“Italian Hours”: The globalization of cultural property law

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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.

—Henry James, Italian Hours, “A Roman Holiday,” 1909

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). 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 public interests at stake. Moreover, the huge cultural bias that dominates the debate about cultural property accentuates the “clash of civilizations” that already underlies the debate about global governance. The analysis of the relationship between globalization and cultural property, therefore, sheds light on broader global governance trends and helps highlight the points of weakness and strength in the adoption of administrative law techniques at the global level.

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In the past few decades, cultural property has been increasing in economic and political relevance worldwide, and its global dimension has been constantly growing.\(^1\) This is mostly because cultural property represents the physical evidence of a culture and civilization that are not necessarily restricted to a specific national identity. This property bears universal values that 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.\(^2\)

Increased globalization of cultural property is illustrated through a wide range of examples and by data.\(^3\) For instance, cultural sites included in the UNESCO World Heritage List currently number 725, as compared with 478 in 1999.\(^4\) The conditions and procedures for listing these sites have been established not by states but by an international organization, UNESCO, which has adopted the Operational Guidelines for the Implementation of the World Heritage Convention.\(^5\)

In addition, the globalization of markets has triggered a huge increase in commercial transactions related to cultural property. This has raised several questions concerning illicit trade and the restitution of artworks or cultural relics to their countries.
of origin; a prime example of these problems is the recent Italian exhibition “Nostoi: Rescued Masterpieces,” which opened in the Quirinale Palace, in Rome, in December 2007. The exhibition collected 1,168 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). Closing in Rome in March 2008, the exhibition traveled to Athens, to the new museum of the Acropolis; however, it did not include the most strongly desired—and least likely—restitution, the friezes of the Parthenon. These remain conserved in the British Museum of London. In spite of that, this exhibition provided an example of best practices in the repatriation of stolen relics or artwork; statistics show that in the United States the amount of art trafficking is estimated at $6 billion annually, behind only the drug and arms trades.

Moreover, trade in cultural property also falls under the WTO and the EU treaty, insofar as such properties are part of regimes of exemption from such treaties that have to be applied by states according to certain principles and rules (e.g., in the case of the WTO, the principle of arbitrary and unjustifiable discrimination). Consider, for instance, the judgment of the European Court of Justice of December 10, 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”. In other words, EU member states can prohibit the exportation of art treasures but they cannot tax it (i.e., if they do permit a work to be exported they are, nonetheless, not permitted to tax the sale).

The global dimension of cultural property, however, affects not only artworks and relics but also the very institutions that protect such properties, for example, 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. This project represents the latest effort to expand the Guggenheim Museum, defined

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6 After this exhibition, the new Acropolis Museum opened officially on June 20, 2009. Concerning the friezes of Parthenon, the so-called Elgin marbles, see John Henry Merryman, Albert E. Elsen and Stephen K. Ure, Law, Ethics and the Visual Arts 346 (5th ed. 2007), and John Henry Merryman, Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law 24 (2nd ed. 2009).

7 See art. XX, lett. F, General Agreement on Tariffs And Trade.

8 See art. 36.

9 See art. 36.


12 The museum, designed by the well-known architect Frank Gehry (who designed the Guggenheim in Bilbao), will be opening in 2013.
as the first experiment in a “global museum.” In connection with this phenomenon of delocalization of museums, there is an increasing demand for culture worldwide. In 2008, for example, the Museum of Louvre in Paris counted 8.5 million of visitors (of which only one-third were French), while, in 2001, there were around 5 million; an increase in seven years of 67 percent. The data regarding the British Museum of London are even more striking; whereas in 2002 there were just 1 million visitors, 2008 saw this figure rise to 6 million.

These examples point to several pertinent legal implications flowing from the globalization of cultural property. First would be the creation of a world system of protection, with rules and procedures set by an international organization and adopted by national administrations; second, problems regarding the circulation and restitution of cultural objects and the need for international rules dealing with this; and third, globalization and delocalization of museums and growth in the demand for culture, which brings to the fore the necessity of setting minimum standards for museums and exhibitions.

