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*J.H.H. Weiler  
European Union Jean Monnet Chair*

in cooperation with the



### **THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER A PERSPECTIVE FROM ITALY**

Jean Monnet Working Paper 11/10

**Lorenzo Casini**

**«Italian Hours»:  
The Globalization of Cultural Property Law**

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## **The New Public Law in a Global (Dis)Order – A Perspective from Italy**

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of “Administrative Law,” “Constitutional Law,” or “International Law,” but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper. The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*

Sabino Cassese, *Judge of the Italian Constitutional Court*

## **Prologue: The New Italian Public Law Scholarship**

Since the second half of the 20<sup>th</sup> Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20<sup>th</sup> century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals (“*Rivista trimestrale di diritto pubblico*” and “*Giornale di diritto amministrativo*”). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled “The New Public Law in a Global (Dis)Order – A Perspective from Italy” – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law<sup>♦</sup>.

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*

Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*

Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

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<sup>♦</sup> Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D’Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo; Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at <http://www.irpa.eu/index.asp?idA=302>.



**«ITALIAN HOURS»:**  
**THE GLOBALIZATION OF CULTURAL PROPERTY LAW**  
By Lorenzo Casini\*

**Abstract**

Cultural property offers a significant yet ambiguous example of the development of global regulatory regimes beyond the State. On the one hand, traditional international law instruments do not seem to ensure an adequate level of protection for cultural heritage; securing such protection requires procedures, norms and standards produced by global institutions, both public (such as UNESCO) and private (such as the International Council of Museums (ICOM)). On the other hand, a comprehensive global regulatory regime to complement the law of cultural property is still to be achieved. Instead, more regimes are being established, depending on the kind of properties and on the public interest at stake, although the complex of cultural property regimes appears to operate largely in isolation. Moreover, the huge cultural bias which dominates the debate about cultural property can accentuate the «clash of civilizations» and the cultural bias that already underlie the debate about global governance.

The analysis of the relationship between globalization and cultural property allows us to shed light on broader global governance trends affecting areas such as the role of States in global regimes, the development of public-private partnerships, and the proliferation of global norms and procedures. Cultural property, however, keeps its specificity and peculiarities, and this helps highlight the points of weakness and of strength in the adoption of administrative law techniques at the global level.

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\* Professor of Administrative Law, Faculty of Architecture, University of Rome «Sapienza». This article is an extensively revised version of a paper written for the Institute for Research on Public Administration (IRPA) and New York University Jean Monnet Center Seminar «The New Public Law in a Global (Dis)Order. A Perspective from Italy» (New York, September 19/20 2010). The author warmly thanks all the participants for their helpful suggestions, and is grateful to Sabino Cassese, Stefano Battini, Sarah Dadush, Benedict Kingsbury, Euan MacDonald, Giulio Napolitano, Sarah Pasetto, Richard B. Stewart, Maria Tzanou, and Joseph H.H. Weiler for their comments. All the usual disclaimers apply.

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«Nothing in Rome helps your fancy to a more vigorous backward flight than to lounge on a sunny day over the railing which guards the great central researches. It "says" more things to you than you can repeat to see the past, the ancient world, as you stand there, bodily turned up with the spade and transformed from an immaterial, inaccessible fact of time into a matter of soils and surfaces» (H. James, *Italian Hours*, A Roman Holiday, 1909).

## Introduction

In the past few decades, cultural property has been increasing in economic and political relevance worldwide, and its global dimension has been constantly growing.<sup>1</sup> This is mostly because cultural property represents physical evidence of a culture and civilization that are not necessarily restricted to a specific national identity. This property bears universal values which must be preserved and made or kept accessible to the public, and this has significant legal implications. As a matter of fact the term «cultural property» itself was first used and defined in an official document at the international level: it was in 1954, in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>2</sup>

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<sup>1</sup> Though it is difficult to find a single definition of cultural property (see *infra* section 2), the term «cultural property» can be meant as «objects that embody or express or evoke the culture; principally archaeological, ethnographic and historical objects, works of art and architecture, but the category can be expanded to include almost anything made or changed by man» (J.H. Merryman, «“Protection” of Cultural “Heritage”?», 38 *American Journal of Comparative Law Supp.* (1990) 513).

<sup>2</sup> The Italian formula “beni culturali”, however, had been already used by M. Grisolia, *La tutela delle cose d'arte* (Soc. Ed. Foro It., Roma, 1952), p. 124 and 145, who had taken it from French: the term “bien culturel” had been used in a report written by Professor Georges Berlia after the UNESCO experts meeting of Paris in October 1949 (see R.F. Lee, *Compte rendu de la Réunion d'Experts*, in *Museum*, 1950, p. 90 et seq.) According to the Article 1 of the 1954 Convention «the term "cultural property" shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a); (c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centres containing monuments”».

Increased globalization of cultural property is illustrated through a wide range of examples and by data.<sup>3</sup> For instance, cultural sites included in the UNESCO World Heritage List currently number 704, as compared with 478 in 1999.<sup>4</sup> The conditions and procedures for listing these sites have been established not by States, but by an international organization, UNESCO, which adopts the Operational Guidelines for the Implementation of the World Heritage Convention.<sup>5</sup>

In addition, the globalization of markets has triggered a huge increase of commercial transactions related to cultural property. This raised several questions concerning illicit trade and the restitution of artworks or cultural relics to their country of origin: a prime example of these problems is the recent Italian exhibition «*Nostoi: rescued masterpieces*», opened in the Quirinale Palace in December 2007. The exhibition collected 1168 relics that had been illegally exported from Italy and finally returned by the institutions in which they had been displayed (mostly American, such as the Getty Museum of Los Angeles and the Metropolitan Museum of New York). Concluding in March 2008, the exhibition traveled to Athens, in the new museum of the Acropolis, but did not include the most strongly desired – and least likely – return: the friezes of the Parthenon, which remain conserved in the British Museum of London.<sup>6</sup> This is an example of best practices in returning stolen relics or artwork, but statistics show that in the United States the amount of art trafficking is estimated in \$6 billion, behind only the drug and arms trades.<sup>7</sup>

Furthermore, even trade of cultural property falls under the WTO<sup>8</sup> and the EU Treaty,<sup>9</sup> insofar as such properties are part of regimes of exemption that have to be applied by States

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<sup>3</sup> An overview can be found in L. Casini (ed.), *La globalizzazione dei beni culturali* (il Mulino, Bologna, 2010).

<sup>4</sup> See <http://whc.unesco.org/en/list>.

<sup>5</sup> See D. Zacharias, «The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution», 9 *German Law Journal* (2008) 1833, and S. Battini, *Amministrazioni nazionali e controversie globali* (Giuffrè, Milano, 2007), p. 69 et seq.

<sup>6</sup> After this exhibition, the new Acropolis Museum opened officially on June 20, 2009. On the friezes of Parthenon, the so called Elgin marbles, see J.H. Merryman, A.E. Elsen e S.K. Urice, *Law, Ethics and the Visual Arts* (Kluwer, The Netherlands, 5<sup>th</sup> ed., 2007), p. 346 et seq., and J.H. Merryman, *Thinking About the Elgin Marbles. Critical Essays on Cultural Property, Art and Law* (Kluwer, London, 2<sup>nd</sup> ed., 2009), especially p. 24 et seq.

<sup>7</sup> [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/arttheft/arttheft](http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/arttheft). See also H. Purkey, «The Art of Money Laundering», 22 *Fla. Journal of International Law* (2010) 111, especially at 118 et seq.

<sup>8</sup> See art. XX, lett. F, General Agreement on Tariffs And Trade.

<sup>9</sup> See art. 36.

according to certain principles and rules (such as, in the case of the WTO, the principle of arbitrary and unjustifiable discrimination).<sup>10</sup> Refer, for instance, to the judgment of the European Court of Justice of 10 December 1968 in Case 7/68, *Commission of the European Communities v Italian Republic*, regarding the Italian export tax on art treasures, in which Italy was penalized for failing to observe the limitations imposed by Article 36 of the EU Treaty «both as regards the objective to be attained and as regards the nature of the means used to attain it»:<sup>11</sup> in other words, EU Member States can prohibit the exportation but they cannot tax it.

The global dimension of cultural property, however, does not only affect artworks or relics, but also the very institutions that protect such properties, e.g. museums. Take, for instance, the agreement sealed in 2006 between the city of Abu Dhabi and the Guggenheim Foundation, aimed at creating a new museum in the Emirates.<sup>12</sup> This project represents the latest effort to expand the Guggenheim Museum, defined as the first experiment of “global museum”.<sup>13</sup> In connection with this phenomenon of “delocalization” of museums, there is an increasing demand for culture worldwide. In 2010, for example, the Museum of Louvre in Paris counted 8.5 million of visitors (of which only one third were French), whilst in 2001 there were around 5 million: an increase in seven years of 67%. The data regarding the British Museum of London are even more striking: whereas in 2002 there were “just” 1 million visitors, 2010 saw nearly 6 million.<sup>14</sup>

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<sup>10</sup> See T. Voon, *Cultural Products and the World Trade Organization*, Cambridge, Cambridge University Press, 2007.

<sup>11</sup> The Court declared that «the Italian Republic, by continuing to levy after 1 January 1962 the progressive tax laid down by article 37 of the Law of 1 June 1939 no. 1089 on the export to other member States of the Community of articles of an artistic, historic, archaeological or ethnographic interest, has failed to fulfil its obligations under article 16 of the Treaty establishing the European Economic Community». On this decision, P. Pescatore, «Le commerce de l’art et le Marché commun», 21 *Revue trimestrielle de droit européen* (1985) 451; J.H. Merryman, «The Retention of Cultural Property», 21 *U.C. Davis Law Review* (1988) 477; A. Biondi, «The Merchant, the Thief & the Citizen: The Circulation of Works of Art Within the European Union», 34 *Common Market Law Review* (1997) 1173. More generally, see J. Min Cheng, «The Problem of National Treasure in International Law», 12 *Oregon Review of International Law* (2010) 141, especially 160 et seq., and E. D’Alterio, «Il commercio», in Casini, *supra* note 3, p. 90 et seq.

