted all over the world, this deteriorates the odds for survival.²²⁸

Another point of view is that if we do not collect or keep some cultural objects, we might never understand some cultures of the world, since they are on the verge to extinction or on their way to give up earlier practices, maybe to blend into modern day society. Conflicts and lack of knowledge in developing countries can lead to the destroying of objects. It could be important for future citizens of these states to be able to study objects from earlier times in order to understand the past.²²⁹

13.2.6 Hording

Another issue is the fact that there exist a very large number of objects of cultural importance in the world. This is especially true for certain cultures or for certain types of objects. All these objects cannot be said to have a scientific interest or value and they might not be “necessary” to gain knowledge on ancient cultures. The result is that large amounts

²²⁴ Warren, 1999, p 3f

²²⁵ Merryman, 1989, p 362

²²⁶ Merryman, 1986, p 846f and André Emmerich, Improving the Odds, Preservation through Distribution, in Kate Fitz Gibbon (ed.), *Who Owns the Past?*, Rutgers University Press, 2005, p 250

²²⁷ De Jager, 1988, p 190

²²⁸ Emmerich, 2005, p 24ff

²²⁹ Wilson, David, Return and Restitution: A Museum Perspective, in Isabel McBryde (ed.), *Who Owns the Past?*, Oxford University Press, 1985, p 104

of objects are stored in museums, universities and other public institutions and never shown to the public or used by scholars. Sometimes they also run the risk of damage since not being properly stored. It can be added that there is often an international market for these objects and some internationalists argue that it would be better to sell the superfluous objects. The money gained could be used to improve the conditions of preservation of more important collections or other projects beneficial to the cultural heritage. It could also be an important source of revenue for developing countries, their cultural heritage sometimes being one of their most attractive export commodities. Selling parts of collections could also mean that the existing illegal markets would be less interesting for collectors and reduce the risks for thefts and looting. Internationalists also suggest that the objects are loaned or exchanged, to raise awareness on the cultural heritage in the world and to make objects accessible for research, since there is an international interest in this common cultural heritage; important to all of us just in the condition of being human. Exchanging of objects with other institutions worldwide could be important to gain knowledge about other cultures, but also about your own. Exports on certain cultures do not always operate mainly in the source country, but in richer market countries.²³⁰ In the generally trade-critical UNESCO Recommendation Concerning the International Exchange of Cultural Property from 1976²³¹, it is actually acknowledged that stocking objects of minor importance might not a good idea when there are institutions willing to include them in their collections:

“Considering that many cultural institutions, whatever their financial resources, possess several identical or similar specimens of cultural objects of indisputable quality and origin which are amply documented, and that some of these items, which are of only minor or secondary importance for these institutions because of their plurality, would be welcomed as valuable accessions by institutions in other countries,

Considering that a systematic policy of exchanges among cultural institutions, by which each would part with its surplus items in return for objects that it lacked, would not only be enriching to all parties but would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages.”

It can be noted that Greenfield uses the same argument – but about Western museums! She says that there is a lot of “foreign” material in the universal museums of the West that is never exposed and kept in storage rooms.²³²

13.2.7 The illegal market

As mentioned before, there is a large illegal market of cultural objects. Many internationalists think that prohibiting or restricting to a high degree a licit market only encourages the growing of the black market, since there is a real demand in the world for cultural objects. They argue that the harder the export control is, the more will the need for an illegal market grow. Reinforced legal control makes more of the market activities illegal. They also think that legalising or keeping legal the trade in cultural objects can reduce the problems with illicit excavations, a business often connected to bribes, professional criminals

²³⁰ Merryman, 1986, p 847

²³¹ UNESCO Recommendation Concerning the International Exchange of Cultural Property of Nov. 26, 1976, UNESCO Doc. IV.B.8

²³² Greenfield, 2007, p 412

and the destruction of valuable cultural property. Nationalist think the contrary: the existence of an illegal market proves the need for international regulation of the matter. This is also the position expressed in the 1970 UNESCO Convention. Those are the same arguments used in many debates on the open or regulated market of goods, for example drugs. According to Merryman, it is proved that retentive laws do change the patterns of trade and the routes that objects take, but it does not lead to less trade in cultural property. He argues that trade – licit or illicit – will continue as long as there is an interest in the objects and in ancient cultures.²³³ Boardman thinks that it is wiser to target middlemen and corrupt civil servants in the source countries than to hunt down collectors and dealers in market countries, since it is more effective and stops the problem at an earlier stage.²³⁴ According to Watson, the discussion on the illegal market is even more complicated by the fact that a very large part – maybe as much as 90 percent – of the antiquities is sold outside the auction houses and the rest of the open market and because the most valuable objects are almost always sold outside the open market. However, Watson's numbers are estimates and it is very difficult to get accurate numbers on the scope of the market.²³⁵

13.2.8 Empty museums

Yet another argument against the repatriation of cultural objects is that if a museum or public collection repatriates one object to its country of origin, this might start an avalanche and force them to give back all foreign objects in their collections. Former Director of the British Museum David Wilson said in 1981: *"If you start to nibble at the...collection by taking away even one or two objects there would soon be a flood of applications for the return of materials... This would create a situation which would be sad for universal institutions and for the concept of universal culture..."*²³⁶ Even if you accept the repatriation of some objects where there are obvious problems surrounding them, for example theft, it does not mean that you want to completely empty Western museums of their contents. This is actually a fear of some important museums in the world and this has led to some of them signing a declaration in 2002 against the repatriation of parts of their collections. In the Declaration on the Importance and Value of Universal Museums, it is declared that universal museums provide a *"valid and valuable context"* for objects. The museum officials further think that every demand for the return of objects must be decided individually, since the collections serve the humanity as a whole. They further argue that demands for return threaten the integrity of universal collections. 18 museums have signed it and among them are the Prado, the Louvre, the Hermitage, the Berlin State Museums and the Museum of Modern Art, New York. Phelan argues that this Declaration should be seen in the light of several American museum officials in some cases have submitted amicus curiae briefs in the support of art merchants in court for illicit exports and smuggling of antiquities. Phelan thinks that American museums do not do enough to prevent traffic in cultural objects.²³⁷

²³³ Merryman, 1986, p 847f

²³⁴ Boardman, 2009, p 115

²³⁵ Watson, Peter, *Convicted Dealers: What We Can Learn*, in Neil Brodie, Morag M Kersel, Christina Luke and Kathryn Walker Tubb (eds.), *Archaeology, Cultural Heritage and the Antiquities Trade*, University Press of Florida, 2006, p 95

²³⁶ Quoted in Mulvaney, 1985, p 92

²³⁷ Phelan, Marilyn, *Legal and Ethical Considerations in Museum Acquisitions*, in Hugh H. Genoways (ed.), *Museum Philosophy for the Twenty-first Century*, Altamira Press, 2006, p 29 and Tokeley, 2006, p 336f

13.2.9 Returned to whom?

One problem with nationalism is that it is not evident what culture is seen as the cultural heritage of a country. Objects from cultures from different peoples or eras can be present on the same soil. There is also the question about how today's modern states acquire the ownership over and the rights to objects that originates in ancient cultures and in states that today do not longer exist. What is the deciding factor to establish a link between ancient peoples and today's states? The Intergovernmental Committee defines *country of origin* as "the country with the traditional culture to which the object was related", but according to Greenfield this is not a satisfactory definition.²³⁸ In some cases it can be so difficult to find a good way of establishing this link that an eventual repatriation is not at all possible. It seems that living on the same *territory* is one important factor, but not the only one. Different peoples have lived on the same piece of land during the centuries without sharing the same culture, which is showed for example in the case of Jews and Palestinians in the Middle East (even though there are obvious similarities between the two cultures). Boundaries have changed thousands of times in the world and colonialism complicated things even more. The system of nation states is much younger than many of the cultural objects that are the matter in issue. Another link could be the *ethnic group*. This is however problematic in the cases where the people that originally created the object does not exist anymore, as is the case with the Etruscans and the Phoenicians. Today, the Italians – living on the same territory as once the Etruscans – claim the right to their cultural remains.²³⁹ As Appiah says, "patrimony, here, equals imperialism plus time".²⁴⁰ Even if an ethnic group has not disappeared, should the connection between today's people and the great-great-grandfathers be scientifically proven with DNA technique or is it to be taken as obvious? Using biology to prove cultural links could also be seen as controversial and even unethical. During the centuries, ethnical groups have also mixed and moved, which also makes it hard to decide if ancient time's people really have relatives in the present world. Could sharing the same *culture* be a reason for establishing ownership? First it must be established what culture is. Second, it cannot always be easy to establish a connection between today's societies and people living 2000 years ago. Is it even possibly to say that today's Swedes belong to the same culture as the people living in Sweden in the 18th century? Habits, political patterns, language etc surely have changed a great deal. Another issue is the original ownership over the objects in question. The origin of cultural objects is not always clear and sometimes they are produced by representatives for one culture and then used in another culture. During ancient times there were also wars, plundering and commerce, which meant that objects travelled between cultures, sometimes more or less illicitly. It is not easy to decide how this should be interpreted in today's debate over the origins and claims of ancient culture. If an object made in Greece was taken by the Romans and stored in what is now Italian territory for hundreds of years, what is the true origin of the object and in which cultural heritage does it belong? Things become complicated when objects turn up where they do not originally belong. Further, a culture could also be present within

²³⁸ Greenfield, 2007, p 367

²³⁹ One example is that the Italian Government has claimed a collection of objects from the American Getty Museum, including an Etruscan candelabrum. Among the objects is also a vase of Greek origin. (Appiah, Kwame Anthony, *Whose Culture Is It?* In James Cuno (ed.), *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2009, p 76)

²⁴⁰ Appiah, 2009, p 76

several countries. This is not uncommon in Africa, where borders were drawn without considering the indigenous groups that habited the lands.²⁴¹

A practical example of this is a request from Italy to the United States to impose import restrictions on a number of objects from the Roman Empire that were said to have been illegally exported. The Italian Government claimed that *“These materials [...] are of cultural significance because they derive from cultures that developed autonomously in the region of present day Italy that attained a high degree of political, technological, economic and artistic achievement [...] the cultural patrimony represented by these materials is a source of identity and esteem for the modern Italian nation.”* Against this, Cuno, strongly supporting an internationalist approach, argues that it is not very wise to claim that the Roman culture – or any other lasting culture, either – developed autonomously, since it is a very good example of a culture that borrowed from other cultures, most importantly ancient Greece, which in its turn was influenced by its neighbours. Cuno thinks that there are no “pure” cultures; only dynamic ones and this makes the nationalist case a weak one.²⁴²

Another example is the case from a New York court, where the states of Croatia and Hungary fought over the Sevso treasure. The treasure consists of fourteen pieces of Roman silver and a copper cauldron. Both states claimed that it was their cultural patrimony, that it had been found within their borders and belonged to them according to national laws. In the end, the court ruled that neither of the states had proven that it had the right to the treasure and returned it to the British Lord that had until then possessed it. Curiously enough, Lebanon had also claimed the treasure on an earlier state, but withdrew its demand.²⁴³

Returning an object to a certain people or state could also be complicated when considering that a part of cultural heritage represented by, say an amphora, could be of importance to several peoples or states cultural heritage and not only the one where the amphora was originally produced. This is the case with Greek and Roman rests; naturally today’s Italians and Greeks can feel cultural connections to their ancestors, but the same goes for all Europeans, since a large part of our history and culture has its roots in these cultures. It can be argued that the Roman and Greek cultural heritage belongs to our whole continent.²⁴⁴

An interesting parallel to the questions on defining whom has the right to cultural objects and how to decide to which culture an object belongs, is a resolution made by the European Council in 1983. It expresses some understanding for the return of objects to other continents, but when it comes to Europe, things are different: *“the European cultural heritage belongs to all Europeans...whose claims for the return must be considered differently from the claims to be made by countries out of Europe”*.²⁴⁵

A situation that further illustrates the problem of establishing to whom a cultural heritage is relevant and belongs, occurred during the Iraqi invasion of Kuwait in 1990. Iraqi forces had had removed objects from museums in Kuwait and when there were complaints

²⁴¹ Tokeley, 2006, p 57f

²⁴² Cuno, 2009, p 27f

²⁴³ Kurzweil, Harvey, Leo V. Gagon and Ludovic de Walden, The Trial of the Sevso Treasure, in Kate Fitz Gibbon (ed.), *Who Owns the Past?*, Rutgers University Press, 2005, p 83

²⁴⁴ Tokeley, 2006, p 80f

²⁴⁵ Jote, 1994, p 302

about this, the Iraqi government answered that they were only protecting Iraqi cultural heritage, “including that of its Province of Kuwait”.²⁴⁶

Returning objects that are the heritage of a minority group to a government does not necessarily mean that the majority allows the minority to access the heritage. States could have other agendas than protecting and giving power to their minorities. Peru is one example: constructing a common, modern Peruvian identity has been more important than embracing the multiethnic past and present. The country has laws that make all pre-Columbian objects into state property, but the different native communities do not get to participate in the administration of the objects. There might be more than one answer to why the Peruvian government insists on protecting these objects, but not the interests of the tribes, but it is suggested that the economically important tourism industry plays a part.²⁴⁷

13.2.10 Bad governance in source countries

Returning cultural objects to or keeping objects in states that are undemocratic or to underdeveloped countries (they often coincide) can be problematic due to bad governance. When an object is returned to a country of origin that is far from being democratic, this is of course problematic since the regime does not represent the population. As seen in the chapter on nationalism, the object is often seen as a symbol, carrying values and with the power to acknowledge an indigenous group. When an object is returned to a dictatorship, it could be seen as an advantage for the leaders and confirm the rightfulness of the regime. That was, according to Merryman, the case with the Crown of St. Stephen, that was returned to Communist Hungary from the United States in 1977. Many exiled Hungarians opposed to the repatriation, as well as some American politicians.²⁴⁸

According to de Montebello, bringing cultural objects “home” does not always mean that they are rightfully put in their original context. It can also be interpreted as a symbol of recent cultural developments, political and even military currents of contemporary society.²⁴⁹ Many internationalists argue that the demands for return is just politics; a way for politicians to strengthen their own position and the one of their country. It is also sometimes argued that repatriation is sentimental and an outburst of Romanticism.²⁵⁰ Cuno says that the demands for return and the laws on export and nationalisation are expressions of national interests and political aims and that the government are more interested in the objects themselves than the values they represent. He says that we must understand that nations are political constructions, made by people who gained control over a certain territory. The citizens’ loyalty with the nation is crucial to stay in power and identification is perfect to create loyalty. This is where culture has its place in the construction of a nation. Cuno argues that cultural objects are used to serve the purpose of the nation, to show and strengthen the power of a nation.²⁵¹ Litvak King says that no object can be the absolute property of any nation, even though it belongs to a cultural heritage. He argues that many national laws on cultural property are not mainly made with the objective to protect the objects themselves or to make it accessible to scholars, but should be regarded as chauvinist

²⁴⁶ Cuno, 2008, p 53

²⁴⁷ Bauer, Lindsay and Urice, 2007, p 50f

²⁴⁸ Merryman, 1989, p 351

²⁴⁹ De Montebello, 2009, p 59

²⁵⁰ Merryman, 1989, p 363

²⁵¹ Cuno, 2008, p 16f

products, made to show power. According to him, some governments regard cultural property “solely as material that proves a politically convenient ethnogenetical theory, or as assets, whose monetary value can be added to a total in the national budget”.²⁵²

Naturally, keeping objects in the place where they were found and exhibiting them there sometimes works fine. The cultural heritage can be used for educational purposes on different levels; it can become a tourist attraction, create work opportunities and become financially important for the local population. However, this kind of development is not always unproblematic, especially when museums and other institutions are run by state officials or people from a dominating ethnic group. The risks of this are evidently bigger when the objects are found in a poor part of the country where people lack education. The sensation of being excluded and not benefiting from the projects in relation to the objects found can make locals keep doing illicit excavations and commerce.²⁵³ This problem could naturally be remedied by a wiser governmental policy towards the cultural heritage, but it shows that it is a quite complicated task to keep objects in their country of origin. Changing the policy might not even be so easy when it depends on deeply rooted social or minority problems or when the states concerned are weak or affected by corruption.