The rise of a purportedly global law, which extends beyond the state and is occasioned by the proliferation of international institutions and regulatory regimes, involves almost every sector, from the environment, to the internet, to defense and public order. Cultural property does not escape this trend; it raises several legal issues that affect not only states but also international institutions—both governmental and nongovernmental—as well as civil society. 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 if 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 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 international law instruments do not seem to ensure an adequate level of protection for 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

14 For these data, Il Giornale dell’Arte, May 2011, p. 44.
as agreements, codes, and best practices in order to face the challenges raised by the emergence of new global interests. On the other hand, 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 interests at stake, though the complex of cultural property regimes seems to operate largely in isolation. Moreover, the huge cultural bias that dominates the debate regarding cultural property can accentuate the so-called clash of civilizations and the cultural bias that already underlies 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 the clash between the different public interests that pertain to 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 goal 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 lacks; 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 has its own specificity and peculiarities, and this helps highlight the strength and weakness in the strategy of 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 often may be opposed to one another. There are many examples of this kind of situation, which explains why the most prominent scholars in this field often have attempted to highlight the clash of interests that underlie cultural property.17

An 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 Greenwich Village, in Manhattan, on West 3rd Street between Sullivan and Thompson streets, the plan, originally, was 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 nineteenth 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.” Some observed, however, that none of the original salmon-colored bricks were used, so that “[w]alking 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.” Some argued, on the other hand, that Poe’s house had been significantly altered in the 154 years since Poe had lived there: “the lower exterior of the building [. . .] only vaguely resembles its 19th century counterpart, as the stoop was removed and the entrance shifted.”

This episode—one among 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 interests-balancing act; on the one hand, the university’s interest in expanding its facilities; on the other, the interest of many others in preserving two historical houses. Such occurrences are very common in Europe, especially in Italy, which accounts for the largest portion of the world’s cultural property and boasts the highest number of world heritage cultural sites (forty-four, plus three world natural sites). This explains why the Italian Constitution sets the fundamental principle that the Republic “safeguards landscape and the historical and artistic heritage of the nation.” And it also explains why Italian legislation has a long tradition of regulating cultural property. The various acts, approved in 1939 (namely Law no. 1089 and Law no. 1497)—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 law). Since the early 1900s, in fact, Italian laws have built sophisticated legal mechanisms for protecting the cultural heritage, such as administrative proceedings aimed at recognizing

18 Jim 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 Nina Siegal, Rapping on Poe’s Door. A Hint of Nevermore: Anger in Village Over N.Y.U. Tower Plan, in New York Times, July 19, 2000, and the web page http://www.nypap.org/content/edgar-allan-poe-house.
20 Siegal, supra note 18.
22 Articale 9. See Fabio Merusi, Art. 9, in COMMENTARIO DELLA COSTITUZIONE I 434 (Giuseppe Branca ed., 1975), and, more recently, SALVATORE SERTIS, PAESAGGIO, COSTITUZIONE, CEMENTO, LA BATTAGLIA PER L’AMBIENTE CONTRO IL DEGRADO CIVILE 242 (2010).
23 Cassese, supra note 17.
the value of cultural property and controlling its use. It is not by chance, therefore, that when Italian scholarship theorized the discretionary power of public administration, cultural property offered excellent case studies for examining how public interests may be balanced, as in the case of the Judson and Poe houses.

Moreover, Italian legal scholarship can provide fruitful insights into finding common features among 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 archaeological relic to an Impressionist painting: immateriality and publicness. The first element relates to the value that cultural objects provide over and beyond their material existence. They transmit something that cannot be touched, such as the terrific emotion that visitors may feel once they enter the Colosseum in Rome: "relics excite a special emotion, even though they have no religious significance." Such value, although in some circumstances it can be treated separately (think of catalogues, photos, postcards), 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 J. D. 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. Above all, cultural property is public because it must be accessible to the public and must be known; cultural objects are instruments 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 fifteenth century, for instance, the pope approved specific decrees ("bolle pontificie") in order to protect artistic and historic objects within his lands. 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. The well-known drain of art from Europe to the United States is

