Institutional Barriers to the Repatriation of the Cultural Property of States within the Framework of the 1970 UNESCO Convention

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Abstract: International cultural heritage law in general, and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in particular, do not have a specific dispute settlement mechanism of norm enforcement. States have had to resort to alternative mechanisms to judicial dispute settlement when bringing its claims for repatriation, along with extensive diplomatic requests. Consequently, repatriation has become in practice a matter relied upon the will of the current possessor –usually the wealthiest nations–. It is the aim of this article to point out, through the analysis of repatriation cases, which institutional barriers, if any, prevent a uniform and safe practice when it comes to the repatriation of cultural property of States within the framework of the 1970 UNESCO Convention and provide some light about which prospective solutions can be raised on this specific issue.

Key words: Cultural Property, Repatriation, International Dispute Settlement.

Introduction

International cultural heritage law in general, and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ('1970 UNESCO Convention')[1] in particular, do not have a specific dispute settlement mechanism of norm enforcement.[2] This situation contrasts with other branches of international law under the system of United Nations, such as the law of the sea[3] or international commercial law.[4]

The 1970 UNESCO Convention has the object and purpose of protecting the cultural heritage of States by inhibiting the illicit international trade in cultural objects.[5] In order to do so, it prescribes both a prospective and retrospective obligation: to prevent the importation of such objects, to restrain the flow of cultural property from source nations to market nations;[6] and, in the event this obligation has been breached, to facilitate their return to the former nations.[7] This way, the abolishment of disputes and litigation through the compliance with the treaty-based good faith obligations would ideally lead towards the international understanding of States.[8] So far, it is important to mention, 134 States have committed to these duties by acceding to the 1970 UNESCO Convention.[9]

To great extent, Articles 2(2), 7(b)(ii), 13(b)(c)(d) and 15 of the 1970 UNESCO Convention appeal to the States Parties to deal with the matter of repatriation of cultural objects by "*helping* to make the necessary reparations", "*taking* the appropriate steps to recover and return", facilitating the recovery consistently with their domestic law and concluding "special agreements among themselves […] regarding restitution of cultural property removed". Additionally, the reliance on diplomatic requests for repatriation is slightly balanced through the good offices of UNESCO, as enshrined in Article 17(5). This situation was justified in light of the alleged absence of a strong tradition for the judicial settlement of such disputes in cultural maters.[10] However, the only subsidiary means of judicial dispute settlement provided in the *travaux*

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[1] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

[2] Francesco Francioni, 'Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law' in J. Gordley, F. Francioni (eds) *Enforcing International Cultural Heritage Law* (2013), 17.

[3] Part XV of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[4] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, as Revised in 2010* (United Nations, 2011).

[5] 1970 UNESCO Convention Preamble and art 2; Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (UNESCO, 19 November 1964) *Considering* n 2.

[6] 1970 UNESCO Convention Preamble and art 7(a); John H. Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 AJIL 831, 843.

[7] 1970 UNESCO Convention art 13.

[8] Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (UNESCO, Paris, 1970) [6].

[9] UNESCO <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> accessed 27 January 2018.

[10] Subsidiary Committee of the Meeting of States Parties to the 1970 UNESCO Convention [16].

préparatoires of the 1970 UNESCO Convention–but not included in the treaty itself–was arbitration, with no reference to adjudicative institutions whatsoever.[11]

Consequently, in response to this absence, States have resorted to alternative mechanisms to judicial dispute settlement when bringing their claims for repatriation of their cultural objects. On the one hand, they used–only when the specific conditions were met–the borrowed fora provided by human rights courts, international criminal jurisdictions and international arbitration.[12] On the other hand, vertical mechanisms of interaction between national and international courts and tribunals have been articulated.[13] Therefore, the fact that there has been no tradition for the judicial settlement of cultural disputes by States Parties could be called into question since they do not have any specific institution available under the 1970 UNESCO Convention for this purpose.

