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A survey of the 1970 UNESCO and 1995 UNIDROIT Conventions and their effects on Italian and European private law

1. The subject of our survey: Duelling between obligation to return cultural property and protection of the bona fide purchaser

In 2020, we celebrated the fiftieth anniversary of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: the 1970 UNESCO Convention) and the twenty-fifth anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: the 1995 UNIDROIT Convention). The two conventions are of significant historical importance because they mark the introduction of a previously unknown legal principle: the obligation to return stolen, illegally exported or illegally excavated cultural goods to their country of origin.

Such a necessity was originally confined to goods stolen during armed conflicts; already at the end of the Napoleonic era,¹ the restitution of works of art looted by the French army was organised, and this practice continued with successive conflicts. Today attempts are even being made to introduce provisions to prevent armed conflict from being an opportunity to facilitate the dispersion of cultural goods or to finance the belligerent parties (e.g. Regulation EU 2019/880). Nowadays the duty to return cultural property is considered especially needed to limit the damage caused by theft and removal of cultural property which occurred during the lockdown caused by the pandemic.²

Starting from the 1970 UNESCO Convention, the obligation to return works of art extends to works illegally transferred from a state, even in the absence of armed con-

¹ See: E. Steinmann, *Der Kunstraub Napoleons*, Rome 2007; E. Jayme, *Antonio Canova (1757–1822) als Künstler und Diplomat: Zur Rückkehr von Teilen der Bibliotheca Palatina nach Heidelberg in den Jahren 1815 und 1816*, Heidelberg 1994.

² See: "Le trafic de biens culturels a explosé pendant la pandémie de Covid-19", *Le Monde*, 9.11.2020, https://www.lemonde.fr/culture/article/2020/11/09/plus-de-pillages-moins-de-controles-des-tresors-culturels-victimes-collaterales-de-la-pandemie_6059098_3246.html (accessed: 20.02.2021).

flict, with the introduction of the general principle that the removal of a cultural good from its state of origin must be considered illegal. The principle was then also accepted by the EU, which issued a directive on this matter in 1993 (later replaced by Directive 2014/60), and it was subsequently reaffirmed by the 1995 UNIDROIT Convention.

The aim of this study is to investigate how these international rules have produced effects on national private law and on provisions concerning the circulation of cultural goods, contributing to the creation of a special status for these goods, which differentiates them from ordinary goods. The analysis will focus, in particular, on the consequences of the obligation to return cultural property with regard to bona fide purchase regulation. Indeed, as it will be seen, international rules to allow broad protection of the cultural heritage of Contracting States limit the protection of the owner, even if he/she has purchased the good in question in a diligent manner.

2. The introduction of the obligation to return cultural property: The 1970 UNESCO Convention

As we have already noted, the general principle that illicitly exported cultural goods must be returned to the country of origin finds its origin in the 1970 UNESCO Convention and was subsequently reaffirmed and strengthened by the 1995 UNIDROIT Convention and Directive 93/7/EEC (later replaced by Directive 2014/60/EU).

The purpose of the international conventions is to protect the cultural heritage of each Contracting State. This aspect must be underlined, as it marks a substantial difference between conventional law and EC/EU legislation, the main purpose of which is to reconcile the principle of free movement of goods with conservation of the cultural heritage of the individual Member States.

Analysing the international conventions (and the EC/EU directives) through the lens of private law, it should be stressed that one of the main results of the adoption of these international rules has been to exclude the applicability of the *possession vaut titre* rule in force in all the main continental legal systems. The inapplicability of this rule to stolen goods, which was already part of the legal *acquis* of almost all European legal systems, has been extended by the conventions also to cultural goods illegally exported or originating from illegal archaeological excavations.

The legal effect of the 1970 UNESCO Convention emerges from the reading of the provisions stating the obligation for Contracting States to recognise that the illicit import, export, and transfer of ownership of cultural goods are one of the main causes of the impoverishment of the cultural heritage of the countries of origin of these goods (art. 2) and that efforts must be made to combat such practices by undertaking the necessary remedies. The Convention, in its art. 3, defines as illegal the import, export, and transfer of ownership of cultural goods carried out in violation of the provisions adopted by the participating States, and in its art. 7 requires the State Parties not only to prevent the purchase of such cultural goods by museums and similar institutions,

but also to recover and return, at the request of the State of origin, any stolen and illegally imported cultural goods.