26 See Massimo Severo Giannini, I beni culturali, Rivista Trimestrale di Diritto Pubblico 3 (1976), and Grisolia, supra note 2, Michele Cantucci, La Tutela Giuridica delle Cose di Interesse Artistico e Storico (1953), Cassese, supra note 17, and Tommaso Alibrandi and Piergiorgio Fierli, I Beni Culturali e Ambientali (4th ed. 2001); more recently, see Diritto e Gestione dei Beni Culturali (Carla Barbati, Marco Cammelli, & Girolamo Scultlo eds., 3rd ed. 2011), and Lorenzo Casini, La disciplina dei beni culturali da Spadolini agli anni duemila, in Le Amministrazioni Pubbliche tra Conservazione e Riforme 423 (2008).
27 Merryman, supra note 17, at 152.
28 Etsi de cunctarum by Martino V in 1425, Cum almam nostram urben by Pio II in 1462 and Cum provida by Sisto IV in 1474 (on these aspects, LUCI PARPAGLIOLO, CO CODE DELLE ANTICHTÀ E DEGLI OGGI D’ARTE (2nd ed. 1932), 2 volumes.
portrayed in 1911 by Henry James in his novel *Outcry*. 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. However, 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 U.S., for instance, with the Thomas Eakins’s painting *Gross Clinic* in Philadelphia, the sale of which to another U.S. museum was not consummated because of the outcry from the local community). There is also the interest in granting public access to cultural property and in spreading knowledge about cultural objects; in this sense, cultural property may be defined as “public goods” insofar as it is accessible to the public. Lastly, there is the interest in using the object—as occurs in the case of buildings or certain other sites—for religious purposes. This is a pertinent issue, one that can create several problems in the protection of cultural property, as Goethe had observed in the eighteenth century, while he was in the Sistine Chapel attending 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.”

Legal scholarship has attempted to classify all of these interests. For example, some have adopted the following categorization: preservation, (cultural) truth, access, cultural nationalism. Another relevant attempt at establishing a taxonomy distinguishes five categories: 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 even 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

30 Henry James, *The Outcry* (1911).
31 Merryman et al., supra note 6, at 346, and Merryman, supra note 6, at 24 et seq.
32 The episode is described by Cheng, supra note 11.
33 This kind of interest can be identified in the nineteenth century (see Jayme, supra note 17, 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. 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 idea became very relevant.
36 “Truth,” here, 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).
37 Jayme, supra note 17, at 929 et seq.
humanity” can be found. 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, given 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 relationships between public and private turn the field of cultural heritage into very much a “social construct,” an “art system” in which “art players” and “art supporters” operate both nationally and internationally.

Globalization, therefore, has 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 while others would prefer what could be called 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.

However, there are other paradoxes attributable 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.”

Although these critiques may be rigid, it is true that a legal approach to cultural property cannot escape some of the defining features of the category of property. The questions this raises 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. Cultural property, in fact, is “put to a variety of political uses in a variety of political contexts—ethnic, regional, and national,” and

40 The term “art system” is used by John Henry 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,” namely, “people and institutions whose lives are centrally concerned with works of art,” such as artists, collectors, traders, museums, or archeologists, and “art supporters,” that is, funds, the public, and the state, which give “moral and material support to the players” (p. 1 et seq.).
42 See infra section 3.
“much cultural property has been destroyed for political and religious reasons,” even though it is also “valuable” and “a form of wealth.” In other words, “cultural objects have a variety of expressive effects that can be described, but not fully captured, in logical terms.”

Legal scholarship must thus accept that the legal notion of cultural property is a “liminal notion,” that is, a notion that legal norms cannot define without referring to other disciplines or sciences. This “liminal notion” makes the legal concept of cultural property malleable. As a consequence, at the international level, each convention adopts its own definition of cultural property or cultural heritage. These definitions, of course, refer to a specific 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,” that is, dominated by a European and U.S. perspective, while ideas coming from other cultures were often unheard. However, the increasing relevance of intangible heritage and cultural diversity represents a sort of balancing, reducing the Western bias in the debate.

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 is concerned with 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 so-called soft mechanisms. Furthermore, the number and variety of actors involved has been increasing, including not only governments but also international nongovernmental organizations and other entities.

The second pattern refers to the establishment of international regulations on trade and the restitution of cultural property. We can see a lack of international law in

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43 Merryman, supra note 17, at 144, 154, 156, and 158.
45 See, for instance, the interesting case of cultural property of Native Americans, on which Sarah Harding, Defining Traditional Knowledge—Lessons from Cultural Property, 11 CARDOZO J. INT’L & COMP. L. 511 (2003).
46 See infra section 3.
regulating this topic while observing 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 has to do with the production by the pertinent institutions of global norms and standards for museums and their exhibitions. In this case, transnational mechanisms, such as the documents approved within ICOM, have become global, due to their wide use and the high degree of compliance that accompanies them. 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 substantially analyzed by scholars, who have relied on it as a prime example of the interaction between international institutions, states, and domestic administrations.\textsuperscript{49}

The World Heritage Convention (WHC) recognized the existence of a world cultural heritage that needs to be preserved.\textsuperscript{50} Created in 1972, this system is built on recommendations and guidelines adopted by UNESCO (the Operational Guidelines for the Implementation of the World Heritage Convention), and it is powered by international nongovernmental organizations (such as the International Council on Monuments and Sites [ICOMOS]), an advisory body of UNESCO\textsuperscript{51} 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, which include not


\textsuperscript{50} According to the convention, “cultural heritage” includes “monuments: architectural works, works of 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 Francesco Francioni, *Thirty Years on: Is The World Heritage Convention Ready for the 21st Century?*, 12 The Italian Yearbook of International Law 13 (2002).