Furthermore, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation ('ICPRCP'), which is the result of an internal decision of the Organization rather than an institutional organ of the 1970 UNESCO Convention, is severely under-utilized.[14] As a result of this fragmentation in the enforcement of the 1970 UNESCO Convention's norms, repatriation has become in practice a matter relied upon the will of the current possessor; and other non-state actors have taken further actions in this field.[15]

It is the aim of this article to point out the concrete institutional barriers, if any, that prevent a uniform and safe practice when it comes to the repatriation of cultural property of States within the framework of the 1970 UNESCO Convention. However, due to the limited time and space of this work, I will focus on the issue of effective repatriation of cultural objects–as defined in Article 1–removed during peacetime from 1970 onwards,[16] or before 1970 if there is a special agreement among the concerned State Parties.[17] Therefore, it will exclude the possible interaction between public and private international law in certain restitution disputes,[18] to focus only on the purely public character.

This necessarily excludes the repatriation of objects of underwater cultural heritage, which find its regulation under the 2001 UNESCO Convention on the Protection of Underwater Cultural

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[11] ibid.

[12] F. Francioni (n 2), 18-19.

[13] Ibid, 20.

[14] Ibid, 17.

[15] As an example, the International Council of Museums (ICOM) and the Red List, in <http://icom.museum/resources/red-lists-database/> accessed 27 January 2018.

[16] As a matter of the 1970 UNESCO Convention, this temporal delimitation is based on Article 7(b)(ii), which call all States Parties to the Convention "to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned". Therefore, only cases of repatriation of cultural objects illicitly imported, exported or transferred will be addressed.

[17] In application of the provision contained in Article 15 1970 UNESCO Convention.

[18] As regulated under UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) 2421 UNTS 457

Heritage.[19] Likewise, claims for repatriation of objects removed during the occupation of a country by a foreign power or by a State responsible for the international relations of a territory will be examined,[20] while those removed during wartime will be excluded from the analysis.[21]

Ultimately, through the brief analysis of the repatriation cases that have been already addressed by the different courts, tribunals and other offices at the international level, some light will be provided about which prospective solutions can be raised on this specific issue of effective repatriation of the States' cultural property. To this latter respect, a presumption is made: cultural property, contrarily to what some scholars defend,[22] should be granted a different treatment than the ordinary property of States under international law.

The Available Legal Mechanisms and Procedures for Repatriation of Cultural Property in light of the 1970 UNESCO Convention

As outlined above, the 1970 UNESCO Convention does not provide any forum for the judicial settlement of disputes concerning the repatriation of the States Parties' cultural objects. On the contrary, it only states that requests for recovery and return of cultural objects shall be made through diplomatic offices[23]–with the necessary support of the competent services at the national level–,[24] or through the conclusion of a special agreement between the States concerned.[25]

This raises concerns about the narrow scope provided by the 1970 UNESCO Convention, which limits to a large extent the number of stolen objects that can be subject to repatriation. Not only because the requesting State must exhaust the diplomatic channels in the first place, but also because there are many other requirements that need to be satisfied. Firstly, the cultural object must be documented; secondly, it must have been imported after the date on which both States became party to the Convention; thirdly, the requesting State might pay just compensation to whomsoever had valid title to that property; and lastly, the requesting State should furnish the documentation necessary to establish its claim for repatriation.[26]

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[19] By virtue of its Article 1, underwater cultural heritage means "means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years" This includes, between others, artefacts, vessels and aircrafts with their archaeological and natural context, and objects of prehistoric character. Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, in force 2 January 2009), UNESCO Doc.31C/Resolution 24; (2002) 41 ILM 37.

[20] As prescribed in Articles 11 and 12 1970 UNESCO Convention.

[21] Precisely, the remove of cultural property in the event of armed conflict fall within the scope of the Convention for the Protection of Cultural Property in the Event of Armed Conflict ('1954 Hague Convention') (adopted 14 May 1954, in force 7 August 1956) 249 UNTS 240.

[22] For instance, Eric A. Posner, 'The International Protection of Cultural Property: Some Skeptical Observations' (2006) 141 Public Law and Legal Theory Working Paper, 1.

[23] 1970 UNESCO Convention art 7(b)(ii).

[24] Ibid art 13(b).

[25] Ibid art 15.

[26] For example, Mayan remains in Belize, El Salvador, Guatemala, Honduras and Mexico. Subsidiary Committee of the Meeting of States Parties to the 1970 UNESCO Convention [79].

Due to these restrictions, the International Court of Justice ('ICJ') has rarely had an opportunity to address the question of repatriation of cultural property, and always has done so as a complementary matter outside the application of the 1970 UNESCO Convention.

