

RESTITUTION OF LOOTED ART IN EUROPE: FEW CASES, MANY OBSTACLES

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*Art belongs to humanity. Without this we are animals.
We just fight, we live, we die. Art is what makes us human.*

Mikhail Piotrovsky, Director Hermitage Museum

INTRODUCTION

The paper will highlight as from the general “right to booty” of ancient times, the international community developed an international customary principle stating that looted art shall be restituted to its legitimate owner. Then the paper will examine how Europe currently deals with art looting, focusing on Italian law and some caselaw on looted art. Finally, the objectives of the paper are to demonstrate how Italy, despite few legal disputes were decided so far, could be a good forum to bring restitution actions and how to strengthen the protection against art looting at European level, providing more uniformity¹.

That said, the purpose of this paper is also to explore the practice of restitution of looted art in Europe, focusing on Italy, explaining the reasons why several disputes brought by European claimants requesting restitution of their artworks looted in Europe during the Second World War are often decided by American courts.

Art looting occurred throughout all ages, as the taking was usually considered as a “right to booty” (*ius predae*)² and it is still a highly topical issue if we

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1 In this article, I am not giving legal advice, merely providing a general overview of some issues and presenting here only my own views and opinion.

2 TOMAN, JIRI, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth, Publishing Company, 1996, p. 3.

consider the looting of antiquities, which occurred during the recent conflicts in Afghanistan, Iraq³ or Syria⁴.

Before Napoleon the act of looting was mainly aimed to impoverish the conquered people of gold or food, but from Napoleon onwards looting concerned more goods that were not necessities and “*in the case of paintings, the looting of which the Napoleonic, Nazi and Soviet regimes were all adept, the artworks or treasure had no intrinsic value, but an immense perceived value for the status of those regimes*”⁵. During the World War II, cultural goods were looted on a massive scale as never happened before and “*post-war records show that several million objects were looted, including museum quality works of art, furniture, books, religious objects and other culturally significant works*”⁶, the Nazis also set up a special department for the seizure and securing of objects of cultural value.

It was only during the last century that the principle that neither public, nor private properties may be seized, nor destroyed, nor taken during war⁷ was included in international treaties, after being only mentioned in 1863 in Lieber’s Code⁸.

The principle that art looting was outlawed was then included in the Annex attached to the Second Convention on the Laws and Customs of War on Land⁹ (1899 Hague II) and in the 1907 Regulations concerning the Laws and Customs on Land, annexed to the Fourth Hague Convention (1907 Fourth Hague Convention) which prohibits the pillage in general¹⁰ and stating that “*all seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings*”¹¹. In 1899 and 1907 Conventions there was no reference to any obligation of restitution of the artwork at the end of the war, but some scholars deem that this

3 WANTUCH-THOLE, MARA, *Cultural Property in Cross Border Litigation: Turning Rights into Claims*, De Gruyter, 2015, p. 2. The author reports that: more than 55,000 artifacts that were looted in Afghanistan since 1980s are still missing; Iraq were largely affected by the Two Gulf Wars and more than 13,000 objects were looted.

4 FEDI, FERDINANDO, “La difesa e la protezione dei beni culturali in caso di conflitto armato”, in *Informazioni della Difesa*, 5/2014, p. 7. The author reports the destruction of the Mosul Museum (Iraq), the Nabi Yunus shrine at the mosque Al Nabi, but also the damage to five world cultural heritage sites as the ancient city of Palmira and the Alep quarters.

5 LINDSAY, IVAN, *The History of Loot and Stolen Art*, Unicorn Press, 2014, p. 2.

6 Commission for Looted Art, *European Parliament Resolution and Report of Committee on Legal Affairs and the Internal Market*, March 26, 2003, available at: <http://www.lootedartcommission.com/european-union>

7 SCOVAZZI, TULLIO, “‘Diviser c’est détruire’: Ethical principles and legal rules in the field of return of cultural property”, *Rivista di diritto internazionale*, 2, 2011, pp. 341 ff.

8 HARTIGAN, RICHARD SHELLEY, *Lieber’s Code & the Law of War*, 1983.

9 1899 Hague, Artt. 28, 47 and 56

10 Art. 28 of 1899 and 1907 Hague Conventions “*The pillage of a town or place, even when taken by assault, is prohibited*”.