\textsuperscript{51} 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 and 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.”
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 comprises international private bodies, like the ICOMOS. This is a nongovernmental 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 capacity-building activities. On the other hand, states that have applied to have their sites included in the World Heritage List are required to adapt their administrations to the institutional expectations: for example, creating ad hoc bodies or enacting specific measures. See, for example, the U.S. National Park Service and the U.S. committee of the ICOMOS, which develop standards and procedures for nominations of American cultural resources as World Heritage sites. In order to be eligible to be added to the World Heritage List, the cultural property must benefit from adequate long-term legislative, regulatory, institutional and/or traditional protection, as well as management mechanisms that can ensure their safeguarding.

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 additions to the World Heritage List—that is, the formation of a Tentative List—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.” 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 the means and rules for both protecting and granting access to the site. In addition, the Operational Guidelines detail some common elements and practices 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

52 See Operational Guidelines, para. 34 et seq. The ICOMOS is an association of professionals that currently brings together approximately 9,500 members throughout the world (see http://www.international.icomos.org). In the case of natural sites, the advisory body is IUCN.
54 Operational Guidelines, para. 97.
55 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).
56 Operational Guidelines, para. 64
57 Operational Guidelines, para. 108.
accountable, transparent description of how the management system functions.\textsuperscript{58}

Put briefly, the procedural aspects highlight at least three different levels of action: national, with states preparing tentative lists and nomination; intergovernmental, 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.\textsuperscript{59}

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, out of all that is of “outstanding universal value.”\textsuperscript{60} Take, for instance, the numerous sites in Italy that are not listed (and it is worth noting that there are, currently, almost forty sites included in the tentative list presented by Italy, 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.”\textsuperscript{61}

Second, there are many political problems concerning areas over which different states have competing claims; for example, the Temple of Preah Vihear, disputed between Cambodia—in whose favor the International Court of Justice had previously ruled\textsuperscript{62}—and Thailand.\textsuperscript{63} The role of the states, therefore, remains crucial, not least because it is up to them to prepare the tentative lists and propose sites for nomination;\textsuperscript{64} moreover, states can register “reservations” about or dissociate themselves from the inclusion of a site, as China and the U.S. did in the 1990s with regard to Hiroshima.\textsuperscript{65} Other problems derive from the fact that only countries that are signatories of the convention can submit a tentative list. This may raise questions concerning contested 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

\textsuperscript{58} Para. 111.

\textsuperscript{59} On these aspects, Anglin, supra note 52, at 241. See also Diana Zacharias, Cologne Cathedral versus Skyscrapers—World Cultural Heritage Protection as Archetype of a Multilevel System, 10 MAX PLANCK Y.B. U.N. L. 273 (2006).

\textsuperscript{60} 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 listed at para. 77 of the Operational Guidelines.

\textsuperscript{61} See Operational Guidelines, para. 52.

\textsuperscript{62} Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 16 (June 15) (merits).


\textsuperscript{64} On the still dominant role played by states within in “international regulatory regimes,” see Daniel W. Drezner, All Politics is Global, Explaining Regimes (2007).

\textsuperscript{65} Galis, supra note 62, at 214.
situations, such as during the war in Yugoslavia, in which governments have deliberately destroyed cultural objects that were relevant to minorities.66

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 nonprofit 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: it happened in some cases regarding mining activities in protected sites in Canada, Australia, and United States.67

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: 725 of the former against 183 of the latter, plus 725 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.68

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.69 According to his account, 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

66 See the Kordić & Ćerkez 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. See Joseph P. Fishman, Locating the International Interest in International Cultural Property Disputes, 35 Yale J. Int’l L. 347, 359 (2010), and Gregory M. Mose, The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Right-Based Approach to the Protection of Religious Cultural Property, 3 Buff. J. Int’l L. 180 (1996). More generally, Roger O’Keefe, Protection of Cultural Property Under International Criminal Law, 11 Mel. J. Int’l L. 339 (2010). “And the most striking example of the political implications related to the UNESCO regime comes probably from the recognition of Palestine, which became the 195th full member of this UN agency during the October 2011 General Conference (107 votes in favour of admission and 14 votes against — including the United States and Israel — and 52 abstentions): as a consequence, the US stopped funding UNESCO, producing a severe cut of its budget (more than $80 million per year, covering around 22 per cent of the whole financial resources). Becoming a full member of UNESCO will allow Palestine to propose the inscription to the World Heritage List of its own sites, such as the city of Bethlehem.