The 1970 UNESCO Convention provides that any “innocent purchaser”, or anyone who can claim a valid title to the stolen cultural property, is entitled to fair compensation. In this respect, it should be noted that the report of the Special Committee of Experts, which drafted the text, referred to a “fair compensation” to be paid to the buyer in good faith, so that it seems that this should be interpreted as an “innocent” purchaser (it is phrased thus in the English text of the Convention), i.e. a buyer who did not know of the unlawfulness of the provenance of the goods due to the theft or illicit export and who acted with necessary diligence.

The 1970 UNESCO Convention does not provide for a detailed regulation of the restitution action carried out by the state of origin, but merely imposes a general obligation to return the property to the state of origin, subject to compensation to the bona fide purchaser. However, it introduces a profile of extreme importance with regard to civil law, although still formulated generically: in the face of theft or illicit export, the application of the protection of the bona fide purchaser provided for by national law conflicts with conventional obligations and, therefore, cannot be applied. From the civil law perspective, the questions that remain unresolved under the Convention are mainly related to the identification of the concept of the good faith of the purchaser and the conditions necessary to be considered an innocent purchaser within the meaning of the Convention in order to receive the compensation provided. On this specific aspect the 1970 UNESCO Convention remains silent, while further details are contained in the subsequent the 1995 UNIDROIT Convention.

3. The need to make the 1970 UNESCO Convention more effective: The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention was the result of a twofold need deriving from the inadequacies of the 1970 UNESCO Convention: firstly, the need to harmonise some issues of private law and, secondly, the need to overcome certain limits linked to the generic nature of the conditions and modalities for the exercise of the action for restitution and the payment of fair compensation to the bona fide possessor.

Among the private law issues raised by the 1970 UNESCO Convention, the central one was certainly its impact on the existing rules of national law on the protection of the bona fide purchaser. Although the provision of art. 7(b)(ii) was drafted taking into account the rules of domestic private law, the final text, which was amended as a result of subsequent revisions, has required further clarification to allow it to be adapted to national legal systems.

The limited results achieved by the 1970 UNESCO Convention led the UNIDROIT Institute, in collaboration with UNESCO itself, to study new uniform rules on the return and restitution of cultural property. The Institute, assisted by renowned experts

and influenced by Directive 93/7/EC, after more than a decade of work, adopted in 1995 the Convention on Stolen or Illegally Exported Cultural Property, signed in Rome on 24 June 1995. This Convention aims to provide a uniform core of detailed rules on procedures for the return and restitution of cultural goods, improving the regulatory framework designed to prevent illegal practices in the cultural heritage trade, which, by taking advantage of the different national provisions on the acquisition of ownership, make it possible to trade in stolen, illegally exported, or illicitly excavated goods. In order to trade these goods easily, in fact, it is sufficient to transfer them to a country that allows the purchase of property in good faith, and, thus, through the *lex rei sitae*, the purchaser could refuse to return them, invoking his/her title of purchase.³

Article 1 of the Convention clarifies that it applies to international claims for: (a) the return of stolen cultural property; (b) the restitution of cultural property removed from the territory of a Contracting State in violation of its internal rules governing its export.⁴ The claim for restitution concerns profiles of private international law, while the claim for return satisfies public law interests of the requesting state.⁵ It should be noted that, in order to facilitate the recovery of archaeological finds from unauthorized excavations, both the rules governing the return of stolen cultural property and the rules governing the restitution of illegally exported cultural property may be applied. In this way, the Convention is suitable for the particular protection needs for cultural and scientific purposes that characterise archaeological finds, since, in principle, it is more difficult to prove that a cultural object has been excavated illegally than to prove that it has been illegally exported, for example, because it does not have a valid export certificate.

For the purposes of the Convention, any object or objects may be considered cultural if they "on religious or secular grounds, are of importance for archaeology, pre-history, history, literature, art or science" and belong to one of the categories listed in the Annex to the Convention (art. 2). It may seem unusual that, unlike Directive 93/7, the Convention does not provide the definition of the terms adopted. This choice was made because the solution adopted by the Directive was contested by some delegations during the Convention's drafting stage. The omission, however, seems to be

³ A particularly significant example is the case *Winkworth v Christie, Manson & Woods Ltd* [*Winkworth v. Christie, Manson & Woods Ltd.*, [1980] ch. 496, [1980] 1 All E.R. 1121], in which there was a dispute about the ownership of certain artworks that had been stolen from an English collector and transferred to Italy, where they had been sold to a bona fide purchaser. Subsequently the Italian buyer presented the artworks to an auction house in London for sale. The English collector, seeing the items in the auction catalogue, brought a legal action in England for their restitution. Under English law, a thief cannot transfer ownership, and if English law had been applied Mr Winkworth would have won the case and the items would have been returned to him. However, the court decided (properly) that the question of whether the seller had obtained good title to the objects when he purchased them in Italy was governed by Italian (not English) law. Under the Italian Civil Code (art. 1153 c.c.), a good faith purchaser can obtain a good title even to stolen objects.