<sup>12</sup> The museum, designed by the well-known architect Frank Gehry (who designed the Guggenheim in Bilbao), will be opening in 2013.

<sup>13</sup> See K. Schubert, *Museo. Storia di un’idea. Dalla Rivoluzione francese a oggi* (Il Saggiatore, Milano, 2004), pp. 138 et seq.

<sup>14</sup> For these data, «Il Giornale dell’Arte», May 2011, p. 44.

These examples point to several relevant legal implications of the globalization of cultural property: the creation of a world system of protection, with rules and procedures set by an international organization and adopted by national administrations; problems regarding the circulation and restitution of cultural objects and the need for international rules; globalization and de-localization of museums, and the growth of the demand for culture, which brings to the fore the necessity of setting minimum standards for museums and exhibitions.

The rise of a «global law» that extends beyond the State, and is caused by the proliferation of international institutions and regulatory regimes, involves almost every sector, from the environment, to the internet, to defense and public order.<sup>15</sup> Cultural property does not escape this trend: it raises several legal issues that affect not only States, but also international institutions – both governmental and non governmental – as well as civil society.<sup>16</sup> Moreover, the peculiar nature of this field, which brings together an incredibly large volume and breadth of public interests, offers a unique case for studying the interaction between public and private actors, nationally and internationally.

The purpose of this paper is to examine the relationship between globalization and cultural property law. The analysis will demonstrate that cultural property is a prime but ambiguous example of the development of global regulatory regimes beyond States. On the one hand, traditional international law instruments do not seem to ensure an adequate level of protection for

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<sup>15</sup> J.E. Stiglitz, *Making globalization work*, 2006; S. Sassen, *A Sociology of Globalization* (Norton, New York, 2007); D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization. Frontiers of Governance* (Polity Press, Cambridge, 2003), and A.M. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004). On the globalization of law, M. Shapiro, «Globalization of Law», *Indiana Journal of Global Legal Studies* (1993) 37, J.-B. Auby, *La globalisation, le droit, l'Etat* (L.g.d.j., Paris, 2<sup>nd</sup> ed., 2010) and S. Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato* (Einaudi, Torino, 2009); with specific reference to international law and public law, see B. Kingsbury, N. Kisch and R.B. Stewart, «The Emergence of Global Administrative Law», 68:3-4 *Law and Contemporary Problems* (2005) 15, and A. von Bogdandy, P. Dann and M. Goldmann, «Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities», 9 *German Law Journal* (2008) p. 1375 ss. (now also in A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann e M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer, Heidelberg, 2010)). More recently, see G. Anthony, J.-B. Auby, J. Morison and T. Zwart (eds.), *Values in Global Administrative Law* (Hart, Oxford, 2011).

<sup>16</sup> E.M. Cottrell, «Keeping the Barbarians outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property», 9 *Chicago Journal of International Law* (2009) p. 627 et seq.

cultural heritage; remedying this situation requires procedures, norms and standards produced by global institutions, both public (such as the UNESCO) and private (such as the International Council of Museums (ICOM)). Further, the globalization of cultural property compels international governmental organizations, States and even private institutions to adopt *ad hoc* legal tools, such as agreements, codes, and best practices in order to face the challenges raised by the emergence of new global interests. On the other hand, however, a comprehensive global regulatory regime to complement the law of cultural property is still some way off. Instead, more regimes are being established, depending on the kind of properties and on the public interest at stake, though the complex of cultural property regimes seems to operate largely in isolation. Moreover, the huge cultural bias which dominates the debate upon cultural property can accentuate the «clash of civilizations» and the cultural bias that already underlie the debate surrounding global governance.

Section 1 will outline the legal features of cultural property, its special value within public policy and public law, and its paradoxes. In particular, the coexistence of and “clash” between the different public interests that inhabit this property will be highlighted. Section 2 will focus specifically on the globalization of cultural property, and it will consider three different patterns: first, the creation of a global system for the protection of World Heritage cultural sites, in connection with the objective of preserving properties of «outstanding universal value» for all mankind; second, the development of an international regulatory framework for the circulation of cultural property and its limits; third, the emergence of global norms regarding museums and exhibitions, adopted by private international institutions on a “bottom up” basis. Lastly, section 3 will examine the legal mechanisms developed in each of these frameworks, with specific regard to their regulatory, procedural, and institutional dimensions. The analysis of the relationship between globalization and cultural property, therefore, will allow us to shed light on broader global governance trends affecting areas such as the role of States in global regimes, the development of public-private partnerships, and the proliferation of global norms and procedures. Nevertheless, cultural property maintains its specificity and peculiarities, and this

helps highlight the points of weakness and of strength in adopting administrative law techniques at the global level.

### 1. **The Legal Complexity of Cultural Property and Its Paradoxes: A Unique “Clash” of Public Interests**

The main characteristic of cultural property is that it refers to many different interests, either public or private or both, which can often be in opposition to each other. There are many examples of this kind of situation. This explains why the most prominent scholars in this field attempted to highlight the clash of interests that underlie cultural property, by illustrating cases in which this conflict takes place.<sup>17</sup>

One interesting example is the history of the Edgar Allan Poe house in New York City. In 2001, when New York University (NYU) decided to construct a new building in the Village, Manhattan, on West 3<sup>rd</sup> Street between Sullivan Street and Thompson Street, the project was originally to demolish two historical houses, the Judson house and the Edgar Allan Poe house. In response to community outcry and a lawsuit, NYU, even though it won the judicial battle, opted to amend the project. The result was an «interpretive reconstruction», that satisfied almost all the actors involved in the dispute (NYU, the Historic Districts Council, a citywide preservation group, and the Committee to Save Washington Square, a coalition of Greenwich Village community groups): the façades of the two houses were reconstructed as they appeared in the 19<sup>th</sup> century, «using bricks, lintels, cornices and other materials salvaged from the original edifices, so that they now serve as part the street-level exterior along part of the new Furman Hall building.»<sup>18</sup> Some observed, however, that none of the original salmon-colored bricks were

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<sup>17</sup> See J.H. Merryman, «The Public Interest in Cultural Property», 77 *California Law Review* 339 (1989), now also in Merryman, *supra* note 6, p. 142 et seq., S. Cassese, «I beni culturali da Bottai a Spadolini» (1975), now in Id., *L'Amministrazione dello Stato* (Giuffrè, Milano, 1976), p. 152 et seq., and E. Jayme, «Globalization in Art Law: Clash of Interests and International Tendencies», 38 *Vanderbilt Journal of Transnational Law* (2005) 927.

<sup>18</sup> J. O'Grady, «N.Y.U. Law School Agrees To Save Part of Poe House», in *New York Times*, January 23, 2001, who reports also that President of NYU John Sexton, Dean of the NYU School of Law at that time, commented: «we are pleased to reach a compromise with the preservationists, but there are some people «who will never be satisfied with any arrangement». See also N. Siegal, «Rapping on Poe's Door, A Hint of Nevermore; Anger

used, so that «Walking by, you would never know this was supposed to be the actual remnant of a 19th-century house [...] It looks tacked on. It's a façade, literally and figuratively».<sup>19</sup> Some argued, on the other hand, that Poe's house had been significantly altered in the 154 years since Poe lived there: «the lower exterior of the building [...] only vaguely resembles its 19<sup>th</sup> century counterpart, as the stoop was removed and the entrance shifted.»<sup>20</sup>

This episode – one amongst thousands – demonstrates that cultural property gives rise to crucial legal and policy issues. In that case, the new NYU building (Furman Hall) was the result of an interest balancing act: on the one hand, the interest of the university in expanding its facilities; on the other hand, the interest in preserving two historical houses. Such occurrences are very common in Europe, especially in Italy, which accounts for the largest amount of the world's cultural property and boasts the highest number of world heritage cultural sites (42, plus 3 world natural sites).<sup>21</sup> This explains why the Italian Constitution sets the fundamental principle that the Republic «safeguards landscape and the historical and artistic heritage of the nation».<sup>22</sup> And it also explains why Italian legislation has a long tradition of regulating cultural property: the Acts approved in 1939 – now incorporated in the 2004 Code of Cultural and Landscape Heritage – have long served as a model for other countries (such as Spain and Greece, which drew inspiration for their legislation from the Italian one).<sup>23</sup> Since the early 1900s, in fact, Italian laws have built sophisticated legal mechanisms for protecting cultural heritage, such as

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in *Village Over N.Y.U. Tower Plan*», in *New York Times*, July 19, 2000, and the webpage <http://www.nypap.org/content/edgar-allan-poe-house>.

<sup>19</sup> This is what the Executive Director of the Greenwich Village Society for Historic Preservation, Andrew Berman, said in 2003 (reported by D. Lee, «The Poe House, and its Mask of Red Bricks», in *New York Times*, October 19, 2003).

<sup>20</sup> N. Siegal, «Rapping on Poe's Door, A Hint of Nevermore; Anger in Village Over N.Y.U. Tower Plan», above. Siegal reports also that in spring 2000 Poe scholars had «asked the city's Landmarks Preservation Commission to designate the Poe house as a landmark to protect it from demolition, but after considering the documentation, the agency declined to hold a hearing. Last week, the New York State Office of Historic Preservation announced that it had determined that the Judson House was eligible for listing in the state and national registers of historic places. But such a designation would not necessarily protect the house from demolition».

<sup>21</sup> See <http://whc.unesco.org/en/list>.

<sup>22</sup> Article 9. See F. Merusi, «Art. 9», in G. Branca (ed.), *Commentario della Costituzione* (Zanichelli-Foro it., Bologna-Roma, 1975), vol. 1, p. 434 et seq., and, more recently, S. Settis, *Paesaggio, Costituzione, Cemento, La battaglia per l'ambiente contro il degrado civile* (Einaudi, Torino, 2010), especially p. 242 et seq.