The problems are even more serious when there are conflicts between ethnic or religious groups within one state or in times of war or civil war. Safeguarding the traces of ancient cultures do not always lie in the interest of the ruling regime; annihilating these traces could on the contrary be a way of consolidating the power of the own group. One example is the Taliban rule in Afghanistan. Most of us have seen and been appalled by the videos of the destruction of the enormous Buddha statues in the Bamyán valley²⁵⁴, but the Taliban also wiped out other examples of pre-Islamic documents, manuscripts and art from public collections as a part of their fundamentalist strategy.²⁵⁵

13.2.11 Failure of nationalist laws

Fitz Gibbon argues that the nationalisation of cultural objects, prohibition of exports and the antiquities market might not be the only ways of protecting the cultural heritage of the world. She points at the facts that most finds of objects are accidental, often the effect of infrastructure projects, and that looting often occurs in areas haunted by war or other kinds of conflicts. While making these laws, the protection of sites and the construction of museums providing good care for objects are ignored. One explanation for this bias towards export control, is that it is easier to receive funding from Western states for this, since export controls in general is a way of fighting against all kinds of trafficking, most importantly the drugs and arms businesses. Fitz Gibbon points at a problem with the current situation in source countries: many of them have not established inventories of objects, which makes it very difficult to enforce the laws domestically. Instead, the states must rely on importing countries’ legal systems to repatriate the objects when they have already left the country.²⁵⁶

²⁵² Litvak King, Jaime, Cultural Property and National Sovereignty, in Phyllis Mauch Messenger, *The Ethics of Collecting Cultural Property*, University of New Mexico Press, 2nd edition, 1999, p 199

²⁵³ Brodie, 2006, p 4

²⁵⁴ The site was declared UNESCO World Heritage in 2003. The destruction of the statues can be seen here:

<http://www.youtube.com/watch?v= MuCnOA rx8>

²⁵⁵ Appiah, 2009, p 80 f

²⁵⁶ Fitz Gibbon, Kate, Alternatives to Embargo, in Kate Fitz Gibbon (ed.), *Who Owns the Past?* Rutgers University Press, 2005, p 291f

Fitz Gibbon argues that ideology cannot be prioritised over functionality when protecting the cultural heritage. Instead of seeing the objects as a resource, many source countries make all export and trade illegal, which leads to an enormous amount of work for the administration and a policy difficult to sustain, especially in developing countries with scarce resources and a less than perfect bureaucracy. Fitz Gibbon proposes a number of measures for obtaining more efficient export control. First, a digitalised inventory of objects accessible for everybody, in order to facilitate cultural exchange. Second, a license system allowing for some objects to be exported, while paying a fee. Such a system could be a way of funding museums and other measures of protection in the source country. Allowing for exports could also be a way of receiving objects from other cultures to integrate in public collections and encouraging finds to be handed over to the authorities. Third, Fitz Gibbon thinks that it is necessary to abandon nationalist rhetoric and encourage international cultural co-operation that could have positive effects also in other fields.²⁵⁷

13.2.12 Cultural heritage of the host country

It can also be thought that the objects that are claimed by one country, now has become part of the present host country's cultural heritage, at least if time has passed since it was placed there. This has been argued to be the case of the Parthenon Marbles. They have been exhibited in Britain for almost two hundred years and the British Minister for the Arts has said that *"I understand the emotional importance...to the Greek people of this case. I would also say with respect that we too in this country are heirs to the classical tradition. I would say that the diffusion of the classical culture of ideas, values and of physical relics and monuments over two millennia, has contributed in profoundly important ways to the history that has led to the emergence of the world that we have. It seems to me unthinkable that we would wish to reverse that process."*²⁵⁸

Rossholm Lagerlöf's point of departure is not that objects from foreign countries might become the heritage of the market country where it is located, but she argues that historical reasons can be an argument for letting at least some objects stay where they are. The cultural property of faraway places that is exhibited in public collections in Western countries can be seen as a reminder of past times, when European countries colonised and looted in other continents and the UK was an empire, but also of times when foreign cultures (the Greek, for instance) served as an example for Europeans and was a source of inspiration. Today we can also include the voices and opinions from these other cultures and the result can be interesting and pedagogical.²⁵⁹

13.2.13 Legalist arguments

An argument that is rather more legalistic is that objects should remain where they are, in those cases where the objects was legally removed from the country of origin, not in breach of laws or export restrictions. Settling the heritage problems in the court room could be seen as a solution offering certainty and rightfulness. This however leads to a complicated discussion on what constitutes a legal acquisition. It is not easy to settle who can decide if it was legal and which state's laws to apply. Many countries of origin have passed laws that make all ancient objects into state property. The result is that an object often is found to belong in two different states, according to two different legal systems: the general property

²⁵⁷ Fitz Gibbon, 2005, p 293f

²⁵⁸ Cuno, 2008, p xii

²⁵⁹ Rossholm Lagerlöf, Margaretha, Västerlandets symbolbilder ges företräde, *Svenska Dagbladet*, 5 June 2003

law of the market country on one hand and the public law of the source country.²⁶⁰ This is of course especially complicated when the country of origin was occupied, colonised or formed part of another state at the moment of the transfer. Questions on retroactivity and limitation also add complexity to the matter.²⁶¹ It can also be doubted if internationalists are ready to accept verdicts that demand the return of a lot of objects. Another question is what court to use: there is no international court appropriate for this matter. When the litigation concerns two different states, it could also be difficult to choose which national court to use.

Another possible solution is to establish, for example internationally by the UNESCO, a cultural heritage amnesty, a time limit that decides that all objects that have been within a country for a certain amount of time, will stay there; a way of healing past crimes and looting. This would, at least to a certain extent, avoid complicated fights over the origins of objects.²⁶² This is somehow the practical consequence of international conventions lacking retroactivity and containing limits for the time during which claims can be made. Many museums also apply the time limits established by the conventions in their ethical codes for acquisitions. It should also be remembered that it is underlined in the preamble to the UNIDROIT 1995 Convention that the non-retroactivity does not mean that all earlier transactions should be regarded as licit. Some kind of amnesty could also hardly be accepted by source countries, since they in that way would never be able to get back what they regard as theirs.

An argument more having to do with politics and the recent development of international public law is that nationalism was more understandable in past times when the nation state was the most important level on the international arena. During the past years however, international law and the United Nations system have developed and become more independent in relation to states. National sovereignty is not what it used to be. There are growing feelings that states do not only have a responsibility to protect their own citizens, but also the human rights and lives of people from other countries. All this could rectify the internationalist approach, since it puts the focus on the international importance of the cultural heritage and the existence of a common heritage.²⁶³

14 Should objects be returned?

14.1 Legal conclusions

It is quite obvious that there is seldom an ordinary legal solution for claims for the return for cultural objects, when the object has not recently been removed from its country of origin or when the case can be treated like an ordinary case of theft. Most disputes that I have been studying regard two states (or one state and a public institution of another state) and it goes without saying that this complicates the case. National law in market countries seldom seem to offer a solution on how to act when the state receives a demand for repatriation.

Questions on which laws to apply and which courts to use become very delicate. Most states are hesitant towards applying other legal systems' laws in their own courts, especially when it comes to public law. Ordinary laws on goods of the state where the object is located might be applicable in some cases, but this is often not possible due to limitation and other

²⁶⁰ Seligman, Thomas K. The Murals of Teotihuacán, in Phyllis Mauch Messenger, *The Ethics of Collecting Cultural Property*, University of New Mexico Press, 2nd edition, 1999, p 79

²⁶¹ Warren, 1999, p 4

²⁶² Tokeley, 2006, p 68f

²⁶³ Merryman, 1986, p 853

factors. When discussing the ownership over objects and the transfer of titles, there is also the problem of differences between legal systems and most importantly between civil law and common law jurisdictions. I earlier mentioned that current legislation also can lead to the conclusion that an object belongs in two different states, depending on which country's law that is applied. As we have seen, EU legislation has a narrow scope of application and is seldom of interest and it also seems clear that there is no customary rule in international law that demands the return of objects regarded as the cultural heritage of a certain group or state.²⁶⁴

The abundant domestic legislation that has developed in some states during the last decades is not applied on international disputes when the object left the country decades ago. Most cultural objects that lack clear provenance were acquired by museums before the adoption of international conventions and special national laws on cultural property.²⁶⁵ This leads us to the question of time, which is essential in cultural heritage disputes.

When it comes to decide upon the fate of antiquities that have been located in a Western museum for 250 years or more, there are often no legal rules to apply and if there are, they might not be appropriate. It can be questioned if it is a good idea to let judges decide whether or not an object was acquired according to the law and still can be under the licit ownership of a legal subject. A legal solution can even be quite absurd; imagine a court of today applying the laws of war from ancient times, when taking booty was accepted by all, and coming to the conclusion that the title of the painting or manuscript was rightfully gained and therefore should stay with its present possessor. What was legal or righteous yesterday is often far from today's standards and ideals. Another question is whether colonial legislation permitting the transfer of cultural objects should be regarded as valid. It is also difficult to get reliable information on the actual circumstances under which an object was acquired. Apart from moral views, laws on ownership and export might also have changed substantially.

Sometimes it is pointed out that pillage during war time once was legal and accepted by both sides of a conflict. This could be interpreted as that it is rightful to keep the objects looted even today, when the law on war has changed and plundering and looting is strictly forbidden according to rules that are broadly accepted. Thompson argues that such an argument is not valid. If we condemn this kind of acts today, we must condemn the acts of our ancestors.²⁶⁶ This point of view does not correspond with the principle of international law called the rule of intertemporal law, which states that modern rules do not make old titles invalid.²⁶⁷ In my opinion, it is necessary to stick to this rule. Accepting Thompson's idea would lead to a complicated legal mess. It can of course be difficult to accept past injustices that were legal at the time, but I think that it is better to correct this politically than legally. Not accepting titles transferred a long time ago also means interfering with the principle of non retroactivity, which is a fundamental security in a democratic state.

It is clear that source countries in some cases use legal arguments of ownership and claim objects in court. However, there are cases when objects can be said to have been legally acquired, but where this does not stop the source countries from claiming them back. Therefore it seems futile to discuss the temporal aspect of law; the claims for return of

²⁶⁴ De Jager, 1988, p 196

²⁶⁵ Cuno, 2008, p 3

²⁶⁶ Thompson, Janna, Cultural Property, Restitution and Value, *Journal of Applied Philosophy*, Vol. 20, No. 3, 2003, p 254

²⁶⁷ De Jager, 1988, p 191

cultural objects are moral, not legal, claims that notwithstanding sometimes use the law as a weapon to achieve a return. Keeping this in mind, I think that it is better to focus on political rather than legal solutions.

This leaves us to the international conventions regarding cultural property. The common problem for all of them is that they are not, according to basic rules on legal security, retroactive. They only apply from the date when they come into force and for each state party, from the date when the state ratified the instrument. This means that the two most relevant conventions only regulate objects removed from its country of origin after 1970 and 1995, respectively.²⁶⁸ Even though the conventions are not applicable directly on a case, they could of course serve as inspiration for a legal assessment, but I am not convinced that this happens very often. As I have said above, the Conventions have been heavily criticised and have not been applied very often. The main success for them seems to have been serving as a way of encouraging the debate and information about the issue, making it known in the media etc. I think that an important reason for the Conventions not being applied is that they have been created without a consensus in the international community. Parts of them are too watered down, in order to suit everybody. The fact that there is a great ideological divide between exporting and importing countries makes it difficult to create a convention that is coherent and that is embraced by all states of the world. Often, it is difficult to agree even on the most basic provisions. This leads to ambiguous and vague conventions.²⁶⁹ Another point of view is that when the conventions leave a lot of freedom to the states when it comes to definitions of important terms and in general developing the conventions, this can lead to insecurity of what the consequences of the conventions actually are and difficulties when applying the instrument in a dispute between two states, when they have different opinions on how to interpret a basic provision. This insecurity could also be troublesome to an individual, not knowing how a situation (for example the acquisition of an object) will be judged. On the other hand, the UNIDROIT convention offers binding and quite detailed norms, but it has been proved that states do not like this since it interferes too much with domestic affairs. States also reject conventions that too severely restrict their possibilities to act in conflicts and war.²⁷⁰ It seems like an impossible problem to create conventions that are equilibrated; detailed and binding enough to make a difference and not too rigorous in order to please states. Further, an important problem is that international conventions are difficult to use, since there is often no way of enforcing them, but relying on the good faith of states and the force of diplomacy and verbal threats.²⁷¹

In my opinion, I think that the more traditional, non-binding international conventions are preferable. They leave more room for the opinions of the states, as well as for discussions and diplomatic solutions. Creating conventions that are slightly more vague and flexible can be one way of avoiding too politicised or biased conventions. It would of course be magnificent if all states of the world could agree on the same binding norms, but since this is an unrealistic scenario, I find that it is better to make conventions that numerous states are prepared to sign and where it is agreed upon that it is a shared goal to solve a certain, common problem, than to draft documents that only a few sign and with hard rules that will never be executed.

²⁶⁸ Renfrew, 2000, p 66

²⁶⁹ Greenfield, 2007, p 369

²⁷⁰ Forrest, 2010, p 399

²⁷¹ Forrest, 2010, p 399f

Another problem is that several conventions are ratified by too few states to have an impact. Often, the most important importing states have – at least in the past – regarded the conventions as too radical and failed to sign. The only exception seems to be the World Heritage Convention, which seems to be the less radical of the conventions mentioned.