A. Cases of Repatriation before the International Court of Justice

Certainly, the ICJ has never dealt with the repatriation of cultural property as a primary issue put forward by any State before it. However, there are some cases in which the ICJ had to decide over the cultural property of States to the dispute, under different circumstances.

In the *Temple of Preah Vihear* case, the Court ruled that Thailand was under an international obligation to restore to Cambodia "any sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which might, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities".[27] However, as the removal was made before the entry into force of the 1970 UNESCO Convention between the parties, the Court could not rely on its application when deciding over the restitution. Instead, in the *Request for Interpretation* in 2013, the Court mentioned the 1972 UNESCO Convention in order to stress the religious and cultural significance of the Temple for the peoples of the region. Consequently, it ordered the parties to cooperate between themselves and with the international community in the protection of the Temple, refraining from cause any damage to it and ensuring its access.[28]

In regard to the *Genocide case*, the Court addressed the question of destruction of cultural property in the framework of genocide. It declared that, "although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and *contrary to other legal norms*, it does not fall within the categories of acts of genocide set out in Article II of the Convention".[29] Still, given the circumstances of the case, these "other legal norms" refer to the rules set in the 1954 Hague Convention, applicable in the event of armed conflict.

Finally, as to the *Case Concerning Certain Property*, the Court did not address the restitution of a seventeenth-century painting owned by Prince Franz Josef II of Liechtenstein, who had to resort in the first place to the Administrative Court of Bratislava and, then, when the painting was lent by a museum in Brno to a museum in Cologne, to the German courts. Later, Prince Franz Josef II brought the case before the European Court of Human Rights, which dismissed the claim on the basis of a non-violation of Articles 6(1) and 14 of the Convention for the Protection of Human Rights. After all, however, the Court declined to exercise jurisdiction in light of Article 27(a) of the European Convention for the Peaceful Settlement of Disputes, as the requisite *ratione temporis* was not fulfilled.[30]

This case best illustrates the barriers a State must face when dealing with the restitution of a cultural object, even in representation of its nationals. Liechtenstein was not compensated for the expropriation of the painting, nor it was repatriated to its lawful owner. In fact, despite the

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[27] *Case concerning the Temple of Preah Vihear* (Cambodia v Thailand) Judgment [1961] ICJ Rep 31, 1.

[28] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v Thailand) (Judgment) [2013] ICJ Rep 281 [106].

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43 [344] (emphasis added).

[30] *Case Concerning Certain Property* (Liechtenstein v Germany) (Preliminary Objections, Judgment) [2005] ICJ Rep 6.

painting being confiscated as a result of the Second World War,[31] repatriation would have been possible under Article 15 of the 1970 UNESCO Convention if the Parties would have agreed thereto–and Liechtenstein would have become a Party to the Convention–.[32] Nevertheless, this was not the event, and therefore, the question of repatriation still remains unsolved.

B. Cases of Repatriation before International Arbitral Tribunals

In their Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, the International Law Association advises several Alternative Dispute Resolution ('ADR') methods for settle repatriation disputes. Precisely, it mentions ad hoc arbitration and institutional arbitration as a subsidiary mechanism "if a requesting party and a recipient are unable to reach a mutually satisfactory settlement of a dispute related to a request within a period of four years from the time of the request".[33] It also refers to good offices, consultation, mediation and conciliation, which will be addressed further in Section C.

Notwithstanding the advantages offered by inter-state arbitration,[34] in practice, there has been no substantial recourse to this means when it comes to the repatriation of cultural objects.

An exception worth mentioning–albeit it does concern damages–is the Eritrea-Ethiopia Claims Commission ('EECC') constituted in light of the 2000 Peace Agreement of Algiers. Specifically, the partial award of 28 April 2004 addressed the destruction of the Stela of Matara, an obelisk of about 2,500 years old and of great historical and cultural significance for both States.[35] Eventually, the Commission concluded that Ethiopia, as the Occupying Power in the Matara area, was responsible for the damage;[36] and that the falling of the Stela was a violation of customary international humanitarian law, enabling the application of Article 56 Additional Protocol I. Therefore, Ethiopia owed compensation to Eritrea.[37] Again, the tribunal dealt with the destruction of a cultural object during wartime, making applicable the rules of *jus in bello*, instead of any of the UNESCO Conventions.