<sup>23</sup> Cassese, *supra* note 17.

administrative proceedings aimed at recognizing the value of cultural property and controlling its use.<sup>24</sup> It is not by chance, therefore, that when Italian scholarship conceptualized the discretionary power of public administration, cultural property offered excellent case studies for examining how public interests are balanced, as in the case of the Judson and Poe houses.<sup>25</sup>

Moreover, Italian legal scholarship can provide fruitful insights in finding common features amongst all the different cultural objects. Since the beginning of the last century, Italian scholars researched this problem and reached the conclusion that there are two main common elements that can be found in any given cultural property, from an archeological relic to an Impressionist painting: *immateriality* and *publicness*.<sup>26</sup> The first element relates to the value that cultural objects bring within their material support: they transmit something that cannot be touched, such as the terrific emotion that visitors can feel once they enter the Colosseum in Rome: «relics excite a special emotion, even though they have no religious significance».<sup>27</sup> Such value, though in some circumstances can be separated (think of catalogues, photos, postcards, etc.), is necessarily tied up with the material support that conveys it: that is the difference between cultural property and intellectual property. To give an example, the novel «Catcher in the Rye» is not a cultural property, but the original manuscript by Jerome David Salinger is. The second feature does not refer to the ownership, because cultural property can be either public or private. Its publicness, therefore, derives from the public interest that justifies its preservation, protection and special regulation, but, above all, cultural property is public because it must be

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<sup>24</sup> An overview is in A. Roccella, «Le patrimoine culturel: droit italien», in N. Mezghani and M. Cornu (sous la direction de), *Intérêt culturel et mondialisation*, tome I, *Les protections nationales* (L'Harmattan, Paris, 2004), p. 143 et seq.

<sup>25</sup> M.S. Giannini, *Il potere discrezionale della pubblica amministrazione. Concetto e problemi*, Milano, 1939, and Id., *Diritto amministrativo* (Giuffrè, Milano, 3<sup>rd</sup> ed. 1993), II, p. 471 et seq.

<sup>26</sup> See M.S. Giannini, «I beni culturali», *Rivista trimestrale di diritto pubblico* (1976) 3, and Grisolia, *supra* note 2, M. Cantucci, *La tutela giuridica delle cose di interesse artistico e storico* (Cedam, Padova, 1953), Cassese, *supra* note 17, and T. Alibrandi and P. Ferri, *I beni culturali e ambientali* (Giuffrè, Milano, 4<sup>th</sup> ed., 2001); more recently, see C. Barbati, M. Cammelli, G. Sciuillo (eds.), *Diritto e gestione dei beni culturali* (il Mulino, Bologna, 2011), and L. Casini, «La disciplina dei beni culturali da Spadolini agli anni duemila», in *Le amministrazioni pubbliche tra conservazione e riforme* (Giuffrè, Milano, 2008), p. 423 et seq.

<sup>27</sup> Merryman, *supra* note 17, p. 152



accessible to the public and must be known: cultural objects are an instrument of culture, civilization and education.

Cultural property, therefore, affects several public interests. There is of course the interest in the physical preservation of these objects, which is perhaps the oldest one: at the end of the 15<sup>th</sup> century, for instance, the Pope approved specific decrees (“bolle pontificie”) in order to protect artistic and historic objects within his lands.<sup>28</sup> There is the interest in controlling the circulation and the trade of these objects, which is also related to the interest in keeping them within the national borders or in having them returned.<sup>29</sup> consider the well-known art-drain from Europe to the United States portrayed in 1911 by Henry James in his novel *Outcry*.<sup>30</sup> A further interest consists in keeping cultural property in its original context: this is the case of the famous friezes of Parthenon, displayed at the British Museum of London and claimed by Greece,<sup>31</sup> but similar situations may occur even within national borders, whenever local communities ask to have cultural property displayed in its place of origin (as happened in the US, for instance, with the Thomas Eakins’ *Gross Clinic* painting in Philadelphia, the sale of which to another US museum was not consummated because of the outcry from the local community).<sup>32</sup> There is also the interest in granting public access to cultural property and in spreading knowledge about cultural objects: in this sense, cultural property can be defined as «public goods» in so far as it is accessible to the public.<sup>33</sup> Lastly, there is the interest in using the object, as occurs in the case of

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<sup>28</sup> *Etsi de cunctarum* by Martino V in 1425, *Cum aliam nostram urbem* by Pio II in 1462 and *Cum provida* by Sisto IV in 1474 (on these aspects, L. Parpagliolo, *Codice delle antichità e degli oggetti d’arte* (Roma, 2<sup>nd</sup> ed., 1932), 2 volumes.

<sup>29</sup> See J.H. Merryman (ed.), *Imperialism, Art and Restitution* (New York, 2006).

<sup>30</sup> H. James, *The Outcry*, New York, 1911. The novel was based on a true story, regarding the portrait *Cristina of Denmark, duchess of Milan* (1538) by Holbein the Young.

<sup>31</sup> Merryman et al., *supra* note 6, p. 346, and Merryman, *supra* note 6, p. 24 et seq.

<sup>32</sup> The episode is described by J. Min Cheng, «The Problem of National Treasure in International Law», 12 *Oregon Review of International Law* (2010) 141, here at 146 et seq.

<sup>33</sup> This kind of interest can already be identified in the 19<sup>th</sup> century (see E. Jayme, «Globalization in Art Law: Clash of Interests and International Tendencies», above, who cites the position of Antonio Canova, the famous sculptor and diplomat of the Pope who in 1815 asked that returned artwork – which had been taken by Napoleon – be made accessible to the public; however, J.W. Goethe during his *Italian Journey* (1786-1788) had already expressed similar thoughts, as to the importance of spreading knowledge of artworks amongst the public). It is however only after the Second World War that the it became very relevant.

buildings or other sites, for religious purposes: this is a relevant issue, that can create several problems in the protection of cultural property (such as J.W. Goethe already observed in the 18<sup>th</sup> century, while he was in the Sistine Chapel attending there the ceremony of the blessing of the candles, which «for three centuries have blackened the frescoes» with their incense wrapping «the sun of art in clouds»<sup>34</sup>).

Legal scholarship has attempted to classify all of these interests. For example, some adopted the following categorization:<sup>35</sup> *preservation*, (*cultural truth*),<sup>36</sup> *access*, *cultural nationalism*. Another relevant attempt at establishing a taxonomy distinguishes five categories:<sup>37</sup> 1) the *global interests* of the international civil society (which include public access to artwork, protecting the free movement of art objects for international exhibitions, and the protection of human rights); 2) the *national interests* of States and nations in preserving artworks of national significance in the home country; 3) the *private interests* of the owners of an artwork or of the artists; 4) the *interests of the artworks* themselves (such as religious functions, protection of the context, and integrity; and 5) the *market interests*. Some scholars also observe that in the protection of cultural property «a shared interest of humanity» can be found.<sup>38</sup>

All of these interests are often in opposition or divergent: increasing access might render protection more difficult; restricting circulation might reduce access; bringing an object out of its original context may contribute to its conservation.

Globalization has made the picture even more complex. This complexity also involves the relationship between public authorities and private actors, due to the fact that the latter can be either owners or visitors or sponsors of cultural objects. The role of private actors in this area is highly heterogeneous and differs from case to case. This plurality of interests and the variety of

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<sup>34</sup> J.W. Goethe, *Italian Journey (1786-1788)*, transl. (London, 1962), p. 141.

<sup>35</sup> Merryman, *supra* note 17, p. 142 et seq. See also S. Cassese, «I beni culturali: dalla tutela alla valorizzazione», in *Giornale di diritto amministrativo* (1998) 674 et seq.

<sup>36</sup> «Truth» means «the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship» (Merryman, *supra* note 17, p. 115).

<sup>37</sup> Jayme, *supra* note 17, p. 929 et seq.

<sup>38</sup> F. Francioni, «Beyond State Sovereignty: the Protection of Cultural Heritage as a Shared Interest of Humanity», 25 *Michigan Journal of International Law* (2004) 1209

relationships between public and private turn the field of cultural heritage into a very «social construct», an «art system» in which «art players» and «art supporters» operate both nationally and internationally.<sup>39</sup>

Globalization therefore produces significant effects even on «national treasures». Yet this unique field displays more than one «paradox», enhanced by the emergence of global regulatory regimes. In regulating cultural property there is of course a tension between the national level and the international level, because several States aim to retain their property whilst others would prefer an «international multiculturalism» approach: one paradox is that the more relevant cultural property is at the global level, the more significant it will be at the national level, and this increases conflicts between States.

But there are other paradoxes to cultural property, which relate to the very concept of «culture». Some scholars critically observe that «cultural property is a paradox because it places special value and legal protection on cultural products and artifacts, but it does so based on a sanitized and domesticated view of cultural production», and that «cultural property is contradictory in the very pairing of its core concepts. Property is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things. Thus, cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable».<sup>40</sup> Although these critiques may be harsh, it is true that a legal approach to cultural property cannot escape defining which objects fall into this label. This question can yield multiple answers for many different reasons (not only cultural, but also religious, political, or economic) which can lead to different views: the well-known case of the Buddhas of Bamiyan in Afghanistan, deliberately destroyed in 2001 by the Taliban government, is a sad example of such differences.<sup>41</sup> Cultural property in fact is «put to a

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<sup>39</sup> The term «art system» is used by J.H. Merryman, *The American Art System and the New Cultural Policy*, Stanford Public Law Working Paper, n. 1489612, October 2009, to indicate a social construct in which there are both «art players», i.e. «people and institutions whose lives are centrally concerned with works of art», such as artists, collectors, traders, museums, or archeologists, and «art supporters», such as funds, the public, and the State, which give «moral and material support to the players». The «underlying set of assumptions and attitudes that direct the ways players and supporters think and act» represents the «art paradigm»(p. 1 et seq.).

<sup>40</sup> N. Mezey, «The Paradox of Cultural Property», 107 *Columbia Law Review* (2007) 2004, here at 2005.