⁴ Regarding the difference between return and restitution see: G. Volpe, "La Convenzione UNIDROIT sul ritorno dei beni culturali rubati o illecitamente esportati", *Notiziario del Ministero dei beni culturali e ambientali* 1996, no. 50, p. 37 ff.

⁵ *Ibidem*.

open to criticism, although it is partly justified by the intention to leave national courts more freedom to interpret the provisions.

One of the main problems has been to balance the interests of the bona fide purchaser of the stolen goods with those of the previous owner. The rules on good faith purchases are not uniform in all jurisdictions. There are countries like Italy that offer extensive protection to the bona fide purchaser at the detriment of the owner, even in the case of stolen goods (see: art. 1153 of the Italian Civil Code), while other legal systems (e.g. France and Germany) limit protection to goods possession of which has not been lost unintentionally, and others that do not provide any kind of protection. This is the case, for example, in the Portuguese and English legal systems, where, by virtue of the *nemo dat quod non habet* rule, the expropriated owner normally prevails over the bona fide purchaser.⁶

The Convention adopts a compromise solution by stipulating (art. 3 para. 1) that: “the possessor of a cultural object which has been stolen shall return it”. If the possessor is able to prove his/her due diligence at the time of purchase, he/she must be compensated through fair compensation (art. 4 para. 1).⁷ It is important to underline the fact that the 1995 UNIDROIT Convention (unlike the UNESCO one) does not consider good faith sufficient, but requires due diligence, which seems more difficult to demonstrate. Article 4 para. 4 of the Convention states the circumstances which must be taken into account in order to ascertain whether the purchaser has exercised due diligence. The provision provides that factors include: “all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.

In order to verify the presence of a right *in rem* in respect of the goods subject to the request for restitution, reference should be made to the *lex originis*,⁸ i.e. the law of

⁶ See: C. von Bar, *Gemeineuropäisches Sachenrecht*, Bd. 2, *Besitz, Erwerb und Schutz subjektiver Sachenrechte*, Munich 2019, p. 452.

⁷ See the so called *Goldberg case* (*Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus vs. Goldberg and Feldman Fine Arts Inc.*, 917 F.2d 278, United States Court of Appeals, 7th Cir. 1990, decision of the 24 October 1990), commented on by: Q. Byrne-Sutton, “The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects”, *International Journal of Cultural Property* 1992, vol. 1, issue 1, pp. 151–168; O. Muir Watt, “La revendication internationale des biens culturels: à propos de la décision américaine Eglise Autocéphale”, *Revue critique de droit international privé* 1992, vol. 81, p. 1 ff.

⁸ See: S.C. Symeonides, “Choice of Law Rule for Conflicts Involving Stolen Cultural Property”, *Vanderbilt Journal of Transnational Law* 2005, vol. 38, p. 1183, where the author proposes to determine the applicable law through the following general rule: “Except as otherwise provided by an applicable treaty or international or interstate agreement, or statute, the rights of parties with regard to a corporeal thing of significant cultural value (hereinafter: ‘thing’) are determined as specified below. A person who is considered the owner of the thing under the law of the state in which the thing was situated at the time of its removal to another state shall be entitled to the protection of the law of the former state (state of origin), except as specified below. The owner’s rights may not be subject to the less

the state of origin of the cultural good, and not to the *lex rei sitae*, which is generally adopted as a connecting factor in private international law.⁹ The solution follows the one already adopted by art. 2 of the 1991 Basel Resolution of the Institut de Droit International on the International Sale of Works of Art, which had largely addressed the problems arising from the application of the general connecting factor of the *lex rei sitae* also in the field of rights *in rem* relating to cultural goods.¹⁰

The reason behind the decision to use the *lex originis* instead of *the lex loci rei sitae*¹¹ is linked to the difficulties in applying art. 7 of the 1970 UNESCO Convention within legal systems protecting the purchase in good faith of movable property. It could be argued that the reference to the *lex originis* raises difficulties of coordination with the law applicable to the contract under which the goods were purchased after their illegal export and to which the *lex loci rei sitae* applies. However, under the Convention, this law cannot be taken into account because, if the purchase was made after the theft or the illicit exportation, a duly diligent purchaser is only entitled to demand fair compensation and will not be able to invoke the suitability of the contract to transfer ownership.