Still, this situation contrasts with private international arbitration, which has been used to a greater extent in order to claim the restitution of cultural objects. In this sense, the seminal case

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[31] *Case Concerning Certain Property* (n 31) [13].

[32] At the time this work is being elaborated, Liechtenstein has not signed not ratified the 1970 UNESCO Convention.

[33] Principle 9, as reproduced by James A.R. Nafziger, 'The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' (2007) 8 Chinese JIL 1, 166.

[34] In order to see the utilities of inter-state arbitration in general, J.G. Merrills, *International Dispute Settlement* (6th edn, Cambridge 2017) p 111-115. Regarding arbitration in international cultural, Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (1st edn, Oxford 2014) 177 notes: "Arbitration may provide significant advantages in disputes concerning object requested by the State of origin because arbitrators are in a neutral posiition to decide questions of sovereignty, cultural policy, national and international law, as well as moral and ethical arguments."

[35] *Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22* (Eritrea v Ethiopia) (EECC Partial Award) [2004] 26 RIAA 115-153 [107].

[36] EECC Partial Award (n 36) [112].

[37] Ibid [113] – [114].

of *Maria Altmann v Republic of Austria*[38] provides strong evidence of the efficiency of arbitration to settle Holocaust-related art disputes.[39] Moreover, on the field of investment arbitration, ICSID tribunals have given considerable weight to the cultural heritage standards when assessing the conduct of the host state.[40] However, in these types of arbitration, the right to property is limited to the individual who initiates the proceedings against the wrongful State, with the issue of inter-state repatriation still unresolved.

C. Cases of Repatriation through Diplomatic Means

The diplomatic means of settlement of disputes, which embrace negotiation, good offices, conciliation and mediation, are deemed to be the first steps that must be taken towards the repatriation of cultural property.[41] Thus, only subsidiarily, in the event these mechanisms result ineffective, States may resort to arbitration or to the judicial organs.

As outlined *supra*, diplomatic means are more widely used by States in order to settle their cultural disputes. Accordingly, only the most representative cases will be analysed.

i. Negotiation and good offices

Negotiation has proved useful to prevent costly and lengthy litigation over stolen or illicitly exported cultural objects; evidenced by the numerous bilateral agreements concluded by source and market nations.[42] Some remarkable cases of repatriation reached under this type of agreements concern the Statue of Eirene, repatriated to Italy on the basis of the restitution agreement between Italy and the Boston Museum of Fine Arts concluded in September 2006;[43] the return of the Dancing Shiva Statue, which involved the Indian and the Australian Governments in a process performed under the 1986 Protection of Moveable Cultural Heritage Act, which implements Australia's obligation under the 1970 UNESCO Convention;[44] and the repatriation on "ethical grounds" of the Durga Idol to India, after negotiations held by the

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[38] *Maria Altmann v Republic of Austria* 142 F Supp 2d 1187 (C D Cal 1999) 317 F 3d 954 (9th Cir 2002) *as amended* 327 F 3d 1246 (9th Cir 2003), 541 US 677 (2004).

[39] Alessandro Chechi 'Plurality and Coordination of Dispute Settlement Methods' in J. Gordley, F. Francioni (eds) *Enforcing International Cultural Heritage Law* (2013), 193-194.

[40] Examples of this practice can be seen in the *Glamis Gold* case (2009) and in the *Grand River* case (2011); in F. Francioni (n 2), p 19.

[41] Alessandro Chechi (n 40), p 188.

[42] Ibid, p 189.

[43] Giulia Soldan, Raphael Contel, Alessandro Chechi, 'Case 13 Antiquities – Boston Museum of Fine Arts' Platform ArThemis <http://unige.ch/art-adr> Art-Law Centre, University of Geneva.

[44] Madeleine Frith, Ece Velioglu Yildizci, Marc-André Renold, 'Case Dancing Shiva Statue – India and National Gallery of Australia' Platform ArThemis <http://unige.ch/art-adr> Art-Law Centre, University of Geneva.

federal State of Baden-Wurttemberg (Germany) and the Embassy of the Republic of India in Berlin in September 2015;[45] between others.