11 Art. 56 (2) of 1899 and 1907 Hague Conventions.

undertaking shall be considered as a customary international rule¹², as affirmed already in a leading Italian case *Mazzoni v. Finanze dello Stato*¹³.

During the Second World War, eighteen allied powers adopted also the London Declaration reserving all rights to declare invalid any transfers of property, rights and interests of anything which were situated in the territories which were under occupation or control. Likely, the Peace Treaties of 1947 between the Allied and the Associated Powers (Bulgaria, Finland, Hungary, Italy and Romania) included provisions which requested the return of cultural properties.

More importantly, art looting started being considered a war crime: the Charter of the International Military Tribunal of Nuremberg - annexed to the Agreement signed in 1945 by France, the Soviet Union, the United Kingdom and the United States - included the “*plunder of public or private property*”¹⁴ among the war crimes.

I. EUROPEAN LAW ON LOOTED ART

I.1. THE LEGAL FRAMEWORK

After the end of the Second World War many post-war treaties recognized that States had the duty to recover looted property and restitute it to its rightful owners¹⁵⁻¹⁶: for example, State Parties to the First Protocol of the 1954 Hague Convention undertook in Article 1 to return cultural property at the end of the war. This return was unconditional and there was no time limit for bringing a claim for return.

Under international law, States became custodians of looted property and not owners of it, so that many European countries (*e.g.* France, Greece, Italy,

12 FRIGO, MANLIO, *La circolazione internazionale dei beni culturali, diritto internazionale, diritto comunitario e diritto interno*, Giuffrè, p. 88, which mentions also MAHLIK, STANISLAW E., “La protection internationale des biens culturels en cas de conflit armé”, in *Recueil des Cours de l'Académie de Droit International*, Paris, 1967, I, p. 96.

13 Court of Venice, January 8, 1927, *Foro Italiano*, 1927, I, p. 961. This decision is frequently mentioned by caselaw to prove the customary nature of the obligation of restitution. This decision stated that “the legal concept of war booty and plunder does not involve the inclusion of anything that is taken by the occupying army. According to the principles of international law, booty is only taking possessions of war objects abandoned by the belligerent enemy and therefore it cannot be extended to include the looting that, while in ancient times was allowed to reward the zeal of troops, today is absolutely forbidden”.

14 See art. 6 b) of the Charter of the International Military Tribunal of Nuremberg.

15 1954 Hague Convention for the protection of Cultural Property in the Event of Armed Conflict provides at art. 4 for the obligation of respect of cultural property against any form of theft, pillage and misappropriation and art. 1 of its first Protocol obliges State parties to prevent the export of cultural property. The second protocol at Art. 9 (1) (a) obliges the State Parties not only to prevent but also to prohibit any illicit export, other removal or transfer of ownership of cultural property.

16 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property at Art. 11 considers illicit the “export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power”.

Netherlands) recognized this concept, creating a presumption in favor of the original owner of property looted during the war¹⁷.

Now that most of these laws have lapsed, or the statutes of limitations expired, there is no international convention which is directly applicable to looted art during the World War II period. Indeed, the most important treaties on this issue - the 1954 Hague Convention¹⁸, the 1970 Unesco Convention¹⁹, the 1995 Unidroit Convention²⁰ - are all non-retroactive, as they are based on art. 28 of Vienna Convention on the law of treaties²¹.

As to European law, the European Union does not have set up a comprehensive legal framework so far. Indeed, the European Community enacted only the Regulation 3911/92 on the export of cultural goods (replaced by Regulation 116/2009), and the Directive 93/7 (replaced by the Directive 2014/60) on the return of cultural objects illegally exported from the territory of member States: both legal measures do not specifically concern looted art.

Indeed, the Regulation 3911/92 was aimed to prevent the export outside the EU of works of art unlawfully removed from EU countries.

The Regulation defined the concept of “national treasure” in an Annex providing that national treasure can be exported only if accompanied by an export certificate; the export of artworks not falling in the definition provided by the annex are ruled by national provisions.