The UNESCO has also been criticised for taking the interests of countries of origin too much in consideration, both in conventions and in the activity on lower levels. Some authors claim that the protection of the common heritage is seen as less important than the national heritage, in UN circles. Western countries criticise the organisation for being too anti-Western and for having forgot the original purpose of it. They also claim that the conventions and other documents on the cultural heritage are too vague, difficult to interpret and filled with beautiful phrases, but also very inefficient and difficult to put into practice. The criticisms from the US and the UK have during periods of time been so harsh that the states have withdrawn their funding to the UNESCO.²⁷² In my opinion, this is quite appalling since the UN is an organisation constructed in order to protect universal values and the interest of humankind, not to promote the interests of separate states. It seems to me that this reflects the problems of the whole UN system: the organisation is ruled by a principle of majority and a large part of the member states are poor developing countries that do not share the interests of the rich market countries. A consensus can therefore never be reached. It should also be remembered that the UN is an organisation ruled by states, not by individuals.²⁷³ Also the fact that many of these developing countries are ruled by authoritarian regimes makes it difficult for me to believe in the UN and the UNESCO as organs promoting peace, democracy and security in the world. To me, this also affects the seemingly less “sensible” areas like cultural heritage. It is not new that dictators are keen to use the cultural heritage and the history to strengthen their own positions and oppressing minorities and democratic forces.

Apart from the earlier discussed methods, one legal solution could be to use arbitration or other forms of alternative dispute settlement, maybe applying basic legal principles. This has been done for instance in a dispute following the war between Eritrea and Ethiopia, where Eritrea demanded compensation for the destruction by Ethiopian troops of an important archaeological site. Both the UNIDROIT Convention and the UNCLOS suggest arbitration as a possible dispute settling mechanism. Because of the special characteristics of cultural heritage claims, Daly deems arbitration a good method, since it is an international system.²⁷⁴ I am convinced that arbitration could be a good system for dispute settlement in some cases regarding cultural objects. It is a middle way between a legal and political solution that can take different aspects into consideration. Arbitration could be a good option for the cases where no law is applicable and a wide spectrum of legal sources (cases, old laws, interpretation of conventions...) could be relevant for reaching a resolution. It is also a way of getting around the problem with choosing the court of a specific country; arbitration can be seen as more neutral. Since it leaves much freedom to the parties, both new and old cases can be managed, without being stopped by limitation and other problems. Another benefit is that the deliberations are secret, so that the states involved in the conflict can minimise the risk that important information escapes the court room. Even if

²⁷² Greenfield, 2007, p 368 f

²⁷³ Appiah, 2009, p 82

²⁷⁴ Daly, Brooks W, *Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration*, in Barbara T Hoffman (ed.), *Art and Cultural Heritage, Law, Policy and Practice*, Cambridge University Press, 2006, p 465ff

arbitration or other kinds of alternative dispute settlement can be appropriate for cultural heritage disputes, it might however be a solution that is difficult to carry through. Both states must be willing to cooperate, and above all, to accept the ruling and an eventual defeat. This means that states that fiercely refuses to return a certain object, will not agree on solving the conflict by arbitration. There is also a risk that developing countries can be sceptical against arbitration since it is sometimes said that traditional, legal systems are disadvantageous for them.

According to Greenfield, it has been suggested that the only way of settling cultural property claims would be to create a special international tribunal only for this kind of disputes. This court could handle claims both when the conventions are applicable and when they are not.²⁷⁵ I am not sure that this is a good solution. This argument seems to reflect a too strong confidence in international organization and cooperation. There are already several international tribunals in the world and they have attained different levels of success. There is always the problem of a sufficient number of states cooperating with the court. It should be remembered that that there are already difficulties making states ratifying the cultural heritage conventions, especially market states, and it seems plausible that that this would be the case also for a tribunal. Apart from state support, a tribunal also needs financing. One could question why an already existing tribunal could not serve also for litigation on cultural property. It also seems difficult to establish which rules should be applied by the court, since the conventions do not at all fully regulate how a demand should be treated and are generally only valid for objects removed from source countries during the last few decades. Another complicated issue is how to enforce the rulings.

Finally, I think that it could be possible to make a connection to the latest years' developments in international law and the debate on humanitarian interventions. The UN and the international community seem to have taken on a more permissive stand towards foreign states intervening when human rights are threatened, like in the case of Kosovo in 1999. Maybe it would be possible to strengthen the relation between the universal human rights and the common cultural heritage, arguing that what is universal and lies in the interest of everybody should be protected by all states. This could mean not accepting that states handle their cultural objects in a way that could harm them, stronger international protests and action against situations like the one concerning the Bamyán Buddhas (chapter 12.2.10) and accepting that objects not always are located in their countries of origin. In my opinion it is a matter of putting human rights or cultural values before the integrity of states and the power of presidents. This is however a politically very sensitive relation. First, the politics of humanitarian interventions is far from accepted by consensus. Second, it is an idea that surely would be called imperialistic, paternalistic and criticised for interfering in other states' affairs.

Having concluded that the law in many cases do not offer much help on how to solve cultural property disputes, I will move on to the political and moral solutions offered, while analysing the arguments used by nationalists and internationalists.

14.2 Ethical conclusions

For the abundant cases where no legal solution seems appropriate or possible, the solution is using the political and diplomatic way, applying practical and ethical arguments. Naturally, this depends to a higher degree on the parties wanting to reach a consensus and showing

²⁷⁵ Greenfield, 2007, p 369

good faith. There might also be a risk that relations of power between states have a greater impact than when using a legal solution. In this chapter I will analyse the arguments used by both nationalists and internationalists when arguing for and against a return of cultural objects.

14.2.1 Nationalist and internationalist perspectives on heritage

The debate on the return of cultural objects is partly about the definitions of cultural heritage, the view on culture and the value of objects with context, without context and in different places of the world. There is an important dividing line between emphasising the national patrimony on one hand and the universal cultural heritage on the other. It seems to me that it is often quite difficult to assess an individual's or a group's view on heritage, since it can be very personal and depending on every people's special history and identity. Heritage is however also connected to politics and can potentially be used as part of a political strategy, especially for nationalist causes and in the struggle for the rights of ethnic minorities. It also seems to me that the perspective on heritage is heavily influenced by the general political and ideological currents of the world. One example is Mexico (chapter 12.1.1) where the politics of heritage fluctuated at the same pace as the general political development of the country. This shows that the cultural heritage and its importance is not something eternal and constant, but part of something larger with connections to important elements of society. Therefore it is wise to treat issues of cultural property on an appropriate level.

Nationalists argue that cultural objects belong where they come from and that they are best understood in that environment. I do however find this argument quite weak. Culture is per se something international that is not, and should not be, limited by frontiers. The international and universal qualities of culture and its importance for understanding between people are described in UNESCO resolutions and other international documents. Of course an object can be of importance for a tribe or group, but this does not mean that it has no value outside of this group. To me the notion that people can appreciate and understand objects, ideas and traditions of *other* people is essential and if we do not accept that, there seems to be little hope for a peaceful development in the world. Further, as I will argue later on, it is not always simple to decide from which country or culture an object actually originates.

Some people completely reject the idea of a common or universal cultural heritage (chapter 12.1.7) or accept it only for short periods of time. To me, this is surprising. I believe that there are many cultural creations that are of interest and importance to other people than just the small group that created them. This is shown by the great number of visitors to museums exhibiting works of foreign cultures and the many tourists that visit cultural monuments and sites in countries all over the world. There are no doubt phenomena and phases in the human history that are of interest to all of us. Negating the common past of humankind seems vane. In my opinion, universalism does not mean imposing a certain culture on everybody or negating cultural differences between groups, but acknowledging common traits and the things we have in common just by being humans. An object can be relevant to a community at the same time as to humankind as a whole. It might sound a bit naive, but we are all human beings and therefore all human history is relevant to us.

The history of humanity is also full of histories of commerce and cultural exchange, especially in the Mediterranean area which is very rich with cultural heritage. Colonialism and slavery are other, darker parts of this globalisation movement. All these international movements of people and goods have led to cultures spreading and mixing and important

knowledge being transferred between groups. These movements are still going on, maybe on a faster pace than ever. I do not see why we should exclude the cultural heritage from this process. In relation to this, I regard the archaeological ideology of context as quite absurd. Archaeology is of course important and interesting, but it cannot be the only approach to heritage. There are other scholars than archaeologists that are interested in the objects. The object in itself carries information and just because it leaves its country of origin, this information is not lost. Even out of context, the object can be studied, admired and used for educational purposes. The new perspectives on objects out of context are probably not only harmful, but can contribute to development. Refusing to exhibit or acquire objects lacking provenance or context seems a bit exaggerated. Objects can still have a value, even for scholars, apart from being aesthetically appealing. A couple of decades ago, the approach to provenance was completely different, but this cannot lead to refusing to exhibit objects bought a long time ago, only since they have an unclear history. Looting and smuggling can be fought in other ways.

Nationalists sometimes argue that universalism reflects a European or Anglo-Saxon view on culture and humanity. It is of course true that today's museums, art market and sciences to a large extent are characterised by a Western perspective since Western states have been rich and powerful during a very long time. Rejecting universalism for this reason only does not however seem very wise. Marking a distance to Western society because of past wrongs does not make cooperation in the globalised world of today easier. Besides, the world has changed. European countries do no longer keep colonies, there are international organisations where all countries can make their voices heard and the UN system includes everybody. The possibilities for dialogue have never been better. In addition to this, in the academic world, there seems to be a great understanding for the non-Western side of the matter. Scholars from both Western and non-Western countries are supportive of the case of the source countries. Especially within the humanist field (anthropology, archaeology...), academics are very critical to colonialism and Western paternalism.

In my opinion, universal museums can have an important role in society and education. Continuing the tradition of Enlightenment philosophy and making knowledge and science available to everybody can never be a bad idea. If museums today are too biased towards a Western ideal or do not sufficiently explain the history from a non-Western perspective, the solution cannot be to exclude the non-Western cultures from museums by repatriating all objects, but on the contrary to include them to a higher degree. Instead of separating cultures and return every object to its origin, we should facilitate understanding by making foreign cultures more known and more accessible. Being able to study objects from other cultures than one's own is important for historical reasons, to be able to understand differences and similarities between cultures and to broaden your perspective of the world. When it comes to cultures like the Roman or the Greek, it is even more important to have access to them than with more distant cultures, since these two societies to a large extent are the foundations for modern Europe. It can of course be questioned why museums and their audiences should have such a centric role in the discussion of heritage. It is however quite natural considering that no matter in which country the objects are located the most important objects will mainly be situated in museums. On the other hand, if what is most important for the heritage is to maximise the museum audience that can see the objects, all objects should maybe be sent to Beijing. This solution however seems vulgar rather than appropriate.

When groups do not want their objects of cultural heritage to be put in exhibitions, this could be a problem, since states often demand that returned objects shall be placed in museums. For example, Australian professor John Mulvaney says that museums are a Western invention and that aborigines never before have created museums. It is claimed that many native populations do not have the same relation to objects as us; sometimes important objects are burned or buried in the ground after being used for ceremonies.²⁷⁶ This seems like a complicated question to me. On one hand, it could be logic to think that once an object is returned, it becomes the property of the country of origin and that the population can do whatever they want with the object. On the other hand, it is understandable that Western states want to protect the objects and therefore demand guarantees for their proper care and preservation. Applying an internationalist perspective, my conclusion is that all humankind has an interest in the cultural heritage and that we therefore cannot accept just any treatment of returned objects. Preserving the objects lies in the interest not only of the native population. It might not be necessary to exhibit all objects, but they should not be allowed to be badly treated. The academic interest in the object also justifies demands for proper protection. It should be remembered though, that many source countries actually want to put objects returned to them in museums.

I also think that the generosity of sharing one's culture should be encouraged. It should lie in a country's own interest to share its culture, if it regards it as valuable. Culture is described as a way of expressing yourself and communicating with others. In modern society we try to make access to culture as broad as possible, in a democratic spirit and to raise the sense of participation in society. If all this is true, I think that refusing access to and reducing possibilities of objects is not appropriate.

In the international community in general, there is an aim to reach consensus and to find positions that suit everybody. The UN system is based on the idea of all humans being equal and the thought that we all have something in common and can share some values. To me, it seems obvious that our culture and heritage have a place in this system. Therefore we should regard the heritage as a common interest instead of each country defending its own.

I also think that nationalist ignore that cultural nationalism can lead to the same problems as political nationalism; it creates division within societies and the world and divides people into groups according to their ethnicity, culture and history. Claiming a national heritage also means excluding people, sometimes parts of the citizens of the own country. When the past (often violent) is glorified and used as a strategy today, there is a risk that the heritage is used for justifying assaults and violence towards excluded groups within or outside the country.

14.2.2 Human rights

The human rights argument is sometimes used to claim a right to return of objects (chapter 12.1.8). Expanding the human rights protection to the field of cultural heritage is however questioned by many people and I share this position. According to Brown, it is problematic to introduce vague terms like "culture" and "heritage" into the human rights system. Rather than strengthening the protection of people, it could lead to an undermining of all human rights, old ones and new ones. Brown also argues that making the cultural heritage a human rights issue leads to less, not more, dialogue between different groups. Rights are seen as absolute and eternal, which excludes political discussions and compromises. The human

²⁷⁶ Mulvaney, 1985, p 88

rights perspective can also lead to the reduction and the petrification of the heritage issue, becoming a battle field where every group just defends their specific and limited right. It can also lead to the ignoring of cultures as the results of encounters and mixing.²⁷⁷ The fact that traditional human rights are universal, while cultural rights are specific, could also be seen as a problem.²⁷⁸ Instead of using the human rights argument when it might not be suitable, or even superfluous, there are other strategies for claiming a cultural object.

Cultural rights are often expressed as group rights, which to me is quite problematic. Acknowledging group rights means putting individual human rights at risk. The individual rights are the basis and the core of human rights and to me it is even questionable if there are at all any other kinds of rights. Accepting group rights means putting the interest of a collective before the interest of an individual and this will infallibly lead to damage of the individual. Of course groups can have interests, but I do not find it right to promote them to human rights. The individual's right must always receive the highest of protection, since the individual is the most fragile unit of society. Therefore, I find the rulings of the Inter-American court of human rights quite offensive. Besides, it might not be necessary to make cultural rights into collective rights in order to claim them. Even individuals could sometimes claim the values protected by cultural rights.

It is also curious that the human rights argument is used, when advocates of the rights of developing countries claim that the human rights system is a Western innovation that only protects Western values or even describe it as an imperialist instrument.²⁷⁹

To conclude, it seems that in general it is not possible to be awarded the right to a cultural object by referring to human rights. It is an argument that is present in the debate but it does not seem to have a large influence on the decisions of returning objects. There is no political or legal consensus on accepting a cultural human right to the return of objects.