The request for return of the goods must be made within three years after the applicant has discovered the location of the goods and identified the owner. The return cannot be requested after fifty years (which may be extended by the laws of the individual States, e.g. art. 3 para. 5) from the date of the theft (art. 3 para. 3).

The limitation period for bringing an action does not apply to the most important cultural objects belonging to the cultural heritage of the Contracting States, for which there is no limitation period (art. 3 para. 4). Given the generality of the rule, both the Contracting State and the private individual physically dispossessed of the property

protective law of a state other than the state of origin, (a) unless: (i) the other state has a materially closer connection to the case than the state of origin; and (ii) application of that law is necessary in order to protect a party who dealt with the thing in good faith after its removal to that state; and (b) until the owner knew or should have known of facts that would enable a diligent owner to take effective legal action to protect those rights."

⁹ M. Salvadori, "Utilizzazione e circolazione dei beni artistici, storici, archeologici. Profili internazionalistici" [in:] *I nuovi contratti nella prassi civile e commerciale. VII. Beni culturali*, ed. P. Cendon, Turin 2003, p. 411.

¹⁰ *Ibidem*.

¹¹ With regard to the debate on *lex rei sitae* and *lex originis* with regard to cultural heritage see: T. Szabados, "In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications", *International Journal of Cultural Property* 2019, vol. 27, issue 3, p. 323 ff.; E. Jayme, "Internationaler Kulturgüterschutz: Lex originis oder lex rei sitae. Tagung in Heidelberg", *Praxis des Internationalen Privat- und Verfahrensrechts* 1990, no. 10, p. 347 ff.; *idem*, *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz*, Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse, Jg. 1991, Bericht 3, p. 7 ff.; *idem*, "Die Nationalität des Kunstwerks als Rechtsfrage" [in:] *Internationaler Kulturgüterschutz (Akten des Wiener Symposium, 18./19. Oktober 1990)*, ed. G. Reichelt, Vienna 1992, p. 7 ff.; *idem*, "Antonio Canova: la Repubblica delle arti ed il diritto internazionale", *Rivista di diritto internazionale* 1992, vol. 75, p. 889 ff.; *idem*, "Kulturgüterschutz in ausgewählten europäischen Ländern", *Zeitschrift für vergleichende Rechtswissenschaft* 1996, no. 95, p. 158 ff.; *idem*, *Die politische Dimension der Kunst: Antonio Canova*, Frankfurt am Main 2000.

have the right to bring an action for restitution. This is a fundamental difference between the Convention and EU law (see EU Directives 1993/7 and 2014/60), which, by contrast, allows only a Member State to take legal action.

The second part of the Convention is dedicated to the regulation of illegally exported cultural goods, i.e. the regulation of the return of goods that have unlawfully left the state of origin or which, despite having left it lawfully, are not returned to that state on time and in the manner provided for. In order to be able to invoke these provisions, it is, therefore, necessary that all Contracting States adopt internal regulations on the export and protection of cultural goods. The right to request the return of illegally exported goods, unlike in the case of stolen goods, lies exclusively with the Member States (art. 5 para. 1). As in the case of stolen goods, if the illegally exported goods have been acquired by a duly diligent third party purchaser, he/she shall be entitled to fair compensation.

The UNIDROIT Convention entered into force on 1 July 1998 and has been signed or ratified by forty-eight States. These are mainly so-called “exporting” states, i.e. countries whose cultural heritage is continually threatened by illicit trafficking and which, therefore, in general, already have advanced legislation on the protection and conservation of cultural goods. The fact that “importing” countries – where trade in cultural goods is free and which have traditionally shown resistance to regulating this market – have not signed or ratified the Convention is a clear sign of its effectiveness in protecting cultural heritage, but is also the reason for its limited diffusion.

4. The relationship between the 1995 UNIDROIT Convention and European Union law

The EU legislator has regulated the return of cultural goods illegally exported from one EU Member State to another with two Directives 93/7 and 2014/60. Unlike the UNIDROIT Convention, the European legislation does not expressly take into account stolen goods and goods resulting from illicitly excavated archaeological finds. However, from reading the recitals (Recitals 5 Dir. 93/7 and Recitals 5 and 16 Dir. 2014/60) and the texts of the two Directives (art. 5 and 10 Dir. 2014/60), it is possible to assume that the provisions contained in the two Directives can also be extended to such goods. The content of the Directives and the Convention constitutes therefore, to a certain extent, overlapping *ratione materiae*.