The Directive focuses on the circulation of a cultural object within the EU and provides a system pursuant to which the judicial authorities of the EU State where the object was imported shall order its return to the requesting member State. However, the Directive did not establish a level playing field for individual claims, which must still rely on extremely varied national legal requirements and cannot not applied retroactively²².

As to soft law, the European Parliament adopted two resolutions on the issue of looted cultural goods: one in 1995(9) on the return of plundered property to Jewish communities and the other on the restitution of property belonging to Holocaust victims in 1998(10).

Likely, the Council of Europe (CoE) adopted several conventions on the protection of various aspects of cultural heritage, such as: the 1954 European Cultural Convention, the 1969 European Convention on the protection of the archeological

17 MANGANARO A., *Restitution of looted art in international law*, Luiss Thesis, pp. 31 ff., available at: <http://tesi.eprints.luiss.it/18617/>

18 Art. 33 of the 1954 Hague Convention for the protection of Cultural Property in the Event of Armed Conflict on the prohibition of exportation of cultural property from the occupied territories and on the obligation to return it.

19 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

20 UNIDROIT Convention on stolen or illegally exported cultural objects.

21 Vienna Convention on the law of treaties concluded on May 23, 1969.

22 See art. 13 of the EC Directive 93/7.

heritage, finally, the 1985 European Convention on offences relating to cultural property, which never entered into force.

Less than twenty year ago, all EU member States, including Italy, adhered to the 1998 Washington conference principles on Nazi-confiscated Art (the “Washington Declaration”) establishing important – though non-binding - principles concerning the restitution of art confiscated by the Nazi regime in Germany before and during the World War II. At the European Level, the CoE adopted a resolution in 1999^[23].

More recently, plundering was declared again a war crime in the Statute of the International Criminal Tribunal for the former Yugoslavia²⁴. The follow-up October 2000 Vilnius International Forum on Holocaust Era Looted Cultural Assets aimed at bringing the Washington principles and the 1999 CoE Resolution into effect²⁵.

Finally, the Terezin Declaration on Holocaust Era Assets and Related Issues was adopted by the States participating in an international conference in Prague and Terezin held in 2009^[26].

In view of the foregoing, EU has not yet established a comprehensive legal framework to resolve the legal problems arising especially from art looted during the Second World War.

1.2. LACK OF A HARMONIZED LAW ON ART LOOTING IN EUROPE

EU then lacks harmonized rules on looted art and its restitution, and this legal vacuum appears clearly with reference to: applicable law, jurisdiction issues, statute of limitation, burden of proof in ownership cases, good faith purchase defense, so that the outcome of legal disputes in national courts of EU member States are quite uncertain.

As to jurisdiction, Brussels I-*bis* Regulation (Regulation n. 1215/2012 of the European Parliament and of the Council of 12 December 2012) and the Lugano Convention are aimed to determine the competent court, but they apply only when both the plaintiff and the defendant are domiciled in the EU or in the European Free Trade Association, beyond having other critical issues²⁷. Moreover, Brussels I-bis Regulation does not contain any specific provision on looted art, but only

23 Parliamentary Assembly of the Council of Europe, Resolution 1205(1999): Looted Jewish Cultural Property.

24 Art. 3 d) of this Statute prohibits the “*seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science*” whereas art. 3 f) states against any “*plunder of public or private property*”.

25 Vilnius Forum Declaration.

26 See at: <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>

27 These two international laws have the following critical issues: (i) they apply only when both the plaintiff and the defendant are domiciled in the EU or in the European Free Trade Association member states; (ii) courts can also decline their jurisdiction because of sovereignty immunity. To this last purpose, common law countries may declare their lack of jurisdiction based on the principle of *forum non conveniens*.

on recovery action based on the Directive 93/7^[28]. This means that, as each EU member State has different international private provisions, many national European courts may theoretically have jurisdiction over the same restitution claim of a looted artwork²⁹: the authorities of the place where the looting act took place, as well as the authorities of the place where the item was taken and for example sold, or the authorities of the place where the artwork is currently located or where the contract related to the artwork shall be performed.