14.2.3 Practical arguments

Some arguments in the heritage debate are rather less ideological and concern the heritage as physical objects. Internationalists often use the "rescue argument"; the idea that it is safer for objects to stay in market countries (chapter 12.2.5). Naturally, cultural objects must be physically protected against all kinds of dangers, both objects that are returned to their countries of origin and the objects that stay. Safe transports, well tempered museums and different safety measures in the buildings (alarms, guards...) are important. However, the risks for physical damage cannot be the only parameter to take in consideration when it comes to the location of objects. Dangers can never be completely avoided and they exist in developed, Western countries as well. There are constant terrorist threats to art rich cities like London, Madrid and New York, and few people question that some of the world's most important museums are located there. The museums themselves could be possible targets, not to mention the risk of robbery. Further, natural disasters do not only occur in developing countries; the Getty Museum in Los Angeles is in the middle of a zone with strong seismic activity. It is neither possible nor desirable to move all of the most important objects to one secured place and completely empty potentially dangerous countries. On the other hand, I do not think that it is acceptable to accept a demand for return and send the object back to no matter which conditions. If the conditions and security in the receiving country are considerably worse, I think that a return should be out of the question, even though there

²⁷⁷ Brown, 2004, p 58f

²⁷⁸ Logan, 2008, p 440

²⁷⁹ Logan, 2008, p 446

are other reasons for a return. Accepting ownership to an object or any other kind of moral right to it does not mean that the rights owner should be able to treat it completely as he likes. There is a universal interest in protecting the most important objects of cultural heritage, which means that all states should have a right and duty to help protecting the object. Therefore, no state should send back an object only to see it be destroyed or damaged.

In connection to this, I think that that keeping objects outside their country of origin is also a good idea from a risk reducing perspective (chapter 12.2.5), not only for making the objects more accessible to the public. This is of course especially relevant in countries where there are imminent threats of conflicts and natural disasters, but also in general it seems wise not to return all objects of a culture to its country or territory of origin. Not putting the cultural heritage at risk is to me a valid reason for not returning objects; but once again, this does not mean that all objects should be placed in the most secure location possible and that we should start moving around objects only to maximise their security. A better way of reducing risks for the objects is probably to increase cooperation between states. Recent wars have shown that the international conventions for the protection of heritage in wartime have not the desired, protective effect.²⁸⁰ Therefore, the systems for protection in times of conflict need to be improved. In the case of return of objects, returning states must share their knowledge of heritage management, help in museum building and create arrangements for cooperation between experts, if this is necessary. This is of course extra important when the receiving state is a developing country.

As we have seen earlier, nationalists and internationalist do not agree on the question of what is commonly called *hoarding* (chapter 12.2.6). In my opinion, it is no doubt logical to sell or exchange objects that are not “needed” by museums and scholars. This can satisfy a demand on the market but also lies in the interest of the objects; it is better that they are cared for and exhibited instead just lying in a warehouse for years. The objects must not necessarily be sold to private subjects that keep them locked up, but can be acquired by academic or other institutions to be studied by scholars and public. Naturally, museums have a right to keep objects in storage, but when they have several copies of the same kind of object without ever exhibiting them, it seems a bit absurd, knowing that there is a demand for the objects elsewhere. Obviously, this applies to museums all over the world; it is not only in source country museums that objects are hoarded. If selling the objects is not regarded as appropriate, lending or exchanging them for other objects is a good alternative. This benefits all parties; new objects are acquired and the knowledge of culture is spread. In general, I think that it would be good for all involved if the cooperation and generosity between museums and other institutions increased, since they all serve the same purpose. This solution is of course only possible if one accepts cultural property as property, as objects that can be bought and sold.

Finally, some internationalists express a fear of museums being emptied (chapter 12.2.8) if demands for return are responded to. This is of course no problem for people regarding source countries as having a moral right to objects. The fate of museums is then definitely a secondary problem. If however you believe in universal museums, it is understandable that the return of objects can be seen as a threat. I do however think that this argument is one of the weaker universalist ones. Demands for return have been made for quite some time now and the important museums of the world still stand strong.

²⁸⁰ Forrest, 2010, p 135

Museums and governments are not generally willing to return all objects of foreign provenance that they keep in their collections. Besides, an individual examination is normally made for every object and a process of return is long and complicated. It also seems that museums in general are quite aware of the debate on the return of heritage and the problems with looting. I think that the more they participate in discussions and take initiatives to dialogue, the easier it will be for them to survive.

14.2.4 The market

Nationalists are normally fiercely against allowing a market in antiquities and argue that the commercialisation of objects paves the way for looters and smugglers (chapter 12.1.6). I do not at all agree with this idea. It does not seem very wise to close down a worldwide market that has existed for ages, only because crimes are sometimes associated with it. Prohibiting the sale of objects seems like a too severe measure. Nationalists often make connections between the arts market and the sale of drugs and weapons, but the difference is that drugs and weapons are dangerous goods that in themselves serve for illegal purposes, while there is nothing perilous about sculptures, paintings and totem poles.

I do not see anything wrong with treating objects of heritage as commodities and I have difficulties understanding how someone can deny that the commercial value of heritage exists. The market is not an enemy. It is not even very realistic to believe that every precious and ancient object can be kept locked up in a museum. Far from all ancient objects of cultural interest need to be in museums; some objects exist in many copies and not all objects have a great scientific value. Allowing for the sale of some objects means that that the cultural heritage can be spread around the world, which makes it accessible and means that more people can take part of it. Fitz Gibbon explains it very well: cultural objects that are sold are not lost forever, but taken care of. Even objects that are sold illegally are actually often well treated by dealers and buyers, since few people want a damaged object.²⁸¹ I also agree with many internationalists on the point that objects are better taken care of if their economical value is acknowledged. This economical value does not however need to exclude other kinds of value.

Further, the fact that the market exists shows that there is a demand for cultural objects. If the market were closed down, there is no reason to believe that the demand would disappear. The consequence is that the whole market would be underground, instead of just a part of it, like today. Smuggling would become the only way of getting hold of an object and the antiquities trade would be connected to other shady businesses. This of course makes it even more difficult to control the movements of objects and stop any illegal activity. Admitting a market does not at all mean opposing control, on the contrary. A certain level of control is of course necessary. On a legal market it is possible to control provenance, export documents, etc and it is easier to reveal forgeries and objects originating from theft and looted sites. Controlled movements of goods also mean that countries of origin can charge export fees, which can be used for protecting the heritage.

14.2.5 Different kinds of objects

We have seen that many states are more willing to return spiritual objects, than other kinds of cultural heritage (chapter 12.1.2). This is the position expressed in the American Nagpra

²⁸¹ Kate Fitz Gibbon, Editor's Note: The Illicit Trade – Fact or Fiction? In Kate Fitz Gibbon (ed.), *Who Owns the Past?*, Rutgers University Press, 2005, p 179f

law and held by the Swedish government (chapter 9.1). I think that this position is only understandable for objects that are still in use, not others. When the objects are still used in ceremonies and have an importance for people's practice of religion there is a connection to the human right perspective. If the objects are no longer in use, I do not understand why they should receive special treatment and I do not see the need for a general rule of inalienability and automatic return. If objects are not used, is it even possible that they are spiritual? Does not this quality depend on a use and importance for people's practice? It cannot always be easy to make a difference between spiritual objects and others. For ancient objects, we cannot be sure of the actual uses of objects. In Europe, museums and collections are full of objects with a religious meaning, and many of them are not at all seen as particularly vulnerable and objects are often sold at auctions etc. Another example is objects from the Scandinavian worship of the Norse gods; nowadays these are hardly seen as spiritual by anyone but a few eccentrics. Instead, they are historically important objects that belong in museums.

Another category of objects that is more commonly and less controversially returned, are objects that are transferred within a country. Some examples are objects given back to North American Indians or to Sami people of Scandinavia.²⁸² It is understandable that there is a wish for healing historical wounds within a country. I also think it logical that different peoples sharing the same history try to solve existing problems, since otherwise co-existing within the same country can be complicated. In these cases, the connection between the ancestors and the group that today claims the objects is normally quite clear and the claiming culture is still alive, unlike the cases of Etruscan or Egyptian remains. Often, the objects were taken not very long ago. It also seems less of a problem changing location and possibly owner of a state owned object within a country, compared to donating an object to a foreign power. If the objects returned are placed in a museum or in any other way are publicly accessible, a return seems more acceptable to me and makes it easier for different groups to understand their respective cultures.

14.2.6 Political issues

Now I will turn to the more political question on deciding to whom an object of cultural heritage belongs. If a return can be accepted, to whom should it be returned? When returning an object, this automatically means pointing out that the object, and the values it represent, is the cultural heritage of a certain nation or tribe. That is quite an important step and makes the question of who has a right to heritage complicated. It becomes even more complicated when it concerns states where many different cultures have lived in the past (Italy, Spain...) or live today (Iraq, India...) or for cultures present in different states (Kurd, Romans...). One could think that it should be the right of each state to define its own heritage, but when it comes to the right to objects, it is not that easy. Ideas of today clash with the past; when applying current ideologies to yesterday's object, it is not easy to find a logic solution. It even becomes rather absurd when objects are used in support of nationalism, when in most cases nation states did not even exist at time when objects were produced. One can question how a government of today can claim an object previously owned by a private person, a tribe or an absolute monarch. It is not evident that this link exists; nevertheless most demands for return are made by governments. The problems with defining the right to heritage are very well illustrated in the case of Mexico (chapter 12.1.1).

²⁸² Vincent, Steven, Indian Givers, in Kate Fitz Gibbon (ed.), *Who Owns the Past?*, Rutgers University Press, 2005, p 33 ff

Objects are claimed both by the state and different ethnic groups, even groups that lack a historical connection to the object. Nationalists do not seem to take this kind of problem in consideration and offer no solution to cases when an object is important to several groups, nations or states.

There is also the economical side of the matter; few states would say no to have a world famous work of art in their main museum. (An economical interest does not however exclude the object from having importance for cultural identity or other values.) The fact that it is very difficult to decide where an object “belongs” (if an object even can belong somewhere) and that it is impossible to know the motivation for a state claiming an object, are to me reasons to doubt that we should at all connect objects of heritage to a certain state. Instead of concentrating on international relations of power and the interests of ministers and presidents, it could be better to focus on the objects and their welfare. That means locating the object where it receives the best treatment and can be admired by and inspiring many people, rather than finding the group of people with the strongest connection to the object.

A related problem is handling demands of return of objects that come from undemocratic states. As we have seen earlier, a large part of the demands that have been made until now, originate from developing countries, and it is commonly known that they are, sadly, to a large extent states ruled by authoritarian regimes. One could think that culture and objects of heritage should be allowed to escape the political world, but of course it is not that simple. The claims of return are highly politicised and decisions taken on a high level. Further, cultural objects can be strong symbols and are often used for political purposes. Bringing an object “home” can boost a government’s confidence. Culture is a powerful political tool, something that Hitler and Saddam Hussein knew. Taking this in consideration, I think that returning cultural objects to undemocratic states should in general be avoided. The political side of heritage cannot be ignored. A government being able to bring back important pieces of cultural heritage gains force and credibility and can be used as a weapon against minorities or for strengthening an ideological base. It seems difficult to combine giving back an object with demands for democratisation. The only cases when returning objects *could* be acceptable is when the claimant is a minority group or when the process of return is carried out without the interference of the government, for example as part of an academic project. The consequence is that the possibilities to return objects are reduced, since many source countries lack basic democratic functions. To conclude, the country that receives a claim for return has a responsibility towards the object and towards the citizens of the demanding country. It should never return an object without knowing what will happen to it or without reassuring that it is not used for injurious purposes. The decision to return an object is normally a political one and therefore it is not strange to take other factors than just the cultural in consideration. Finally, in my opinion developed countries should always make sure that other states do not oppress their populations and that they protect human rights. This cannot be ignored just because the matter is one of cultural heritage.

In my opinion, it is especially important to be careful in relation to minority groups. Returning objects produced by a minority to a government representing the majority could be hazardous, especially in an undemocratic state. On the contrary, this could lead to the government misusing the objects, destroying them, using them against the minority or unrightfully earning money with them. On the other hand, it is difficult to decide who has the right to the heritage, as I already mentioned. The minority heritage can also of course be

of interest for the state as a whole and sometimes it might be preferable to exhibit objects from several cultures of one state in the same place, rather than letting each group take care of “their” heritage.²⁸³

It is clear that the cultural heritage sometimes has a political potential. The political use of or perspective on cultural property is often criticised, especially by representatives of museums. It is seen as not in line with museum values and against the scientific approach to the objects. It is said that politicising takes the focus away from what is really important and mixes with sentimentalism or romanticism.²⁸⁴ I definitely think that this is sometimes true, , but I think that is necessary to understand that this is just what the groups claiming objects want. I definitely see the aesthetic, educational and historical value of objects, but it is impossible to ignore the possible political and ideological side of them. Many group want objects back as part of re-establishing a group identity or healing historical wounds and this is inherently political. This must be taken in consideration, even though I do not always agree with the political demands. It should also be remembered that (Western) museums not always are neutral ground and that the objects exhibited there also can be part of politics and described in ideological terms.²⁸⁵ Finally, all politicisation is not necessarily bad and it does not always mean that the government wants to fool people. Using cultural objects in order to strengthen the nation could be useful, in the same way as sports events can contribute to national unity, boosting self confidence and make society stronger.

In the case of former colonies, the political and historical importance of objects is often special (chapter 12.1.3). I understand the will to strengthen oneself in relation to the former metropole and healing historical wounds, but sometimes it seems to me that anti colonialism becomes more important than anything else. It cannot be the only possible ideology and there is also a risk of the feeling of revenge becomes too important. It should also be remembered that many ex-colonies are still not democratic. Further, it is impossible to return every object removed from a country during the colonial period. First, it is not practically feasible. Second, many of the objects were not taken illegally. Third, time cannot be turned back and the atrocities committed cannot be undone. It seems to me that also in these cases, it is better to assess every case individually. Finally, keeping objects with a colonial past in countries like France and the UK could have an educational purpose, serving as a memory of colonialism and making it easier to understand the past. This of course requires that the places where the objects are exhibited explain the history in a correct way and avoid turning the objects into a shrine of empirical glory.

14.2.7 Conclusion

It seems that demands of return of objects made by states often do not take the way through the court room, but are made by diplomats or representatives of the government. According to Cuno, there are even examples of demands made only through the press.²⁸⁶ The fact that cultural heritage disputes are often solved politically can be explained in several ways. There are cases when laws and the legal system are not used when it normally should be possible. Complicated cases could take long time to accomplish and demand a lot

²⁸³ Cuno, 2008, p 11

²⁸⁴ Glass, 2004, vol. 9, p 133

²⁸⁵ Wiber, Melanie G, Cultural Property, Repatriation and Relative Publics: Which Public? Whose Culture? in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Melanie G. Wiber (eds.), *Changing Properties of Property*, Berghahn Books, 2006, p 333

²⁸⁶ Cuno, 2008, p 2f

of experience and good lawyers. Countries of origin are often – but not always – developing countries and might not have the financial means or the experience to manage these kinds of cases. The fact that developing countries often lack the resources and knowledge to use the court room for their battles is proved for example in the World Trade Organisation.²⁸⁷ It is not impossible that avoiding the court room also has strategic explanations. However, it seems that the most important reason for relying on political and moral solutions for heritage cases, is that there legal solutions are not possible; there are no laws or conventions that can be applied (chapter 13.1).

