Introduction

Francesco Francioni and James Gordley

Over the past two decades, international law has seen a remarkable intensification of interest in cultural property and a significant expansion of the legal tools for its protection. New multilateral conventions have been negotiated and soft-law instruments adopted to address new types of cultural heritage, such as the 2001 Underwater Cultural Heritage Convention, the 2003 Convention on the Safeguarding of Intangible Cultural Heritage, the 2003 Declaration on the Intentional Destruction of Cultural Heritage, and the 2007 Declaration on the Rights of Indigenous Peoples. Intense work has been undertaken in the same period for updating and completing older regimes on cultural property protection. This is the case with the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), and with the adoption of the 1995 UNIDROIT Convention, which has filled some private law gaps of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This law-making activity has stimulated the development of a vast body of academic writings spanning different disciplines and aspects of cultural heritage, from the material to the intangible.[1]

At the same time, cultural heritage concerns have started to pervade other areas of international law and international adjudication. It is common today to find references to cultural heritage protection in the adjudication of investment disputes, in WTO law, in the jurisprudence of human rights courts, and even in the work of WIPO, which has been striving for the accommodation of intellectual property rights (IPRs) with manifestation of cultural heritage commonly identified as 'traditional knowledge'. Today, it is safe to say that cultural heritage law is a discrete branch of international law, and at the same time it constitutes an evolving dimension of many other areas of international law.

But as in other areas of international law—especially the law of environmental protection—rule making at the level of treaty law and of other international law instruments has not been matched by a corresponding development of

[1] For an overview of law making in the area of cultural heritage, see the UNESCO publication *Standard Setting in UNESCO: Normative Action in Education, Science and Culture* (UNESCO Publishing and Martinus Nijhoff: Leiden/Boston, 2007).

enforcement procedures and mechanisms. No general court exists or is being considered in the field of cultural heritage. Even in the critical area of illicit trade in cultural property—the breeding ground for the greatest number of cultural heritage disputes—the UNESCO Intergovernmental Committee on Restitutions shows a dismal record of under-utilization and remains inaccessible to private parties. To this 'weakness' of international cultural heritage law corresponds a gap in the relevant legal literature, which has addressed so far the issue of the implementation of cultural heritage law almost exclusively within the perspective of private international law and the role of courts in deciding the issues of applicable law and the competent forum.

This book aims to fill this gap by providing a multilevel analysis of the possible approaches to the enforcement of international cultural heritage law. The first part examines the opportunities for enforcement offered by international mechanisms and methods. The second part focuses on the role of domestic adjudication, including limits posed by international law, such as jurisdictional immunities. The third part is devoted to the analysis of alternative means of implementation and dispute settlement such as arbitration, diplomatic negotiations, practices of museums, and the development of social norms.

The first chapter by Francesco Francioni connects the idea of pluralism in the variety of cultural expressions with the plurality of legal orders that may come into play in the enforcement of norms in the protection of cultural heritage. The chapter shows how different legal orders (domestic and international) and different systems of norms (wartime and peacetime, public and private) interact one with another at various levels of regulation of cultural property and in the process of enforcement. The chapter emphasizes the importance of cultural property as an international public good, and the role that public and private actors have in contributing to the enforcement of international rules in the protection of art and heritage as a common good of humanity.

Chapter 2 by Ana Vrdoljak provides innovative insights on the role of peace treaties by focusing on a set of important treaties following the First World War and dealing with restitution, reparation in kind, and reconstitution of national cultural patrimony. The chapter examines also important aspects of state succession in relation to the dissolution of multinational states such as Austria and the Ottoman Empire. These early examples of cultural heritage enforcement by peace treaties provide in the opinion of the writer an important legacy to build on in view of the contemporary settlement of disputes in post-conflict situations.

Chapter 3 by Federico Lenzerini examines the recent jurisprudence of the International Criminal Tribunal for Former Yugoslavia and, more in general, the practice of international and mixed criminal courts and tribunals in the enforcement of the principle of individual criminal responsibility for offences against cultural heritage. He focuses on the role of international criminal law as a tool for the enforcement of cultural heritage law, because of the human dimension of cultural property, and its importance to peoples and communities as part of

their cultural and spiritual identity. The examination of the case law, especially that arising from the Balkan wars, shows that destruction of cultural heritage was neither the result of military necessity nor the unfortunate collateral damage of the conduct of hostility, but an intentional attack on an essential element of the life and identity of the targeted people, thus a continuation of ethnic cleansing by different means.

Chapter 4 by Laurie Rush provides a 'view from the ground' on the variety of methods for preventing and combating looting of archaeological sites and illicit traffic in antiquities and examines models of legislation, physical protection, and the setting up of specialized agencies, such as the Italian Corps of the Carabinieri for the protection of cultural patrimony. The chapter provides original information about the direct experience of the writer in peacetime looting, and the suppression of illicit traffic in conflict situations such as Iraq.

The second part of this book examines the enforcement of cultural heritage and cultural property law in domestic courts. In this area, an issue of concern is the prerogative of states either to raise a defence or to assert a right on the basis of their sovereignty.

Chapter 5 by Riccardo Pavoni deals with the extent to which states can raise the defence of sovereign immunity from suit and execution. He describes three exceptions to immunity from suit that may apply in cases involving cultural property. One is the 'commercial exception' to state immunity, such as that provided by article 10 of the United Nations Convention on State Immunity (UNCSI), or § 1605(a)(2) of the Foreign Sovereign Immunities Act (FSIA) in the United States. A second is the 'ownership, possession and use of property' exception and its limitations (as per article 13 UNCSI, or § 1605(a)(4) FSIA). A third is the 'expropriation' exception of § 1605(a)(3) of the FSIA. Pavoni discusses the difficulties that result from the recognition of these limited exceptions. In the area of immunity from execution, he considers to what extent a 'cultural heritage' exemption from measures of constraint is legitimate when claims for the recovery of art based on customary or treaty obligations or for the return of cultural objects taken away in times of war or peace are brought before the courts. He also discusses the contours and feasibility of a 'cultural human rights' exception to sovereign and sovereign-property immunity along the lines of the Italian *Ferrini* jurisprudence.