Moreover, even when jurisdiction is clearly conferred on one State, the policy of this State can be very difficult for a claimant. For instance, Germany was less cooperative with restitution claims ignoring them or working with museums to create barriers to restitution, but also countries such as Italy, Hungary, Poland seem to have done little to comply with international agreements³⁰.

Likewise, there is not a harmonized conflict of law rules at European level on looted art. European courts may apply: domestic provisions of European member States law, the Rome I Regulation on the law applicable to contractual obligations³¹, or Rome II Regulation on the choice of law on non-contractual obligations³². Therefore, the applicable laws could be namely: the law where the artwork is located (*lex rei sitae*), the law applicable to the contract related to the artwork or the place of destination (if the artwork is in transit) or the law of where the damage occurred.

1.3. OTHER LEGAL BARRIERS FOR LITIGATING A RESTITUTION CASE IN EUROPE

In addition to nonuniformity, there are other barriers for litigating art looted cases in Europe such as the good faith purchase rule applied by many European nations, which prefer the current purchaser to the dispossessed previous owner³³. This appears clearly with adverse possession: for example, in Italy the possessor can become incontestably owner of an item after ten years of uninterrupted pos-

28 Art. 7 (4) of Regulation Brussels I-bis provides as a special forum “as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seized”.

29 Policy Department for Citizen’s rights and constitutional affairs, *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations: Study for the Jury Committee*, European Parliament (May 2016), available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282016%29556947

30 COHEN, P., “The story behind woman in gold: Nazi art thieves and one painting’s return”, *NY TIMES* (March 30, 2015), available at: <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html>

31 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

32 EU Regulation No. 864/2007 on the conflicts of law on the law applicable to non-contractual obligations (Rome II Regulation).

33 KLINE R. T., “Restitution roulette: A comparison of U.S. and European approaches to Nazi era art looting claims”, 16 *IFAR J.*, 1, 62 (2015), available at: <https://www.law.upenn.edu/live/files/6412-kline-thomas-2015-restitution-roulettedpdf>

session if in good faith³⁴, or twenty years if in bad faith³⁵; whereas in France or Switzerland the possessor acquires the title after five years³⁶.

To the contrary, the leading rule in U.S. restitution cases is that a thief cannot receive title or pass title to a subsequent purchaser, even if in good faith³⁷. The U.S. courts seem not to recognize the “good faith purchase” defense, as clearly confirmed in the case *Sotheby's Inc. v. Shene* where the United States Second Circuit Court of Appeals rejected the Swiss “good faith purchase” defense reasoning that the “New York law gives greater protection to an object's true owner than to its good-faith purchaser, because doing otherwise would “encourage illicit trafficking in stolen art”³⁸.

Legislation and caselaw in US seems more favorable for claimants also for other aspects.

Unlike many European States³⁹, US recognizes immunity from seizure for foreign State or state-owned institutions⁴⁰, providing some exceptions related to “actions involving waiver of immunity, commercial activity, rights to property taken in violation of international law, rights in property in the United States, tortious acts occurring in the United States, and actions brought to enforce arbitration agreements with a foreign state”⁴¹. The “commercial activity” and “property taken in violation of international law” exceptions are frequently used to declare the US jurisdictions over foreign countries in looted art cases, as happened for example in the *Altmann v. Republic of Austria* case⁴². As art looting is recognized as an international crime and there is an international customary rule which provides its return, the extension of US jurisdiction to decide these cases seems, in my opinion, grounded when in other countries such claims would be refused.

Recently the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA) clarified that immunity from seizure does not include: (i) works whose provenance includes Nazi-era activity, either by the Nazi government or by other European government associated with the occupying German army, or (ii) works that were confiscated by oppressive government after the year 1900, so helping possible plaintiffs to ask for seizure and restitution.

Moreover, in 2016, the Holocaust Expropriated Art Recovery Act (the HEAR Act)⁴³ created a uniform statute of limitations for Nazi looted art cases in the

34 See Art. 1159 of the Italian Civil Code.

35 See Art. 1159 of the Italian Civil Code.

36 DEMOTT, DEBORAH A., “Artful good faith: An essay on law, customs and intermediaries in art markets”, *Duke Law Journal* (2012), p. 632.