67 These cases are examined by Natasha Affolder, Democratizing or Demonizing the World Heritage Convention, 38 Victoria U. Wellington L. Rev. 341 (2007).

68 See Operational Guidelines, para. 61.

69 John Henry Merryman, Two ways of thinking about cultural property, 80 Am. J. Int’l L. 831 (1986), now also in Merryman, supra note 6, at 82 et seq.
their borders, and, on the other, 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; these display a predominantly nationalist approach, while a swing in favor of cultural internationalism is apparent in the 2001 UNESCO Convention on Protection on the Underwater Cultural Heritage and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.

Whatever the result of such attempts at balancing, most commentators highlight the fact that international regulations pertaining to the trade in cultural objects and to their restitution has not been particularly effective. The same has been the case, unfortunately, for the protection of cultural heritage in times of armed conflict, as illustrated by the recent looting of Iraqi Museum. As a matter of fact, the recent cases regarding the illicit traffic of archaeological relics from Italy to the U.S. 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, as was the situation in the 2006 agreement between Italy and the Metropolitan Museum of New York for the restitution to Italy of the Euphronios Krater or the 2007 preliminary settlement—completed in 2010—between Yale University and Peru in the dispute over the treasures of Machu Picchu.


71 On this point, Eric 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 excessive, but it underlines an important issue, namely, the difficulty in grasping the special essence of cultural property and its unique character, so unique that even “Marxism-Leninism had never got to grips with the concept of the Proletariat. Was the collector a class-enemy? If so, how?”: BRUCE CHATWIN, UTO 26 (1988).


73 The accord was signed in February 2006. See Aaron Kyle Briggs, Consequences of the Met–Italy Accord for the International Restitution of Cultural Property, 7 CUL. J. INT’L L. 623 (2006–2007).

74 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, Stephanie Swanson, Repatriating Cultural Property: The Dispute Between Yale and Peru Over the Treasures of Machu Picchu, 10 SAN DIEGO INT’L L.J. 469 (2009).
In other circumstances, states try to encourage different forms of regulation, such as the 1998 Washington Conference Principles on Nazi-Confiscated Art.\textsuperscript{75} This is a crucial issue; one recent, important case is \textit{Maria Altmann v. Republic of Austria}, in which Austria had to give back five famous Gustav Klimt paintings 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 paintings, in fact, had been displayed in the Belvedere Museum of Vienna; after the restitution, they were sold to a private art collector, and not all of them are currently displayed in museums or galleries).\textsuperscript{76} Another highly significant case is \textit{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.”\textsuperscript{77}

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. It is worth noting that the example of the international regulation of trade and the restitution of cultural property provides evidence of the limits of traditional international mechanisms in addressing global interests; it further confirms the need to develop global standards for private actors as well as museums.

\section*{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.

In terms of the museum management, the system is governed by ICOM, a non-governmental organization created in 1946, which maintains formal relations with UNESCO and has a consultative status in the United Nations’s Economic and Social


Council. With its headquarters in Paris, ICOM has around 28,000 members in 137 countries. 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 actions. ICOM is affiliated with 17 international associations. 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.”

ICOM statutes set rules for the functioning of the organization, and they offer a definition of “museum” that has evolved significantly from 1946 to the present. While originally 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.” One of the most important documents produced by ICOM—its “cornerstone”—is the Code of Ethics for Museums. 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, therefore, is a relevant example of self-regulation operating at the global level: an international nongovernmental organization that adopts global standards with which members must comply. However, the scope of ICOM’s code goes beyond its membership, because many countries, such as Italy, have enacted statutes or