I see some risks with not to using the legal way of conflict resolution. It could lead to arbitrariness, different assessments of similar cases and legal insecurity. Another risk is that information in the media and the public opinion become more important. Involving the public could be relevant when it comes to objects owned by public institutions, but the information that is published by the press is not always fair or correct, and could simplify the issues too much. It can be difficult to establish a just debate and to correct wrongful information once it has been published. At the same time, these cases might not be suitable for being decided by judges. They could be seen as issues of cultural policy or, even more likely, as foreign politics problems. Obviously, political conflicts cannot be solved in the same way as purely legal ones. It could probably sometimes be of interest for states to be able to involve cultural property issue in a larger political discussion. The return of objects can be part of a larger process between countries, especially between countries that have been in conflict with each other. One could also imagine that returning an object could be a gesture of goodwill that serves a purpose in negotiations on important public affairs and even economical issues. This of course means that the question of culture and heritage is not the centre of attention, which could be regarded as a problem.

Considering the fact that there is often no suitable legal solution and the many individual practical problems (described in chapter 13.2.3) surrounding cultural heritage cases, I think that it is in general more appropriate to rely on political solutions and treat demands on a case to case basis, which is the general rule in most countries. It is also advisable considering the differences between cases; demands are made for return of colonial objects, war booty, old objects, newer things, by other states, by native populations, from neighbours and far away states... Every case is unique. Maybe the fact that cultural objects have a special cultural side to them, are symbols with aesthetical value and are something more than physical objects of economic importance makes it more appropriate to use something else than a logic, legal solution. Normally, this leads to cases being decided with the help of ideological positions and principles, which is also quite suitable since it makes it a little easier to anticipate the outcome of a demand and might reduce the risk of treating different states differently.

Another benefit of using political instead of legal solutions is that it probably leaves room for market state initiatives to return objects. Instead of courts forcing returns, ministries, museums and institutions can carry out projects for inventories of collections, cooperation with source countries and between scholars and other creative solutions.

A consequence of cultural heritage conflicts being political is that they suffer from the same problems as other foreign politics quarrels. The time between states can become harsh and the heritage conflict can affect other fields as well. One example of how grave conflicts can become is the recent Egyptian threat to stop all cooperation with Western museums and

²⁸⁷ van den Bossche, Peter, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, 2008, p 438

banish all foreign archaeologists who work in the country, if their claims of certain objects were not met.²⁸⁸ Ethiopia warned that they would cut the diplomatic relations with Italy if an obelisk taken as war booty by Mussolini was not returned.²⁸⁹ If the conflict is purely legal and being decided by a court, it is normal that one side wins and one loses, to some extent. Here, it is however necessary – and possible, due to the elasticity of politics – to find a solution that does not leave one state deeply unsatisfied. It is not desirable that the relation between two states suffer because of the inability to reach an agreement on a piece of cultural heritage. On the other hand, violent threats like the ones made by Egypt and Ethiopia (both states with big democratic problems) should not be encouraged. In other cases, the situation could also come to a standstill when one state refuses to return an object and the other just keeps insisting.

To conclude, I have what must be regarded as an internationalist point of view. I think that it is preferable to cherish the universal heritage and that the internationalist position promotes the understanding between groups and nations. It is very important that the international community can agree on some universal human values that should be protected by all, instead of dividing humanity on the basis of culture. Objects out of their original context can evoke curiosity about foreign and past cultures. If every object is returned to the territory where it was produced, what is left of the common heritage and the exchange between cultures that are so present in different UN documents?²⁹⁰

To me, nationalism is quite an absurd vision of cultural purity that focuses too much on particularities between cultures rather than the things that we have in common. I also think that we should put the safety and survival of objects before the interests of governments. I just do not find it reasonable to have laws making all objects from a time span of thousands of years into untouchable heritage. It is just not possible that all of them are vital for the culture of a certain state. When some states include all ancient objects, while others only protect a few, this leads to an imbalance. It seems more appropriate to protect some especially important objects, by turning them into national treasures or something similar. Of course there are objects that have a special importance for people, but it cannot just be *all* objects from the past.

It is not possible to correct history. Objects have always travelled (and still do) the world, due to harmless reasons like commerce and tourism, and because of war, colonialism and theft. This cannot be changed. Objects find their place in their new environment; they become integrated parts of exhibitions that are admired by millions every year, collections of objects become heritage in themselves and the objects can even become the cultural heritage of its present location. As Wilson calls it, the objects become monuments of science and the thirst for knowledge.²⁹¹

Departing from an internationalist point of view does not however mean that I reject all returns whatsoever of objects. It is a bit too simplistic to say that all cultural objects belong equally well everywhere; questions of cultural identity and the needs of people cannot be ignored. Even with universalism as ideological starting point it is possible to find a balance. Some internationalists say that the cultural heritage of a nation is nothing more than a construction, a political method, but I think that it is simplifying matters a bit too much.

²⁸⁸ Sala, Tangi, Le Sud se ligue pour récupérer ses antiquités, *Le Figaro Magazine*, 9 April 2010

²⁸⁹ Roussin, Lucille A, Cultural Heritage and Identity (www.savingantiquities.org/Culturalheritageidentity.rtf)

²⁹⁰ Forrest, 2010, p 406

²⁹¹ Wilson, 1985, p 105

It can be argued that if universality and the protection of universal human values have preference over the claims of groups, this could be valid also in other situations. It could mean that the interests of humankind as a whole should prime over the interests of the collectivities and justify the imposing of restrictions of how collectivities can use their cultural heritage, even when it is located on their territory. It does not seem like a desirable or politically practical solution. But how do we know when universal values trump over the interests of a nation or group? However, the convention on World Heritage seems to be a step in this direction. Thompson gives examples of when universal values do not trump the rights of a group: tribes that construct beautiful temples that they destroy once it is complete, orthodox Jews not letting outsiders see the Torah, tribes keeping secret their most sacred rituals. It is when an object or tradition is very important to the group that its rights trumps universal values, not in relation to just any object that has been produced or held by the group.²⁹² This seems quite logic to me and can be an indication on which objects deserve repatriation.

It is also important to bear in mind that if we allow a market in ancient cultural objects, this can lead to a certain inequality between developed and developing states. Rich countries can acquire important objects of heritage, while the poor ones do not have the same opportunity to bid at auctions. Therefore it might be important to control the trade to a certain extent and exclude some objects from it.

As I have mentioned earlier in this chapter, there are some cases where I find it reasonable to comply with claims for demand. In my opinion, there is a big difference between cultures that still exist today and the ones that have disappeared. It is also relevant if the object still has a use; if it is returned it will be actively employed in religious rites and ceremonies. Refusing a group the right to practise its religion or other important rituals does not seem right. This position is also held by several scholars²⁹³ and is expressed in the American Nagpra law and in the 2007 UN Declaration on the Rights of Indigenous Peoples (even though it is just a declaration and not a legally binding act). Returning objects that are of crucial importance for a group also seems appropriate, even though it is not easy to decide which objects that belong to this group. It also seems more relevant to return objects to vulnerable minorities than to a powerful state. This also extends to the situation when a minority demands a return from the state with which it share its territory.

Finally, my impression is that even though the international conventions created in order to protect the cultural heritage and facilitate the return of illicitly transferred objects often are not possible to apply to demands of return, they have had an effect on the debate in general. The conventions, together with other events (like art dealers ending up in court rooms accused of smuggling), seem to have influenced the public, the museums and the art and antiquities world in general. The media often write about issues of cultural heritage and when visiting airports of the world, it is possible to see posters informing on matters of smuggled antiquities. Special task forces within the police are set up²⁹⁴ and the Interpol²⁹⁵ works actively on cultural property crimes. Market countries regulate the art and antiquities market and seem to be more willing to cooperate with source countries in order to prevent

²⁹² Thompson, 2003, p 257f

²⁹³ Thompson, Cultural Property, Restitution and Value, *Journal of Applied Philosophy*, Vol. 20, No. 3, 2003, p 253

²⁹⁴ Guardia Civil Homepage, Grupo de Patrimonio Histórico

(<http://www.guardiacivil.org/patrimonio/default.jsp>)

²⁹⁵ Interpol Homepage, Stolen Works of Art (<http://www.interpol.int/Public/WorkOfArt/Default.asp>)

crimes today. There is a more open approach to demands and institutions are more aware of the existence of stolen and trafficked objects and are more careful when acquiring objects. This is also reflected by the large number of ethic codes established at museums and auction houses. Dealers find it more difficult to sell dubious goods and risk being convicted if they do not follow the laws.²⁹⁶ I have also seen examples of museums and states being more open to cooperation with other countries and institutions; this, I think, is very important. If the so called universal museums really aspire to be universal, they need to be willing to spread their knowledge, publish academic results, use digital means to make objects available, have generous policies for loans and cooperate with countries of origin. Apart from lending objects, other alternatives to returning objects and for ensuring access to the heritage, are to lease objects on a long-term basis or produce advanced replicas. There is also the trend of top of the line museums creating branches in other countries. Another important measure could be to create projects for Western museums helping developing countries constructing museums and safe conditions for cultural objects, both already existing and potentially for objects on their way to be returned.

There are still a lot of cultural objects being demanded back and more demands will probably follow. However, the last years' evolution makes me believe that the problems will be less in the future, because the society is more conscious of the problem and fewer objects are hopefully being robbed and looted. I do think, though, that the development does not only depend on laws on the export of heritage, museum policies and the like, but equally on the political changes in source countries, and most importantly in the developing countries. The huge demand combined with severe laws in source countries makes me believe that smuggling and looting probably will not end, but at least it can be more appropriately fought.

Regarding the Swedish Paracas case, it has many similarities with other cultural heritage cases. It is not completely clear how the collection ended up in Göteborg, the issue of taking care of the objects in an appropriate way is discussed and the conflict is highly political. It seems now that the City of Göteborg and the Peruvian state have come to an agreement that satisfies both parties. The agreement however awaits a final authorisation and it should be remembered that even though the objective is to return the textiles, this might never happen in practice because of the fragility of the objects and the lack of appropriate museum facilities in Peru. Even though the Peruvians have a very ideological cause for their demand, it seems like the integrity of objects is taken in consideration. Both parties seem to agree upon the importance of exhibiting the textiles and making them accessible and understandable by the public. In my opinion, the debate on the objects has been too influenced by the position of the Museum of World Culture, which is very positive to a return and a bit too accommodating towards the Peruvian position. This is also reflected in the present exhibition at the museum, where the cultural heritage conflict is simplified and presents a quite lopsided picture, where the Western countries represent the evil, and the developing the good. It can also be doubted if the decision would have been the same, had the textiles been state property, considering that the Swedish government takes a very cautious position towards demands of restitution.

²⁹⁶ Herscher, 1999, p 118ff

15 Cultural *property*?

15.1.1 An introduction to property

With this chapter, I have no intention at all telling the whole story about property; I only want to sketch a theoretical background to my analysis of cultural property. Since this is only a short introduction to property, I try to find the characteristics that are common to most, or several, theories on property; a middle-way, so to speak. I will also try to highlight the themes that are most relevant to *cultural* property. This chapter will however have a bias towards the liberal, traditional view on property, with its roots in Hobbes, Locke, Smith and Mill. This is partly because the majority of the world's inhabitants live in states that are partially or completely market economies where the system of property is not based on Marx's and Engels's ideas and partially because in the legal sphere this is still a very important theory. In addition, Hann calls it the "*current hegemonic paradigm*" which is a critique, but could also be seen as an evidence for the liberal theory being the most accepted today.²⁹⁷ The liberal theory is also sometimes called "possessive individualism", which means that the value is created when a human being adds his creative work to something that used to be only a part of nature. Every person owns completely her own skills and does not have a responsibility to contribute to society.²⁹⁸

Property is difficult to define: it is a vast object, its philosophical foundations are well documented and there are many different views on the concept. It is a much-debated and politically and ideologically sensitive subject. Apart from the philosophical view, property is also defined and protected by a number of international conventions. For most citizens, national legislation on property is however the most important one, since it decides conditions of society and the sphere of action for people. Property is a way of organising society and one of the principles that the legal system is based on.²⁹⁹

Property can be public or private, individual or collective (owned by groups, organisations, companies...).³⁰⁰ Common property is another category. Carman adds open access property to this list, but I will not discuss it here, since it is rather non-property than anything else. Carman argues that the rights and obligations and the power over the object is the same whoever owns it; the difference is which subject decides over it.³⁰¹ Honoré however says that objects subject to public property are seen as excluded from trade. There are normally special rules for these objects.³⁰² The objects of property are goods that are seen as having a value and the system of property regulates how these valuable objects can be transferred between subjects.³⁰³

Having property means having a right of disposition; to dispose oneself freely of the object and to exclude others from disposition. The right of disposition is however never absolute; it

²⁹⁷ Hann, C.M, Introduction: the embeddedness of property, in C.M. Hann (ed.), *Property Relations. Renewing the anthropological tradition*, Cambridge University Press, 1998, p 7

²⁹⁸ Rowlands, 2004, p 211

²⁹⁹ Sterzel, Fredrik, Karin Åhman and Ulf Lönnberg (eds.), *Äganderätten: ansvar, skydd, Ägarfrämjandet*, 2004, p 14f

³⁰⁰ Sterzel, Åhman and Lönnberg, 2004, p 14f

³⁰¹ Carman, John, *Against Cultural Property. Archaeology, Heritage and Ownership*, Duckworth, 2005, p 29

³⁰² Honoré, Tony, *Ägande*, in *Idéer om ägande*, Tidens förlag, 1994, p 65

³⁰³ von Benda-Beckmann, Franz and Keebet and Melanie G. Wiber, The Properties of Property, in von Benda-Beckmann, Franz and Keebet and Melanie G. Wiber (eds.), *Changing Properties of Property*, Berghahn Books, 2006, p 2ff

is limited out of consideration of other people and other rights.³⁰⁴ Property is the highest form of interest in an object that is possible under the legal system. This exclusive power over the object makes it easy to economically use the object and transfer it to another subject. According to Honoré, property includes eleven different elements: the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the incident of transmissibility, the incident of absence of term, the duty to prevent harm, liability to execution and the residuary character.³⁰⁵ The owner is responsible both for the benefits and the costs of the property.³⁰⁶ Property is not just a right but carries also obligations. While disposing of the object of property, the owner must respect social norms, is responsible for dangers and problems caused by the property or the using of it, etc.³⁰⁷ Property is not an absolute right, but limited by laws, customs and expectations.³⁰⁸

Property can be seen as a relationship. It is also described as “*a bundle of rights*”, meaning that there are relations between the owner of the object and other people, on different levels. No one is allowed to take the object from the owner, the owner can sell the object or transfer it to his best friend in a testament, etc. – all these are relations forming a bundle.³⁰⁹

Property is something more than just economy. It can be a part of identity of both individuals and groups and through inheritance within a group it creates continuity. Property can also be power, both political and other and it can have religious purposes. The concept of property is sometimes argued to be universal, but some claim that is a Western invention, at least private, individual property; the kind of property that is often seen as central to law and economical progress and as the factor enabling market economy. Private property moving on a market is the kind of property that best guarantees efficient use of objects.³¹⁰

15.1.2 Cultural heritage as property

The debate on cultural objects is very harsh and as seen in the introduction, there is not even a consensus on the definitions and terms that should be used. Sometimes different terms are mixed in the same text (as in this thesis) or used for expressing the same thing without further thought, even in international conventions, but there is often an ideological devotion behind the decision to use a specific term. Today, both *cultural property* and *cultural heritage* are used commonly by scholars, even though it seems that the latter has become the dominating term during the last couple of years. It is sometimes said that the former is expressing a commoditisation of culture and putting too much emphasis on the economical side of heritage. It is too commercial and too ideological.³¹¹ It seems that *cultural property* is often employed when the physical side of the object is in focus; for example when discussing the protection of culture in wartime, where the threat is also highly physical. The term is however used in other situations. I think that it is not necessary to regard it as controversial (as a matter of fact, there might not be a need for regarding the

³⁰⁴ Sterzel, Åhman and Lönnberg, 2004, p 14f

³⁰⁵ Honoré, 1994, p 64f

³⁰⁶ Carman, 2005, p 32

³⁰⁷ Sterzel, Åhman and Lönnberg, 2004, p 14f

³⁰⁸ Carman, 2005, p 30

³⁰⁹ Hansson, Sven Ove, Introduktion till Felix Cohen, in *Idéer om ägande*, Tidens förlag, 1994, p 11

³¹⁰ von Benda-Beckmann, Franz and Keebet and Melanie G. Wiber, 2006, p 2ff

³¹¹ Blake, Janet, On Defining the Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 49, January 2000, p 65f

property concept as controversial, either): the fact that we talk about *cultural* property, a specific kind of culture, shows that there is something more to the objects than just the physical property side. *Cultural* in cultural property is the obvious symbol for a cultural value that is also a quality of the object, and an important one. There is however no clear or established difference between the two terms and everybody does not regard them in the same way or make any connections to ideology.