37 KLINE, *supra* note 25, p. 58.

38 *Sotheby's Inc. v. Shene*, No 04 Civ. 10067 (TPG), 2009 wl 762697 (S.D.N.Y. March 23, 2009).

39 For example, Italy, Czech Republic, Greece, Latvia, Poland, Portugal and Slovenia do not have an immunity from seizure legislation.

40 United States Foreign Sovereign Immunities Act (FSIA) of 1976.

41 See Art. 28 U.S. Code § 1605.

42 *Altmann v. Republic of Austria*, 317 F. 3D 954, 962 (9th Cir. 2002).

43 LAZEROW, HERBERT I., *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, The International Lawyer, San Diego Legal Studies Paper n.º 17-312, available at: <https://ssrn.com/abstract=3079738>

United States of six years so to eliminate the prohibitively short three-year statute of limitations previously provided by many US states. This six-year statute of limitations begins either when (i) the claimant discovers the identity and location of the work or (ii) the claimant discovers his own possessory interest in the work⁴⁴. In addition, caselaw went recently further: in *Philipp v. Fed. Republic of Germany*⁴⁵ the district court ruled that the United States had the power to file a lawsuit against Germany as US can sue other countries when property has been taken in violation of international laws as in case of Nazi art looting, which constitutes genocide. The jurisdiction grounds of US courts in restitution cases of looted arts seem broader and broader.

As to statutes of limitations periods, though terms are usually shorter in the U.S. rather than Europe, several exceptions allow claims not to expire. For example, New York State “applies a “demand and refusal rule”, under which the statute of limitations does not begin to run against a good faith possessor until the true owner has demanded her property and the wrongful possessor refuses to return it”⁴⁶. In this regard, it is important to remember the doctrine of laches which may also bar a claim even if non-expired, if the court believes that the claimant delayed unreasonably in filing the suit and that the delay caused prejudice to the current possessor.

Another potential obstacle for filing a lawsuit in Europe is that the cost in many European countries (such as Italy) are paid by the losing party, which pays also the attorney’s fees of the prevailing party⁴⁷. Moreover, the claimant attorneys are prohibited from making contingent fee arrangements with clients. The United States, on the other hand, allow contingent fee arrangements for looted art cases, meaning that claimants only must find an attorney willing to represent them, without worrying about potentially having to pay such high fees⁴⁸.

Finally, the judgement shall be recognized and enforced in a foreign jurisdiction to execute it and this could be difficult in European States.

In any case, the use of alternative resolutions methods - such as mediation, conciliation and arbitration - is preferable to court decisions to solve issues concerning looted art.

A good example in this respect is the Beneventan Missal dispute between the Metropolitan Chapter of the Cathedral city of Benevento and the British Library⁴⁹.

44 SHEPPARD MULLIN, “Can you hear me now? Holocaust Expropriated Art Recovery (HEAR) Act”, Sheppard Mullin Art Law Blog (April 25, 2017), available at: <https://www.artlawgallery.com/2017/04/articles/changes-in-law/hear-act/>

45 *Philipp v. Federal Republic of Germany*, Civil Action No. 2015-0266 (D.C. 2017). This case, commonly known as the *Guelf Treasure* case, concerned a group of medieval items known as the “Welfenschatz” that were transferred in an alleged forced sale to the State of Prussia.

46 KLINE, *supra* note 25, at 60, citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.e. 2d 426, 77 N.Y. 2d 311, 318 (N.Y. 1991).

47 KLINE, *supra* note, p. 61.

48 *Id.*

49 NICOLAZZI, LAETITIA, CHECHI, ALESSANDRO, and RENOLD, MARC-ANDRÉ, *Case Beneventan Missal – Metropolitan Chapter of the Cathedral City of Benevento and British Library*, Platform ArThemis, Art Law Centre, Geneva, available at: <http://unige.ch/art-adr>

The Missal disappeared in 1943 while the city was occupied by the Allied forces and was bought in 1973 by the British Library. The Metropolitan Chapter filed the case before the UK Spoliation Advisory Panel, but the restitution of the Missal was prevented from existing legislation. So, the Panel recommended the UK Secretary of State to change the legislation and this occurred in 2009, then the restitution of the Missal that was accepted by the British Library. In this case, if the case had been litigated before the English courts, the claimant would not have won because of the statute of limitations⁵⁰, therefore out of courts solutions seem preferable.