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78 ICOM is financed primarily by membership fees and supported by various governmental and other bodies (http://icom.museum).
79 See http://icom.museum/hist_def_eng.html.
80 See http://icom.museum/hist_def_eng.html.
81 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.
82 These issues are widely examined in Lorenzo Casini, Il Diritto Globale dello Sport (Giuffrè 2010).
regulations which refer expressly to the code.\textsuperscript{83} This is, in part, due to the fact that, even though ICOM and the code are formally private, they involve elements of “publicness,”\textsuperscript{84} 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 regulation. Therefore, ICOM could be considered a type of “global administration” because it is a private body that carries out genuine regulatory functions at the global level.\textsuperscript{85}

The ICOM code, however, is not the only example of this kind of regulatory activity, which is a lawmaking, from-the-bottom-up procedure. Another interesting case, which is less structured and based even more so on self-regulation, is the document “General Principles on the Administration of Loans and Exchange of Works of Art Between Institutions.”\textsuperscript{86} These loan standards were originally approved in 1992 and revised in 2002 by an informal international group—the so-called Bizot group\textsuperscript{87}—formed by the organizers of large-scale exhibitions (including, for instance, the British Museum of London, and all the major U.S. museums, such as the Museum of Modern Art, the Metropolitan Museum of Art, and the Guggenheim, in New York, and the National Gallery of Art in Washington D.C.).\textsuperscript{88} The 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. In fact, as a general principle, they state that “loans should primarily be granted for the benefit of other museums to which there is general public access.”\textsuperscript{89} The compliance levels for these standards is very high, and they have been also used as a basis by the working group on Mobility of Collections, a committee on the “open method of coordination” 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 \textit{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.\textsuperscript{90}

\textsuperscript{83} 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 Cinzia Carmosino, \textit{Le modalità e i luoghi della fruizione,} and Eleonora Cavalieri, \textit{I modelli gestionali: il management museale,} both in Casini, supra note 3, respectively, at 197 et seq. and at 249 et seq.
\textsuperscript{85} On the concept of “global administration”, see Kingsbury et al., supra note 15, at 20 et seq.
\textsuperscript{86} The principles are available at \url{http://www.lending-for-europe.eu/index.php?id=214}. See Iole Chiavarelli, \textit{Il prestito e lo “scambio,”} in Casini, supra note 3, at 113 et seq.
\textsuperscript{87} The name comes from Irene Bizot, former head of Reunion des Musées Nationaux of France, who promoted the initiative.
\textsuperscript{88} The list of the members is available at \url{http://www.lending-for-europe.eu/index.php?id=214}.
\textsuperscript{89} 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.”
\textsuperscript{90} See \url{http://www.lending-for-europe.eu/index.php?id=215}.\textsuperscript{90}
This pattern from transnational to global, therefore, stems from the use of best practices in the management of museums. However, this is not necessarily a good thing, insofar as self-regulation might often ensure more protection for the interests of the regulators/regulatees (that is, museums) than for the interests of third parties, such as the general public or even governments. From this perspective, risks are reduced at least by the fact that museums cannot survive without visitors, and, therefore, their policy will tend to enhance public access. Undoubtedly, however, 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, 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 involved and on the public interests at stake.91

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, that is, sites of outstanding universal value, while the objects affected by international regulation of trade and restitutions are much more numerous. Still, the number of definitions is enriched by other notions formulated at the supranational level (as in the case of the EU)92 and at the domestic level.93 From this perspective, the example of Italy is significant. In 1967, a study commission on

91 See Kal Raustiala and David G. Victor, The Regime Complex for Plant Genetic Resources, 58 INTERNATIONAL ORGANIZATION 277 (2004), who recognize in complex regimes the “horizontal, overlapping structure and the presence of divergent rules and norms” (p. 305).

92 See article 167.1-2 of the EU Treaty, which also mentions the “conservation and safeguarding of cultural heritage of European significance.”

93 According to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property, for instance, “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). See also article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects or article 1 of the 2001 UNESCO Convention on Protection on the Underwater Cultural Heritage, or article 2 of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, or 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 formulas: take, for instance, the definition 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.”
cultural property (the so-called Commissione Franceschini) formulated a definition that has been widely accepted and, now, has been incorporated in Italian legislation.\footnote{“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 119 (1966); its proceedings are collected in three volumes: Per la Salvezza dei Beni Culturali (1967).} According to this definition, “Cultural property consists of immovable and movable things which [. . .] present artistic, historical, archaeological, ethno-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.”\footnote{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, Bruno Zanardi, La mancata tutela del patrimonio culturale in Italia, Rivista Trimestrale di Diritto Pubblico 431 (2011).} In domestic legislation, there is also a tendency to identify particular properties as “national treasures.” This, of course, can create barriers between the cases examined above; it also limits the interconnection and overlapping between the various sets of rules applicable to each object of preservation.