As we have seen from the brief introduction on the terms used for describing cultural objects, there is a connection between property and commodities; objects with economic value. Using the institution of private property, we organise wealth and at the same time, this system is wealth producing. Private property is the foundation of the economical system that is dominating in the world today. It seems to me that it is not treating cultural heritage as property that itself causes indignation among some; it is the connection to money that disturbs people and makes them argue that cultural objects should not be treated as property.

It seems that in most countries of the world, cultural objects have some kind of special protection. The objects can be described in terms of cultural heritage, cultural property or in several other ways. Some states give a high protection to a lot of objects, while others take a slightly more minimalist approach. I have not come upon any case where heritage expressly is described in legislation as not being property, but as I have described before (chapter 12.1.1) it is quite common in source countries that the state is awarded ownership over all objects, known and unknown, belonging to the cultural heritage category. The objects cannot be traded like other objects, they cannot be subject to private property and there is no market. The result is that the heritage in these states not at all is treated as property; the objects are inalienable and the values of the object cannot be realised. It is true that the state claims *ownership* to the objects, which indicates that the objects are property, but not being private property also means that the objects have lost important characteristics of property. They cannot be transferred, there is no market and their (economical) value cannot be realised.

In France and some other European countries, there are (chapter 10) also laws making objects inalienable, but they concern only some selected objects and the regulation is more flexible. In market countries in general, cultural objects receive protection (often in form of export restrictions), but the approach is different compared to the severe legislation in some source countries: fewer objects are protected, they can normally be owned by private subjects and there is a legal antiquities market. The objects are treated more or less like any kind of property and are regarded as an economical commodity.

In some cases of demands of return, especially when the object has recently left its country of origin, the demand is made legally and treated by a court. A demand is made for the restitution of the object; just as it were any kind of stolen or illicitly acquired item. Both internationally and nationally, it is forbidden to steal and smuggle cultural objects; one example is the article 3.3 of the UNIDROIT Convention, prohibiting theft. This prohibition is based on both ordinary private and criminal legislation and special laws for cultural objects. Even without the more modern conventions and laws on heritage, stealing a cultural object would still be illegal considering that theft is criminalised no matter what the object is (with very few exceptions). The right to a cultural object can be defended in court, both in civil and criminal cases. It seems that all these facts should be considered arguments for cultural heritage being property.

Cultural objects normally share the characteristics of other objects that no doubt are regarded as property: they are physical, movable objects. They are traded nationally and internationally. It cannot be denied that physical possession of cultural objects is possible. As we have seen, a lot of efforts have been made to fight the illegal market in antiquities and other cultural objects. It is true that some people want to completely close down the antiquities market in order to get rid of looting and smuggling. However, it seems to me that the fact that we talk about an *illegal* market indicates that there is also a *legal* market. Nationalists like to compare the antiques business to the market of narcotics, but I do not think that this is correct. The commerce of drugs is prohibited because the products themselves are dangerous and have negative effects on society, while the same cannot be said about cultural objects (rather the contrary). Without forgetting the problems of looting and damage being made to important archaeological sites, I think that it is clear that there exists a licit market where cultural objects are being bought and sold without big difficulties.

Private law legislation often applies to cultural property; for example laws regulating commercial transactions in those countries where objects can be traded. It should be remembered that the UNIDROIT Convention regulates private law and deals with questions of ownership, *bona fide* purchasers and payment of compensation. This shows that objects can be traded and acknowledges the economical value. Ownership to the objects is possible (but that there are rightful owners and others that are not) and also other kinds of common private law obligations. Rowlands adds that the notion of possessing culture is not new, but has long roots and could almost be said to be universal.³¹²

Further, it is broadly accepted that when an artist or artisan today produces a painting, a bowl or any other kind of object, this becomes his or her property. No exception is made just because the object has a cultural value. The objects can be bought and sold and exploited through IP rights. This idea also has a thorough philosophical base; Locke famously stated that an individual gains the ownership over the object to which he adds his proper labour.³¹³ One could wonder why this principle should not be valid for older cultural objects. Yes, it is *heritage*, meaning that it has an extra value and importance for peoples' history and identity, but I do not think that this is enough for awarding any special treatment compared to recently produced items. Even these could rapidly become famous and get special importance for a certain culture. Maybe it is only a question of the age of the objects, but it still seems strange to me to accept private property today, but that this shall change in the future.

As we have seen earlier, there are several source countries that have drafted legislation making all cultural objects – known and unknown – property of the state. It could maybe be questioned if this kind of legislation is really legislation on ownership or if it is more a way of making a point in the debate or just an export regulation. The issue was the subject of a case in a US Court of Appeals in 1972³¹⁴. Some cultural objects from Mexico had been brought to the US and according to Mexican laws; they had been stolen from the state. The American court decided that it was not just a regulatory law, but "*a vesting*³¹⁵ *statute that utilized terms that were sufficiently clear for a US citizen to understand*". The ruling and

³¹² Rowlands, 2004, p 211

³¹³ Locke, John, *The Two Treatises of Civil Government*, Book II, Of Civil Government, 1689

³¹⁴ *United States v. McClain*

³¹⁵ "A vesting statute is to give an immediately secured right of present or future enjoyment. One has a vested right to an asset that cannot be taken away by any third party, even though one may not yet possess the asset." (<http://en.wikipedia.org/wiki/Vesting>)

its acceptance of the Mexican law paved the way for several similar decisions in American courts and made it possible to return objects to their countries of origin. The decision was followed by a debate where art collectors and politicians argued that it was not right to base ownership only on a declaration of a foreign state. A similar case occurred in 2001³¹⁶, where the US Court of Appeals for the Second Circuit more closely investigated the status of foreign laws on cultural property; here more specifically the Egyptian law making all objects state property. The court came to the conclusion that it was a real property law since, first, that the law was on its face a property law and second, that the law also in internal cases was enforced as a property law. The court also analogised theft from a foreign state with theft from a private subject.³¹⁷ It seems that the result of these rulings is yet another argument for regarding cultural objects as property, even though it concerns state property.

The reasons for treating cultural objects as property are the same as for other kinds of objects. The system of private property already exists and has proven to be practical and efficient. Property is a protecting mechanism for the value of the object and its physical characteristics. It awards rights to the owner, who can defend these against other peoples' claims. The property system also creates value and welfare; an object can gain value, it can be sold or transferred in other ways, giving satisfaction to both seller and buyer.

There are clearly arguments for regarding cultural objects as property. We have seen that today, even indigenous communities use the property definition while defending their right to the cultural heritage. Not everybody does however embrace this development. It is argued that it gives larger influence to European and American ideas, since property in the sense that we normally use it is a Western invention. The cultural heritage is said to be created as part of a collective ownership, which stands in bright contrast to individual, Western property rights, IP rights included. Brown says that it can be difficult to combine moral claims of indigenous communities with the mercantile purpose of property rights. The protection of cultural heritage often is made *against* Western influence.³¹⁸ In relation to the criticism of property as a Western invention, it has been argued that this whole discussion is Western: the criticism also uses Western arguments and ideas, but anti-liberal ones.³¹⁹ I would like to add that it could be regarded as a bit strange for source countries embracing the property concept in some areas but completely opposing it for cultural objects. Economical systems based on private property are widely seen as the way to prosperity and freedom, nowadays even in ex-colonial states. It is true that in most societies there are objects, values and commodities that are excluded from the market or more rigorously regulated. There are reasons related to the environment, safety, moral etc, for this. These special rules are however only exceptions to the general market economy; this latter is generally accepted. It seems however to me that the criticism towards regarding the cultural heritage as often tends to be a criticism of capitalism in general, which makes it quite blunt and not easy to take serious. Accepting heritage as property does not exclude the possibility of making special laws for this kind of objects. This is thoroughly proven in many European countries, where special rules giving protection to some cultural objects co-exist with a legal antiquities and art market within a capitalist system.

In close connection to this, it is sometimes claimed that the concept of private property is not appropriate for the cultural heritage, at least not when it comes from non-Western

³¹⁶ *United States v. Schultz*

³¹⁷ Gerstenblith, 2006, p 69 ff

³¹⁸ Brown, 2004, p 53f

³¹⁹ Hann, 1998, p 10

countries. The argument is that “our” concept of property is not the same as “theirs” and that Westerns try to impute our definition of property on source countries. Individual ownership is claimed to be something typically European or Anglo-Saxon that until the arrival of the white man did not exist on other continents, at least not in Africa. This might be true for hunter societies, which are not based on the concept of land. It has however been shown that individual and family property exists outside of Europe.³²⁰ I would like to add that ancient ideas of property might not be completely relevant in the discussion on the return of cultural objects of today. States claim ownership over objects, regulate their export and trade and put them in museums. It seems that in every important source country, it is the state and not ethnical groups that manage the heritage and that make demands for repatriation of objects. Further, these states (maybe with one or two exceptions) accept private property and use it as a base for its society and the economical system. Referring to ancient structures of property in countries that are on their way to becoming modern economies and well functioning democracies seems odd.

It seems that the main argument against regarding cultural objects as property is that it is harmful for the heritage being treated as a commodity, which is a natural result of accepting the property quality. The economical value is put in stark contrast to the cultural value and the former is said to be a threat to the latter. As Herscher puts it, for source countries, the cultural heritage objects “*are not simply objects, but tangible symbols of historical wrongs and economic inequities, a focus for national self-esteem and identity in response to military conquests, exploitation under European colonialism, and resentment toward the power and affluence of the developed nations*”.³²¹ The fear of commercialism is strong. Vinson describes the debate on the cultural heritage as “*a homogenizing world capitalism that opposes itself to particularist claims*”.³²² When discussing the Parthenon Marbles, one author has expressed the fear of moving the sculptures from a public, traditional museum to an “*Athenian theme park*”.³²³

Some authors are not mainly opposed to viewing cultural heritage as property, but as private property. According to Carman, the cultural heritage was not created in order to be appropriated. On the contrary, it was meant to be shared. Therefore, a good way to treat cultural objects could be as common property, which excludes exclusive rights over the objects.³²⁴ Brown also thinks that cultural objects can be regarded as property, but “*subject to principles of group ownership*” and not without restrictions. Rowlands’ argumentation is similar; he sees cultural property as a special kind of property because of its “*inalienable and collective quality*”. He argues that the possession, or claims to possess, cultural objects is part of a process for demanding recognition. Communities understand that in order to gain political influence they need to actually *possess* their culture. The cultural identity is objectified through the possession. Earning money using the heritage, for example by selling souvenirs or in other ways encouraging tourism, is part of this battle for recognition, in which the valuing of objects is one important part.³²⁵ Thompson defines cultural property as the property of a collectivity, but rejects state property. According to her, states regard cultural property as something they have the right to control, and this is problematic, since it

³²⁰ Hann, 1998, p 11

³²¹ Herscher, 1998, p 809

³²² Vinson, 2004, p 64

³²³ Michael Daley, director of Art Watch, an art organisation, quoted in Kersel, 2004, p 51

³²⁴ Carman, 2005, p 76ff

³²⁵ Rowlands, 2004, p 208f

gives preference to states – the subjects that control territories – above other collectives, like native people or religious communities, who also could claim the objects.³²⁶

Carman says that some archaeological objects (this can probably be said to concern other cultural objects as well) have a financial value, but that the non-economical values that they represent are more important. He argues that when an object is acquisitioned, the acquisition includes “*the store of symbolic and cultural value the object represents*”. The buyer of the object affects how these values will be expressed. “*When held by a public institution, the object’s store of symbolic and cultural value serves to create and enhance the sense of community on behalf of whom the object is held. Where the object falls into private hands, that store of cultural capital accrues not to the community from which it derives but to the individual owner.*” Carman argues that cultural heritage is not meant to be held by a private person, but should be the property of a community. If not, the whole purpose of the object is lost. However, he does not regard a state as a suitable owner: this normally makes the object affirm the institution of the state, rather than the community that is connected to the object. Control over the object representing the heritage gives power and prestige to a nation, not to the original community.³²⁷

In many source countries, there is a strict control of cultural objects at the same time as private property is allowed during some circumstances. One example is Peru, as mentioned above. Martorell-Carreño argues that even though there is no public ownership regime for all cultural property, one must look at the aim, which is state control over the heritage. The idea is that the property belongs to the nation. This relation should be seen as superior to an ordinary title; the cultural heritage legislation is not property legislation but expresses an interest “*superior to private property rights*”. Besides, the special legislation differs from other laws on property since the value of the objects, or even their artistic value, are not decisive of its value according to the law. Instead, the value is decided by history, archaeology, etc.³²⁸

It seems that even within societies where private property is well protected and accepted, like the US, there is a tendency towards creating *lex specialis* for cultural property and treating cultural objects and art in a special way and granting it a special legal regime. This regime gives the objects a higher degree of protection and is less focused on commerce than the rules for other kinds of movable objects. This tendency has been expressed by both legislators and courts and regardless of if the owner of the object is a private or public subject. As we have seen, there are ways of establishing this regime both domestically and with international instruments. Courts have even acknowledged laws of foreign states establishing special regimes for cultural property.³²⁹ Carducci explains it as a way of balancing two ends of the spectrum: unlimited trade and absolute protection of culture.³³⁰

Moustakas connects the view on property to the, in his view, necessary repatriation of cultural objects to their countries of origin. His argument is that laws and international conventions can never deal with the issue of national identity if they do not new concepts of ownership. All existing legal instruments presuppose the existence of property in its

³²⁶ Thompson, 2003, p 252f

³²⁷ Carman, 2005, p 73f

³²⁸ Martorell-Carreño, Alberto, Cultural Patrimony and Property Rights in Peru, in Barbara T Hoffman (ed.), *Art and Cultural Heritage, Law, Policy and Practice*, Cambridge University Press, 2006, 105f

³²⁹ Two well-known examples when Egyptian and Guatemalan laws making cultural objects State property were given the status of property law by American courts are *United States of America v. F. Schultz* and *United States of America v. Pre-Columbian Artifacts and the Republic of Guatemala*.