Moreover, when the 1995 UNIDROIT Convention was drafted, Directive 93/7 was the model to which it looked and by which it was inspired, given that it was only two years older; at the same time, preparatory work carried out on the Convention had inspired the drafting of the Directive itself. It is, therefore, not surprising that there is much in common between the two texts and that the potential overlap between them has been taken into account by the Convention itself, which in art. 13 provides that “this Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this

Convention, unless a contrary declaration is made by the States bound by such instrument". Paragraph 3 of art. 13 is even more precise providing that "In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules"¹² According to the so-called "disconnection clause" contained in para. 3, EU Member States, which are also members of the Convention, will be allowed to apply the provisions of the Directive which overlap with those of the Convention; whereas in matters not covered by the Directive, the rules of the Convention will apply.¹³

The "disconnection clause" has only been invoked by six of the fourteen EU Member States that have signed the Convention.¹⁴ The question, therefore, arises as to what would happen if these states were called to choose between the Directive (the problem, as we shall see, arises to a lesser extent with regard to Directive 2014/60) and the Convention.

The clause made it possible to invoke the rules of the Convention to fill certain gaps in the Directive.¹⁵ For example, the UNIDROIT Convention could have been used to require the restitution or the return of goods not covered by Directive 93/7 or to allow the exercise of actions which, under the Directive, were to be regarded as time-barred.¹⁶ With the introduction of the 2014 Directive, however, the application of the two rules,¹⁷ *ratione temporis* and *ratione materiae*, has essentially coincided, reducing the cases where the Convention could have been used to fill gaps in EU legislation.

Although there are many similarities between the UNIDROIT Convention and the Directives, it is important to note that there are also many differences, which can be traced back to two distinct profiles, one formal, linked to the different nature of the two acts, the other of content.¹⁸ As regards the differences in content, it should be

¹² See: J.A. Winter, "The Application of the Unidroit Convention on Stolen or Illegally Exported cultural Objects in Relations between Member States of the European Union" [in:] *Reflections on International law from the Low Countries: In Honour of Paul de Waart*, eds. E.M.G. Denters, N.J. Schrijver, The Hague 1998, p. 347 ff.

¹³ According to the *Rapport explicatif* (p. 557) "A la demande de la délégation de l'État détenant alors la présidence du Conseil de l'Union européenne, une clause dite 'de déconnexion' a été insérée pour permettre aux États membres d'organisations d'intégration économique ou d'entités régionales de déclarer qu'ils appliquent les règles internes de cette organisation ou entité au lieu de celles de la Convention dont le champ d'application coïncide avec celui de ces règles".

¹⁴ The "disconnection clause" has been invoked by: Finland, Greece, Italy, Netherlands, Spain, and Sweden; see: UNIDROIT Convention on stolen or illegally exported cultural objects (Rome 1995) – Status, last updated: 2.12.2019, <https://www.unidroit.org/status-cp> (accessed: 20.02.2021).

¹⁵ See: *Il Codice dei beni culturali e del paesaggio tra teoria e prassi*, eds. A.L. Maccari, V. Piergigli, Milan 2006, p. 357.

¹⁶ See: G. Magri, *La circolazione dei beni culturali nel diritto europeo: limiti e obblighi di restituzione*, Naples 2011, p. 71.

¹⁷ See: *Il Codice dei beni culturali...*, p. 357.

¹⁸ See: M. Marletta, *La restituzione dei beni culturali: normativa comunitaria e Convenzione Unidroit*, Padua 1997, p. 203.

noted that the scope of the Convention is broader than that of the Directive. The Convention aims to regulate both the restitution of stolen cultural goods and the return of those illegally exported. Moreover, in the case of stolen goods, the Convention also recognises the legitimacy of private individuals to take action to obtain the restitution. It follows that, while the Directives only protect the public interest of Member States, the Convention also aims to satisfy the private interest of the owner, allowing him/her to recover the ownership of the stolen good.

The correct and uniform interpretation of the Directives by the Member States is subject to the supervision of the Court of Justice, to which national courts are entitled to refer the matter using a preliminary ruling procedure, while the Convention lacks an organ entrusted with a nomophilactic function. Finally, compliance with the Directive is guaranteed by the effective system of control and sanctions provided for in the Treaties, while compliance with the Convention remains entrusted to the weakest guarantee mechanisms offered by international law.¹⁹

The Convention is more rigorous in demanding that the requesting state demonstrate to the state requested which the primary interests are to be satisfied by the restitution of the cultural object involved, by providing proof of the damage caused by the loss of the object (see: art. 5).