There can be cases, moreover, in which these separate regimes may conflict with one another. This occurs, for instance, when a claimed cultural property, which has not yet been restituted by one state to another, subsequently is lent for an exhibition. In this case, the solution has been found in specific antiseizure legislation enacted by states (such as Germany, for example), in order to make an exhibition possible without incurring risks.\footnote{On these issues, Matthias Weller, Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Liechtenstein Litigation, 38 Vand. J. Transnat’l L. 997 (2005), and, more generally, John Henry Merryman, The Nation and the Object (1994), in Merryman, supra note 3, at 206 et seq.} There might even be a 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.”\footnote{See John Henry Merryman, Thinking about the Sevso Treasure (2008), in Merryman, supra note 3, at 348 et seq.} Furthermore, as noted above, globalization has rendered the framework of cultural property law more complex, mostly because the number of 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 among the three examples considered above, which can be also examined in comparison with other global regulatory regimes.

First, there is increasing lawmaking activity carried out at the international or supranational levels, regarding both public and private actors. On the one hand, UNESCO produces significant guidelines, policies, and other norms that implement
traditional treaties and conventions.98 On the other hand, international nongovernmental institutions adopt normative documents—such as ICOM’s code—that affect not only the actors involved in the lawmaking process but also the states or other institutions that are not yet members of the organizations. There is also the elaboration of global standards—such as exist for loans of cultural property—that are produced through private and informal procedures, the results of which are 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.99 And the global context offers many examples of “global private regimes,”100 such as the ISO system,101 the internet,102 or the accounting sector.103

However, it should be remembered that, in spite of the formally private nature of these organizations—such as 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 in the absence of other comparable actors in the same field, allows us to frame the regulatory regimes created by ICOM or by other international nongovernmental organizations as hybrid public and private regimes. The sports antidoping regime regulated by the World Anti-Doping Agency (WADA) provides a good example.104

Second, the institutional framework is highly diversified. The actors involved are not only states (that is, 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 interests

102 See the private-public system of governance for domain names governed by the Internet Corporation for Assigned Names and Numbers (ICANN) and national authorities: Jochen von Bernstorff, The Structural Limitations of Network Governance: ICANN as a Case in Point, in Transnational Governance and Constitutionalism 257 (Christian Joerges, Inger-Johanne Sand, & Gunther Teubner eds., 2004). Thomas Schultz, Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface, 19 EUR. J. INT’L L. 799 (2008), and, more extensively, David Lindsay, International Domain Name Law: ICANN and the UDRP (2007).
connected with cultural property. Of course, this 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.\textsuperscript{105}

Third, 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 the one side, and states, domestic administrations, and museums, on the other. There is also a horizontal dimension, consisting of the relationships between states and relationships between members inside ICOM or within the Bizot group. This arrangement is 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, reason-giving—that could improve the effectiveness of global regulation. This is particularly true in the case of the international regulation of trade and restitution; the lack of such mechanisms has led to the emergence of self-regulation or mutual agreements or even alternative means of dispute resolution.\textsuperscript{106}

In comparison with other regulatory regimes, that of cultural property has yet to ripen fully. For example, globalization of these properties has triggered a proliferation of norms and procedures; however, this has not been accompanied by the development of review techniques nor of a court or tribunal.\textsuperscript{107} Moreover, except for the compliance instruments introduced by the WHC for the protection of the sites entered into the Danger List,\textsuperscript{108} the system has not introduced any effective enforcement mechanisms that might have forestalled what happened in Afghanistan with the Buddhas of Bamiyan, destroyed by the Taliban in 2001.\textsuperscript{109} This is partially due to the fact that states still play a prominent role in cultural property law; and the recent admission of Palestine as full member of UNESCO, in October 2011, gives evidence of all these political implications. Where the states retain relevant functions, the global regulatory regimes reduce their own level of replication of domestic orders, since the presence of states encourages the development of techniques and procedures that allow governments to retain significant powers (as has happened with the multilayered system designed by the WHC). On the other hand, the more-private


\textsuperscript{108} See Marco Macchia, \textit{La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli}, in \textit{Casini, supra} note 3, at 57 et seq.

regimes are—characterized by a low level of state influence—the more they will come to resemble public law regimes.\textsuperscript{110}