2. ITALY: FEW LEGAL CASES, MANY LOOTED WORKS

Notwithstanding Italy can claim one of the oldest body of laws for protecting cultural property⁵¹ including national ownership of antiquities and straight export control regulations, it was badly looted during the Napoleonic regime and afterwards.

Napoleon signed some treaties with few of the defeated States: the armistice of Bologna on June 23, 1796 and the treaty of Peace of Tolentino on February 19, 1797; whereas in other cases (Grand Duchy of Tuscany, Reign of Sardinia) artworks were taken without any formal authorization. After the Napoleon's defeat in 1815, Pope Pio VII sent the famous sculptor Antonio Canova⁵² to the French King Louis XVIII to request the restitution of a hundred of artworks and around five hundred books transferred to the French State. Canova, with the crucial help of William Richard Hamilton⁵³ and referring to the letters of Antoine Chrysostome Quatremère de Quincy's letters (who wrote against the looting occurred during Napoleonic regime in Italy)⁵⁴, obtained the restitution of seventy per cent of looted art, which he demanded.

Looting occurred even during the Nazi era, though Italy was an ally of Germany. Scholars reported that 1653 artworks looted during Fascism and the Second

50 European Parliament, Policy Department for Citizen's Rights and Constitutional Affairs, *Cross-border restitution claims for art looted in armed conflicts and wars and alternatives to court litigations: Study for the Juri Committee*, (May 2016).

51 FRIGO, M., *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, Giuffrè, 125, mentions the Deliberation of October 24, 1602 of the Grand Duke of Tuscany, which requested the issue of a license for exporting outside the city of Florence artworks of nonliving artists, denying the export of artworks created by 19 famous artists (i.e. Buonarroti, Raffaello, Leonardo da Vinci). The edict of December 26, 1754 extended such prohibition to all the Grand-Duchy of Tuscany, extending also the cultural goods for which export was prohibited.

52 JOHNS, CHRISTOPHER M. S., *Antonio Canova and the Politics of Patronage in Revolutionary and Napoleonic Europe*, University of California Press, 1998, p. 176.

53 JOHNS, *supra* note 34, at 179.

54 QUETREMERE DE QUINCY, ANTOINE C., *Lettre sur le préjudice qu'occasionneraient aux Arts et à la Science le déplacement des monuments de l'art de l'Italie, le démembrement de ses Écoles, et la spoliation de ses Collections, Galeries, Musées*, Roma, 1815.

World War are still missing: 800 paintings, dozens of statues, tapestries, musical instruments as Stradivari's violins⁵⁵.

Though many Italian looted artworks are still missing, legal disputes for the restitution of these artworks are quite rare and the reasons for such a few recovery actions are coinciding with the obstacles highlighted for Europe in general in the previous paragraph.

To determine applicable law in restitution cases, Italian courts will generally apply the *lex rei sitae* rule pursuant to art. 51 of the Italian International private law, which states that "*possession, ownership and other rights in rem in immovables and movables shall be governed by the law of the State in which the property is located*". The application of this rule led though to unpredictable outcomes as shown in two cases: *Repubblica dell'Ecuador v. Danusso*⁵⁶ and in *Ministère Français de la Culture v. Ministero dei beni culturali e De Contessini*⁵⁷.

In the first case, an Italian citizen purchased some archeological artifacts in Ecuador and illicitly exported them in Italy. The Republic of Ecuador requested the restitution of the items and the Italian court, by applying the Ecuadorian law as it was the *lex rei sitae* at the moment of the purchase, held that the archeological items shall be restituted⁵⁸.

In the second case, the French Government requested the restitution of some tapestries that were stolen in France and then brought to Italy, where they were purchased by a good faith purchaser. The Court deemed that the applicable law was the Italian one as the purchase of the tapestries took place in Italy, so the Court rejected the request of restitution protecting the *bona fide* buyer⁵⁹.

As to statute of limitations, there is no final term for claiming entitlement⁶⁰ except for the effects of adverse possession (uninterrupted possession) occurring after ten⁶¹ or twenty⁶² years, depending from the good or bad faith of the new owner.