<sup>41</sup> See *infra* section 3.

variety of political uses in a variety of political contexts – ethnic, regional, and national», and «much cultural property has been destroyed for political and religious reasons», but it is also «valuable» and «a form of wealth»: in other terms, «cultural objects have a variety of expressive effects that can be described, but not fully captured, in logical terms».<sup>42</sup>

Legal scholarship must thus accept that the legal notion of cultural property is a «liminal notion», i.e. a notion that legal norms cannot define without referring to other disciplines or sciences.<sup>43</sup> This «liminal notion» makes the legal concept of cultural property mobile.<sup>44</sup> As a consequence, at the international level each Convention adopts its own definition of cultural property or cultural heritage.<sup>45</sup> These definitions of course refer to the concept of culture and this partially explains the fact that the idea of cultural property – which emerged immediately after the Second World War – is “unbalanced”, i.e. dominated by the Euro-American perspective, whilst ideas coming from other cultures were often unheard.<sup>46</sup> However, the increasing relevance of intangible heritage and cultural diversity represents a sort of balancing, reducing the Western bias in the debate.<sup>47</sup>

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<sup>42</sup> Merryman, *supra* note 17, at 144, 154, 156 and 158.

<sup>43</sup> Giannini, *supra* note 26, p. 8. On the limitations of the term «cultural property», see L.V. Prott and P.J. O’Keefe, «Cultural Heritage or Cultural Property», 1 *International Journal of Cultural Property* (1992) 307. See also A.A. Bauer, «New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates», 31 *Fordham International Law Journal* (2008) 607.

<sup>44</sup> See for instance the interesting case of cultural property of Native Americans, on which S. Harding, «Defining Traditional Knowledge – Lessons from Cultural Property», 11 *Cardozo Journal of International & Comparative Law* (2003) 511.

<sup>45</sup> See *infra* section 3.

<sup>46</sup> See S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton, 2002). On these problematic issues, see also K.A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (W.W. Norton & Company, New York, 2006), especially p. 118 et seq., where the author examines the concepts of culture and cultural patrimony. See also D. Gillman, *The Idea of Cultural Heritage* (Cambridge, Cambridge University Press, 2010).

<sup>47</sup> According to the Article 4 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, «“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.»

## 2. The Globalization of Cultural Property: Three Patterns

As noted above, the impact of globalization on cultural property has been increasing over the past few decades. Drawing on several examples, we can distinguish three different patterns, which allow us to frame this phenomenon.

The first pattern regards the creation of a global system for protecting the world cultural heritage. In this case, the system moved from an *international* law framework, based on a convention, to a *global* one, composed of guidelines, policies, and other “soft” mechanisms. Furthermore, the number and variety of actors involved has been increasing, including not only governments, but also international non-governmental organizations and other entities.

The second pattern refers to the establishment of international regulations on trade and restitution of cultural property. We can see a lack of international law in regulating this topic, and the emergence of solutions based on consensus, such as agreements between governments and museums. Therefore, there is a shift from *international* law to *transnational* law.

The third pattern regards the self-production of global norms and standards for museums and exhibitions. In this case transnational mechanisms, such as the documents approved within the International Council of Museums (ICOM), have become global, due to their large use and high degree of compliance. The pattern here goes from *transnational* to *global*.

### 2.1. *From International to Global: A Global Regulatory Regime for the World Cultural Heritage*

The case of the World Heritage Convention has been heavily analyzed by scholars, who have relied on as a prime example of the interaction between international institutions, States and domestic administrations.<sup>48</sup>

The World Heritage Convention (WHC) recognized the existence of a world cultural heritage that needs to be preserved.<sup>49</sup> Created in 1972 with the WHC, this system is built on

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<sup>48</sup> See S. Battini, «The World Heritage Convention and the Procedural Side of Legal Globalization», Jean Monnet Working Paper 17/2010.

<sup>49</sup> According to the Convention, «cultural heritage» includes «- *monuments*: architectural works, works of

recommendations and guidelines adopted by UNESCO (the Operational Guidelines for the Implementation of the World Heritage Convention), and it is powered by international non-governmental organizations (such as the International Council on Monuments and Sites (ICOMOS), an advisory body of UNESCO),<sup>50</sup> and cooperation between States and international institutions. In order to ensure the effectiveness of the system, instruments of compliance have been created, such as the «name and shame» mechanism that can be adopted for sites in danger.

This system is important from at least three different perspectives.

The first one is regulatory. The legal framework for the protection of world cultural heritage is currently made up of several international documents, that include not only traditional conventions or treaties, but also operational guidelines and policies approved by UNESCO and by the ICOMOS.

The second perspective is institutional. On the one hand, the system is made up of international private bodies, like the ICOMOS. This is a non-governmental organization with headquarters in Paris, which carries out strategic functions in relation to the World Heritage Convention, such as the evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage cultural sites, reviewing requests for international assistance submitted by States Parties, and providing input and support for

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monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; - *groups of buildings*: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; - *sites*: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view» (article 1). See F. Francioni, «Thirty Years on: Is The World Heritage Convention Ready for the 21st Century?», 12 *The Italian Yearbook of International Law*» (2002) 13, and H. Cleere, *The World Heritage Convention 1972: Framework for a Global Study (Cultural Properties)*, Government of Canada, Department of the Secretary of State (ICOMOS, Paris, 1993).

<sup>50</sup> The ICOMOS is the advisory body for cultural sites, while in the case of natural sites there is IUCN- the World Conservation Union (formerly the International Union for the Conservation of Nature and Natural Resources). According to the *Operational Guidelines*, para. 36 et 37, «IUCN was founded in 1948 and brings together national governments, NGOs, and scientists in a worldwide partnership. Its mission is to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable. IUCN has its headquarters in Gland, Switzerland».

capacity-building activities.<sup>51</sup> On the other hand, States that decided to apply to have sites included in the World Heritage List have had to adapt their administrations (for example creating *ad hoc* bodies or enacting specific measures: see for example the US National Park Service and the US Committee of the ICOMOS, which develop standards and procedures for nominations of American cultural resources as World Heritage sites).<sup>52</sup> In order to be eligible to be added to the World Heritage List, cultural property must benefit from adequate long-term legislative, regulatory, institutional and/or traditional protection and management mechanisms that can ensure their safeguarding.<sup>53</sup>

The third perspective is procedural. There are new forms of cooperation between international institutions, States, domestic administrations and other actors. Moreover, the procedure for proposing addition to the World Heritage List – i.e. the formation of a Tentative List<sup>54</sup> – must involve all relevant actors: «States Parties are encouraged to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners».<sup>55</sup> There are also new legal instruments, such as the management plans for cultural sites, which are extremely important because they represent a legal requirement for inclusion in the World Heritage List, and because they provide means and rules for both protecting and granting access to the site.<sup>56</sup> In addition, the *Operational Guidelines* detail some common elements and practices

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<sup>51</sup> See *Operational Guidelines*, para. 34 et seq. The ICOMOS is an association of professionals that currently brings together approximately 9500 members throughout the world (see <http://www.international.icomos.org>). In the case of natural sites, the advisory body is IUCN, which carries out the same kind of functions which ICOMOS accomplishes for cultural sites.

<sup>52</sup> R. Anglin, «The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide», 20 *Yale Journal of Law & Humanities* (2009) 241, especially 225 et seq., who takes into account the normative framework of United States, Canada, South Africa, India, and New Zealand.

<sup>53</sup> *Operational Guidelines*, para. 97.

<sup>54</sup> A Tentative List is an inventory of those properties situated on its territory which each State Party considers suitable for inscription on the World Heritage List (see WHC, articles 1, 2 and 11(1), and *Operational Guidelines*, para. 62).

<sup>55</sup> *Operational Guidelines*, para. 64

<sup>56</sup> According to the *Operational Guidelines*, para. 108, «Each nominated property should have an appropriate management plan or other documented management system which should specify how the outstanding universal value of a property should be preserved, preferably through participatory means».

for effective management, such as ensuring a thorough and shared understanding of the property by all stakeholders, a cycle of planning, implementation, monitoring, evaluation and feedback, the involvement of partners and stakeholders, the allocation of necessary resources, capacity-building, and an accountable, transparent description of how the management system functions.<sup>57</sup> Put briefly, the procedural aspects highlight at least three different levels of action: national, with States preparing tentative lists and nomination; inter-governmental, in the phase of recognizing the outstanding universal value of the cultural property in question; and international, in the phase of funding and assistance provided by the World Heritage Fund.<sup>58</sup>

However, the formation of a global regime for protecting and granting access to cultural property is far from complete.

First, this regime covers only a small part of cultural heritage, i.e. that of «outstanding universal value».<sup>59</sup> Take, for instance, the numerous sites in Italy that are not listed (and

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<sup>57</sup> Para. 111.

<sup>58</sup> On these aspects, Anglin, *supra* note 52, p. 241. See also D. Zacharias, «Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multivel System», 10 *Max Planck Y.B. U.N. L.* (2006) 273.

<sup>59</sup> According to the *Operational Guidelines* (para. 49), «Outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole. The Committee defines the criteria for the inscription of properties on the World Heritage List». Such criteria are enlisted at para. 77 of the Operational guidelines, and they require that properties: (i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance (this criterion should preferably be used in conjunction with other criteria); (vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation. To be deemed of



considerate is worth noting that there are currently almost 40 sites included in the Tentative list presented by Italy, i.e. about as many as the number of properties already enlisted as world cultural sites for this country). In other words, the Convention «is not intended to ensure the protection of all properties of great interest, importance or value, but only for a select list of the most outstanding of these from an international viewpoint».<sup>60</sup>

Second, there are many political problems concerning, for example, areas over which different States have competing claims: e.g., the Temple of Preah Vihear, disputed between Cambodia – in whose favor the International Court of Justice had previously ruled<sup>61</sup> – and Thailand.<sup>62</sup> The role of the States, therefore, remains crucial, not least because it is up to them to prepare tentative lists and propose sites for nomination;<sup>63</sup> and other States can register «reservations» about or dissociate from the inclusion of a site, as China and the US did in the 1990s with regard to Hiroshima.<sup>64</sup> Other problems derive from the fact that only countries which are signatories of the Convention can submit a tentative list. This may raise questions for contended sites, such as the Temple Mount and the Esplanade of the Mosques in Jerusalem, or in cases where a State does not recognize the value that a site may have for a portion of the population of a particular country (there have even been situations, such as during the war in Yugoslavia, in which governments have deliberately destroyed cultural objects that were relevant to minorities: see the *Kordić & Čerkez* case, in which the ICTY held that a state's deliberate destruction of the cultural institutions of particular political, racial or religious groups was a crime against humanity).<sup>65</sup>

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outstanding universal value, a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding.