Another difference between the two texts results from the limitation period for bringing an action, which in Directive 93/7 is only one year. The limitation period, which was considered too short to allow states to implement the measures necessary to bring an action, has been extended by art. 8 of Directive 2014/60 and is now aligned with that laid down in the UNIDROIT Convention. This shows that there is still a dialogue between the UNIDROIT Convention and EU law.

Both the Convention and the EU legislation make use of the purchaser's due diligence criterion in order to recognise the right to fair compensation; the rules of the Convention are, however, more elaborate than those set out in Directive 93/7. The latter, in fact, limits itself to providing, in art. 9, that the competent court of the state in which restitution is requested shall award fair compensation to the possessor of the good on the basis of the circumstances of the case, provided that due diligence at the time of purchase is proved. The Convention, on the other hand, following the proposal of 1993 Directive, sets out more specifically the criteria to be examined in determining whether or not there has been due diligence on the part of the purchaser. The Convention also makes a distinction according to whether the goods are stolen or exported illegally. In the first case, art. 4 provides that the possessor is entitled to fair compensation when the goods are returned, provided that he/she can prove that he/she "neither knew nor ought reasonably to have known that the object was stolen". In the case of illegally exported goods, on the other hand, art. 6 requires the possessor to prove that he/she "neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported". This difference has been partially eliminated by art. 10 of the 2014 Directive, which, transposing the wording

¹⁹ *Ibidem*, p. 205.

of the Convention, provides that in determining whether the purchase was made with the required (due) diligence, consideration must be given to “all the circumstances of the acquisition, in particular the documentation on the object’s provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances”. The Directive takes over almost word-for-word art. 4. para. 4 of the Convention, but by adding “the authorisations for removal required under the law of the requesting Member State”, it has become even more rigorous in regulating due diligence than the Convention.²⁰

The burden of proof of having purchased with due diligence shall be carried by the possessor (art. 10 para. 1 of Directive 2014/60). The Directive, in this way, seeks, on the one hand, to standardize the interpretation of the notion of due diligence, providing a guide to judges in the concrete evaluation of the concept, and, on the other hand, always with harmonizing intent, it has removed the regulation of the burden of proof from the *lex fori*, and, therefore, from any differences between civil and common law systems, in order to attribute it in a general way to the possessor/purchaser.

Article 6 para. 3 of the Convention provides, in lieu of compensation, and in agreement with the requesting state, that the possessor obliged to return the cultural property to that state may decide to retain ownership of the good or to transfer ownership to a person of his choice residing in that state. The Directive does not foresee such choice for the possessor; neither does it address the question of attribution of ownership of the returned good (art. 12 Dec. 93/7 and 13 Dec. 2014/60). It merely states that the acceptance of the action entails the restitution of the property in the territory of the requesting state and that the requesting state will regulate the attribution of ownership.

5. Closing remarks

According to some scholars the question should be asked whether “cultural property is distinctive or special, and therefore different from ordinary property”.²¹ According to Eric Posner, “[t]here is no good argument for international legal regulation of cultural property, during peacetime or wartime”, and it might even be assumed that

²⁰ M. Schneider, “The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive”, *Santander Art and Culture Law Review* 2016, no. 2, p. 161.

²¹ E.A. Posner, “The International Protection of Cultural Property: Some Skeptical Observations”, *Chicago Journal of International Law* 2007, vol. 8, no. 1, pp. 214–215.

“the treatment of cultural property would improve, even during wartime, if the current regime of international regulation were abolished”.²²

In reality, at a national, European and international level, the rules on cultural property are different from those governing other types of ownership and this seems more than understandable: with regard to cultural property, in fact, in addition to the owner’s interest, there is also a collective interest in its conservation and preservation. For this reason, in Italy, it has been observed that the ownership of cultural goods is a *sui generis* property ownership,²³ in which both the state’s interest in the preservation of the national cultural heritage and that of the private owner (if any) coexist. Therefore, in Italy, it has been proposed that cultural heritage should be considered as a “common” property.²⁴ Given that the category of commons is not yet transposed by Italian law, but it is just a thought within a part of academic literature,²⁵ even working with traditional categories and supported by the *ius condito*, it is evident that cultural goods, even when they are privately owned, never completely belong to their private owner.