Recovery actions are also very difficult to succeed because of the so called "*probatio diabolica*" (evil's proof)⁶³, a burden of proof weighing on the original owner or his heirs: the dispossessed owner shall demonstrate either an originating title or an unbroken chain of titles from the first title till his own one.

Due to all these obstacles in Italian law, many requests of restitution are conveyed through diplomatic channels.

55 GIANNELLA, SALVATORE, *Operazione salvataggio: gli eroi sconosciuti che hanno salvato l'arte dalle guerre*, Chiarelettere, 2014, p. 4.

56 Court of Turin, *Repubblica dell'Ecuador contro Danusso*, 25 March 1982, *Rivista di diritto internazionale privato e processuale*, vol. XVIII (1982) p. 625.

57 Cass. Civ. 23 November 1995.

58 GRAZIADEI, MICHELE, "Beni culturali", *Enciclopedia del Diritto*, 2007, p. 94.

59 LANCIOTTI, ALESSANDRA, *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Martinus Nijhoff, 2012, p. 313.

60 See art. 948 of the Italian Civil Code.

61 See art. 1159 of the Italian Civil Code.

62 See art. 1158 of the Italian Civil Code.

63 ALPA, GUIDO and ZENO-ZENCOVICH, VINCENZO, *Italian Private Law*, The University of Texas at Austin, Studies in Foreign and Transnational Law, 2007, p. 140.

A good example of restitution occurred diplomatically concerned the obelisk taken in Axum during the fascist conquer of Ethiopia. The obelisk was transported to Rome where it was erected in front of the building of the former Italian ministry of colonies. At the time of its removal, only Italy was a member of the Second 1899 Hague Convention on the Laws and Customs of War on Land, whereas also Ethiopia was part of the 1907 Fourth Hague Convention.

Restitution of the obelisk was petitioned by an Italian scholar, Vincenzo Francaviglia in 1991 and echoed by scholars worldwide, besides five hundred eminent Ethiopians⁶⁴ and envisaged by several treaties: the Peace Treaty between Italy and the Allied and Associated Powers, the Agreement between Ethiopia and Italy on the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, a joint statement signed by Ethiopia and Italy on March 4, 1997 and a memorandum of understanding on the transfer and handover of the Axum obelisk. The obelisk was then restituted in 2005.

In 2008 Italy restituted to Libya, another former colony, the Venus of Cyrene, a headless marble statue shipped to Italy in 1913. The restitution followed lengthy negotiations: in 1998, Italy and Libya signed a Joint Communiqué, which concerned *inter alia* the restitution of all looted cultural property from Libya. In 2000 the two countries concluded an agreement on the restitution of the Venus of Cyrene and in 2002 the Italian Ministry of Cultural Heritage and Activities passed a decree to implement it acknowledging that Italy had no longer interest in owning the statue, removing it from the State patrimony.

In November 2002, Italia Nostra, a non-governmental organization filed a lawsuit before the Regional Administrative Tribunal (“TAR”) against the Ministry of Cultural Heritage and Activities requesting the annulment of the decree. At first instance TAR rejected Italia Nostra’s claim confirming that Italy was under an obligation to return the Statue⁶⁵, and on appeal the Consiglio di Stato⁶⁶ confirmed the judgement of first instance so that on August 30, 2008 the Venus of Cyrene was returned to Libya.

3. FINAL REMARKS

The importance of these last two Italian decisions on the Venus of Cyrene is that they recognized the nature of customary international rule to the obligation of restitution of looted artworks⁶⁷.

This means that possible claimants when filing a recovery action based on Italian law could ask the restitution of looted artworks according to customary

64 SCOTTI, SUZETTE, “Do unto others as you would have them do unto you: the Axum Obelisk”, 10 *J. Art Crime* 87 (2013).

65 T.A.R. Lazio, 20 marzo 2007, n. 3518, sez. II.

66 Consiglio di Stato, sez. VI, 23 giugno 2008 n. 3154.

67 ACRI D., *La sussistenza dell’obbligo di restituzione di un bene asportato durante l’occupazione bellica della Libia. La Venere può tornare a “casa”*.

international law which has constitutional value pursuant to art. 10(1) of the Italian Constitution and could then prevail on law provisions of lower lever such as the protection of the good faith purchaser or as adverse possession.