Chapter 6 by PatriziaVigni concerns one of the most problematic claims that a state can raise on the basis of its sovereignty: a claim over cultural property found under the sea. The claim may be based on the state of origin; that is, the state where a historic object had been produced and used before it disappeared into the sea. Alternatively, such a claim may be based on the sovereign right of a flag state over its vessels, as recognized by customary international law, the 1982 United Nations Law of the Sea Convention, and admiralty law. In addition, coastal states have sovereign rights over their territorial sea and the natural resources of their continental shelf and powers of control over activities

in contiguous areas such as salvage operations. Vigni notes that domestic courts have allowed the sovereign rights of states asserted on these grounds to prevail over other interests. These other interests include those of private persons and those arising from the special status of cultural objects as part of the heritage of humankind, as recognized, in particular, by the 2001 UNESCO Convention. She argues that these interests are entitled to a greater degree of protection.

The following chapters examine the protection that domestic courts afford cultural heritage and cultural property when a sovereign state asserts a claim or a defence.

Patricia Gerstenblith describes in Chapter 7 how three types of illegal activity are dealt with in civil and criminal cases: the looting of cultural objects from sites in which they are buried or concealed, the theft of such objects from their owners, and the smuggling of such objects across international boundaries in violation of export laws. She discusses the extent to which domestic courts can provide protection, given the complexities of international and domestic law. She concludes that civil suits for the recovery of cultural objects are playing a declining role due to the difficulties of bringing such actions. Criminal suits have been ineffective because of the insufficient effort of law enforcement due in part to a lack of resources, and in part to the relatively low priority that governments have assigned to cultural objects.

The first of these problems, the obstacles to civil suits, is addressed in Chapter 8 by James Gordley. One obstacle is a rule that art objects smuggled out of a country in violation of its export laws cannot be reclaimed on the grounds that one country will not enforce the export control laws of another. Gordley argues that this rule should not be applied to objects that are important to a nation's cultural heritage even under existing law. Another obstacle is a rule that a state cannot claim the return of cultural property on the ground of ownership unless it has the normal rights of an owner to use, possess, and dispose of the objects. Gordley argues for the recognition of a different sort of property right in the state, a right to guard and preserve cultural objects, which would allow it to reclaim objects smuggled abroad just as it can protect these objects while they are still within its borders.

The third part of the book is devoted to alternative methods of enforcement of norms for the protection of cultural property and cultural heritage.

Alessandro Chechi acknowledges in Chapter 9 the difficulties of bringing suits in domestic courts. They may be barred for a number of technical reasons, such as the expiration of limitation periods or the application of anti-seizure legislation or the rules on state immunity. Litigation entails zero-sum solutions that often force a judge to assign a financial loss either to the dispossessed owner or the current good faith possessor. Moreover, litigation is expensive. According to Chechi, despite these difficulties, there has not been a widespread use of alternatives such as negotiation, mediation, and arbitration. Negotiation and mediation cannot ensure that a suit will be settled or that the settlement will be enforceable.

Arbitration may be as costly and time-consuming as conventional litigation. Chechi sees a more hopeful alternative in an increasing willingness of domestic courts to recognize the special features of suits over cultural objects, the unique features of the art market, and to reach solutions that reconcile the historical, moral, cultural, financial, and legal issues involved. This willingness is illustrated by cases in which judges have ordered the restitution of cultural objects seized in times of war, cases in which they have given effect to the laws of source countries despite the rule against extraterritorial enforcement of export laws, cases in which they have tightened the obligation of purchasers to investigate the provenance of art, and cases in which they have found ways to allow claimants to sue even many years after the wrongdoing.

Derek Fincham focuses in Chapter 10 on the implementation potential arising from the spontaneous observance of international standards by museums and cultural heritage institutions. He describes a positive change in the social norms observed by museums and galleries. Museums are increasingly hesitant to acquire objects without a documented pre-1970 provenance. When objects are shown to have been illicitly excavated, nations are asking for their return, and in several notable cases, museums have been willing to return them. The next logical step, according to Fincham, should be an increasing acceptance of these norms by individuals.

Holly Flora describes in detail in Chapter 11 the change in the formal ethical standards adopted by leading American museums. She concludes that although these new standards reflect a long-needed awareness by museums of the problem of looting, museums like the Metropolitan Museum in New York have a great deal of latitude in acquiring an object without full provenance, provided it is not proven to be illegal and if there is a strong enough case for its importance. She doubts that the new standards will prevent looters from doing what they now do. Indeed, the stakes are effectively higher, which might encourage a different, and perhaps even more dangerous, kind of trafficking via new networks that will establish false provenances for looted objects. Moreover, even in this era of stricter standards, museums continue to buy objects from the same dealers, albeit with a stricter eye towards provenance.

The final chapter, Chapter 12, by Wang Yunxia provides an analytical study of the recent Memorandum of Understanding (MoU) between China and the United States on import restriction of cultural objects from China. The MoU is presented as a diplomatic model of enforcement of international cultural heritage law through cooperation between importing countries and source countries. This model, based on the specific provision of Article 9 of the 1970 UNESCO Convention, in the opinion of the author, could be extended also to cover other lines of illicit traffic in antiquities and cultural objects, particularly those linking China to Japan and South Korea.