They are one of the most typical expressions of the social function of private property which, since the Weimar Constitution, characterises European private law, allowing limitations to the right to property of individuals in accordance with the (public) need to protect an interest of the state and the community.²⁶ The UNESCO and UNIDROIT Conventions and, although to a lesser extent, given that by express declaration they do not affect the ownership regime, Directives 93/7 and 2014/60 are a further manifestation of the presence of a public interest in cultural property, an interest which may go so far as to limit and exclude the private owner’s dominical rights.

The rules we have examined, in fact, derogate from the normal rules of private law and contribute to creating a particular private *status* for cultural property, which is largely influenced by the public interest. The 1995 UNIDROIT Convention and the directives issued by the EU deserve special attention in this analysis. These rules have had an impact on the concept of cultural property, contributing to the creation, at

²² *Ibidem*, note 63 and pp. 214, 215, 225, 228.

²³ See: L. Biamonti, “Natura del diritto dei privati sulle cose di pregio artistico e storico”, *Foro italiano* 1913, part I, sec. 1, column 1011; R. Balzani, *Per le antichità e le belle arti. La legge n. 364 del 20 giugno 1909 e l’Italia giolittiana. Dibattiti storici in Parlamento*, Bologna 2003, p. 404; G. Severini, “L’immaterialità economico nei beni culturali”, *Aedon* 2015, no. 3, <http://www.aedon.mulino.it/archivio/2015/3/severini.htm#nota12> (accessed: 20.02.2021).

²⁴ See: S. Marotta, “Per una lettura sociologico-giuridica dei beni culturali come ‘beni comuni’” [in:] *Patrimonio culturale. Profili giuridici e tecniche di tutela*, eds. E. Battelli et al., Rome 2017, p. 37 ff.

²⁵ Indeed, the creation of a new ownership system that lies between public and private ownership is rightly criticised also on a philosophical level. See, in this regard, the convincing arguments of P.P. Portinaro, *Le mani su Machiavelli. Una critica dell’«Italian Theory»*, Rome 2018, *passim*; S. Mabellini, “I beni culturali e lo status di ‘beni comuni’: un’assimilazione indispensabile?”, *Economia della cultura* 2017, no. 1, pp. 81–94, which stresses that the constitutional status of the property – both public and private – has not run out of the ability to protect the collective interest, as evidenced paradigmatically by the development of the status of cultural heritage.

²⁶ See: F. Longobucco, “Beni culturali e conformazione dei rapporti tra privati: quando la proprietà «obbliga»”, *Politica del diritto* 2016, vol. IV, p. 547 ff.

least with regard to circulation, of that particular status of cultural property mentioned above. The international rules, in fact, intervene to limit the circulation of cultural goods and to protect the interest of the requesting state (and also of the owner in the case of the UNIDROIT Convention) to have returned goods that have been stolen or illegally exported. The provision clearly affects the regulation of good faith purchases by derogating from the rules normally adopted by European legislation. Moreover, the investigations that the purchaser must carry out in order to be considered diligent appear to be so in-depth that it is difficult to compare the circulation of cultural goods with that of other movable goods for which, on the contrary, no particular precautions are generally prescribed. The general rule, accepted by European private law, is that whoever buys in good faith from the apparent owner becomes the owner if he/she buys under a suitable title and comes into possession of the good.

This rule has different variations at a national level and operates in some jurisdictions in a more extensive way, while in others it does so in a more restrictive manner; in Italy, for example, the protection of the bona fide purchaser is particularly wide and also includes stolen goods, which in the rest of Europe, by contrast, are generally excluded from its scope of application.

The UNIDROIT Convention (and on its model EU legislation), on the other hand, limits the effects of the protection of the bona fide purchaser by requiring not only the return of stolen goods, which would be natural in almost all European jurisdictions, but also the restitution of illegally exported goods. With reference to the subjective requirement, the international regulation adopts an even stricter criterion than the good faith already known to the national legal systems, imposing a particularly high degree of diligence on the purchaser in order to claim fair compensation in the event of return or restitution. Such a regulation ends up by limiting the field of application of the rules of private law, harmonising legal systems so as to exclude the possibility that, through the application of the *lex rei sitae* and an extensive protection of the bona fide purchaser, markets are created in which trade in cultural goods of illicit origin can be concentrated.