Likely, at a European level, in my opinion, EU institutions should enact a Regulation or a Directive which provides National States with uniform provisions concerning looted art without leaving to domestic courts the application of national laws, which could differ enormously from country to country so much that the outcomes are often unpredictable. This new body of laws should at least determine common criteria for looted art disputes on: jurisdiction, choice of law, burden of proof for proving ownership and statute of limitations. Europe shall look at the previously enacted US laws following this path, by providing exceptions to the application of immunity from seizure for all artworks looted during the Nazi-era or confiscated or sold forcibly by oppressive governments. This exception for looted art shall also overcome general rules applied in civil law countries such as non-domino purchases, as well as adverse possession. Finally, as in US, Europe shall determine at least a common term for statute of limitations starting from the day the legitimate owner has discovered or could have discovered the identity of the current owner and the location of the work.

BIBLIOGRAPHY

- ALPA, GUIDO and ZENO-ZENCOVICH, VINCENZO, *Italian Private Law*, The University of Texas at Austin, Studies on Foreign and Transnational Law, 2007.
- DEMOTT, DEBORAH. A., "Artful Good Faith: An Essay on Law, Customs and Intermediaries in Art Markets", *Duke Law Journal* (2012).
- FRIGO, MANLIO, *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, Giuffrè.
- GRAZIADEI, MICHELE, "Beni culturali", *Enciclopedia del Diritto*, 2007.
- HARTIGAN, RICHARD SHELLEY, *Lieber's Code & the Law of War*, 1983.
- JOHNS, CHRISTOPHER M. S., *Antonio Canova and the Politics of Patronage in Revolutionary and Napoleonic Europe*, University of California Press, 1998.
- KLINE R. T., "Restitution roulette: A comparison of U.S. and European approaches to Nazi era art looting claims", 16 *IFAR J*, 1, 62 (2015), available at: <https://www.law.upenn.edu/live/files/6412-kline-thomas-2015-restitution-roulettepdf>
- LANCIOTTI, ALESSANDRA, *Cultural Heritage, Cultural Rights, Cultural Diversity, New Developments in International Law*, Martinus Nijhoff, 2012.
- LAZEROW, HERBERT I., *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, The International Lawyer, San Diego Legal Studies Paper n.º 17-312, available at: <https://ssrn.com/abstract=3079738>
- LINDSAY, IVAN, *The History of Loot and Stolen Art*, Unicorn Press, 2014.

- MAHLIK, STANISLAW E., “La protection internationale des biens culturels en cas de conflit armé”, in *Recueil des Cours de l'Académie de Droit International*, Paris, 1967, I, p. 96
- MANGANARO A., “Restitution of looted art in International Law”, LUISS THESIS, available at: <http://tesi.eprints.luiss.it/18617/>
- NICOLAZZI, LAETITIA, CHECHI, ALESSANDRO, and RENOLD, MARC-ANDRÉ, Case Beneventan Missal – Metropolitan Chapter of the Cathedral City of Benevento and British Library, Platform ArThemis, Art Law Centre, Geneva, available at: <http://unige.ch/art-adr>
- QUETREMER DE QUINCY, ANTOINE C., *Lettre sur le préjudice qu'occasionneraient aux Arts et à la Science, le déplacement des monuments de l'art de l'Italie, le démembrement de ses Ecoles, et la spoliation de ses Collections, Galeries, Musées*, Roma, 1815.
- SCOTTI, SUZETTE, “Do unto others as you would have them do unto you: The Axum Obelisk”, 10 *J. Art Crime* 87 (2013).
- SCOVAZZI, TULLIO, “‘Diviser c’est détruire’: Ethical principles and legal rules in the field of return of cultural property”, *Rivista di diritto internazionale*, 2, 2011, pp. 341 and ff.
- TOMAN, JIRI, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing Company, 1996.
- WANTUCH-THOLE, MARA, *Cultural Property in Cross Border Litigation: Turning Rights into Claims*, De Gruyter, 2015.