<sup>60</sup> See *Operational Guidelines*, para. 52.

<sup>61</sup> Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 16 (June 15) (merits).

<sup>62</sup> A. Galis, «UNESCO Documents and Procedure: The Need to Account for Political Conflict When Designating World Heritage Sites», 38 *Georgia Journal of International and Comparative Law* (2009) 205, especially 215 et seq.

<sup>63</sup> On the still dominant role played by States within in «international regulatory regimes», see D.W. Drezner, *All Politics is Global. Explaining Regimes*, Princeton, 2007.

<sup>64</sup> Galis, *supra* note 62, p. 214.

<sup>65</sup> See J.P. Fishman, «Locating the International Interest in International Cultural Property Disputes», 35 *Yale Journal of International Law* (2010) 347, here 359 et seq.; see also G.M. Mose, «The Destruction of Churches and

Third, there is the matter of States' sovereignty. Once a site has been listed, specific compliance mechanisms can be activated by actors other than governments or domestic administrations, such as non profit organizations or communities. In such cases, the World Heritage Committee can intervene in order to ensure the protection of sites, in this way limiting the sovereignty of the State. However, it must be considered that all of the procedures begin at the national level, and that failed participatory processes at the domestic level may undermine international processes: this is what happened in some cases regarding mining activities in protected sites in Canada, Australia, and United States.<sup>66</sup>

Fourth, although this global regulatory regime was conceived to protect both cultural and natural sites of outstanding value, there has been to date a strong prominence of cultural over natural heritage: 704 against 180, plus 27 mixed sites. This unbalance compelled the World Heritage Committee to update the criteria of its decisional criteria in order to give priority to natural sites. As a matter of fact, such corrections fall into a wider policy aimed at ensuring a representative, balanced and credible World Heritage List, according to which every State party to the Convention should have at least some properties listed.<sup>67</sup>

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Mosques in Bosnia-Herzegovina: Seeking a Right-Based Approach to the Protection of Religious Cultural Property», 3 *Buffalo International Journal of International Law* (1996) 180. More generally, see R. O'Keefe, «Protection of Cultural Property Under International Criminal Law», 11 *Melbourne Journal of International Law* (2010) 339.

<sup>66</sup> These cases are examined by N. Affolder, «Democratizing or Demonizing the World Heritage Convention», 38 *Victoria University of Wellington Law Review* (2007) 341.

<sup>67</sup> According to the *Operational Guidelines*, para. 61, «The Committee has decided to apply the following mechanism: a) examine up to two complete nominations per State Party, provided that at least one of such nominations concerns a natural property, nevertheless, on an experimental basis of 4 years, leaving to the State Party the decision on the nature of the nomination, whether natural or cultural, as per its national priorities, its history and geography and, b) set at 45 the annual limit on the number of nominations it will review, inclusive of nominations deferred and referred by previous sessions of the Committee, extensions (except minor modifications of limits of the property), transboundary and serial nominations; c) the following order of priorities will be applied: in case the overall annual limit of 45 nominations is exceeded: i) nominations of properties submitted by States Parties with no properties inscribed on the List; ii) nominations of properties submitted by States Parties having up to 3 properties inscribed on the List; iii) nominations of properties that have been previously excluded due to the annual limit of 45 nominations and the application of these priorities; iv) nominations of properties for natural heritage; v) nominations of properties for mixed heritage; vi) nominations of transboundary/transnational properties; vii) nominations from States Parties in Africa, the Pacific and the Caribbean; viii) nominations of properties submitted by States Parties having ratified the *World Heritage Convention* during the last ten years; ix) nominations of properties submitted by States Parties that have not submitted nominations for ten years or more; x) when applying this priority system, date

## 2.2. *From International to Transnational: the Limits of International Law in Regulating the International Trade and the Restitution of Cultural Property*

The regulation of the trade in artworks and control of their exportation has evolved along a path that has been clearly conceptualized by John H. Merryman.<sup>68</sup> According to his theory, since the Second World War the international regulation of cultural property has been influenced by the coexistence of two different approaches: on the one hand, the «cultural nationalism» supported by the so-called «source nations», like Italy or Greece, which favor the adoption of strict rules in order to keep their national treasures within their borders; on the other hand, the «cultural internationalism» supported by the so-called «market nations», like the United States, which are interested in more flexible regulations. The balance between these two positions produced the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention, which display a predominantly nationalist approach, whilst the 2001 UNESCO Convention on Protection on the Underwater Cultural Heritage and the 2001 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage swing in favor of «cultural internationalism».<sup>69</sup>

Whatever the result of such attempts at balancing, most commentators highlight that international regulations pertaining to the trade in cultural objects and to their restitution has not

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of receipt of full and complete nominations by the World Heritage Centre shall be used as a secondary factor to determine the priority between those nominations that would not be designated by the previous points; d) the States Parties co-authors of a transboundary or transnational serial nomination can choose, amongst themselves and with a common understanding, the State Party which will be bearing this nomination; and this nomination can be registered exclusively within the ceiling of the bearing State Party.»

<sup>68</sup> J.H. Merryman, «Two ways of thinking about cultural property», 80 *American Journal of International Law* (1986) 831, now also in Merryman, i note 6, p. 82 et seq.

<sup>69</sup> J.H. Merryman, «Cultural Property Internationalism», 12 *International Journal of Cultural Property* (2005), n. 11, now also in Id., *Thinking About the Elgin Marbles. Critical Essays on Cultural Property, Art and Law*, above, p. 110 et seq., and F. Francioni, «Beyond State Sovereignty: the Protection of Cultural Heritage As A Shared Interest of Humanity», 25 *Michigan Journal of International Law* (2003-2004) 1209. See also Anglin, *supra* note 52, p. 247 et seq., who sees in the World Heritage Convention a third model, that one of cooperation. On these topics, see also M.R. Hoffman, «Cultural Pragmatism: A New Approach to the International Movement of Antiquities», 95 *Iowa Law Review* (2009-2010) 666, and N. Klug, «Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise Between the Conflicting Ideologies of Cultural Property», 42 *Case W. Res. Journal of International Law* (2009-2010) 711.

been particularly effective<sup>70</sup> – and the same has unfortunately been the case for the protection of cultural heritage in times of armed conflict, as illustrated by the recent looting of Iraqi Museum.<sup>71</sup> As a matter of fact, the recent cases regarding the illicit traffic of archeological relics from Italy to the US confirm the necessity of developing alternative means to traditional treaties. This is happening in part because, in most cases, actual control, and effective restitution, can only take place after a specific agreement between the actors involved is reached: see, for instance, the case of the 2006 Agreement between Italy and the Metropolitan Museum of New York for the restitution to Italy of the Euphronios Krater;<sup>72</sup> or the 2007 preliminary settlement agreement – finalized in 2010 – between Yale University and Peru in the dispute over the treasures of Machu Picchu.<sup>73</sup>

In other circumstances, States try to encourage other forms of regulation, such as for the 1998 Washington Conference Principles on Nazi-Confiscated Art.<sup>74</sup> This is a crucial issue: one

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<sup>70</sup> On this point, see in particular E.A. Posner, «The International Protection of Cultural Property: Some Skeptical Observations», Public Law and Legal Theory Working Paper No. 141, The Law School, The University of Chicago, November 2006, who goes as far as to question the very usefulness of a specialized international regulatory framework, on the basis that cultural property does not deserve a special treatment but should be regulated in the same manner as art, oil, and other cultural or natural resources. This provocative claim seems to be excessive, but it underlines a very important issue, i.e. the actual difficulty in grasping the special essence of cultural property and their unique character, so unique that even «Marxism-Leninism had never got to grips with the concept of the private collection [...] no one had ever decided if the ownership of work of art damned its owner in the eyes of the Proletariat. Was the collector a class-enemy? If so, how?» (B. Chatwin, *Utz*, New York, 1988, p. 26).

<sup>71</sup> See K.E. Petersen, «Cultural Apocalypse Now: The Loss of the Iraqi Museum and a New Proposal for the Wartime Protection of Museums», 16 *Minnesota Journal of International Law* (2007) 163, and R.E. Patron, «The Looting of Iraqi Archeological Sites: Global Implications and Support for an International Approach to Regulating the Antiquities Market», 40 *George Washington International Law Review* (2008-2009) 465. More generally, see P. Gerstenblith, «From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century», 37 *Georgia Journal of International Law* (2006) 245, and E.J. Techera, «Protection of Cultural Heritage in times of Armed Conflict: The International Legal Framework Revisited», 4 *Macquarie Journal of International & Comparative Environmental Law* (2007) 1.

<sup>72</sup> The Accord was signed in February 2006. See A.K. Briggs, «Consequences of the Met-Italy Accord for the International Restitution of Cultural Property», 7 *Chicago Journal of International Law* (2006-2007) 623.

<sup>73</sup> Under this agreement, «Yale will return, over the next two years, the archaeological materials excavated by Hiram Bingham III at Machu Picchu nearly a century ago.» (see <http://opac.yale.edu/news/article.aspx?id=1997>). On this case, S. Swanson, «Repatriating Cultural Property: The Dispute Between Yale and Peru Over the Treasures of Machu Picchu», 10 *San Diego International Law Journal* (2009) 469.