³³⁰ Carducci, 2006, p 69f

traditional sense and accept the market economy. Moustakas wants to make cultural property subject only to group rights and not possible to trade on a market, since it is so closely knit together with the identity of the group that it cannot be taken away from it without causing loss. Since the objects belong to a group and not to a number of specific people, the ownership also includes future generations of this group, whom cannot give their consent to transactions today.³³¹

To the discussion on cultural heritage as property, one might also add that since demands for return of cultural objects very often (as pointed out in chapter 13) take the form of political decisions and not legal cases, this could strip the objects of their property quality. This might be a bit of a vague idea, but maybe objects returned as the result of a political discussion are not property, but symbols, since the return is often symbolic and made not to fulfil a law, but for higher purposes, that can be pragmatic as well as ideological.

The opposing to collecting antiquities expressed by people, mainly archaeologists, who are also supporting source countries' nationalist claims, can also be seen as an opposition to regarding cultural objects as property. Their arguments are that collecting and ownership encourage looting and illegal trafficking in objects. They also seem to think that if the legal market closes, objects are stripped of their property quality.³³² This is however not possible, I think. The pieces of heritage will still be objects and someone can own, or at least possess, them. In my opinion, denying this property quality paves the way for the establishment of an illegal market.

I am not so sure that making cultural heritage the collective property of a group is such a good idea. First, it strips the objects of some major property characteristics. Second, cultural heritage is important to groups of people, but this does not automatically mean that collective ownership is the most accurate. Third, Carman's argument that cultural heritage was created to be shared is not correct for all kinds of objects. It might be true about spiritual objects for example, but not everything that we today regard as heritage was created and used for collective purposes. Objects used and owned by individuals in past times can today be important to larger groups, as representing a culture or an identity. Fourth, I think that an object subject to private property in general is better protected than a collectively owned one, as in the case of the tragedy of the commons. Finally, authors suggesting the cultural heritage being subject to collective property do not usually mean that the objects should be the property of a state, but of the ethnical or cultural group to which the objects "belong". This kind of ownership seems quite vague and not really corresponding to any existing legal form of ownership. Sometimes it seems that authors try to avoid the property concept, rather than proposing a new form of ownership. This makes it difficult to handle and not very practical to use. Further, our existing forms of property have proven to be quite a good way of organising wealth; it is a flexible system for transferring objects and gives freedom to the owner.

A rather obvious result of the nationalist view on culture is that claims of restitution are made by groups: tribal councils, states, local governments, organizations, etc. The object belongs to a nation or to an ethnic group in form of collective ownership or just an inalienable right to the object, while for internationalists, it is accepted that several types of subjects can have the right to an object: private persons, states, museums... It has

³³¹ Moustakas, Group Rights in Cultural Property, *Cornell Law Review*, n. 1179, 1989, as referred to in Coombe, 1995, p 260 f

³³² Bunker, Emma C, The Acquisition and Ownership of Antiquities in Today's Age of Transition, in Kate Fitz Gibbon (ed.), *Who Owns the Past?* Rutgers University Press, 2005, p 311f

sometimes been said that this is also the consequence of the definition of property within tribes and indigenous groups, or rather the lack of a Western, classic concept of private property. Glass however points out that both individual and family ownership exists in for example some Native American groups. Fascinatingly, he recalls a Canadian case where some native families had given up their actual possession of some objects, in order to place it in a museum and let it become *“the cultural property of the people as a whole”*. Another point of view is that by claiming property to cultural objects, indigenous groups acknowledge themselves as legal subjects and towards the state. This is of course most important for native groups within a country, as is the case with Native Americans.³³³

15.1.3 Something *more* than property

The relation between property and cultural objects is complicated, but it seems that more or less everybody agrees upon that there is something special about heritage. Even the ones defending the position that cultural heritage is property also acknowledges the cultural side of it and normally admits some kind of special protection or legislation. The cultural heritage is often described as something more than property, something that goes beyond the sheer physical object. Warren says that when debating the right to objects, it is not only the question of a possible return of the object, but also about the perception of the past and the values that the objects represent.³³⁴ Herscher says that for the source countries, the objects are not simply objects, but *“tangible symbols of historical wrongs and economic inequities, a focus for national self-esteem and identity in response to military conquests, exploitation under European colonialism, and resentment toward the power and affluence of the developed nations”*.³³⁵

Also in the field of “ordinary” culture – music, film, digital media – there is a lively discussion on intellectual property, culture as property and commercialisation. The dual nature of culture is underlined: on one hand the commercial interest; culture as a product, on the other the artistic and social value. This dual nature has also been debated in WTO circles for decades.³³⁶ The fact that cultural products have a commercial value and can be bought and sold is seen in relation to the idea that they also incorporate something more than this commercial value, a cultural quality. It is argued that this cultural quality cannot be subject to ownership; that it goes beyond economy and in some way belong to everybody.³³⁷

Biondi says that art (and I think that it could easily be expanded to cultural products in general) always have been considered a special legal category that is not regulated as other property. Modern states have drafted legislation giving cultural objects and the own cultural heritage special protection, as we have seen earlier. Also within European legislation, it exists as an own category.³³⁸

15.1.4 Cultural heritage as intellectual property

During the latest decade, the strategy of using modern intellectual property rights for safeguarding (and earning money off) a community’s cultural heritage has been very popular

³³³ Glass, 2004, p 120 f, p 129

³³⁴ Warren, 1999, p 2

³³⁵ Herscher, 1998, p 809

³³⁶ Voon, Tania, State Support for Audiovisual Products in the World Trade Organization: Protectionism or Cultural Policy?, *International Journal of Cultural Property*, Vol 13, 2006, p 133

³³⁷ Bruncevic, Merima, Cultural Property Rights, *Intellectual Property Quarterly*, Vol. 4, 2009, p 458f

³³⁸ Biondi, 1997, p 1177

among scholars the latest decade, and it has been used in practice. In this way, the property is made private and given an economic value. This could also be one way of constructing the common property that Carman and other say is the appropriate view on cultural property. The right to the heritage can stay a collective right if the IP right belongs to everybody in the community. It is also a way for native populations – often weak groups – to protect what they know and to make money out of it. Using IP rights has for example been a common procedure for protecting the traditional knowledge that is commercially used in the creation of medicines. This also shows that the IP strategy is not used until the indigenous groups are “disturbed”; the legal protection is needed when there is an external interest in their heritage.³³⁹ Carman also says that “*At the same time, the moral rightness of giving ownership rights is asserted, and of course such rights have the merit of general recognition*”. Structures can be built up to protect the object.³⁴⁰ To me it seems that just the fact that IP rights are used to protect the cultural heritage seems like proof for this being property. Intellectual property might not be the classical kind of property, but as its name indicates, it sure has a place in the modern system of property and is a basis for economical wealth. Maybe it could be argued that the intellectual property rights are used to protect cultural heritage not be free will, but since there are no other options. The thought of indigenous communities being forced to use Western, capitalist tools to survive could seem like reality for some people, but I do not agree. A creative use of law and IP rights could work well for both tribes protecting their heritage as well as for modern pharmaceutical companies taking advantage of ancient knowledge to produce life saving medicines. This development means rather that some legal innovations can suit people with different backgrounds and not only in the way that were first thought. Besides, I do not think that it is good to make too much of a difference between people from different parts of the world. Why would not native populations of Australia or Indonesia want to earn money at the same time as protecting their heritage and making it known to the world?

Often, the IP strategy is described in terms of using Western techniques while defending the heritage against powerful, multinational enterprises. The IP strategy has mainly been utilised for protecting the intangible cultural heritage: music, biological knowledge that can be used for making medicine, genetic codes, etc. IP rights can of course also be used in connection to a physical object, for example selling copies, pictures and souvenirs of cultural objects.³⁴¹ After the successful repatriation of cultural objects to native populations in the US, Canada and Australia, some argue that the time has now come for “repatriation of information”. It is however not clear if ideas and other intangible heritage always can be regarded as property and be repatriated.³⁴² This is an interesting problem: is it necessary to identify intangible heritage as property in order to repatriate it? Maybe, since one can wonder what is otherwise given back, if it is not property? If something cannot be subject to property, logically it cannot be given back, since the act of repatriation can be seen as an act of transmission of ownership. What is otherwise given back? However, everybody might not consider this true; the act could maybe be seen as a transmission of custody or something else. Regarding it only as a change of location of the object could be an alternative, but I do not think that this is correct, since repatriation could probably take

³³⁹ Thuen, Trond, Culture as Property? Some Saami Dilemmas, in Erich Kasten (ed.), *Properties of Culture – Culture as Property. Pathways to Reform in Post-Soviet Siberia*, Dietrich Reimer Verlag, 2004, p 92

³⁴⁰ Carman, 2005, p 93f

³⁴¹ Rowlands, 2004, p 208

³⁴² Brown, 2004, p 49f

place even though the object itself did not change location. Objects can in general be bought and sold and the ownership transferred while the object remains on the same spot. Brown talked about the intangible heritage, which logically cannot even have a location and I think that it might be possible to extend this line of thought to the tangible heritage as well.

There are also arguments against IP rights in general and in connection to the cultural heritage of unprivileged groups in particular. It is claimed that these rights do little to promote innovation and that they create obstacles to research. Expiring rights, as patents and copyrights, work rather well for people that themselves lack eternal life. It is however different for groups that live on even if the individuals of the groups die.³⁴³ In relation to this, it might be added that the same goes for companies that live on even when its founder passes away.

Turning the tangible cultural heritage into intellectual property can however not be the only solution to the question on how to handle cultural heritage and the claims for return. IP rights are not appropriate for every object. The tangible, physical objects remain even though some communities or states find creative ways of enjoying their economical value and protecting them. The objects need a location and will still be subject to claims of ownership or cultural connection. In some cases, traditional ownership to the physical object is probably enough. Keeping in mind that the IP sector is constantly expanding and developing, this will however probably keep having an influence on the heritage sector.

15.1.5 Whose perspective on property?

Working on this thesis, I have seen the term *property* being used hundreds of times by scholars from different fields. For someone legally trained it might seem natural, but as it is, also anthropologists, archaeologists and others widely use the term. Brown sees risks in this, meaning that we cannot be sure of what the term means when it is used by different groups under different circumstances. The word certainly does not mean the same for everybody. When anthropologists or others claim that group has a right to property or ownership over its cultural heritage, they might not realise that the consequences of this could be surprising when legal definitions and instruments become involved.³⁴⁴ *Property* surely does not have the same meaning for everybody and there is a big difference between using it in an academic article, in everyday language and in a law.

Brodie discusses the views on cultural property and according to him there is a big difference between archaeologists and ethnographers and almost everybody else. Collectors, dealers, politicians and lawyers have an object-centred view on the issue and focus on ownership, following the European/English tradition of a classic, liberal view on property. According to Brodie (himself an archaeologist representing a nationalist view) this is the group that dominates the debate today. Archaeologists with their academic perspective on the other hand “*value knowledge over property*” and focus on the information that an object can give. Lawyers, dealers etc often use the term “*cultural property*” for describing objects while Brodie argues that it might be better to replace it with “*cultural heritage*”³⁴⁵, since in his view it is a “*less ideologically loaded term*”. According to Brodie, this would show that cultural objects is something else that ordinary property that can be bought and sold, and instead something to share and conserve.³⁴⁶

³⁴³ Brown, 2004, p 55f

³⁴⁴ Brown, 2004, p 63

³⁴⁵ As seen above, this is already reality in many cases.

³⁴⁶ Brodie, 2002, p 8f

As we have seen above (chapter 12.1), archaeologists tend to emphasize the importance of context and want to exclude practically all cultural objects from the market. Their stand is generally anti-property. They also tend to talk depreciatively about objects as art and put the aesthetic perspective in contrast to their own, historical, context based perspective. It seems that this is partly because of the connection between art and property or a commercial side of heritage.³⁴⁷

This leads us to the discussion on the difference between cultural heritage and “ordinary” art. There are debates on the nature of modern day culture as well, and it can hardly be seen only and fully as a commodity, but it is rather generally accepted that culture produced in our society is possible to buy, sell and own. Earning money in the cultural sector might not always be easy, but it is accepted by most. Artists paint for many different reasons, but the majority of them are prepared to sell their works to pay their milk and bread or to achieve fame. He or she creates a painting that becomes his or her property and that can be transferred to someone else. Contemporary culture is commercial, at least to a certain extent, and one could question why this should not also apply to the cultural heritage. Just the fact that the objects are older should not automatically mean that they are not property and should be stripped of their commercial value. It can be argued that artists of today are aware of the commercial potential of their works, while the people that created objects of heritage might not have realised that one day someone would have wanted to buy their creations. On the other hand, heritage consists of objects of very different characteristics: art, religious symbols, objects of everyday use... Some were created for the gods, the ancestors or to be passed on to children and grand children, but not everything. There are also objects that had no high value in the ancient culture and that were produced and used without any special consideration, but are highly appreciated today. Parts of what is now regarded as cultural heritage, was actually once produced for a market. Local artists in Africa even chose their motives in order to attract European collectors since both buyer and seller seem to have regarded the pieces as souvenirs rather than great works of art.³⁴⁸ Further, it is impossible that today know what the creators of heritage might have thought of their objects being sold on a market today. Finally, the cultural heritage in some countries includes the art of artists that were paid for their work and produced what were demanded of them.

My conclusion is that since there seems to be no clear limit between the culture of today and historical culture, we should not deny the possibility of heritage to be transferred and commercialised. This could however be done within certain limits and respecting the cultural importance of the objects.