Additionally, if bilateral negotiations between the requesting and the required State fail or are suspended, they can call upon the ICPRCP, which will examine the request of return and seek alternative ways of facilitating cooperation, fostering those negotiations.[46] The most noticeable examples of repatriation under the aegis of the ICPRCP include the return of the Boğazköy Sphinx from Germany to Turkey in May 2011–a process already initiated in 1987, with the direct return of 7,000 Boğazköy cuneiform tablets–and the restitution of the Makondé Mask from Switzerland to the United Republic of Tanzania in May 2010.[47] Yet, taking into account the massive amount of cases of illicit appropriation reported every week, the ICPRCP's outcome cannot be regarded as a total success, if compared to the bilateral agreements outlined above.

ii. Mediation and conciliation

With regard to mediation, the International Council of Museums ('ICOM') stands as a key institution. Indeed, as a non-governmental organization, it has been closely associated with the action undertaken by the ICPRCP in order to promote the restitution of cultural property to the countries of origin.[48] To this purpose, and in association with the World Intellectual Property Organization Arbitration and Mediation Centre ('WIPO Centre'), it has developed a special mediation process for art and cultural heritage disputes: the Art and Cultural Heritage Mediation ('ACHM').[49]

Despite this specific institutional framework, it is not an easy task to discover the existence of a mediated claim, mainly due to the confidentiality that mediation guarantees to the State parties.[50] Therefore, in the absence of cases falling within the scope of the 1970 UNESCO Convention collected in the database of the Geneva Art Law Centre, no representative examples of inter-state mediation or conciliation can be provided. Nonetheless, there are two worth cases to mention concerning repatriation under the auspices of the ICPRCP mediation: the return of the Phra Narai lintel from the US to Thailand in 1988, and the exchange of the moulds of the respective parts of the Tyche sandstone panel from the US to Jordan in 1986.[51]

However, in spite of the advantages offered by these ADR means, occasionally they do not result suitable for dealing with all kinds of cultural disputes. Firstly, the parties must have some room for negotiation and compromise. Secondly, they ought to have a "win-win" perspective, rather than a "zero-sum" position. Thirdly, the climate should be prone to constructive

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[45] Kartik Ashta, Alessandro Chechi, Marc-André Renold, 'Durga Idol – India and Germany' Platform ArThemis <http://unige.ch/art-adr> Art-Law Centre, University of Geneva.

[46] UNESCO, *The Fight Against the Illicit Trafficking of Cultural Objects. The 1970 UNESCO Convention: Past and Future* (November 2013), p 9.

[47] UNESCO 'Restitution of Cultural Property' <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/> accessed 19 February 2018.

[48] UNESCO, *Witness to History: Documents and Writings on the Return of Cultural Objects* (2009), 182.

[49] International Council of Museums 'ICOM-WIPO Art and Cultural Heritage Mediation' < http://icom.museum/?id=1546> accessed 19 February 2018.

[50] Alessandro Chechi (n 40), 190.

[51] UNESCO 'Restitution of Cultural Property' (n 48).

bargaining and mutual concession.[52] For all these reasons, the ADR mechanisms are not a viable option where the dispute has reached a certain magnitude or in situations involving asymmetric powers,[53] which is the most likely scenario when source and market nations are involved.

D. Other Cases of Repatriation: the Role of National Courts and Regional Instruments

The initiation of legal proceedings before domestic courts is the main avenue for the settlement of the majority of transnational art cases, as that litigation ends with a definitive ruling susceptible to be enforced through state machinery. For this reason, States usually sue before foreign domestic courts by relying either on patrimony laws or export statutes. [54]

The restitution envisaged by the 1970 UNESCO Convention only covers property stolen from museums and religious or public monuments and institutions. Hence, according to Article 13(c), State parties are bound to admit actions for recovery of lost or stolen cultural objects brought by or on behalf of the rightful owners, but only to the extent this is consistent with the laws of each State. This premise is problematic, since such laws may well include immunity statutes or provisions governing the incorporation of customary international law on immunity in domestic legal systems.[55]

In effect, the 1970 UNESCO Convention does not foresee an unconditional duty of repatriation of stolen cultural objects actionable by means of proceedings instituted by dispossessed individuals.[56]

To address the absence of any treaty provision and the lack of legislative harmonization at the national level, some regional solutions have emerged thereof. At the European level, the Council Directive 93/7 aims to facilitate cooperation between the Member States of the European Union with regard to return its "national treasures".[57] For this purpose, it enables the initiation, by the requesting Member State, of proceedings before the competent court in the requested Member State.[58] Moreover, it compels the competent court to order the return of the cultural object in question where it is found that it has been unlawfully removed from the national territory of the requesting Member State.[59] This way, the possibility to allege immunity by any of the State parties to the dispute is precluded.