The interplay of all the interests that inform cultural property and its protection produces many different legal problems, which become even more complex because of globalization. This intensifies 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 that hosts them. Put briefly, the more universal cultural property is, the more important it will be nationally. This might create conflicts: for instance, the state can discriminate between its citizens and foreigners or, in the case of movable properties, it 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 for Italian nationals and persons resident within the territory of those authorities; the European Court of Justice penalized such rates as discriminatory.\textsuperscript{111}

Balancing all of these interests is very difficult, and the question “Who owns the past?” can find multiple answers.\textsuperscript{112} This is why the private actors involved started producing self-regulation, in order to compensate for 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 the 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 that must be weighed.

3.2. Toward new legal techniques in the global arena

The three patterns, highlighted above, show that even cultural property is subject to globalization’s impact. They demonstrate the poverty of international law in regulating this field and, concomitantly, the emergence of various mechanisms based either on public and administrative law, such as the World Heritage Convention and ICOM’s 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 that dominates the debate about cultural property. There is, in fact, a class bias, based on a high-culture


\textsuperscript{111} European Court of Justice judgment of January 16, 2003, case C-388/01, \textit{Commission of the European Communities v. Italian Republic}.

conception, which is diminishing. The increase of visitors to cultural sites and the growth of world heritage sites suggest a degree of democratization of cultural property that was inconceivable only few decades ago. In Italy, for instance, the first museum cafeteria was opened in the mid-1990s, less than twenty years ago. Yet 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 only confirms that a comprehensive legal approach to this field must go beyond the managerial issues regarding competing claims to ownership and beyond the putative supremacy of preservation.\textsuperscript{113} Furthermore, it is the presence of such biases that make the development of principles such as transparency, accountability, and participation in the global context of cultural property highly problematic, especially if we consider that these sorts of mechanisms are themselves seen as the results of the Western tradition.\textsuperscript{114} The multiplicity of biases that comes with the idea of culture, which cultural property law must address, thus may accentuate the so-called clash of civilizations and the bias that already underlies the debate about global governance.\textsuperscript{115}

Moreover, the complex of cultural property regimes seems to operate largely in isolation: in a certain sense, it shares in the exceptionality and unique character of artworks. However, some connections with other regimes do exist, depending on the question at issue. 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.\textsuperscript{116} But these interconnections are still malleable and somewhat tenuous, and 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 and drawing closer the various forms of cooperation between the protection of the environment and the protection of cultural and natural heritage; here we should consider, especially, the so-called mixed sites, of which there are only twenty-seven worldwide.

The main strength offered by administrative law techniques 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, that is, the dense coexistence of several public and private interests regarding such material. In light of this recognition, a number of different public bodies and different proceedings have emerged, in order to deal with these interests. Once again, Italy offers a prime

example; since the 1960s, the function of protection has been complemented by the function of enhancement ("valorizzazione"), which was inserted into the Italian Constitution in 2001.\footnote{117} In other words, the case of cultural property represents one of the most significant pieces of evidence for 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.”\footnote{118} This means that cultural property law can contribute significantly to developing the existing legal tools of global governance and to creating new ones; indeed, some scholars observe that in international art cases new legal techniques have emerged, such as “narrative norms” (that is, “non-binding principles that may have legal effects” that “may be taken into consideration for the interpretation and construction of legal texts”) or a “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.”\footnote{119} The ways in which different interests are regulated within cultural property law, therefore, can offer interesting solutions in wider contexts,\footnote{120} such as the public goods theories.\footnote{121}

In conclusion, global challenges to the law of cultural property are still numerous, and they will continue to increase. 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” as well as all the other cultural resources available to the world.\footnote{122}

\footnote{117} Article 117(3) of Italian Constitution. According to 2004 Italian Code of the Cultural and Landscape Heritage, “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” (article 6(1)); while “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” (article 3(1)).

\footnote{118} See Benedict Kingsbury & Lorenzo Casini, Global Administrative Law Dimensions of International Organizations Law, in the symposium on “Global Administrative Law in the Operations of International Organizations,” supra note 103, at 319 et seq., here at 332.

\footnote{119} Jayme, supra note 17, at 943 et seq.

\footnote{120} On the relevance of public interest in the global legal space, see John Morison & Gordon Anthony, The Place of Public Interest, in Anthony et al., supra note 15, at 215 et seq.


\footnote{122} Henry James, Italian Hours (1909), at the last sentence.