From the international and European Union rules, there derives, therefore, a reformulation of the discipline of the bona fide purchase, according to which the purchaser, instead of keeping the ownership of the purchased goods, has the right to fair compensation, provided, however, that he/she has acquired the property with due diligence, i.e. with a deeper diligence than that adopted by a bona fide purchaser. Italian jurisprudence seems to have been influenced by these innovations: in fact, when it is called upon to rule on the applicability of art. 1153 of the Italian Civil Code to cultural goods, the judgment appears to be particularly rigorous in imposing on the purchaser the burden of proving his/her good faith.²⁷

The rules on the international circulation of cultural goods have struck an even greater echo in Italian literature, where some scholars have begun to reflect on the compatibility of the protection of bona fide purchasers provided for in art. 1153 of

²⁷ See: Cass. 14. 9. 1999, Nr. 9782, in *Giust. civ. Mass.* 1999, p. 1968; M. Cenini, *Gli acquisti a non domino*, Milan 2009, p. 166 ff.

the Italian Criminal Code with reference to cultural goods, stressing how the moment has arrived to rethink the discipline of good faith purchasing, to bring it into line with that provided for in other European legal systems.²⁸

The Draft Common Frame of Reference of European private law (DCFR) itself, in identifying the common frame of reference of European private law on the bona fide purchase of movable property, in art. VIII-3:101 (2), excludes stolen cultural goods, demonstrating a particular sensitivity to the subject, which is further proof of how much international and European law has affected European private law.

It might be questioned why the rules on the protection of cultural heritage affect private law and whether such an influence of public law on private law is desirable. The reason why rules on the protection of cultural heritage restrict the freedom of private individuals and affect private law is clearly linked to the need to ensure the overriding general interest in the preservation of cultural heritage, which can be jeopardised by inadequate market regulation and the absence of provisions restricting the free movement of cultural goods and thereby making the rules on general goods inapplicable to them. A delimiting intervention of public law over private law is therefore essential. The UNESCO and UNIDROIT Conventions, as well as the European directives, fulfil precisely the function of connecting public and private law, avoiding that the freedom of movement provided for goods also extends to goods that are an expression of the cultural interest of the individual states. They also demonstrate that in the struggle between cultural nationalism and internationalism,²⁹ the idea that cultural goods are the expression of the cultural community that produced them and that, therefore, they must be returned to that community is currently prevalent.

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²⁸ R. Sacco, R. Caterina, *Il possesso*, 4th ed., Milano 2014, p. 445; G. Magri, "Beni culturali e acquisto a non domino", *Rivista di diritto civile* 2013, no. 3, pp. 741–766, *idem*, "Directive 2014/60/EU and Good Faith Acquisition of Cultural Goods in Italy" [in:] *Cultural Heritage. Scenarios 2015–2017*, eds. S. Pinton, L. Zagato, Venice 2017, p. 227 ff.

²⁹ See: J.H. Merryman, "Cultural Property Internationalism", *International Journal of Cultural Property* 2005, vol. 12, no. 1, p. 11 ff.; F. Francioni, "Beyond State Sovereignty: the Protection of Cultural Heritage as a Shared Interest of Humanity", *Michigan Journal of International Law* 2004, vol. 55, no. 4, p. 1209 ff.

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Summary

Geo Magri

A survey of the 1970 UNESCO and 1995 UNIDROIT Conventions and their effects on Italian and European private law

This article analyses the influence on Italian and European private law of the UNESCO and UNIDROIT Conventions and European directives on the return of stolen and illicitly exported cultural goods. In effect, international rules have influenced the application of rules on the bona fide purchase of movable property, amending the provisions in force in most European countries and contributing to the constitution of a particular statute for cultural property.

Keywords: cultural heritage, good faith, restitution, return

Streszczenie

Geo Magri

Przegląd konwencji UNESCO (1970) i konwencji UNIDROIT (1995) oraz analiza ich wpływu na włoskie i europejskie prawo cywilne

W artykule omówiono wpływ konwencji UNESCO i konwencji UNIDROIT na włoskie i europejskie porządki prawa cywilnego, a także na unijne dyrektywy dotyczące zwrotu dóbr kultury wyprowadzonych niezgodnie z prawem z terytorium państw członkowskich. Porządek prawa ponadnarodowego wpływa na zastosowanie norm rządzących nabyciem rzeczy ruchomej w dobrej wierze, *de facto* wypierając obowiązujące w państwach członkowskich przepisy i tworząc autonomiczny reżim prawny dla ruchomych dóbr kultury.

Słowa kluczowe: dziedzictwo kultury, dobra wiara, restytucja, zwrot