<sup>74</sup> See R. Dubin, «Museums and Self-regulation: Assessing the Impact of Newly Promulgated Guidelines on the Litigation of Cultural Properties», 18 *University of Miami Business Law Review* (2010) 101, especially 120, where she notes that these principles, adopted by more than 40 governments, are based on the guidelines produced

important recent case is the *Maria Altmann v. Republic of Austria*, in which Austria had to give back a famous Gustav Klimt painting stolen by the Nazis to a legitimate heir. In this case, the interest in protecting human rights prevailed over the interest in ensuring public access to artwork (the painting was in fact displayed in the Belvedere Museum of Vienna; after the restitution, it was sold to a private art collector);<sup>75</sup> another highly significant case is the *Chabad v. Russian Federation*, an «epic struggle by an orthodox Jewish organization to recover a collection of sacred, irreplaceable religious books and manuscripts taken during the Russian revolution and World War II».<sup>76</sup>

Effective international regulation of the trade and restitution of cultural property requires, therefore, the intervention of several actors – not only States but also museums and institutions – and the adoption of a multilayered set of norms, ranging from international treaties and conventions to operational policies and mutual agreements. In a certain way, the example of international regulation of trade and restitution of cultural property provides evidence of the limits of traditional international mechanisms in addressing global interests, and confirms the need to develop global standards for private actors, as well as museums.

### 2.3. *From Transnational to Global: Setting Global Norms for Museums and Exhibitions*

Cultural property requires a supranational level of regulation able to address global interests. From this perspective, the experience of museums in managing and lending artworks represents a very interesting case study.

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by the American Association of Museum Directors Task Force on the Spoliation of Art during the Nazi/World War II Era (AAMD), and by the American Association of Museums' Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (AAM). See also J. Anglim Kreder, «The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities», 64 *University of Miami Law Review* (2009-2010) 997.

<sup>75</sup> The case has been in depth analyzed by E. Jayme, «Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?», 11 *Uniform Law Review n.s.* (2006) 393. From a wider perspective, see also E.A. Graefe, «The Conflicting Obligations of Museums Possessing Nazi-Looted Art», 51 *Boston College Law Review* (2010) 473, and M.J. Reppas II, «Empty International Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed», 36 *Denver Journal of International Law & Policy* (2007-2008) 93.

<sup>76</sup> M.J. Bazylar and S.M. Gerber, «Litigating the Pillage of Cultural Property in American Courts: *Chabad v. Russian Federation* and Lesson Learned», 32 *Loyola Los Angeles International & Comparative Law Review* (2010) 45.

In terms of the museum management, the system is governed by the International Council of Museums (ICOM), a non-governmental organization created in 1946, which maintains formal relations with UNESCO and has a consultative status in the United Nations' Economic and Social Council. With its headquarters in Paris, ICOM has around 28,000 members in 137 countries.<sup>77</sup> The membership participates in the activities of 115 National Committees and 31 International Committees. Some National Committees have also organized at the regional level to reinforce their action. ICOM is affiliated with 17 international association. Its activities are focused on «enhancing professional cooperation and exchange, dissemination of knowledge and raising public awareness of museums, training of personnel, advancing of professional standards, elaborating and promoting professional ethics, preserving heritage and combating the illicit traffic in cultural property».<sup>78</sup>

ICOM Statutes set rules for the functioning of the organization, and they offer a definition of museum, which has evolved significantly from 1946 to date. Whilst at that time the term included «all collections open to the public, of artistic, technical, scientific, historical or archaeological material, including zoos and botanical gardens, but excluding libraries, except in so far as they maintain permanent exhibition rooms», nowadays «a museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment».<sup>79</sup>

It is worth noting that ICOM developed a “network” structure similar to that of other international private organizations operating at the global level, such as the International Organization for Standardization (ISO), the International Olympic Committee (IOC) and the Internet Corporation for Assigned Names and Numbers (ICANN), which have national bodies or

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<sup>77</sup> ICOM is financed primarily by membership fees and supported by various governmental and other bodies. Members participate in the national, regional and international activities of the organization: workshops, publications, training, twinning programs, and the promotion of museums through International Museum Day (May 18, annually) (<http://icom.museum>).

<sup>78</sup> See [http://icom.museum/hist\\_def\\_eng.html](http://icom.museum/hist_def_eng.html).

<sup>79</sup> See [http://icom.museum/hist\\_def\\_eng.html](http://icom.museum/hist_def_eng.html).

committees (one per country) and/or other regional bodies. It should be also considered that many ICOM members are public entities under the law of their own country (this is also the case for the national standardizing bodies in the ISO system and with domestic sporting bodies – such as national Olympic committees or national anti-doping organizations – in the global sports system).<sup>80</sup>

One of the most important documents produced by ICOM – its «cornerstone» – is the Code of Ethics for Museums.<sup>81</sup> It sets minimum standards of professional practice and performance for museums and their staff. In joining the organization, ICOM members undertake to abide by this Code.

ICOM is therefore a relevant example of self-regulation operating at the global level: an international non-governmental organization that adopts global standards with which members must comply. But the scope of this Code goes beyond ICOM membership, because many countries, such as Italy, have enacted statutes or regulations which refer expressly to the Code.<sup>82</sup> This is partially due to the fact that, even though ICOM and the Code are formally private, they implicate a number of elements of “publicness”,<sup>83</sup> such as the public mission carried out by museums or the public nature of many of ICOM’s members. Furthermore, such standards rely on a high level of professional expertise, which also acts as a source of legitimacy for this

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<sup>80</sup> These issues are widely examined in L. Casini, *Il diritto globale dello sport* (Giuffrè, Milano, 2010).

<sup>81</sup> The ICOM Code of Professional Ethics was adopted unanimously by the 15th General Assembly of ICOM in Buenos Aires, (Argentina) on 4 November 1986. It was amended by the 20th General Assembly in Barcelona (Spain) on 6 July 2001, retitled ICOM Code of Ethics for Museums, and revised by the 21st General Assembly in Seoul (Republic of Korea) on 8 October 2004. The ICOM Code of Ethics for Museums has been prepared by the International Council of Museums. It is the statement of ethics for museums referred to in the ICOM Statutes. The Code reflects principles generally accepted by the international museum community. Membership in ICOM and the payment of the annual subscription to ICOM are an affirmation of the ICOM Code of Ethics for Museums.

<sup>82</sup> See, for Italy, the «Atto di indirizzo sui criteri tecnico-scientifici e sugli standard di funzionamento e sviluppo dei musei», adopted with the decree of Ministry for Cultural Property of May 10 2001. See C. Carmosino, «Le modalità e i luoghi della fruizione», and E. Cavalieri, «I modelli gestionali: il *management* museale», both Casini, *supra* note 3, respectively at 197 et seq. and at 249 et seq.

<sup>83</sup> See in this regard B. Kingsbury, «The Concept of ‘Law’ in Global Administrative Law», 20 *European Journal of International Law* (2009) 23, and Id., «International Law as Inter-Public Law», in H.R. Richardson e M.S. Williams (eds.), *NOMOS XLIX: Moral Universalism and Pluralism* (New York University Press, New York, 2009), p. 167 et seq., especially p. 175 et seq.

regulation. Therefore, ICOM could be considered to be a type of «global administration», because it is a private body that carries out genuine regulatory functions at the global level.<sup>84</sup>

The ICOM Code, however, is not the only example of this kind of regulatory activity, which is a law-making based on a “bottom-up” procedure. Another interesting case, which is less structured and even more based on self-regulation, is the *General Principles on the administration of loans and exchange of cultural goods between institutions*<sup>85</sup>. These loan standards were originally approved in 1992 and revised in 2002 by an informal international group – the so-called “Bizot group”<sup>86</sup> – formed by the organizers of large-scale exhibitions (including for instance the British Museum of London, and all the major US museums, such as MoMA, the Metropolitan and the Guggenheim in New York and the National Gallery of Art in Washington D.C.).<sup>87</sup> Principles are adopted by all group members, who meet annually; the principles aim to inform, simplify and make more cost-effective the organization and administration of international exhibitions. Moreover, they are driven by the interest in increasing the level of public access to cultural property: as a general principle, in fact, they state that «loans should primarily be granted for the benefit of other museums to which there is general public access».<sup>88</sup> The compliance levels for these standards is very high, and they have been also used as a basis by the OMC working group on Mobility of Collections, an “*Open*

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<sup>84</sup> On the concept of «global administration», see Kingsbury et al., *supra* note 15, p. 20 et seq., who distinguished five different types of global administration: 1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid intergovernmental–private arrangements; and (5) administration by private institutions with regulatory functions.

<sup>85</sup> The Principles are available at <http://www.lending-for-europe.eu/index.php?id=214>. See I. Chiavarelli, «Il prestito e lo “scambio”», in Casini, *supra* note 3, p. 113 et seq.

<sup>86</sup> The name comes from Irene Bizot, former head of *Reunion des Musees Nationaux* of France, who promoted the initiative.

<sup>87</sup> The list of the members is alleged to the Principles.

<sup>88</sup> Principle 1.2. Therefore «museums are advised to consider carefully whether to lend to exhibitions held in non-museums environments such as town halls, department stores, churches, art or antique fairs and other spaces not specifically built for the display of cultural goods and without trained staff and adequate security and climate controls. Similar considerations should apply when lending to government departments». In other words, the principles establish a clear preference for museums – in so far as they are open to the public – as institutions to which to loan cultural goods.



*Method of Coordination*” Committee set up by the EU Commission in 2009. It is also worth noting that, in 2005, when a European working group of museum experts proposed some amendments to the Principles, in the report *Lending to Europe: Recommendations on collection mobility for European museums*, it did so after consultation with the Bizot group and after having obtained its consent.<sup>89</sup>

This pattern from transnational to global, therefore, stems from best practices in the management of museums. However, this is not necessarily a good thing, in so far as self-regulation might often ensure more protection for the interest of the regulators/regulated (i.e. museums) than for the interest of third parties, such as the general public or even governments. From this perspective, however, risks are reduced at least by the fact that museums cannot survive without visitors, and therefore their policy will tend to enhance public access. But undoubtedly the largest museums retain most of the powers within these self-created associations and groups, and this might cast a shadow over the genuinely «global» value of the ICOM Code and of the Bizot Principles.