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[52] Isabelle Fellrath Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (1st edn Transnational Publishers, 2004), 62-63.

[53] Ibid.

[54] Alessandro Chechi (n 40), 187.

[55] Riccardo Pavoni, 'Sovereign Immunity and the Enforcement of International Cultural Property Law' in J. Gordley, F. Francioni (eds) *Enforcing International Cultural Heritage Law* (2013), 81.

[56] Ibid.

[57] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State ('Council Directive 93/7'), 074 OJL 0074-0079, Preamble.

[58] Council Directive 93/7, Article 5.

[59] Council Directive 93/7, Article 8.

As to the fifty-three Commonwealth Member countries,[60] the Protection of Cultural Heritage Act applies, although it does not prejudice any action of repatriation under the law of either of the Member countries.[61] Bearing this in mind, it sets common proceedings for recovery of cultural objects. Under these proceedings, where a requested cultural object has been seized under the Act, the holder may institute proceedings against the central authority for the recovery of the item on the ground that it is not liable to be returned to the requesting country.[62] Furthermore, the competent court of the requested Member country has the obligation to order the return of the cultural object to *the person* who was last lawfully entitled to its possession.[63] Therefore, the Protection of Cultural Heritage Act provides a subsidiary mechanism outside the rules of immunity, as long as an individual is involved.[64] However, this is not the case in all cultural disputes, and inter-state conflicts shall be solved taken into account the diversity of laws of the Commonwealth countries, which, again, are not uniform. This is even more relevant since the Commonwealth includes large market nations–as the US and the United Kingdom–along with weak source nations–such as Nigeria, India or Belize–between which cultural disputes are likely to arise.

In conclusion, inasmuch as the 1970 UNESCO Convention did not remove the institutional barriers that prevent the effective repatriation of cultural objects, there is a need for coordination between the rules on state immunity and treaties aimed at this end. This is justified in view of the prominent place that the fight against illicit trafficking of cultural objects has acquired in the international community;[65] and the uneven positions in which market and source nations are placed when the repatriation relies exclusively on their diplomatic resources.

Conclusion

All in all, practice shows how, in international organizations such as UNESCO, which lacks its own judicial organs, the application of the obligations to cooperate contained in the 1970 UNESCO Convention usually remains a plaything in the arena of politics.[66] Therefore, reasonable concerns may arise when source nations–generally poor–seem themselves forced to negotiate with market nations, which count with far more resources to pursue their own interests in cultural matters.

For this reason, there should be borne in mind the issues outlined in this article and posed by the 1970 UNESCO Convention itself: from the narrow scope of jurisdiction and admissibility of international claims to repatriation, to the factual difficulties arising out the obtaining of reliable evidence and the fragmentation of both national and international law applicable in key aspects of export and import of cultural property. Only taking into account which institutional barriers

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[60] The list of the Member countries of the Commonwealth can be consulted in The Commonwealth online site < http://thecommonwealth.org/member-countries> accessed 20 February 2018.

[61] Scheme and Model Bill for the Protection of Cultural Heritage Within the Commonwealth ('Protection of Cultural Heritage Act') (2017), Part I Section 4.

[62] Protection of Cultural Heritage Act, Part II Section 19 Subsection (1).

[63] Protection of Cultural Heritage Act, Part III Section 21A Subsection (2) (emphasis added).

[64] This goes in light of what is prescribed under the 1995 UNIDROIT Convention.

[65] Riccardo Pavoni (n 56), 94.

[66] This concern is generally addressed in Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn, Martinus Nijhoff Publishers 2011) [20].

prevented in the past the effective repatriation of cultural objects to the States Parties, prospective and specific solutions would be able to come up.

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