15.1.6 If it is not property, at least it has a value

The cultural heritage can be regarded as property just like any other, something else than property or a special kind of property, but what seems clear, is that it represents great values. The art and antiquities market represents very large values; in 2007, before the global economical crisis, the world market represented 48 billion euro, according to the European Fine Art Foundation. Last year, the number had dropped to 31 billion euro.³⁴⁹ Besides, we have seen that there is also an illegal market dealing in cultural objects and that

³⁴⁷ Brodie, 2006, p 1f

³⁴⁸ Unplundering art, The Economist, Vol. 345, 1997

³⁴⁹ TEFAF Study 2010, quoted on the homepage of CINOA (Confédération Internationale des Négociants en Oeuvres d'Art): (<http://www.cinoa.org/index.pl?id=2937;>)

it is difficult to estimate the scope of it. All objects traded as antiquities are not necessarily the cultural heritage of a special culture or nation, but many objects are similar to the ones that are claimed by states and that we currently find in museums. Museums and other public institutions also buy objects at auctions and from antiquities and art dealers. Examining the value of the objects currently located in museums might be difficult and sensitive, since they generally are supposed to stay there and not be commercially used, but one can guess that the worth of all cultural objects placed in public collections worldwide reach astronomical sums.

The great value of the cultural heritage is also proven by the tourism industry. I cannot go into depth on the matter, but I will give two examples. Machu Picchu in Peru is visited by over one million tourists every year and the recent flooding of the area meant a great economical blow to the area, maybe as much as 400 million dollars.³⁵⁰ France is by far the world's most important tourist destination and received over 80 million tourists in 2007. A governmental report shows that their spending represent around 6 % of the GNP. According to a study, 80 % of the visitors came to France because of its cultural image, even though not everybody visits the French cultural patrimony sites.³⁵¹ The Louvre Museum, exhibiting objects from different cultures, received over 8 million visitors in 2008.³⁵²

Yet another example of the value incorporated in cultural heritage is the interest of the World Bank in protecting the tangible cultural property in the developing countries that they are helping. This development depends on the strategy of putting economic growth in a social context, but also the understanding that culture does not only consume public money, but generates it and is one factor of the poverty reduction. The fact that the Bank's member states already often already have legislation for the protection of cultural heritage is also a factor. This new policy of the institution has also had practical consequences. Until 2006, the Bank had funded 250 projects with connections to the cultural sector and 35 projects only focused on the protection of cultural resources. It has also produced internal documents and guidelines on cultural management and started research projects. Apart from introducing non-damage rules for all activities of the Bank, it also offers training on cultural resource management for the borrowing countries and projects for strengthening existing institutions in the field of protection.³⁵³

Greek antiquities are generally seen as a commodity and are commonly used in the tourist business. The pressure for return of the Parthenon Marbles was especially hard just before the Athens Olympic Games in 2004; another wealth producing event.³⁵⁴

The fact that objects are looted, smuggled, stolen and sold on an illegal market are also proof of the heritage having a value. Considering the sums that some nationalists claim that this market represents, the values must be very large.

All this leads to the conclusion that there are potential values in the heritage, that can be realised or not, depending on your approach to the market. Acknowledging these values

³⁵⁰ Varise, Franco, Machu Picchu: incertidumbre turística frente a su reapertura, *La Nación* (Argentina), 7 February 2010 and Machu Picchu reabre sus puertas al público, *BBC Mundo*, 31 March 2010 (http://www.bbc.co.uk/mundo/america_latina/2010/03/100331_1901_reapertura_machupicchu_lav_shtml)

³⁵¹ Chiffres clés du tourisme, 2008, Ministère de l'Économie, de l'Industrie et de l'Emploi: (http://www.tourisme.gouv.fr/stat_etudes/c_cles/chiffres_cles08_fr.pdf)

³⁵² Palmarès des 30 premiers sites culturels, 2009, Ministère de l'Économie, de l'Industrie et de l'Emploi: (http://www.tourisme.gouv.fr/stat_etudes/memento/2009/sites2.pdf)

³⁵³ Di Leva, Charles E, The World Bank's Policy on Physical Cultural Resources, in Barbara T Hoffman (ed.), *Art and Cultural Heritage, Law, Policy and Practice*, Cambridge University Press, 2006, p 245f

³⁵⁴ Kersel, 2004, p 51

by regarding the heritage as property could maybe be a way of protecting this value. To me, this seems like a better idea, at least better than closing down markets and ignoring the economic values that the objects have, whether we like it or not.

15.1.7 Cultural property in the conventions

It should be emphasized that all the international conventions on cultural heritage that I have described above are made to confront one individual problem or area. They must be regarded as separate products that have not been created simultaneously or with the others in consideration. They are also products of their time and the view on heritage and property in each and every one of them should be understood from that point of view. This explains for example the criticism of the 1970 UNESCO Convention for being too supportive of nationalist policies; it was adopted during the decolonisation process.³⁵⁵

At the time of the creation of the 1954 Hague Convention, the debate on culture, colonialism and heritage was very different from today. Therefore, the starting point of the convention is quite different from the other conventions. War is mainly a physical threat to the cultural heritage and therefore the objects protected by the convention are in the first place treated like physical objects. It is not the value of the objects that is directly protected, but the object in itself. This seems to be a connection to the property concept. The convention also regulates the return of illicitly exported objects, including rules on compensation for *bona fide* purchasers, which also indicates property. The convention however does not discuss the possible commodity quality of cultural objects, since this is not the main concern in situations of armed conflict.

The 1970 UNESCO Convention is the product of a compromise between source countries and market countries. However, it took a long time before any market countries ratified it since they believed that the convention was too market hostile.³⁵⁶ The convention however does not prohibit trading in cultural objects, but intends to regulate the market. The convention is a public law document, but it still partly regulates the cultural heritage in a private property way. For example, it establishes a right to compensation for private persons having to return a stolen object. Article 13 of the convention acknowledges that ownership over objects is possible. Despite of source countries' attempts to limit the market approach to cultural property, the convention by and large seems to treat cultural objects as property, even though imposing rules for preventing smuggling and looting.

In the 1995 UNIDROIT Convention, the cultural heritage is clearly seen as property and as a commodity that can be bought and sold, even though the special quality and importance of heritage is acknowledged. The convention only regards questions of private law: ownership, compensation, etc, which are only relevant in a property relation. The heritage object can be both private and state property and the rights awarded to the owner are fundamentally the same. When the convention is incorporated on the national level, it directly gives rights to individuals. The convention gives a right to court access for defending one's right to an object.³⁵⁷ Interestingly, the convention makes an explicit difference between "ordinary" art created at present and culture created today, but by tribes and for spiritual purposes. The latter is given stronger protection and is less commercialised.

At last, the World Heritage Convention is clearly a public law document. It has not mainly a property perspective and there are no private law rules. It is also important to

³⁵⁵ Forrest, 2010, p 388f

³⁵⁶ Magness-Gardiner, 2004, p 32

³⁵⁷ Forrest, 2010, p 398

remember that it only regulates immovables. In the convention it is said that matters of property are left to national legislators to decide about. This means that it is not ruled out that sites of world heritage can have property qualities. It is possibly to take on a property perspective but in practice, this is in each case decided by national legislation, where it is also possible to completely exclude this perspective. As we have seen before (chapter 7.4), at least in the case of the United States, there has been a debate on the designation of world heritage sites infringing property rights to the land. This shows the potential property quality of world heritage, or at least the surrounding land. It can however be doubted if the same perspective would be possible in countries that do not have the same legal system for defending constitutional rights and where the right to property is so fundamental as in the US.

15.1.8 Cultural property in other international legal instruments

As far as I know, the property quality of cultural objects is not denied in any other international instrument. It is true that within the European legal system, *cultural treasures* are excluded from the common market. I however doubt that this can be interpreted as cultural objects in general not being property, since few objects belong to this category and since every member state itself decides upon what to include.

Even though the question of cultural heritage is not really relevant within the WTO, it can be mentioned that the debate on culture within the organisation has been of quite some importance during several decades. The discussion concerns whether or not cultural products (films, magazines, books...) should be subject to free trade or if there should be special rules that better take the special characteristics of culture in consideration.

15.1.9 Constitutional perspectives

As I see it, there are two interesting questions that put a constitutional perspective on the cultural heritage question. First, the clash between the right to private property and the preservation of the national cultural heritage. Second, the possible constitutional problems with a state donating state public property to a foreign entity.

Modern constitutions generally include a constitutional right to private property³⁵⁸, based on the human right to property. I think that it can be questioned if all state measures made to protect the cultural heritage take this right in consideration. Prohibitions on exporting, a right for the state to buy objects, costly responsibilities for owners to protect objects and other measures interfere with the right to freely dispose of one's property and therefore violates the right to private property. In some constitutions however³⁵⁹, the cultural heritage is explicitly protected, which can make it easier to make exceptions from the right to property, in the same way as most constitutions make it possible to put a public interest before individual rights in some cases. It is probably easier to make exceptions from the right to private property if the heritage is explicitly protected by the constitution, instead of having to rely on a general rule in favour of the public interest. The fact that the specific rule on heritage exists already acknowledges that its protection is important. In my opinion though, exceptions for the public good are always difficult. The constitutional rights need a

³⁵⁸ Some examples: Regeringsformen article 2:18 (Swedish constitution), La Constitution - Déclaration des Droits de l'Homme et du citoyen de 1789, article 2 (part of the French constitution), Constitución Política del Perú de 1979, article 70 (Peruvian Constitution), Constitución Española de 1978, article 33 (Spanish Constitution)

³⁵⁹ Constitución Española de 1978, article 46, Constitución Política del Perú de 1979, article 21

very high level of protection and if it is too easy to make exceptions to satisfy public interests, the right is no longer a right, but one interest among others. This leads to the individual becoming more fragile in relation to the collective.

The second potential problem is if the constitution limits the government's possibility to accept demands for return of cultural objects. Most cultural objects that are claimed seem to be state property and it could be questioned if it lies in the interest of the citizens that the state gives back objects for free, since it means an economical loss for the state. (This of course depends on the acceptance for cultural objects as property, as something that has economical value.) The question here does not regard property as a right, but rather the government's duty to act in the interest of the people and a responsibility of good governance. It could also be seen as a question of democratic protection of the minority; a possibility to control that the government does not misuse its economical powers in a way that is irreversible.

In Sweden there is no explicit rule that prevents the government from returning objects to source countries without charges. The Budget law says that the state can only sell public companies and similar things according to market conditions, but I doubt that this comprises the free return of cultural objects.

It seems just giving the government liberty to decide upon the fate of objects since it is a question of politics to a high degree. It should also be remembered that all objects might not be valuable, for example human remains. On the other hand, when giving away objects of great value it is impossible to ignore the economical value. Donating a valuable object that could have importance for the state (for example by generating money if exhibited at a museum) is not necessarily a good idea. The same action would not be taken with objects without a cultural value, and one could question if it is reasonable to give the cultural factor such a big importance.

15.1.10 Former (private) property

Another aspect is that when the cultural objects were created and used, thousands of years ago, they were often subject to private property and not always the property of princes, emperors, states or other public entities. It seems that no difference is generally made between objects with private and public provenance; all things with their roots in an ancient culture are treated in the same way regarding their actual ownership. This shows that it is not a matter of one state only inheriting the objects of its predecessor. The objects demanded in return have many different sources; they have belonged to kings and princes, groups and tribes or individual persons. Suddenly, when the objects are demanded in return, the previous owners are not always in focus. Today, demands are generally made by states that claim any object having a cultural link to the contemporary nation. State property is what matters. It can be added that the definitions of and differences between private and public ownership not necessarily were the same in ancient Greece or Mesopotamia as in today's societies. In my opinion, it is a bit strange to deny the property quality to an object that formerly was considered someone's property. It is true that the object of heritage might have become *res nullius*, but this does not explain why the object not later on can become someone's property. Further, *res nullius* does not necessarily have to turn into state property when it is found; it can as well become private property.

15.1.11 Conclusion

After analysing different aspects of the cultural heritage in this chapter, I think that it is impossible to ignore that it has a property quality. Many people, especially nationalists, oppose this view on cultural objects, but I find this position futile. I also think that the property quality is not completely rejected by source countries, but seen both as a threat and as a possibility for groups defending their cultural heritage. The concept is used when it suits the aims of the group. Some examples are using the heritage for attracting tourists and the cases from the Inter-American Court of Human Rights where the native populations were awarded a property right to their ancient lands (chapter 12.1.8). Besides, the current development seems to mean including more objects in the property sector, for example when indigenous groups protect their intangible heritage by turning it into intellectual property. Some would probably say that this is only about Western influences, but I do not see why it is not possible that native groups want to be able to earn some money and in the same time protecting their traditions. Using the property system and IP rights might be the only way for native populations and developing countries to protect their heritage, and a very efficient way since property is protected both by ordinary laws and constitutionally.³⁶⁰ In my opinion, there is nothing wrong with making commercial use of the cultural heritage, neither in European museums or art galleries, nor in the source countries. The objects do not lose their cultural qualities only because they are put on display or protected by copyright laws. However, if the objects are seen as property, this must include all subjects, not only the native tribes. Logically, if one person or collectivity can have ownership to an object, this must extend to all people and all groups.

It is my strong conviction that the property system protects the cultural heritage – in the same way as it protects all other objects that we regard as property without even reflecting about it. One example is the objects acquired, looted and stolen during the colonial period; had there been a real property system and a functioning legal structure, it had been rather impossible to take a grand part of the objects out of the source countries. Objects taken as war booty would also have benefited from a proper respect for property. Normally, if a cultural treasure has a high price, it will be protected and probably even more so if it is put on the market rather than staying in a museum, where its value is not realised.

I also think that it is not at all sure that objects become less accessible if they are treated as property and (potential) goods. Even things that are bought by collectors are exhibited and viewed by big audiences. As in ordinary art, there are private museums and galleries. We should also remember that public museums also buy objects to incorporate in their collections. Public institutions can also benefit from donations made by collectors or works left to the state as part of paying a tax debt; a common scheme in many countries.

There is not necessarily an opposition between regarding cultural objects as property and at the same time claiming that it belongs to the common heritage. An object can represent both a commercial value and a cultural value at the same time. I do however think that it is necessary to take the cultural side of heritage objects in consideration. Culture in general and the cultural heritage cannot be treated just like any other property, at least not in all situations. Special rules and an acceptance and insight in the special characteristics and importance of cultural objects for people and for nations, is essential. Special rules or laws might not be necessary for all kinds of cultural objects, but at least for treasures of special importance. In my opinion, these special rules should recognize the universal nature of

³⁶⁰ Thuen, 2004, p 91

heritage and not only lead to severe export regulations and the like, but also protect objects from states and politicians, giving others a right to protest if the Peruvians put ancient Inca objects in humid museums, if the British sell all their Egyptian mummies to be put in the palace of a sheik or if the Taliban destroy ancient monuments.

Finding a balance between commercial and cultural interests is no easy, but at least it is a good start to recognize this dual nature of heritage. Denying one side is not a good strategy since it makes it impossible to understand the full spectrum of the problem. Taking this in consideration, I think that the *cultural property* definition is very good. It shows very well what it is all about; property, but with a special cultural value built-in.

16 Literature

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