### 3. An “Outstanding” Complex Global Regime?

The three patterns examined above present a complex framework, with many peculiarities but also with some common threads. First of all, however, it must be clarified that a comprehensive global regulatory regime to complement the law of cultural property is still some way off. Instead more regimes are being established, depending on the kind of properties and on the public interest at stake.<sup>90</sup> Indeed, a problem that has always characterized cultural heritage is the difficulty in finding a common and unique definition of cultural property: this is why each treaty or convention gives its own definition. Thus the system built on the WHC affects only a “special” kind of property, i.e sites of outstanding universal value, whilst the objects affected by

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<sup>89</sup> See <http://www.lending-for-europe.eu/index.php?id=215>.

<sup>90</sup> See K. Raustiala and D.G. Victor, «The Regime Complex for Plant Genetic Resources», 58 *International Organization* (2004) 277, who recognize in complex regimes the «horizontal, overlapping structure and the presence of divergent rules and norms» (p. 305).

international regulation of trade and restitutions are much more numerous. But the number of definitions is enriched by other notions formulated at the supranational level (such as in the case of the EU)<sup>91</sup> and at the domestic level.<sup>92</sup> From this perspective, the case of Italy is significant. In 1967, in fact, a study commission on cultural property (the so called «Commissione Franceschini») formulated a definition that has been widely accepted and now has been incorporated in the legislation.<sup>93</sup> According to this definition, «Cultural property consists of immovable and movable things which [...] present artistic, historical, archaeological, ethno-

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<sup>91</sup> According to Article 167.1-2 of the EU Treaty, the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore; and action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European peoples; conservation and safeguarding of cultural heritage of European significance; non-commercial cultural exchanges; and artistic and literary creation, including in the audiovisual sector.

<sup>92</sup> At the international level, take, for instance, the different definitions provided by international conventions: according to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property, «the term 'cultural property' means property which, on religious or secular grounds, *is specifically designated by each State* as being of importance for archaeology, prehistory, history, literature, art or science» and which belongs to the listed categories (e.g. products of archaeological excavations (including regular and clandestine) or of archaeological discoveries as well as property of artistic interest) (article 1); according to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, «cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to [the] Convention» (article 2); according to the 2001 UNESCO Convention on Protection on the Underwater Cultural Heritage, «“Underwater cultural heritage” 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 such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character» (article 1); according to the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, «The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage» (article 2); and see also definitions provided by the 1954 Hague Convention and by the 1972 World Heritage Convention (*supra* Introduction and section 1). At the domestic level, there are also several different formula: take, for instance, the definition set by the U.S. Native American Graves Protection And Repatriation Act [104 Stat. 3048 Public Law 101-601--Nov. 16, 1990], section 2(3): «(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native».

<sup>93</sup> It was the «Commissione di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio», established by the Act of 26 April 1964, no. 310 (its final report and declarations can be read in *Rivista trimestrale di diritto pubblico* (1966), p. 119 et seq., whilst its proceedings are collected in three volumes: *Per la salvezza dei beni culturali* (Colombo, Roma, 1967).

anthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as *testifying to the values of civilization*».<sup>94</sup>

In domestic legislations, there is also a tendency to identify particular properties as «national treasures». This, of course, creates barriers between the cases examined above, and limits the interconnections and overlapping between the set of rules applicable to each.

There can be cases, however, in which these separate regimes may conflict with one another: this occurs, for instance, when a claimed cultural property, that has not yet been restituted by one State to another should subsequently be lent for an exhibition. In this case, the solution has been found in specific anti-seizure legislations enacted by States (such as Germany for example), in order to make the exhibition possible without incurring risks.<sup>95</sup> But there might be even case in which the origin of cultural property is uncertain, such as in the Sevso case, a late Roman treasure stored in England but claimed by Lebanon, Croatia and Hungary, a «spectacular example» of «unprovenanced antiquities».<sup>96</sup> Furthermore, as noted above, globalization has rendered the framework of cultural property law more complex, mostly because the public interests at stake are increasing and the way in which such interests are evaluated by States and domestic administrations is changing.

### 3.1. *The Cultural Property Regimes in Context*

There are however several common elements between the three examples considered, which can be also examined in comparison with other global regulatory regimes.

Firstly, there is increasing law-making activity carried out at the international or supranational level. This regards both public and private actors. On the one hand, UNESCO

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<sup>94</sup> See the 2004 Code, art. 2.2. On the concept of cultural property in Italy, see Giannini, *supra* note 8, p. 3, and Cassese, *supra* note 17; more recently, B. Zanardi, «La mancata tutela del patrimonio artistico in Italia», *Rivista trimestrale di diritto pubblico* (2011) 431.

<sup>95</sup> On these issues, M. Weller, «Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the *Liechtenstein* Litigation», 38 *Vanderbilt Journal of Transnational Law* (2005) 997, and, more generally, J.H. Merryman, «The Nation and the Object» (1994), in Merryman, *supra* note 3, p. 206 et seq.

<sup>96</sup> See J.H. Merryman, «Thinking about the Sevso Treasure» (2008), in Merryman, *supra* note 3, p. 348 et seq.

produces significant guidelines, policies and other norms that implement traditional treaties and conventions.<sup>97</sup> On the other hand, international non governmental institutions adopt normative documents – such as ICOM in approving its Code – that affect not only the actors involved in the law-making process, but also States or other institutions that are not yet members of the organizations. There is also the elaboration of global standards – like for loans of cultural property – that are produced through private and informal procedures, the result of which is extremely effective: from this perspective, the example of the Bizot group standards can be likened to that of the Basel Committee in the field of banking.<sup>98</sup> And the global context offers many examples of “global private regimes”,<sup>99</sup> such as the ISO system,<sup>100</sup> the internet,<sup>101</sup> or the accounting sector.<sup>102</sup>

However, it should be recalled that in spite of the formally private nature of these organizations – like ICOM – their members are in many cases public authorities or public entities. This circumstance, together with the undoubtedly public mission that these bodies seek to fulfill and with the absence of other comparable actors in the same field, allows us to frame

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<sup>97</sup> A.A. Yusuf (ed.), *Standard-Setting at UNESCO. Normative Action in Education, Science and Culture*, I, (Brill, Leiden, 2007).

<sup>98</sup> M.S. Barr and G.P. Miller, «Global Administrative Law: The View from Basel», 17 *European Journal of International Law* (2006) 15.

<sup>99</sup> G. Teubner, «Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?», in K.H. Ladeur (ed.), *Public Governance in the Age of Globalization* (Ashgate, Aldershot, 2004), p. 71 et seq., and H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Market* (Hart, Oxford and Portland, 2005).

<sup>100</sup> C.N. Murphy and J. Yates, *The International Organization for Standardization (ISO). Global governance through voluntary consensus* (Routledge, London-New York, 2009), and E. Shamir Borer, *The Evolution of Administrative Law-Type Principles, Mechanisms and Practices in the International Organization for Standardization (ISO)*, paper presented at the Viterbo II *Global Administrative Law Seminar* (2006).

<sup>101</sup> See the public-private system of *governance* for domain names governed by the *Internet Corporation for Assigned Names and Numbers* (Icann) and national authorities: J. von Bernstorff, «The Structural Limitations of Network Governance: ICANN as a Case in Point», in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford, 2004), p. 257 et seq., T. Schultz, «Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface», 19 *European Journal of International Law* (2008) 799, and, more extensively, D. Lindsay, *International Domain Name Law: ICANN and the UDRP* (Hart, Oxford, 2007).

<sup>102</sup> D. Zaring, «International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations», in 33 *Texas International Law Journal* (1998) 281, S. Battini (ed.), «La regolazione globale dei mercati finanziari», *Rivista trimestrale di diritto pubblico*, Quaderno n. 3 (Giuffrè, Milano, 2007), and M. De Bellis, *Gli standard globali per i mercati finanziari* (Giuffrè, Milano, 2011).

the regulatory regimes created by ICOM or by other international non governmental organization of museums as hybrid public and private regimes, of which the sport anti-doping regime regulated by the World Anti-Doping Agency (WADA) provides a good example.<sup>103</sup>

Secondly, the institutional framework is highly diversified. The actors involved are not only States (i.e. governments) or international governmental organizations (such as UNESCO), but also domestic administration or other national entities and private actors, either international or domestic or both. There is therefore a plethora of institutions acting in concert in order to balance the numerous public interests connected with cultural property. This of course blurs the dividing line between public and private, producing hybrid regimes. Such situations are familiar to other global regimes, especially those in which there are many interests at stake, such as public health or the environment, where forms of global public-private partnerships have been extensively developed.<sup>104</sup>

Thirdly, the procedural aspects present a multilayered system in all three examples considered above. There is a vertical dimension, with UNESCO, ICOM and other international institutions on one side, and States, domestic administrations and museums on the other. There is also a horizontal dimension, consisting of the relationships between States and of the relationships between members inside ICOM or within the Bizot group. This is also something common to many global regimes. What seems to remain underdeveloped in the field of cultural property is the use of administrative law principles – such as transparency, participation, reasoning – that could improve the effectiveness of global regulation. This is particularly true in the case of the international regulation of trade and restitution, and the lack of such mechanisms has led to the emergence of self-regulation or mutual agreements or even alternative means of dispute resolution.<sup>105</sup>

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<sup>103</sup> On these aspects, L. Casini, «Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)», in Symposium on “Global Administrative Law in the Operations of International Organizations” (ed. L. Boisson de Chazournes, L. Casini, and B. Kingsbury), 6:2 *International Organizations Law Review* (2009) 421.

<sup>104</sup> An overview is in B. Bull and D. McNeill, *Development Issues in Global Governance. Public-Private Partnerships and Market Multilateralism* (Routledge, Abingdon, 2007).

<sup>105</sup> See M. Cornu and M.A. Renold, «New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution», 17 *International Journal of Cultural Property* (2010) 1.

In comparison with other regulatory regimes, that of cultural property seems to be yet to ripen fully. For example, globalization of these properties has triggered a proliferation of norms and procedures, but this has not been accompanied by the development of review techniques, nor of a court or tribunal.<sup>106</sup> Moreover, except for the compliance instruments introduced by the WHC for the protection of the sites enlisted in the Danger List,<sup>107</sup> the system has not introduced yet effective enforcement mechanisms for other hypothesis, as happened in Afghanistan with the Buddhas of Bamiyan, destroyed by the Taliban in 2001.<sup>108</sup> This is partially due to the fact that States still play a prominent role in cultural property law: when they retain relevant functions, global regulatory regimes reduce their own level of mimesis of domestic orders, because the presence of States encourages the development of techniques and procedures which can allow governments to retain significant powers (as happens with the multilayered system designed the WHC); on the other hand, the more “private” – and characterized by a low level of State influenced – regimes are, the more they will come to resemble public law regimes.<sup>109</sup>

The interplay of all the interests that inhabit cultural property produces many different legal problems, which become even more complex because of globalization. This enhances the paradoxes of cultural property, such as the fact that the more universal the value of cultural sites or objects, the more significant such properties are for the country which hosts them. Put briefly, the more universal cultural property is, the more nationally important it will be. This might

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<sup>106</sup> See F. Francioni and F. Lenzerini, «The Destruction of the Buddhas of Bamiyan and International Law», 14 *European Journal of International Law* (2003) 619, especially 645 et seq., in which the need of establishing international tribunals to punish those who commit acts against cultural property is underlined.

<sup>107</sup> See M. Macchia, «La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli», in *La globalizzazione dei beni culturali*, above, p. 57 et seq.

<sup>108</sup> At that time they were not enlisted as a world heritage cultural site; it happened in 2003. The story of Bamiyan Buddhas’ destruction and its legal implications can be found in C. Brenner, «Cultural Property Law: Reflecting on the Bamiyan Buddhas’ destruction», 29 *Suffolk Transnational Law Review* (2006) 237, and Francioni and Lenzerini, *supra* note 106. See also, P. Gerstenblith, «From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century», above, p. 246 et seq. More generally, see R. O’Keefe, «World Cultural Heritage Obligations to the International Community as a Whole?», 53 *International & Comparative Law Quarterly* (2004) 189, and O’Keefe, *supra* note 65.

<sup>109</sup> A. Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State”, 56 *Am. J. Comp. L.* (2008), p 605 et seq., at p. 629, and E. Meidinger, “Competitive Supragovernmental Regulation: How Could It Be Democratic?”, 8 *Chicago Journal of International Law* (2008), p. 513 et seq., at p. 516 et seq.

creates conflicts: for instance, the State can discriminate between its citizens and foreigners, or, in the case of movable properties, they can ban any kind of exportation. A case in point occurred in Italy, when municipal authorities introduced advantageous rates for admission to museums, monuments, galleries or archeological sites only in favour of Italian nationals and persons resident within the territory of those authorities, and the European Court of Justice penalized such rates as discriminatory.<sup>110</sup>

Balancing all of these interests is very difficult, and the question «Who owns the past?» can find multiple answers.<sup>111</sup> This is why private actors involved started producing self-regulation, in order to fulfill the lack of norms at the global level: this has been the case not only for standards regarding museum management and lending artworks, but also for principles concerning the restitution of Nazi-confiscated art. In addition, cultural property often is private property, and this adds the owners' rights to the number of interests which have to be weighed.

### 3.2. *Towards New Legal Techniques in the Global Arena*

The three patterns highlighted above, therefore, show that even cultural property is under the impact of globalization. They display the poverty of international law in regulating this field and the emergence of various mechanisms based either on public and administrative law, such as in the case of the World Heritage Convention or ICOM rule-making activity, or on transnational law, such as for the agreements sealed between museums and governments for the restitution of cultural objects. As a matter of fact, the regulatory, procedural and institutional frameworks triggered by the globalization of cultural property resemble several global regimes. Cultural property, however, retains its specificity and peculiarities. This allow us to highlight the points of weakness and of strength in adopting administrative law techniques at the global level.

The main weakness derives from the huge cultural bias which dominate the debate about cultural property. There is in fact a class bias, based on a high culture conception, which is

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<sup>110</sup> European Court of Justice, Judgement of 16 January 2003, case C-388/01, *Commission of the European Communities v. Italian Republic*.

<sup>111</sup> See Merryman et al, *supra* note 3, p. 217 et seq, and K. Fitz Gibbon (ed.), *Who Owns the Past?: Cultural Policy, Cultural Property, and the Law* (Rutgers, New Brunswick, N.J., 2005).

diminishing: the increase of visitors to cultural sites and the growth of world heritage sites display a degree of “democratization” of cultural property which was unconceivable only few decades ago: in Italy, for instance, the first museum cafeteria was opened in the mid 1990s, i.e. less than twenty years ago. But there is also a Western bias in the definition of cultural property, as mentioned above, which is being reduced by the recognition of cultural diversity. These tensions are enhanced by the multiplicity of interests that inhabit cultural property, and this confirms that a comprehensive legal approach to this field must reach beyond the managerial issues about competing claims to ownership, and beyond the “supremacy” of preservation.<sup>112</sup> Furthermore, it is the presence of such bias that can make the development of principles such as transparency, accountability, participation in the global context of cultural property highly problematic, especially if we consider that this kind of mechanisms are themselves seen as results of the Western tradition.<sup>113</sup> The plurality of bias that comes with the idea of culture, which cultural property law must address, thus can accentuate the «clash of civilizations» and the bias that already underlie the debate about global governance.<sup>114</sup>

Moreover, the complex of cultural property regimes seems to operate largely in isolation: in a certain sense, it shares the exceptionality and unique character of artworks. However, some connections with other regimes do exist, depending on the case in question. The WHC system, for instance, presupposes that world cultural sites can also be environmentally protected. In addition, the circulation of artworks has always raised issues regarding the relationships between this “special” market and the WTO regime.<sup>115</sup> But these interconnections are still labile, whilst it would be worth strengthening them, especially in the environmental field. From this point of view, the World Heritage Convention represents an excellent opportunity for enhancing forms of

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<sup>112</sup> See S. Harding, «Cultural Property and the Limitations of Preservation», 25 *Law and Policy* (2003) 17.

<sup>113</sup> B.S. Chimni, «Co-Option and Resistance: Two Faces of Global Administrative Law», 37 *New York University Journal of International Law and Politics* (2005) 799.

<sup>114</sup> See S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, New York-London-Toronto-Sydney, 1996).

<sup>115</sup> See T. Voon, «UNESCO and the WTO: A Clash of Cultures?», 55 *International and Comparative Law Quarterly* (2006) 635, and, regarding the diversity of cultural expressions, S. Peng, «International trade in ‘cultural products’. Unesco’s commitment to promoting cultural diversity and its relations with the WTO», 11 *International Trade and Business Law Review* (2008) 218.



closer cooperation between protection of the environment and protection of cultural and natural heritage: consider the so-called mixed sites, which are only 27 worldwide.

The main strength derives from the way in which cultural property has been regulated at the national level. In almost every country legislation has recognized the specificity of cultural objects, i.e. the coexistence of several public and private interests. Due to this recognition, a number of different public bodies and different proceedings emerged, in order to deal with such interests. Once again, Italy is a prime example of this: since the 1960s, indeed, the function of protection has been complemented with the function of enhancement or “valorization” («valorizzazione»), which was inserted into the Italian Constitution in 2001.<sup>116</sup> In other terms, the case of cultural property represents one of the most significant pieces of evidence of the «national law theories in which the public function of administrative action (the public interest, identified and regulated by law) justifies application of public-regarding administrative law rules to the administrative actors.»<sup>117</sup> This means that cultural property law can significantly contribute to developing the existing legal tools of global governance, and to create new ones: some scholars indeed observe that in international art cases new legal techniques have emerged, such as «narrative norms», i.e. «non-binding principles that may have legal effects» and «may be taken into consideration for the interpretation and construction of legal texts», or the «legal approach that attributes at least factual significance to foreign art law, a tool which may help to overcome differences of legal systems and foster cooperation».<sup>118</sup> The way in which different

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<sup>116</sup> Article 117(3) of Italian Constitution. According to 2004 Italian Code of the Cultural and Landscape Heritage, article 6(1), «Enhancement consists in the exercise of the functions and in the regulation of the activities aimed at promoting knowledge of the cultural heritage and at ensuring the best conditions for the utilization and public enjoyment of the same heritage. Enhancement also includes the promotion and the support of conservation work on the cultural heritage»; whilst according to article 3(1), «Protection consists in the exercise of the functions and in the regulation of the activities aimed at identifying, on the basis of adequate investigative procedures, the properties constituting the cultural heritage and at ensuring the protection and conservation of the aforesaid heritage for purposes of public enjoyment».

<sup>117</sup> See B. Kingsbury and L. Casini, «Global Administrative Law Dimensions of International Organizations Law», in Symposium on “Global Administrative Law in the Operations of International Organizations”, *supra* note 103, p. 319 et seq., here p. 332.

<sup>118</sup> Jayme, *supra* note 17, at 943 et seq.

interests are regulated within cultural property law, therefore, can offer interesting solutions in wider contexts,<sup>119</sup> such as the public goods theories.<sup>120</sup>

In conclusion, global challenges to the law of cultural property are still numerous and they will continue to increase. In the meanwhile, regulatory regimes are growing, following the emergence of new global public interests. Whatever the future holds, however, it is hoped that people will never lose their passion and love for these objects, and will always be willing and able to face «the difficulty for the right and grateful expression of which makes the old, the familiar tax on the luxury of loving Italy» and all the other cultural resources.<sup>121</sup>

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<sup>119</sup> On the relevance of public interest in the global legal space, see J. Morison and G. Anthony, «The Place of Public Interest», in Anthony *et al.*, *supra* note 15, p. 215 et seq.

<sup>120</sup> The contemporary theory of “global public goods” is discussed in E.A. Andersen and B. Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights* (Martinus Nijhoff, Leiden, 2007), and I. Kaul et al. (eds.), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, Oxford, 2003); more recently, J.-B. Auby, «Public Goods and Global Administrative Law», in Anthony *et al.*, *supra* note 15, p. 239 et seq., who focuses on the relationships between public goods and legal globalization.

<sup>121</sup> H. James, *Italian Hours*, 1909, last sentence.